

IN THE SUPREME COURT OF MISSOURI

DEBORAH WATTS as next friend for )  
NAYTHON KAYNE WATTS )  
 ) Supreme Court No. 91867  
Appellants/Cross-Respondents, )  
 )  
vs. )  
 )  
LESTER E. COX MEDICAL CENTERS, )  
d/b/a FAMILY MEDICAL CARE )  
CENTER, et al, )  
 )  
Respondents/Cross-Appellants. )

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BRIEF OF AMICUS CURIAE MISSOURI COALITION FOR  
QUALITY CARE IN SUPPORT OF APPELLANTS

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## Interest of Amicus Curiae

### **Missouri Coalition for Quality Care (MCQC)**

MCQC was founded in 1987 for the purpose of working to improve quality of care and quality of life for nursing home residents and recipients of in-home healthcare services. It now has over 700 members, most of whom are Missouri citizens. MCQC asks this court to conclude that Section 538.210 violates a party's right to a jury trial. Eliminating caps on non-economic damages will ensure that the elderly will be able to bring malpractice claims, which will help to ensure that negligent healthcare providers will be held responsible for injuring the defenseless.

### **Consent of the Parties**

MCQC has received written consent from Appellants and oral consent from Respondents. Therefore, MCQC is filing this brief under Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure.

### Point Relied On

**The circuit court erred in reducing Watts' non-economic damages on the basis of section 538.210's non-economic damage cap because section 538.210 violates Watts' rights to a jury trial. Specifically, section 538.210 violates Watts' rights to a jury trial because one of the essential guarantees of the right to a jury trial requires the jury to decide the amount of a party's non-economic damages and section 538.210 diminishes that essential guarantee.**

*Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 222 (2010)

*Lakin v. Senco Products, Inc.*, 987 P.2d 463 opinion clarified, 987 P.2d 476 (1999)

*Moore v. Mobile Infirmary Ass'n.*, 592 So. 2d 156, 159 (Ala. 1991)

*Sofie v. Fibreboard Corp.*, 771 P.2d 711, 722 (1989) amended, 780 P.2d 260 (Wash. 1989)

### **Jurisdictional Statement**

This court has jurisdiction under Article V, Section 3 of the Missouri Constitution because the Supreme Court has exclusive appellate jurisdiction “over all cases involving the validity of...a statute or provision of the constitution of this state.” MO. CONST. art. 5, § 3. *Amicus* MCQC challenges the constitutionality of non-economic damage caps on medical malpractice claims as being in violation of Missouri’s right to a jury trial provision. *See* MO. CONST. art. I, § 22. *Amicus* asserts an interest in Watts’ appeal of the judgment in favor of Respondents in the circuit court in which the circuit court reduced Watts’ non-economic damages and ordered the judgment paid over time.

**Statement of Facts**

Amicus adopts the appellant's statement of facts.

## Argument

The circuit court erred in reducing Watts' non-economic damages on the basis of the non-economic damage cap in section 538.210 because section 538.210 violates Watts' rights to a jury trial. Specifically, section 538.210 violates Watts' rights to a jury trial because one of the essential guarantees of the right to a jury trial requires the jury to decide the amount of a party's non-economic damages and section 538.210 diminishes that essential guarantee.

*Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 222 (2010)

*Lakin v. Senco Products, Inc.*, 987 P.2d 463 opinion clarified, 987 P.2d 476 (1999)

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*Sofie v. Fibreboard Corp.*, 771 P.2d 711, 722 (1989) amended, 780 P.2d 260 (Wash. 1989)

## **Standard of Review**

Courts review constitutional challenges to statutes *de novo*. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. 2008). Courts will invalidate a statute as unconstitutional when it clearly contravenes a constitutional provision. *Id.* The party challenging a statute's validity has the burden of proving the statute clearly and undoubtedly violates constitutional limitations. *Id.*

Article 1, section 22 of the Missouri Constitutions states “[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate[.]” Mo. Const. art. I, § 22(a). This court has held that Missouri’s constitutional right to a jury trial has remained the same through the four Missouri constitutions. Thus, Missouri’s constitutional right to a jury trial means that Missouri citizens are entitled to a jury trial in all actions to which they would have been entitled when Missouri adopted its first constitution in 1820. *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 11 (Mo. 1992). *Webster's Third New International Dictionary* 1190 (1976), defines “inviolate” as “free from change or blemish: pure, unbroken ... free from assault or trespass: untouched, intact ....” Courts have held that for a right to remain inviolate, “it must not diminish over time and must be protected from all assaults to its essential guarantees.” *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 722 (1989) amended, 780 P.2d 260 (Wash. 1989). Hence, Missouri’s right to a jury trial provision preserves the right to a jury trial as it existed at common law and prohibits the legislature or the courts from diminishing any of the right’s essential guarantees. *Lee v. Conran*, 111 S.W. 1151, 1153 (1908).

Missouri statute section 538.210 contains a cap that limits non-economic damages to \$350,000:

1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars for noneconomic damages irrespective of the number of defendants.

In addition, Missouri statute section 538.215 require the circuit court to reduce the party's non-economic damages to \$350,000. Therefore, regardless of the jury's factual findings, the legislature now requires the circuit court to ignore any jury determination that a party's non-economic damages are over \$350,000 and to reduce a party's non-economic damages to \$350,000.

To determine whether or not section 538.210 violates a party's right to a jury trial, the court must determine whether or not (1) at the time that Missouri adopted its constitution, the party's rights to a jury trial included the essential guarantee that the jury would assess the amount of his or her damages and (2) the non-economic damage cap diminishes a party's right to a jury trial because it requires the circuit court to ignore the jury's factual determination of a party's non-economic damages.

**a) The right to a jury at common law included the right to have a jury assess a party's non-economic damages**

The courts that have invalidated non-economic damage caps have concluded that the right to a jury trial at common law included a jury trial on personal injury cases like medical malpractice claims. See e.g. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 222 (2010). These courts have summarized the common law accurately. The first modern medical malpractice case occurred in 1374 when a party sued a doctor in an action before the Kings Bench. C. Joseph Stetler, *The History of Reported Medical Professional Liability Cases*, 30 Temp. L.Q. 366, 367 (1957). In that case, the court did not find the doctor liable but did conclude that the law could hold a doctor liable for his negligence. *Id.* By the mid-18<sup>th</sup> century, medical malpractice claims were sufficiently

established in the law that Blackstone classified them as one of the five classes of private wrongs. 3 W. Blackstone, Commentaries on the Laws of England, Ch. 8, p. 122 (1772); see also *Nestlehutt*, 691 S.E.2d at 222. And, the colonies also allowed a party to sue his doctor for negligence. The first reported case of medical negligence in America occurred in 1794. *Cross v. Guthery*, 2 Root 90, 1794 WL 198 (Conn. Super. 1794); see also *Nestlehutt*, 691 S.E.2d at 222. In fact, even the courts that have upheld non-economic damages caps concede that the right to a jury at common law included a party's right to have a jury trial for his or her personal injury claim like medical malpractice. See e.g. *Judd v. Drezga*, 103 P.3d 135, 144 (2004).

The courts that have upheld non-economic damage caps and the courts that have invalidated non-economic damage caps also agree that, since the beginning of the American jury system, the jury has had the responsibility to determine the facts of the trial. *Nestlehutt*, 691 S.E.2d at 222; *Judd*, 103 P.3d at 144. And, the courts agree that, at common law, the jury's fact-finding function included the responsibility to determine a party's economic and non-economic damages. *Id.*; see also 3 Blackstone, Commentaries, supra, Ch. 24, p. 397; Charles T. McCormick, *Handbook on the Law of Damages* 24 (1935). Most –if not all—courts agree that, at common law, a party had the right for the jury to determine his or her personal injury claim and his or her non-economic damages. Based on this history, the court should conclude that, at the time Missouri adopted its constitution, a party's right to a jury trial included a party's right to have a jury decide his or her medical malpractice claim and the right to have the jury make the factual determinations regarding his or her economic and non-economic damages. Thus,

Missouri's constitutional right to a jury trial, which preserves the right to a jury trial as it existed in 1820, means that a party has the constitutional right to have a jury decide his or her medical malpractice claim and the right to have the jury make the factual determinations regarding his or her economic and non-economic damages. *Goodrum*, 824 S.W.2d 6, 11 (Mo. banc 1992).

Finally, the courts agree that, at common law in 1820, there was almost no support for the proposition that the court or the legislature had the authority to reduce the jury's factual assessment of a party's economic and non-economic damages. See also Paul B. Weiss, Reforming Tort Reform: Is There Substance to the Seventh Amendment?, 38 Cath. U.L. Rev. 737, 748-49 (1989). Of course, the courts do have the common law power of remittitur. Under the court's remittitur doctrine, the court has the authority to order a new trial unless a party agrees to take a reduction of the jury's damage award.

In *Dimick v. Schiedt*, 293 U.S. 474, 484-85, 55 S. Ct. 296, 300, 79 L. Ed. 603 (1935), the United States Supreme Court traced the origins of the American court's system's use of remittitur to a 1822 opinion. The *Dimick* court noted that the 1822 opinion did not cite any precedent for the court's use of the remittitur doctrine nor did it explain the common law origins of the remittitur doctrine. The court, therefore, suggested that the 1822 opinion created the remittitur doctrine. *Id.*

Of course, the court's creation of the remittitur doctrine in 1822 post-dates the adoption of Missouri's constitution in 1820. Thus, at the time Missouri adopted the Missouri Constitution in 1820, neither the legislature nor the courts had the authority to reduce a jury's factual determination of the party's damages. And, in fact, until the

1970s, no person or court had suggested that the jury did not have the absolute power to assess the party's economic and non-economic damages or that the legislature could force a party to forgo full compensation for his or her injuries. Weiss, 38 Cath. U.L. Rev. at 748-49. In conclusion, the courts that have upheld non-economic damage caps and the courts that have invalidated non-economic damage caps agree on three principles: (1) at common law, a party had a right to a jury trial on a personal injury claim like a medical malpractice claim; (2) the party's right to a jury trial on that claim included the right to have the jury assess his or her economic and non-economic damages; and (3) precedent for the court system's remittitur doctrine began in 1822, which is after Missouri adopted its constitution.

**b) The right to a jury trial does not remain inviolate when the legislature caps non-economic damages**

Although virtually all courts agree that a party has the constitutional right for the jury to assess his or her damages, the courts are split on whether or not a non-economic cap deprives the party of this right. *Judd*, 103 P.3d at 144. The courts that have invalidated non-economic caps have held that the jury's right to assess damages extends not only to a factual assessment of their amount, but also to the actual award of those damages. *See, e.g. Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711, 720-23 (1989). The courts that have upheld non-economic damage caps have held that, while a party has the right to have the jury assess his or her damages, he or she has no right to have the court enter judgment for that amount. *Judd*, 103 P.3d at 144. The Virginia

Supreme Court was one of the first courts to outline the later view. *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (1989).

In *Etheridge*, the Virginia Supreme Court upheld a statute limiting the total recovery against a health care provider to \$750,000. The *Etheridge* court conceded that the jury's fact-finding function included the assessment of damages. 376 S.E.2d at 529. The court, however, reasoned that “although a party has the right to have a jury assess his damages, he [or she] has no right to have a jury dictate through an award the legal consequences of its assessment.” The court concluded that the right to a jury trial is not impaired where the “trial court applies the [statute's] limitation only *after* the jury has fulfilled its fact-finding function.” *Id.* (emphasis in original). The courts that have upheld non-economic damage caps have used *Etheridge's* reasoning to do so. See e.g. *Judd*, 103 P.3d at 144.

This court adopted *Etheridge's* reasoning in *Adams By & Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. 1992). In *Adams*, this court used *Etheridge's* reasoning to uphold a prior non-economic damage cap. In that case, the party claimed that the cap violated her right to a jury trial. *Adams*, 832 S.W.2d at 907. This court conceded that the jury's primary function is fact finding, which includes a determination of the party's damages. *Id.* The court held that the cap did not violate the party's right to a jury trial because the cap did not infringe on the jury's fact-finding function. The court concluded that, once the jury completes that function, its constitutional task is over. The court then held that the non-economic damage cap did

not infringe on the jury's constitutional role because the court applied the damage cap only after the jury completed its fact-finding function:

The court applies the law to the facts. Section 538.210 establishes the substantive, legal limits of the plaintiffs' damage remedy. In this sense, the permissible remedy is a matter of law, not fact, and not within the purview of the jury. Because Section 538.210 is not applied until after the jury has completed its constitutional task, it does not infringe upon the right to a jury trial.

*Adams*, 832 S.W.2d at 907.

This court should re-examine its holding in *Adams*. The Virginia Constitution provision granting a right to a jury trial is different than Missouri Constitution, article 1, section 22. Virginia Constitution article 1, section 11 states [t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." Missouri Constitution article 1, section 22, however, states that the right to jury must remain "inviolable," which means that the court must protect it from all assaults to its essential guarantees. *Sofie*, 771 P.2d at 722.

This court should conclude that section 538.210 constitutes an assault to the essential guarantees of the right to a jury trial because it nullifies the jury's factual findings regarding his or her damages. *Nestlehutt*, 691 S.E.2d at 223. Section 538.210 requires that the court reduce the jury's assessment of the party's damages regardless of the individual facts of the party's case. In doing so, section 538.210 undermines the jury's most basic function of fact-finding. *Id.* Furthermore, because the statute requires

the circuit court to reduce any damages over \$350,000, the jury's fact-finding function becomes something less than an advisory function. *Moore*, 592 So. 2d at 164. Thus, section 538.210 allows the jury's fact-finding function to exist in form, but strips it of any substance. *Sofie*, 771 P.2d at 724.

The courts with similar constitutional provisions that use the term "inviolable" have concluded that non-economic caps infringe on a party's right to a jury trial:

- The Georgia Supreme Court has held that a damages cap violates the Georgia Constitution, which states that "[t]he right to trial by jury shall remain *inviolable*." *Nestlehutt*, 691 S.E.2d at 221 (emphasis added);
- The Oregon Supreme Court has held that a damage cap violates the Oregon Constitution, which states that "[i]n all civil cases the right of Trial by Jury shall remain *inviolable*." *Lakin v. Senco Products, Inc.*, 987 P.2d 463 opinion clarified, 987 P.2d 476 (1999) (emphasis added);
- The Alabama Supreme Court has held that a damage cap violates the Alabama Constitution, which states that "the right of trial by jury shall remain *inviolable*." *Moore v. Mobile Infirmary Ass'n.*, 592 So. 2d 156, 159 (Ala. 1991) (emphasis added);
- The Washington Supreme Court has held that a damage cap violates the Washington Constitution, which states that "[t]he right of trial by jury shall remain *inviolable*." *Sofie*, 771 P.2d at 722 (emphasis added).

These courts have rejected *Etheridge's* rationale. *Etheridge's* rationale assumes that a damage cap does not diminish the right to a jury trial's essential guarantees even

though the circuit court must ignore the jury's factual findings of the party's non-economic damages. Thus, under *Etheridge's* rationale, the Constitution's right to a jury trial does nothing more than allow the jury to make factual determinations of the party's non-economic damages but does not guarantee that the jury's factual determinations have any legal significance. See *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 456 (2007) (Pfeiffer, dissenting). Although a party has a constitutional right that requires a jury to determine his or her damages, under *Etheridge*, the right to a jury trial also allows the circuit court to disregard the jury's determination. *Id.*

As the Washington Supreme Court noted, *Etheridge's* reasoning allows the jury's fact-finding function to occur in form, but then strips it of all effect by requiring the circuit court to ignore the jury's finding of damages and enter judgment based on the legislature's predetermined assessment of the maximum value of everybody's non-economic damages. *Sofie*, 771 P.2d at 724. The *Etheridge* court's conclusion that a cap does not violate the jury's fact-finding function because the jury still determines the facts, even though the circuit court must reduce the jury's damage calculation maintains the form of the jury's role, but deprives it of any substance. *Sofie*, 771 P.2d at 724.

Such an argument pays lip service to the form of the jury but robs the institution of its function. [The courts should not] construe constitutional rights in such a manner. . . . “ ‘The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.... If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.’

*Sofie*, 771 P.2d at 721. Thus, these courts have concluded that the party's right to a jury does not remain inviolate when the law allows the party the right to have a jury assess his or her damages but then the legislature strips that assessment of any substance by mandating that the circuit court reduce his or her damages to a predetermined amount that bears no relation to the facts of his or her case.

The courts that have upheld non-economic damages caps have constitutions that do not mandate that the state keep its right to a jury trial inviolate. Rather, these constitutions place less importance on the right to a jury trial:

- The Utah Supreme Court has held that a damage cap does not violate the Utah Constitution, which states that “[i]n capital cases the right of trial by jury shall remain inviolate,” but only guarantees the parties a right to a jury trial in civil cases. *Judd*, 103 P.3d at 144;
- The West Virginia Supreme Court has held that a damage cap does not violate the West Virginia Constitution, which states that “the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to the rule of court or law.” *MacDonald v. City Hosp., Inc.*, 35543, 2011 WL 2517201 (W. Va. June 22, 2011);
- The Michigan Supreme Court has held that a damage cap does not violate the Michigan Constitution, which states, in part, that “[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless

demanded by one of the parties in the manner prescribed by law.”

*Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. App. 2003);

- The Alaska Supreme Court has held that a damage cap does not violate the Alaska Constitution, which states that “[i]n civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law.” *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002);
- The Virginia Supreme Court has held that a damage cap does not violate the Virginia Constitution, which provides [t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.” *Etheridge*, 376 S.E.2d 525.

The court, therefore, should follow the courts that have similar constitutional language and conclude that section 538.210 violates a party’s constitutional right to a jury trial.

Finally, to the extent that this analysis does not persuade the court, the court should ask itself what Missouri’s right to a jury trial protects in a civil trial. A common law cause of action presents two broad questions for the jury’s determination: whether or not one person has caused a legal injury to another person, and, if so, the extent of that person’s injuries. Weiss, 38 Cath. U.L. Rev. at 757. If the court believes that the legislature can enact a law requiring the circuit court to ignore the jury’s factual findings on non-economic damages then the court must also believe that the legislature could:

- Enact a law stating that, when a corporation and individual are joint tortfeasors, the court cannot enter judgment finding that the corporation is more than 35% liable for the party's injuries;
- Enact a law requiring the circuit court to reduce a party's non-economic damages to \$10.00;
- Enact a law requiring the circuit court to reduce a party's economic damages to \$10.00; or
- Enact a law requiring the circuit court to increase a party's non-economic damages to 1,000,000.

These laws would have the same legal effect of overriding the jury's factual determinations. If the court believes that the legislature could enact any of these laws then the court must believe that the legislature could enact any law and that a party's right to a jury trial provides no protection for the jury's role in Missouri's judicial system. If the court believes that the legislature could not enact these laws because they would violate a person's right to a jury trial then the court must also conclude that the legislature's non-economic cap violates a person's right to a jury trial.

**c) The cap's proponents' arguments are not valid**

The courts that have upheld their legislatures' non-economic damages caps on the basis that the caps do not violate their constitutions' right to a jury trial have presented other reasons why the caps do not violate that right. Specifically, courts have held that caps do not violate a party's right to a jury trial because (1) a damage cap is similar to the court's remittitur doctrine, which is constitutional, (2) the legislature can abolish a cause

of action so it must be able to limit a cause of action, and (3) a person does not have the right to full compensation for his or her injuries. The court should reject these arguments.

**1) A damage cap is different than the court's remittitur power**

The court should reject any argument that the legislature's non-economic damage cap is similar to the court's remittitur doctrine. Non-economic damage cap proponents claim that since the courts have declared the court's remittitur doctrine constitutional then the court must also declare the legislature's non-economic damage cap constitutional. Under section 537.068, the court has the authority to enter a remittitur "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 party's injuries and damages." "Excessive verdicts generally arise in two situations: (1) when the jury makes an honest mistake in weighing the evidence as to the nature and extent of the injury and awarding disproportionate damages; and (2) when the jury is biased by trial misconduct to award grossly excessive damages." *Knifong v. Caterpillar, Inc.*, 199 S.W.3d 922, 927 (Mo. App. 2006).

A legislature's non-economic damage cap and the court's remittitur doctrine are different for two reasons. First, the court may use the remittitur doctrine only if the court determines that the jury has awarded excessive damages that are not supported by the evidence. Thus, the court must apply its remittitur doctrine on a case-by-case basis to provide post-judgment relief from an excessive award. Weiss, 38 Cath. U.L. Rev. at 757. A legislature's damage cap requires the court to reduce the party's non-economic

damages regardless of the individual facts of the party's case and even if the evidence supports the jury's damage award. Thus, the court's remittitur doctrine does not support the legislature's mandate that the court reduce the jury's verdict to comply with a statutory limitation when the evidence supports the jury's verdict. *Id.*

Second, under the remittitur statute, the circuit court cannot require the party to take the reduced jury award. Rather, Rule 78.10(b) gives the party the option of rejecting the circuit court's remittitur and obtaining a new trial. Other courts have held that the remittitur doctrine does not violate a party's right to a jury trial *only* because the circuit court must give an option of a new trial to the plaintiff. *Chavez-Rey v. Miller*, 658 P.2d 452, 454 (Ct. App. 1982); *Hatchell v. McCracken*, 132 S.E.2d 7, 9 (1963). Legislative damage caps, however, reduce the party's non-economic damages without reference to the particular evidence in the case and without an option of a new trial. *Nestlehutt*, 691 S.E.2d at 223. Courts, therefore, have held that, while a remittitur does not violate a party's right to a jury because the party has an option of a new trial, damage caps do violate the party's right to a jury. *Id.*; *Lakin*, 987 P.2d at 472.

**2) The court should conclude that the legislature does not have the power to abolish personal injuries claims and, even if it does, that does not justify the damage cap**

Although relying primarily on *Etheridge's* reasoning, the *Adam's* court also justified its holding that a damage cap does not violate a party's right to a jury trial because the legislature has the inherent authority to regulate common law causes of action. The *Adams* court reasoned that if the legislature had the authority to abolish a

common law cause of action then the legislature has the authority to limit recovery in a common law cause of action. Other courts have made similar arguments that, because the legislature may abolish or modify a common law cause of action without violating due process or equal protection, the legislature may limit the amount of non-economic damages that a party may receive in a common law cause of action. *See e.g. Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 447-48 (2007).

The court should reexamine this rationale for two reasons. First, the court should examine whether or not the legislature has the power to abolish a common law cause of action as significant as a medical malpractice claim. *Adams*, 832 S.W.2d at 907. In support of this proposition, the *Adams* court cites *De May v. Liberty Foundry Co.*, 327 Mo. 495, 512, 37 S.W.2d 640, 649 (1931). In that case, the Missouri Supreme Court upheld the constitutionality of Missouri's Workers Compensation Act. *De May v. Liberty Foundry Co.*, 37 S.W.2d at 649. In that case, the court held that the workers compensation system did not deprive the worker of his right to a jury trial because the employer and employee waived their rights to the jury trial:

Suffice it to say that a ground or reason frequently used by the courts in sustaining the constitutionality of the elective Compensation Acts (such as our own act) is that the operation of the act rests upon the free and voluntary consent of both employer and employee given in the manner provided in the act, and, the act being contractual or quasi contractual in operation and effect, the mutual election of employer and employee to accept the provisions of the act is tantamount to a waiver by both employer

and employee of the right to a jury trial; hence there is no deprivation of the constitutional right.

*Id.* *Amicus* does not believe that *DeMay* stands for the proposition that the legislature could abolish common law personal injury lawsuits like medical malpractice claims. Furthermore, *Amicus* does not believe that the legislature has the power to abolish personal injury lawsuits like medical malpractice claims.

Second, while other courts have held that the legislature may abolish a common law cause of action without violating a constitution's equal protection clause or due process clause, *see e.g. Arbino*, 880 N.E.2d at 447-48, this does not necessarily mean that a damage cap does not violate a person's right to a jury trial. The constitutional right to a jury trial guarantees that, *when* a cause of action exists, the party has the right to have a jury determine his or her damages. *Nestlehutt*, 691 S.E.2d at 223-24. Thus, while it is possible that the legislature has the authority to abolish a common law cause of action without violating due process or equal protection, that reasoning does not mean that legislature has the authority to violate a party's constitutional rights in a cause of action.

For example, the legislature has the power to create new criminal laws. *State v. Kaiser*, 139 S.W.3d 545, 553 (Mo. Ct. App. 2004). But, once the legislature does so, the constitution requires that a criminal defendant receive his or her constitutional rights including the right to a jury trial. And no one would argue that, because the legislature has the authority to abolish or create new criminal laws, the legislature could prevent a criminal defendant from receiving a jury trial in a criminal trial. Thus, the mere fact that the legislature may have the authority to abolish or create a cause of action does not mean

that the legislature may circumvent a party's rights during the litigation of a cause of action.

**3) A party does have a right to compensation for his or her injuries**

The *Adam's* court also justified its holding that a damage cap does not violate a party's right to a jury trial because the common law never recognized that the party had a right to a full recovery for his injuries:

Because Section 538.210 is not applied until after the jury has completed its constitutional task, it does not infringe upon the right to a jury trial. *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989). *See also Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) (Interpreting the Clean Water Act). *There is no substantive right under the common law to a jury determination of damages under the Seventh Amendment. The assessment of a civil penalty is not one of the "fundamental elements" preserved by the common law right to a jury trial); and Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88–89, 98 S.Ct. 2620, 2638, 57 L.Ed.2d 595 (1978) (*The common law never recognized a right to a full recovery in tort.*)

*Adams*, 832 S.W.2d at 907 (emphasis added).

The court should re-evaluate its conclusion. The court states that a party has no substantive right to a jury determination of his or her damages under the 7<sup>th</sup> Amendment to the U.S. Constitution. The United States Supreme Court, however, has held that the 7<sup>th</sup> Amendment is not incorporated into the 14<sup>th</sup> Amendment and does not apply to the states.

See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). Thus, whether or not the 7<sup>th</sup> Amendment grants a substantive right to a party to a jury determination of his or her damages is irrelevant. Rather, as *Amicus* notes above, state courts have consistently held that a party did have a common law right to a jury determination of his or her damages.

To the extent that federal case law on the 7<sup>th</sup> Amendment is relevant to Missouri's construction of its right to jury provision, the *Adams*' court's citation to *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) does not support the proposition that a party had no common law right to a jury determination of his or her damages. In *Tull*, the parties asked the U.S Supreme Court to decide whether or not a defendant had a 7<sup>th</sup> Amendment right to a jury assessment of the civil penalties when the government prosecuted it for a violation of a federal statute. *Tull*, 481 U.S. 412, 425 (1987). The court held that the assessment of a civil penalty was not a fundamental element of the 7<sup>th</sup> Amendment. *Id.*

A civil penalty, however, is different than non-economic damages. The legislature designs a civil penalty to punish or deter a tortfeasor. The legislature does not design a civil penalty to compensate a person's injuries. Thus, the mere fact that United States' Supreme Court has stated that the 7<sup>th</sup> Amendment does not require the jury to determine whether or not to assess a civil penalty on the defendant is not a sufficient reason for this court to conclude that the right to a jury trial does not require the jury to determine a party's non-economic damages

For similar reasons, the court should also reject the argument that because the legislature requires the court to award double or treble damages for certain causes of action then the legislature must have the authority to reduce damages for other causes of action. See *Arbino*, 880 N.E.2d at 438. The legislature has enacted laws that require the court to enter awards for double or treble damages for certain causes of action. See e.g. section 537.340; section 537.420. The courts, however, have held that Missouri statutes that allow individuals to recover double and treble damages are penal statutes. *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. 2008); *Collier v. Roth*, 468 S.W.2d 57, 60 (Mo. Ct. App. 1971). Thus, in enacting legislation to award double or treble damages, the legislature was not attempting invade the jury’s fact-finding function by setting the party’s level of compensation. Rather, the legislature was attempting to punish the tortfeasor by requiring him or her to pay double or treble damages. The legislature was also attempting to deter other people from committing similar torts.

Finally, the *Adams* court stated that the common law did not grant to a person a right to full recovery in tort. In support of this proposition, the *Adams* court cited *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88–89, 98 S.Ct. 2620, 2638, 57 L.Ed.2d 595 (1978). The *Duke* court did state that “[o]ur cases have clearly established that ‘[a] person has no property, no vested interest, in any rule of the common law.’” In support of that proposition, the court cites a case that quotes *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

In *Munn*, the United Supreme Court considered the legislature’s power to regulate rates at public grain warehouses, which is regulation that has nothing to do with a party’s

right to a jury trial. See also Weiss, 38 Cath. U.L. Rev. at 751. Given that context, the United States Supreme Court's statement does not support subsequent court's use of that statement as justification for the legislature's non-economic damage caps. Nothing in the Supreme Court's subsequent use of its language from *Munn* indicates its approval of such an expansive use of that language. See also *id.* *Amicus'* historical analysis in this brief shows that, at common law, a party did have a right to full compensation for his injuries. And, in fact, as *Amicus* points out above, until the 1970s, no person or court had suggested that the jury did not have the absolute power to assess the party's economic and non-economic damages or that the legislature could force a party to forgo full compensation for his injuries. *Id.* at 748-49.

#### **d) Conclusion**

This court should conclude that the circuit court erred in reducing Watts' non-economic damages on the basis of the non-economic damage cap in section 538.210 because section 538.210 violates Watts' rights to a jury trial. The courts that have upheld non-economic damage caps and the courts that have invalidated non-economic damage caps agree on three principles: (1) at common law, a party had a right to a jury trial on a personal injury claim including a medical malpractice claim; (2) the party's right to a jury trial on these claims included the right to have the jury assess his non-economic damages; and (3) precedent for the court's remittitur power occurred in 1822, which is after Missouri adopted its constitution.

Missouri's constitution requires that a party's right to a jury trial remain inviolate. Courts with similar constitutional language have concluded that the party's right to a jury

does not remain inviolate when the law allows the party the right to have a jury assess his or her damages but then the legislature strips that assessment of any substance by mandating that the circuit court reduce his or her damages to a predetermined amount that bears no relation to the facts of his or her case. For the reasons that *Amicus* outlines above, the Supreme Court should follow the reasoning of those courts.

Respectfully submitted,

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### **Certificate of Service and Compliance**

I certify that filed this brief with the Missouri Supreme Court's electronic filing system. I also certify that this brief (1) includes the information that 55.03 requires; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 7,247 words. I also certify that I sent a copy of this brief by email to:

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