

WD83485

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IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

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MARIA DEL CARMEN ORDINOLA VELAZQUEZ  
APPELLANT-RESPONDENT,

vs.

JENNIFER REEVES, M.D., ET AL.,  
RESPONDENTS.

CASE NO. 1716-CV20186

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APPEAL FROM THE CIRCUIT COURT OF  
JACKSON COUNTY, MISSOURI  
DIVISION NO. 14  
HONORABLE JOHN M. TORRENCE, CIRCUIT JUDGE

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BRIEF OF RESPONDENTS JENNIFER REEVES, M.D., KRISTEN FRIED, M.D.,  
SHILPA BABBAR, M.D., KATHRYN GOINS, M.D., KENT BURK, M.D., AND  
UNIVERSITY PHYSICIAN ASSOCIATES

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BURK, M.D.**

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	5
STATEMENT OF FACTS.....	7
I. Procedural Background.....	7
II. Care at Issue .....	9
III. Discovery Dispute .....	10
POINTS RELIED ON.....	11
ARGUMENT.....	13
I. The trial court erred in refusing to instruct the Jury regarding the burden of proof because the argument misstated Missouri Law and improperly shifted the burden of proof from Ms. Ordinola’s to Respondents, in that Ms. Ordinola’s counsel improperly argued in closing that Respondents had the “burden to convince them” and allowing the argument in without a corrective instruction was an abuse of discretion.....	13
A. Preservation and Standard of Review.....	13
B. During her closing argument, Ms. Ordinola’s counsel capitalized on the confusing nature of Missouri Approved Instruction 3.01, she misstated the law to the jury and the trial court refused to admonish the jury accordingly.....	14
II. The trial court erred in overruling Respondents’ objection to Ms. Ordinola’s use of a recording of Respondent Kent Burk, M.D., at trial, because this evidence should not have been admitted in that Ms. Ordinola failed to disclose the recording during discovery and the use of that recording caused extreme prejudice to Respondent Dr. Burk by denying him adequate opportunity to prepare and explain the context of the recording.....	17
A. Preservation and Standard of Review.....	17

B. Argument.....17

III. The trial court correctly reduced the total noneconomic damages awarded to the plaintiff under R.S.Mo. 538.210 because that statute does not violate the right to trial by jury guaranteed by the Missouri Constitution. (Responds to Ms. Ordinola’s Point Relied on 1).....23

A. Standard of Review.....23

B. The General Assembly repealed and replaced the common law action for medical negligence with a statutory cause of action.....23

C. The Missouri Supreme Court should revisit *Watts* and find that statutory damages caps do not violate the jury trial right .....27

IV. The trial court erred in denying the Motion for Periodic Payments of Future Non-Economic Damages because the court had a duty to allocate damages properly on a pro rata basis, in that the court incorrectly applied all of Ms. Ordinola’s Attorneys’ Fees to the future damages portion of the judgment, rather than applying the attorneys’ fees pro-rata to past and future damages, and that error caused prejudice by artificially reducing the future damages award.....30

A. Preservation and Standard of Review.....30

B. Argument.....31

V. The trial court erred in denying the motion for remittitur because the judgment applied the “catastrophic injury” cap on non-economic damages rather than the standard cap on non-economic damages in that the evidence did not establish that Ms. Ordinola suffered an irreversible failure of an organ system as defined by Section 538.205.....33

A. Preservation and Standard of Review.....33

B. Argument.....33

VI. The trial court erred in denying Respondents’ motion for remittitur because the court applied the incorrect statutory cap, in that the court applied the cap in effect in calendar year 2019 (the year the case was tried), rather than calendar year 2015 (the year the cause of action accrued) and thereby improperly gave retroactive effect to a substantive change in the law, in violation of *Klotz v. St. Anthony Medical Center*.....36

A. Standard of Review.....36

B. Argument.....36

CONCLUSION.....38

RULE 84.06 CERTIFICATE.....41

CERTIFICATE OF SERVICE.....42

## TABLE OF AUTHORITIES

### Cases

<i>Adams By &amp; Through Adams v. Children’s Mercy Hosp.</i> , 832 S.W.2d 898, 907 (Mo. banc 1992).....	29
<i>Anchor Ctr. Partners, Ltd. v. Mercantile Bank, N.A.</i> , 803 S.W.2d 23, 30 (Mo. banc 1991).....	14
<i>Bradley v. Buffington</i> , 500 S.W.2d 314, 320 (Mo.Ct.App. 1973).....	14
<i>Branson v. Director of Revenue</i> , 601 S.W.3d 302, 304 (Mo.Ct.App. E.D. 2020).....	30, 33, 36
<i>Doe v. Phillips</i> , 194 S.W.3d 833, 841 (Mo. 2006).....	23
<i>Doe v. Roman Catholic Dicoese of Jefferson City</i> , 862 S.W.2d 338, 340 (Mo. banc 1993).....	23
<i>Estate of Overbey by Overbey v. Franklin</i> , 558 S.W.3d 564, 573 (Mo.Ct.App. W.D. 2018).....	13, 24, 25, 28
<i>Feltner v. Columbia Pictures Television, Inc.</i> , 523 U.S. 340, 349 (1998).....	28, 29
<i>Hautly Cheese Co. v. Wine Brokers, Inc.</i> , 706 S.W.2d 920,922 (Mo. Ct. App. W.D. 1986).....	14
<i>Hemann v. Camolaur, Inc.</i> , 127 S.W.3d 706, 710 (Mo.Ct.App. W.D. 2004).....	13
<i>Hoffman v. Illinois Terminal R. Co.</i> , 274 S.W.2d 591, 595 (Mo.Ct.App. 1955).....	13
<i>Horton v. Oregon Health &amp; Sci. Univ.</i> , 359 P.3d 998, 1041 (2016).....	29, 30
<i>Klotz v. St. Anthony’s Medical Ctr.</i> , 311 S.W.3d 752, 760 (Mo. banc 2010).....	12, 26, 36, 37
<i>Lakin v. Senco Prod., Inc.</i> , 987 P.2d 463, 466 (Or. 1999).....	29
<i>Lowe v. Mercy Clinic E. Communities</i> , 592 S.W.3d 10, 29 (Mo.Ct.App. E.D. 2019).....	31
<i>Mahoney v. Doerhoff Surgicla Servis., Inc.</i> , 807 S.W.2d 503, 508 (Mo. banc 1991).....	30
<i>Miller v. State</i> , 558 S.W.3d 15, 20 n.4 (Mo. Banc 2018).....	26
<i>Minze v. Missouri Dept. of Public Safety</i> , 541 S.W.3d 575, 581 (Mo.Ct.App. W.D. 2017).....	13
<i>Missouri Ass’n of Club Executives v. State</i> , 208 S.W.3d 885, 888 (Mo. 2006).....	23
<i>Munn v. Ill.</i> , 94 U.S. 113, 134 (1876).....	24

*P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 810 (Mo. Ct. App. 2011).....27

*Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 742 (Mo. 2007).....23

*Sanders v. Ahmed*, 364 S.W.3d 195, 204 (Mo. banc 2012).....24

*Saint Louis Univ. v. Masonic Temple Ass’n of St. Louis*, 220 S.W.3d 721, 725 (Mo. banc 2007).....24

*St. Louis Cty v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011).....23

*State v. Liberty*, 370 S.W.3d 537, 552 (Mo. 2012).....26

*State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. banc 1974).....36

*Walker v. Div. of Employment Sec.*, 592 S.W.3d 384, 387-88 (Mo. App. W.D. 2020)....25

*Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 637 (Mo. banc 2012).....23, 27, 28, 29, 30

*Ziolkowski v. Heartland Regional Medical Ctr*, 317 S.W.3d 212, 216 (Mo.Ct.App. W.D. 2010).....17

**Constitutional Provisions**

Missouri Constitution, Art. I, § 3.....24

Missouri Constitution, Art. I, § 13.....36

Missouri Constitution, Art. I, § 22(a) .....28

Missouri Constitution Art. III, § 3.....24

**Jury Instruction**

Missouri Approved Instruction 3.01.....15

**Statutes**

R.S.Mo. § 1.010.....24

R.S.Mo. § 105.711.....27

R.S.Mo. § 538.205.....33, 34

R.S.Mo. § 538.210.....23, 24, 26, 27, 31, 33, 38

R.S.Mo. § 538.220.....31, 32, 38

Missouri Rule of Civil Procedure 56.01.....22

## STATEMENT OF FACTS

### I. Procedural Background

This appeal involves the disposition of a medical malpractice action at the trial level through a jury verdict and resulting judgment for the petitioner, Ms. Ordinola. (D6 p. 1; D142 p. 1-6). On August 24, 2017, Appellant filed her Petition against Respondents containing several allegations of medical malpractice involved with her caesarean section delivery and post-procedure care. (D 98 p. 10-11). Appellant alleged damages in the form of permanent urinary incontinence, extreme physical pain, mental pain and anguish, depression and surgical scars. (D 98 p. 11).

This case was called to trial on October 21, 2019 and concluded with the jury's verdict for Appellant on October 30, 2019. (D 142 p.1-2). The jury's verdict awarded Appellant \$30,000.00 in compensatory damages, \$300,000.00 in past non-economic damages, and \$700,000.00 in non-economic damages for \$1,030,000.00 in total damages. (D 142 p. 2).

On October 30 and 31, Respondents filed post-trial motions for Remittitur and Periodic Payment of Future Non-Economic Damages. (D. 110, 111, 112, and 113). On December 2, 2019, Respondents filed their Motions for New Trial. (D 116 and 122). On January 6, 2020, the trial court entered its initial judgment and denied Respondents' motions for new trial. (D 132 p. 3).

In ruling on Respondents' other post-trial motions, the court found Appellant's alleged injury to be "catastrophic" under applicable Missouri statutes and found the

relevant cap on non-economic damages to be \$748,828 (the cap for 2019, the year in which the trial was held). (D 132 p. 4). The judgment also calculated only \$13,102.72 due to Appellant in future, non-economic damages. Finding there was no statutory basis for future periodic payments, the court found the entire damage award of \$778,828 due upon entry of judgment. (D 132 p. 5).

On January 7, 2020, Respondents moved to amend the judgment to correct a typographical error regarding costs assessed against Defendant Susan Mou, M.D., despite her prevailing at trial. (D 133 p. 2-3). Respondents filed their Notice of Appeal on January 10, 2020. (D 134, 135). Appellant moved to amend the judgment, requesting the trial court find the applicable non-economic damages cap unconstitutional and award Appellant the full amount within the jury's verdict. (D 137 p. 3-4).

On March 2, 2020, the trial court granted Respondents' motion to amend the judgment. (D 138). The trial court also entered an Order denying Appellant's motion to amend the judgment. (D 140). On March 2, 2020, the trial court entered its Amended Judgment on Jury Verdict correcting the cost issue involving Susan Mou, M.D. (D 139 p. 6). Appellant filed their Notice of Appeal on April 9, 2020. (D 141). This appeal was given case number WD83722 before the Court consolidated it under this case number.

On April 27, 2020, staff counsel for the Western District of the Missouri Court of Appeals sent a letter to counsel for Respondents, requesting clarification of which judgment Respondents would be appealing. (D 146 p. 2). In response to this letter, Respondents moved for leave to file notice of appeal out of time. (D 146). On May 21, 2020, the Court granted this motion. (D 152). Respondents filed their subsequent Notice



of Appeal of the trial court's Amended Judgment on June 9, 2020. On June 10, the Court consolidated both appeals under this case number. (D 155).

## **II. Care at Issue**

At about 11:43 p.m. on Friday, September 4, 2015, Ms. Ordinola presented to Truman Medical Center with complaints of fluid leakage and the onset of contractions earlier in the day. Appellant was already scheduled for a Caesarean Section delivery on Monday, September 9. Respondents Babbar, M.D., assessed Appellant, and after discussing this assessment with Respondents Fried, M.D., and Reeves, M.D., Appellant was offered and accepted the Caesarean delivery and bilateral tubal ligation at that time. These procedures took place on Saturday, September 5, at about 3:25 a.m. (D 98 p. 5).

Appellant experienced post-partum hemorrhage, and she became unresponsive just before noon on Saturday, September 5, 2015. (D 98 p. 6). An exploratory laparotomy performed by Respondents Burk, M.D., and Goins, M.D., revealed blood in Appellant's abdominal cavity and her left fallopian tube actively bleeding. This bleeding was addressed with assistance from Dr. Anuj Shah. (D 98 p. 6-7). Two days later, Respondents Burk, M.D., and trial defendant Susan Mou, M.D., performed a total abdominal hysterectomy because Appellant's uterus became infected. (D 98 p. 7). During this procedure, a laceration of Appellant's bladder occurred, was recognized and repaired intraoperatively by Drs. Burk and Mou. (D 98 p. 8). On November 3, 2015, after her discharge from the hospital and two months after the events involved in this lawsuit, Appellant went to the offices of Dr. Burk and Dr. Shah, who was not a party to the later

lawsuit, separately to speak with them about what had transpired during her hospitalization. (D 117 p. 4).

### III. Discovery Dispute

During pretrial discovery, Respondents' opening interrogatories asked Appellant if she had any recorded statements of any of the defendants. On December 17, 2017, Appellant's sworn interrogatory only stated that she had a recorded statement of Dr. Anuj Shah (not a defendant) but said no more. It did not reveal she had secretly recorded Respondent Dr. Kent Burk, and retained it. (D 119 p. 7, 9, 11).

Respondents' Requests for Production of Documents included a request for any statements of any of the defendants. (D. 118 p. 2). In Appellant's response, also on December 17, 2017, she again revealed only that she had a recorded statement of Dr. Shah and did not mention Dr. Burk's statement. (D 118 p. 2, 5).

On March 22, 2018, Appellant produced a recorded statement purporting to be of Dr. Shah. She produced this recording to a former associate of Horn Aylward & Bandy. Lead counsel for Respondents, Tim Aylward, was not copied on this production. This associate eventually left the firm about three months later. (D 105 p. 10).

On August 27, 2019, Dr. Soyini Hawkins, an expert witness for Ms. Ordinola, produced the recording at issue in response to her *duces tecum* request. This was the first time undersigned counsel discovered the existence of this recording. (D 105 p. 10). Upon listening to this recording on October 9, 2019, undersigned counsel identified the voice as belonging to Dr. Burk and not Dr. Shah, contrary to Ms. Ordinola's representations throughout discovery. (D 105 p. 10). Undersigned counsel approached Appellant's

counsel with this finding, and Appellant's counsel at that time confirmed it was Dr. Burk on the recording. (D 117 p. 5).

Respondents moved in limine to exclude Dr. Burk's recording at trial. (D 105 p. 11). The court denied the motion and a renewed motion made at trial. (Transcript Vol. I, p. 194). When counsel objected to the admission of the transcript of the recording during the Dr. Burk's examination, (Transcript Vol I, p. A175), the trial court overruled this objection and allowed Appellant's counsel to question Dr. Burk using the transcript. (Transcript Vol I, p. A195).

#### **POINTS RELIED ON**

- I. The trial court erred in refusing to instruct the Jury regarding the burden of proof because the argument misstated Missouri Law and improperly shifted the burden of proof from Ms. Ordinola's to Respondents, in that Ms. Ordinola's counsel improperly argued in closing that Respondents had the "burden to convince them" and allowing the argument in without a corrective instruction was an abuse of discretion**
- II. The trial court erred in overruling Respondents' objection to Ms. Ordinola's use of a recording of Respondent Kent Burk, M.D., at trial, because this evidence should not have been admitted in that Ms. Ordinola failed to disclose the recording during discovery and the use of that recording caused extreme prejudice to Respondent Dr. Burk by denying him adequate opportunity to prepare and explain the context of the recording.**

- III. The trial court correctly reduced the total noneconomic damages awarded to the plaintiff under R.S.Mo. 538.210 because that statute does not violate the right to trial by jury guaranteed by the Missouri Constitution. (Responds to Ms. Ordinola’s Point Relied On).**
- IV. The trial court erred in denying the Motion for Periodic Payments of Future Non-Economic Damages because the court had a duty to allocate damages properly on a pro rata basis, in that the court incorrectly applied all of Ms. Ordinola’s Attorneys’ Fees to the future damages portion of the judgment, rather than applying the attorneys’ fees pro-rata to past and future damages, and that error caused prejudice by artificially reducing the future damages award.**
- V. The trial court erred in denying the motion for remittitur because the judgment applied the “catastrophic injury” cap on non-economic damages rather than the standard cap on non-economic damages in that the evidence did not establish that Ms. Ordinola suffered an irreversible failure of an organ system as defined by Section 538.205.**
- VI. The trial court erred in denying Respondents’ motion for remittitur because the court applied the incorrect statutory cap, in that the court applied the cap in effect in calendar year 2019 (the year the case was tried), rather than calendar year 2015 (the year the cause of action accrued) and thereby improperly gave retroactive effect to a substantive change in the law, in violation of *Klotz v. St. Anthony Medical Center*.**

## ARGUMENT

- I. The trial court erred in refusing to instruct the Jury regarding the burden of proof because the argument misstated Missouri Law and improperly shifted the burden of proof from Ms. Ordinola’s to Respondents, in that Ms. Ordinola’s counsel improperly argued in closing that Respondents had the “burden to convince them” and allowing the argument in without a corrective instruction was an abuse of discretion.**

### **A. Preservation and Standard of Review**

The above error was preserved for appellate review through Respondents’ objection on the record at trial. (Transcript Vol. II, p. A283). It was also preserved through Respondents’ request for a corrective instruction to the jury, which the trial court declined to give. (Transcript Vol. II, p. A285-6). Missouri appellate courts review a trial court’s decision to overrule an objection to a portion of a closing argument for abuse of discretion. *Minze v. Mo. Dept. of Public Safety*, 541 S.W.3d 575, 581 (Mo. Ct. App. W.D. 2017).

An abuse of discretion review entails determining whether counsel’s comments, when interpreted in light of the entire record, were plainly unwarranted and clearly injurious to the opposition. *Hemann v. Camolaur, Inc.*, 127 S.W.3d 706, 710 (Mo. Ct. App. W.D. 2004). A trial court abuses its discretion in controlling closing argument when unwarranted and injurious arguments go unrestrained. *Estate of Overbey by Overbey v. Franklin*, 558 S.W.3d 564, 573 (Mo. Ct. App. W.D. 2018). Improper argument made during a plaintiff’s rebuttal closing argument is especially prejudicial because the defense can only respond with an objection. *See Hoffman v. Ill. Terminal R. Co.*, 274 S.W.2d 591, 595 (Mo. Ct. App. 1955).

## B. Argument

- i. **During her closing argument, Appellant’s counsel improperly argued to the jury that Respondents had the burden to “convince” the jury of certain propositions, a misstatement of the law, and the trial court refused Respondents’ request that court instruct the jury on the proper burden of proof, which led to confusion to the jury and prejudice to Respondents.**

During the rebuttal portion of her closing argument, counsel for Appellant misstated the law regarding the burden of proof. She told the jury: “This is something they (defendants) have to convince you (the jury) that Maria Ordinola was not stable or that she was stable. They have to convince you of that . . . .” (Transcript Vol. II, p. A283).

Of course, that statement about the burden of proof is incorrect. “It is axiomatic that the burden of proof *always* remains on the party who has the affirmative of the issue.” *Hautly Cheese Co. v. Wine Brokers, Inc.*, 706 S.W.2d 920, 922 (Mo. Ct. App. W.D. 1986) (emphasis added). It “rests upon a plaintiff regarding all allegations required to state a cause of action.” *Bradley v. Buffington*, 500 S.W.2d 314, 320 (Mo. Ct. App. 1973). This burden “never shifts throughout the trial.” *Anchor Ctr. Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. banc 1991).

Respondents objected to that argument and requested the trial court to “instruct the jury that the burden of proof is on the plaintiff and defendants don’t have to convince them of anything.” (Transcript Vol. II, p. A285). They specifically requested this instruction as it would precisely respond to the improper argument and provide the jury with a correct statement of the law. (Transcript Vol. II, p. A285). Respondents worried that M.A.I. 3.01’s

burden language would not be enough to cure counsel's improper argument. (Transcript Vol. II, p. A286). That instruction provides:

“Your verdict will depend on the facts you believe after considering all the evidence. *The party who relies upon any disputed fact has the burden to cause you to believe that such fact is more likely true than not true.* In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence.”

Missouri Approved Instruction 3.01 (2016) (emphasis added). Respondents had even objected at the instruction conference, and been overruled, that M.A.I. 3.01's “is vague and creates confusion for a jury unschooled in the law about who has the burden of proof . . . .” (Transcript Vol II p. A275).

The trial court declined to the requested instruction. (Transcript Vol. II, p. A285). Instead, it advised the jury that they were to be guided by the instruction at issue “in determining who has to prove what in this case.” (Transcript Vol. II, p. A286). But this does not cure the misstatement of law because it tells the jury that *any* party who disputes a fact has the burden of proof on that disputed fact. To a jury, unschooled in law, the phrase “any disputed fact” could easily be misunderstood to mean that if a defendant denies liability, his or her protestation of nonculpability is a “disputed fact” on which defendant bears the burden to cause the jury to believe. Such a shifting of the burden of proof is impermissible under the common law.

The trial court's decision to overrule Respondents' request for a specific admonition was an abuse of discretion given the whole record. Just before this improper argument, counsel specifically referenced the burden of proof instruction, M.A.I. 3.01, and then

discussed how the instruction tasks the jury with deciding what parts of Respondents' testimony is more likely true than not true. (Transcript Vol. II, p. A281). Counsel suggested that Respondents had not convinced the jury of several material facts before arguing that what Missouri law requires.

The improper argument was not an isolated statement. Rather, it was the conclusion of nearly ten minutes of counsel pondering whether the defense had convinced the jury about several material facts. This extended misstatement of law required the court to inform the jury that Appellant bore the burden of proof.

Instead, the trial court compounded the confusion by merely referencing the instruction and how it guides "who has to prove what in this case." (Transcript Vol. II, p. A286). The court did not distinguish between the parties and their respective evidentiary burdens. Instead, the trial court relied on a vaguely worded instruction to address confusion created by an improper misstatement of the law.

This failure to instruct was an abuse of discretion because it injured Respondents. The last time counsel could address the jury, they heard this misstatement. This lightened Appellant's evidentiary burden, and without an instruction, the jury was free to misapply the law in coming to their verdict. The trial court failed to restrain this possibility.

Counsel's improper closing argument and the burden of proof instruction failing to cure such a misstatement and caused the jury to apply the wrong burden of proof in the case, and thereby deprived Respondents of a fair trial.



**II. The trial court erred in overruling Respondents' objection to Ms. Ordinola's use of a recording of Respondent Kent Burk, M.D., at trial, because this evidence should not have been admitted in that Ms. Ordinola failed to disclose the recording during discovery and the use of that recording caused extreme prejudice to Respondent Dr. Burk by denying him adequate opportunity to prepare and explain the context of the recording.**

**A. Preservation and Standard of Review**

The above issue was raised at the earliest possible juncture through Respondents' Motions in Limine. (D 105 p. 9-11). It was preserved for appellate review through an objection during the trial testimony of Dr. Kent Burk. (Transcript Vol I, p. A175). The trial court overruled this objection and allowed counsel for Appellant to question Dr. Burk with the statement. Missouri appellate courts review a trial court's admission or exclusion of evidence under an abuse of discretion standard. *Ziolkowski v. Heartland Regional Med. Ctr.*, 317 S.W.3d 212, 216 (Mo. Ct. App. W.D. 2010). Upon finding an abuse of discretion, appellate court will reverse when the prejudice resulting from the improper admission of evidence is outcome determinative. *Id.*

**B. Argument**

Dr. Burk is a staff physician at Truman Medical Center. He initiated the code blue and massive transfusion protocol on September 5, 2015, and he participated in the exploratory laparotomy the same day. He also participated in plaintiff's total abdominal hysterectomy on September 9, 2015. He later participated in a surgery in 2017 to repair a vesico-vaginal fistula. Of all Respondents, Dr. Burk was most involved in Ms. Ordinola's complex medical condition.

During the trial examination of Dr. Burk, Ms. Ordinola's counsel questioned him about the substance of a secretly recorded conversation between Ms. Ordinola and Dr. Burk on November 3, 2015. (D 117 p. 3). This conversation came from an unscheduled "drop in" by Appellant at Truman Medical Center. Dr. Burk was working at a different facility at that time, and he came to Truman Medical Center to receive her. (Transcript Vol II p. A205).

During this visit, which resulted in a 17-minute recording, Dr. Burk tried to summarize Appellant's 30-day hospitalization that included multiple surgeries and produced more than 5,000 pages of medical records. He tried to recall these details about two months after the surgical care he gave her. Because of the unscheduled visit, Dr. Burk did not have the benefit of reviewing *any* records to refresh his recollection about the timing or sequence of events.

As a result of the impromptu nature of the visit, the passage of time, and the complexities of Ms. Ordinola's treatment, Dr. Burk did not accurately relay all the details in precise order. Given the opportunity, Dr. Burk could have investigated and prepared for these inaccuracies if he had timely received the statement he requested in discovery. According to Rule 56.01(b)(3) any party has a right to obtain from an opposing party any statement of that party.

Early in the litigation, Respondents requested all written or recorded statements obtained from any defendant. (D 118 p. 2). On December 18, 2017, Appellant identified a recording purporting to be of Dr. Anuj Shah, a third-party provider, and she produced this recording on March 22, 2018. (D 117 p. 4). With that recording, she produced an

eleven-page transcript (D 121) of a meeting with Dr. Shah and Appellant. (Transcript Vol I p. A187). Appellant never corrected her representation that this recording was anything but the conversation with Dr. Shah reflected in the produced transcript.

Twelve days before trial, on October 9, 2019, counsel for Respondents discovered it was a recording of the unscheduled encounter between Appellant and Dr. Burk on November 3, 2015. (D 117 p. 4). At no point had Appellant represented that she had recorded Dr. Burk. (Transcript Vol I p. A193). It was not until defense counsel raised this issue that Appellant's counsel confirmed that the voice on the recording was that of Dr. Burk, not of Dr. Shaw. (D 117 p. 5). This discovery, so close to trial, that there were two separate recordings, not just one of Dr. Shah, caused prejudicial surprise to defendants. (Transcript Vol I p. A187-188).

At trial, Appellant's counsel used the transcript of Dr. Burk's audio recording, which had not been produced prior to trial, and which was not marked as an exhibit at trial, to impeach Dr. Burk. Appellant's counsel compared the transcript of the secret audio recording to Dr. Burk's responses that he gave at his deposition on May 8, 2019. Appellant's counsel noted that in the recording, Dr. Burk told Ms. Ordinola that her bleeding started after a doctor came in and pressed firmly on her abdomen, referencing a bimanual exam, and that she received blood shortly thereafter. (Transcript Vol II P. A288-289).

At trial, after having had the opportunity to study the medical records and the sequence of events, Dr. Burk clarified that Appellant had three separate bimanual exams following her Caesarean section delivery. Dr. Burk testified that the bimanual examination

at approximately 7:08 a.m. did “not necessarily” cause the suture at issue to dislodge. (Transcript Vol II p. A207-208). Unsurprisingly, Appellant’s counsel used the secret recording of Dr. Burk in November 2015, to argue to the jury that Dr. Burk’s sworn testimony at trial was false because the sequence of events described in the recording is different from his sworn testimony on the subject of exactly when and why Ms. Ordinola’s internal bleeding began. (Transcript Vol II p. A288-289).

Appellant used the discrepancy between Dr. Burk’s unprepared narrative of events in November 2015 and his trial testimony in October 2019 to impeach and impugn his credibility. Had the recording been properly identified and produced before Dr. Burk’s deposition, he could have addressed and explained any discrepancies then. Without the benefit of what he had said on the secret recording, Dr. Burk swore to the facts and a narrative in his deposition, and then had to explain on the stand that he had at one time told Appellant something different. Dr. Burk, of the six initially named doctors, was the most involved in Appellant’s treatment at issue. Impeaching Dr. Burk’s testimony on the onset of Ms. Ordinola’s hemorrhage had the effect of impeaching the testimony of all the defendants involved in Ms. Ordinola’s care in the immediate post-operative time frame after the Caesarean-section surgery. Of the six physician defendants at trial, only Dr. Susan Mou was not involved in the care of Ms. Ordinola immediately after the Caesarian-section operation, and Dr. Mou was the only defendant to whom the jury apportioned no fault in its verdict. (D 142 p. 2).

Respondents’ counsel renewed its motion in limine on this issue and objected on the grounds Appellant failed to properly identify the recording at issue or produce a transcript

matching this recording of Dr. Burk. The trial court eventually overruled this objection, finding the Respondents “had this information an adequate amount of time and have been aware of what it is for an adequate period of time such that there’s not prejudice from it getting past the discovery objection.” (Transcript Vol I p. A195).

Respondents respectfully suggest that the facts involved in this non-production show clear and undue prejudice to the Respondents in their preparation for trial. Respondents requested exactly this kind of material evidence from Appellant almost two years before trial. The produced audio recording was materially mislabeled as a statement by Dr. Shah, a non-party, and it came with the transcript of the recording of Dr. Shah. Appellant never supplemented or otherwise corrected this misidentification.

The failure to disclose Dr. Burk’s statement caused undue prejudice to him and the other Respondents. This surprise diverted precious resources and time from the defense of all six Respondents to determine the recording’s accuracy and review Dr. Burk’s previous statements shortly before trial. Given the thousands of pages of medical records, the numerous depositions, and other discovery responses, this was no small task when time was particularly scarce. This secret recording undermined Dr. Burk’s credibility on the stand as he truthfully explained that under oath he had said one thing, and in private had told Appellant something different.

Appellant had multiple opportunities to disclose this recorded conversation, but she did not. She had sworn in her answers to Interrogatory Nos. 19 and 26 that she had only recorded Dr. Shah, even though she had met with Dr. Burk on the same day. (Transcript Vol II p. A200). She also signed her response to Respondents’ document request that also

only acknowledged Dr. Shah's recording. Furthermore, the production of the audio recording mislabeled the recording of Dr. Burk as that of Dr. Shah, which misled defense counsel. Although they "inadvertently labeled" (Transcript Vol I p. A183), they never disclosed or produced the transcript that they eventually used at trial. All these mistakes and missed opportunities caused undue prejudice to Respondents.

Witnesses forget or misremember the exact order of events from time to time—especially busy surgeons who have an off-the-cuff meeting with a former patient. Dr. Burk's previous statements should not have been admitted to as inconsistent statements without having had the opportunity to address them before trial. To hold otherwise is tantamount to saying that one's adversary need not disclose prior statements, because if a person is always honest, he should not need copies of his prior statements. Rule 56.01(b)(3) permits parties to obtain their own prior statements from their opponent. Dr. Burk was denied that opportunity, and due to this surprise he had to convince a jury that this time he was telling the truth, which is prejudicial under the best of circumstances, and unduly prejudicial when it comes as a surprise.

Respondents' counsel asked the trial court to correct this discovery violation by prohibiting Appellant from using the recording at trial. The trial court overruled this request. This decision of the trial court materially altered Dr. Burk's presentation on the stand, created undue prejudice for Dr. Burk and, by association, his colleagues, and thus deprived Respondents of a fair trial.

**III. The trial court correctly reduced the total noneconomic damages awarded to the plaintiff under R.S.Mo. 538.210 because that statute does not violate the right to trial by jury guaranteed by the Missouri Constitution. (Responds to Ms. Ordinola’s Point Relied On).**

**A. Standard of Review**

A constitutional challenge to a statute is reviewed de novo. *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 637 (Mo. banc 2012). The party “challenging the validity of the statute has the burden of proving the act ‘clearly and undoubtedly’ violates the constitution.” *St. Louis Cty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011). Each “act of the legislature carries a strong presumption of constitutionality.” *Missouri Ass’n of Club Executives v. State*, 208 S.W.3d 885, 888 (Mo. 2006). A statute “will not be declared unconstitutional unless it clearly contravenes some constitutional provision.” *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. 2006) (quoting *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. banc 1993)). “It is presumed that the General Assembly would not pass laws in violation of the constitution.” *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 742 (Mo. 2007).

**B. The General Assembly repealed and replaced the common law action for medical negligence with a statutory cause of action.**

Following the decision in *Watts v. Lester East Cox Medical Centers*, 376 S.W.3d 633, 637 (Mo. banc 2012), the General Assembly repealed the common law medical malpractice cause of action and replaced it with a statutory cause of action. § 538.210, RSMo (2015). The legislature “expressly exclude[d] the common law of England as it relates to claims arising out of the rendering of or failure to render health care services by

a health care provider.” § 1.010, RSMo (2015). The legislature comprehensively revised the cause of action, including by reenacting limits on a plaintiff’s recovery that the Missouri Supreme Court struck down in *Watts*. § 538.210(2), RSMo (2015).

This statute falls within the legislature’s constitutional power. That legislative power is vested in the General Assembly, Missouri Const. Art. III §3, knows few limitations. *E.g.*, Art. I, §3 (prohibiting ex post facto laws, laws impairing the obligation of contracts, retrospective laws, and laws making irrevocable grants of special privileges or immunities). It is a “long-established principle of constitutional construction that Missouri’s constitution is not a grant of legislative power, but, except for its restrictions, legislative power is unlimited and practically absolute.” *Saint Louis Univ. v. Masonic Temple Ass’n of St. Louis*, 220 S.W.3d 721, 725 (Mo. banc 2007). This power includes the legislature’s power to create, modify, or even abolish the common law. *See Munn v. Ill.*, 94 U.S. 113, 134 (1876) (“[T]he great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.”). Nothing excludes modifying the common law from the powers of the people’s representatives.

The General Assembly’s legislation abolishing the common law tort of medical malpractice followed state court precedents confirming that the legislature may set the parameters of a statutory cause of action and “limit[] ‘the substance of the claims themselves.’” *Estate of Overbey v. Chad Franklin Nat’l Auto Sales N., LLC*, 361 S.W.3d 364, 376 (Mo. banc 2012) (recovery limits for MMPA punitive damages constitutional); *see also Sanders v. Ahmed*, 364 S.W.3d 195, 204 (Mo. banc 2012) (“The General Assembly



merely placed limits on the amount of non-economic damages recoverable under a statutorily created cause of action.”).

And this legislative power is broad. Not only can the legislature limit a plaintiff’s recovery, the legislature could have “precluded recovery of punitive damages altogether.” *Estate of Overbey*, 361 S.W.3d at 376. The jury trial right requires access to a jury as a factfinder, as a procedural matter, and it does not limit the legislature’s power over the common law, which it can abolish. As the state supreme court held in *Estate of Overbey*, even though the MMPA’s cause of action is analogous to common law fraud, the legislature had the power to preclude the recovery of damages. *Id.*

This medical malpractice law is thus constitutional. The legislature had the power to abolish the old common law cause of action of medical malpractice. It has plenary power to replace that cause of action with a new statutory cause of action, and it has plenary power to define the claims, recovery, and damages available under the new cause of action. The legislature exercised that power here, and so the new statute is a valid law. As the trial court held when it rejected this challenge, this challenge conflicts with “holdings of the appellate courts in this State” and with “existing case law.” D31 p.3-4; App.11-13.

In this appeal, Ms. Ordinola asserts that this law is unconstitutional because the legislature has done no more than recodify the old common law action.<sup>1</sup> Ordinola Br. 17–

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<sup>1</sup> Ms. Ordinola asserted that section 538.210 violates several provisions of the Missouri constitution before the trial court, but on appeal, she only contends that the statutory cap violates the jury trial right found in Article I, section 22(a). Because her opening brief fails to raise her other constitutional objections, she has abandoned them on appeal. *Walker v. Div. of Employment Sec.*, 592 S.W.3d 384, 387–88 (Mo. App. W.D. 2020) (“A question

18. But, although the new medical malpractice statute largely follows its common law predecessor, the legislature created a new statutory cause of action, at the same time that it abolished the common law cause of action, and significant changes were made. And courts presume that “the legislature’s action of repeal and enactment is presumed to have some substantive effect such that it will not be found to be a meaningless act of housekeeping.” *State v. Liberty*, 370 S.W.3d 537, 552 (Mo. 2012). This new cause of action is, by its plain text, only a statutory cause of action. And this court has no grounds to treat it otherwise, as the lower court properly held.

Ms. Ordinola also claims that this new cause of action seeks to “legislate[] away” the right to a jury trial. Ordinola Br. 19 (quoting *Klotz*, 311 S.W.3d at 774 (Wolff, J. concurring)). But the new statute only limits the plaintiff’s recovery as a matter of law by defining substantively what constitutes a violation and what damages are available. The new statutory cause of action still preserves the procedural right to have all claims heard by a jury. At a party’s request, a jury is free to find the amount of damages and they cannot be told about the statutory limit. § 538.210 (6), RSMo.

Ms. Ordinola also asserts that this law conflicts with “the very framework of our democracy.” Ordinola Br. 24. But, to the contrary, any attempt to strike down this democratically enacted law, and to hold that the people may never change common law causes of action through the legislature, conflicts with the democratic structure of the state

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not presented in an appellant’s brief will be considered abandoned on appeal.”); *Miller v. State*, 558 S.W.3d 15, 20 n.4 (Mo. banc 2018) (“Claims not raised in the court of appeals are not preserved for this Court to review.”).

constitution. The state constitution does not prohibit the legislature from exercising its plenary power to abolish common law actions and to enact new statutory causes of action in their place.

Moreover, Section 538.210 is constitutional as applied to the particular facts of this case, for reasons of sovereign immunity that would not arise in cases between purely private parties. Unlike other cases, any judgment here will be paid out of the State Legal Expense Fund because the physicians are covered by Section 105.711. The Fund is a limited partial waiver of sovereign immunity. *P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 810 (Mo. Ct. App. 2011), *as modified* (Jan. 31, 2012). Any such waiver is to be strictly construed, *id.* at 808, and the General Assembly's liability limits can be construed as revoking that waiver for judgments that exceed the statutory caps.

**C. The Missouri Supreme Court should revisit *Watts* and find that damages caps do not violate the jury trial right.**

As just shown, this statutory cause of action with its damages caps fits comfortably within the precedent holding that the legislature may abolish common law causes of action and replace them with statutory causes of action.

But, were this statute to be in tension with any state precedent, the proper course would be for the Missouri Supreme Court to reconsider and limit any conflicting precedent to its facts, or to overrule past incorrect precedent. In particular, this case would present is a chance to reevaluate *Watts* for common law causes of action and properly construe the jury trial right as requiring access to a jury as a factfinder and not limiting the legislature's power over the common law. Even if the legislature does not abolish a common law cause

of action entirely, the legislature may change the substantive aspects of a claim, recovery, and damages. The Missouri constitution simply does not freeze the substantive elements of lawsuits as they existed in 1820. It simply allows juries, and not judges, to determine the facts and whether liability exists.

Article I, section 22(a) states that “the right of trial by jury as heretofore enjoyed shall remain inviolate.” The Missouri Supreme Court has explained that “as heretofore enjoyed” means that Missourians have a right 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.” *Watts*, 376 S.W.3d at 638. It also defined “inviolate” as “free from change or blemish, pure or unbroken.” *Id.* (citing Webster’s Third International Dictionary 1190 (1993)). Although the federal civil jury trial right and the Missouri right require similar historical analysis, Missouri’s inviolate right is a “more emphatic guarantee of the right to jury trial.” *Estate of Overbey*, 361 S.W.3d at 375.

*Watts* contained two incorrect assumptions underlying its holding that a legislative cap on damages violates this state jury trial right.

First, *Watts* asserted that “statutory caps on damage awards simply did not exist” for common law damages actions and therefore the jury trial right is a substantive guarantee against imposing legislative limits. *Watts*, 376 S.W.3d at 639. But any lack of widespread damages caps does not, by itself, mean that the jury trial right limits the *legislative* rather than the *judicial* prerogative. In English common law actions for copyright infringement (codified in 1710 by the Statute of Anne), “damages for infringement were set at one Penny for every Sheet which shall be found in the infringer’s custody.” *Feltner v. Columbia*

*Pictures Television, Inc.*, 523 U.S. 340, 349 (1998) (quotations and brackets omitted). So at common law, it was not unheard of to have statutory damages. *Feltner* makes clear that parties had “the right to have a jury determine the *amount* of statutory damages,” *id.* at 353, and that legislature could not give the fact-finding function to a judge, *id.* at 355.

Second, *Watts* equated the jury’s fact-finding function (including the amount of damages) with a court’s role to apply the facts to the law and enter judgment. *Watts*, 376 S.W.3d at 640. But the jury’s constitutional task is complete when the “jury assessed liability and then determined damages.” *Adams By & Through Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. banc 1992), *overruled by Watts*, 376 S.W.3d 633. As a result, when the court later entered judgment per the statutory cap, the “permissible remedy is a matter of law, not fact, and not within the purview of the jury.” *Id.* Similarly, the Oregon Supreme Court has also explained that a statutory cap does not interfere with the jury’s fact-finding role because it is not a legislative attempt to find a fact but “a statutory cap is a legal limit on damages that applies generally in a class of cases.” *Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168, 244, 376 P.3d 998, 1041 (2016) (overruling *Lakin v. Senco Prod., Inc.*, 987 P.2d 463, 466(1999)).

*Watts* should not be allowed to freeze elements of substantive law, and the principles of stare decisis warrant correcting the errors of *Watts*. “Overturning erroneous precedent is particularly important where the precedent violates a constitutional right.” *Watts*, 376 S.W.3d at 644. *Watts* is a recent precedent, and the only significant reliance interests at stake here are those doctors and other medical professionals who relied on the new statute to limit their liability. *Watts* also cannot be fairly squared with other Missouri precedent

approving various legislative limits on bringing a medical malpractice claim. *E.g.*, *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 508 (Mo. banc 1991) (medical affidavit requirement not present in 1820 constitutional). Nor have a host of jurisdictions followed Missouri’s lead to prevent legislative choices on the substantive elements of a claim. The Oregon Supreme Court, in overruling a precedent *Watts* relied on, noted 17 of 22 jurisdictions (even some that hold the right “inviolable”) recognize that statutory damages caps do not violate the trial by jury. *Horton v. Oregon Health & Sci. Univ.*, 376 P.3d 998, 1043 (2016) (collecting cases).

**IV. The trial court erred in denying the Motion for Periodic Payments of Future Non-Economic Damages because the court had a duty to allocate damages properly on a pro rata basis, in that the court incorrectly applied all of Ms. Ordinola’s Attorneys’ Fees to the future damages portion of the judgment, rather than applying the attorneys’ fees pro-rata to past and future damages, and that error caused prejudice by artificially reducing the future damages award.**

**A. Preservation and Standard of Review**

This error was preserved for appellate review through Respondents’ post-trial Motion for Periodic Payment of Future Damages. (D 111). This issue was preserved for appeal at the earliest possible juncture as Respondents filed their motion when the jury returned the verdict and before the trial court entered its Judgment. The trial court, at first, denied this motion in its Judgment on Jury Verdict (D 132 p. 4-5) and retained this ruling in its Amended Judgment. (D 150 p. 4-5). When the resolution of an issue turns solely on interpreting pertinent statutes, Missouri appellate courts review questions of statutory interpretation de novo. *Branson v. Director of Revenue*, 601 S.W.3d 302, 304 (Mo.Ct.App. E.D. 2020).

## B. Argument

The trial court erred in three ways. First, periodic payments were required because the “total award of damages in the action” exceeded \$100,000.00. Second, the trial court failed pro rate the past and future damages and the attorneys’ fees and expenses (30% past damages/70% future damages). This resulted in a future damages award of \$13,102.72, that must be made in periodic payments, instead of a future damages award of \$219,271.90.

Once a party invokes Missouri’s statute on periodic future damage payments, trial courts must follow the dictates of that statute. *Lowe v. Mercy Clinic E. Communities*, 592 S.W.3d 10, 29 (Mo. Ct. App. E.D. 2019). Section 538.220.2, RSMo, provides that “[a]t the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid . . . in part in periodic installment payments if the total award of damages in the action exceeds one hundred thousand dollars.”

The jury’s verdict assessed Appellant \$1,030,000.00 in total damages. The jury awarded Appellant \$1,000,000 in total non-economic damages \$700,000.00 of that amount was future non-economic damages. (D 150 p. 2). The trial court’s amended judgment reduced the total non-economic damages to \$748,828 under the statutory cap on non-economic damages for calendar year 2019. *See* § 538.210, RSMo (2017). The court added the jury’s economic damages award of \$30,000 and entered a total judgment of \$778,828.00 to Appellant. (D 150 p. 2).

The trial court subtracted \$435,725.28 for attorneys’ fees and expenses (50% of the capped damages and \$46,311.28 in expenses) from the total damages award. This resulted

in a total net award of \$343,102.72 to Ms. Ordinola. After subtracting all assessed past economic and non-economic damages (\$330,000.00), only \$13,102.72 remained for future damages. The court then determined that periodic payments were not required because the net future damages amounted to less than \$100,000.00. This is incorrect: the statutory text requires periodic payments when the total amount of damages “in the action” exceeds \$100,000.00, as it does here. § 538.220.2, RSMo.

The trial court also erred by failing to pro rate the non-economic damages award and subtracting the full amount of attorneys’ fees and expenses from the total damages amount instead of on a pro-rata basis. The court should have allocated 30% of attorneys’ fees and expenses (\$130,717.58) to past damages (\$224,648.40) and allocated 70% attorneys’ fees and expenses (\$305,007.70) to future damages (\$524,279.60). Had that been done, Ms. Ordinola would have received a past damages award in a lump sum of \$93,930.82, and a future damages award of \$219,271.90.<sup>2</sup>

The requirement that future damages awards be paid in periodic payments embodies an important policy choice that benefits plaintiffs and defendants. It provides a steady stream of income to plaintiffs when damages are expected to occur—in the future. And pro-rating the attorney’s fees against future and past damages does not stall or lessen the

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<sup>2</sup> Respondents assert that the statutory non-economic damages cap for non-catastrophic injuries as it existed in 2015 (\$400,000.00) should apply. *See infra* Point 6. Under that amount, the total judgment awarded to Ms. Ordinola would be \$430,000.00 and attorneys’ fees and expenses would amount to \$261,311.28. If the court should agree with Respondents, Ms. Ordinola would receive \$71,606.62 in a lump sum for past damages and \$97,082.10 in periodic payments for future damages.



fees and expenses paid to attorneys. The trial court's failure to apply periodic payments to the future damages award violates the plain text and must be reversed.

- V. The trial court erred in denying the motion for remittitur because the judgment applied the "catastrophic injury" cap on non-economic damages rather than the standard cap on non-economic damages in that the evidence did not establish that Ms. Ordinola suffered an irreversible failure of an organ system as defined by Section 538.205.**

**A. Preservation and Standard of Review**

The above error was preserved for appellate review through Respondents' post-trial Motion for Remittitur. (D 110). This issue was preserved for appeal at the earliest possible juncture as Respondents filed their motion the same day of the jury verdict and before the trial court entered its Judgment. The trial court at first denied this motion in its Judgment on Jury Verdict (D 132 p. 4-5) and retained this ruling in its Amended Judgment. (D 150 p. 4-5). When the resolution of an issue turns solely on interpreting statutes, Missouri appellate courts review questions of statutory interpretation de novo. *Branson*, 601 S.W.3d at 304.

**B. Argument**

Generally, in a damages action against a healthcare provider for personal injury arising out of the rendering of healthcare services, a plaintiff's recovery is limited to \$400,000.00 for noneconomic damages. § 538.210.2(1), RSMo (2015). When that action involves a "catastrophic personal injury," however, a plaintiff can recover up to \$700,000.00 for noneconomic damages. *Id.* at (2). A catastrophic personal injury is a physical injury resulting in an injury that causes quadriplegia, paraplegia, loss of two or more limbs, an injury to the brain that results in permanent cognitive impairment, an injury

that cause irreversible failure of one or more major organ systems or vision loss such that patient's visual acuity is no more than twenty/two-hundred in the better eye. § 538.205(1), RSMo.

Appellant presented no evidence that she suffered quadriplegia, paraplegia, loss of two or more limbs, a traumatic brain injury or visual loss. Her only claim for a catastrophic injury is that her injury caused irreversible failure of one or more major organ systems. The evidence presented at trial did not support a finding of "irreversible failure" of one or more major organ systems. The evidence showed persistent problems with urinary incontinence but no "irreversible failure" of an "organ system."

Dr. Burk testified he performed a fistula repair surgery on Appellant on January 18, 2017. During this procedure, Dr. Burk stated they repaired the fistula by creating a watertight repair of the fistula. (Transcript Vol I, p. A169). Appellant did not experience urine leakage in the months following this repair procedure. (Transcript Vol I, p. A170). The evidence also showed that Appellant's overactive bladder being an alternate explanation for this alleged urine leakage. (Transcript Vol I, p. A172). This condition is a separate cause for Appellant's alleged injury. It is not an irreversible failure of an organ system but rather a manageable, medical condition. Dr. Burk prescribed Oxybutynin to treat this condition (Transcript Vol. I, p. A142) as well as other anti-incontinence medication following the treatment at issue. (Transcript Vol. I, p. A166). As for the alleged vesico-vaginal fistula, evidence was presented that such conditions may take multiple surgical attempts to fix the symptoms. Appellant underwent a single repair

procedure, and she has refused subsequent surgical care from any care provider to resolve it. (Transcript Vol II, p. A255).

By its nature and definition, an “irreversible” condition is one that, despite pursuing the full gamut of treatment, is unable to be undone or even altered. Appellant refused to seek additional surgical care for this condition after the initial repair procedure. (Transcript Vol II p. A255). This voluntary choice not to seek corrective medical care for an ailment does not automatically equate to an irreversible condition.

It is undisputed Appellant experienced a vesico-vaginal fistula following the care and treatment at issue. Appellant also agrees that her urine leakage improved after undergoing an initial repair procedure and that she has not sought standard surgical care to address this issue. Fistulas commonly require two or three surgical attempts at fixation. (Transcript Vol. I p. A255). Despite this evidence, the trial court found that Appellant experienced a “catastrophic” injury to a major organ system. (D 150 p. 4).

Appellant experienced temporary relief for her alleged urine leakage, and she has elected not to pursue the standard treatments to resolve it. Respondents respectfully suggest the trial court erred in awarding non-economic damages pursuant to the “catastrophic” injury cap because Appellant did not suffer an irreversible injury to a major organ system.

**VI. The trial court erred in denying Respondents’ motion for remittitur because the court applied the incorrect statutory cap, in that the court applied the cap in effect in calendar year 2019 (the year the case was tried), rather than calendar year 2015 (the year the cause of action accrued) and thereby improperly gave retroactive effect to a substantive change in the law, in violation of *Klotz v. St. Anthony Medical Center*.**

**A. Preservation and Standard of Review**

The above error was preserved for appellate review through Respondents’ post-trial Motion for Remittitur. (D 110). This issue was preserved for appeal at the earliest possible juncture as Respondents filed their motion the same day of the jury verdict and before the trial court entered its Judgment. The trial court at first denied this motion in its Judgment on Jury Verdict (D 132 p. 4-5) and retained this ruling in its Amended Judgment. (D 150 p. 4-5). When the resolution of an issue turns solely on interpreting pertinent statutes, Missouri appellate courts review questions of statutory interpretation de novo. *Branson*, 601 S.W.3d 302, 304.

**B. Argument**

The Missouri Constitution prohibits the enactment of retrospective laws. Mo. Const. Art. I, §13 (“That no ex post facto law...or retrospective in its operation...can be enacted.”). “It is settled law in Missouri that the legislature cannot change the substantive law for a category of damages after a cause of action has accrued.” *Klotz v. St. Anthony’s Med. Ctr.*, 311 S.W.3d 752, 760 (Mo. banc 2010). “Those rights which are substantive and which therefore cannot be applied retrospectively are regularly defined as those which take away or *impair vested rights acquired under existing laws.*” *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. banc 1974) (emphasis added).

Appellant suffered her injuries in September 2015 (D 98 p. 6), and a medical malpractice plaintiff's cause of action accrues when the injury occurs. *See Klotz*, 311 S.W.3d at 759. Thus, Appellant's substantive rights, as well as those of Respondents, became fixed at that time. *Klotz*, 311 S.W.3d at 760 (statute may not change recovery limits for cause of action that accrues before enactment). As the *Buder* opinion instructed, and on which *Klotz* expanded, the damages available in a particular lawsuit, specifically non-economic damages, are part of a litigant's substantive rights. It follows logically that the amount of damages available to a plaintiff, and any limitations on those damages in effect at the time the cause of action accrued, are also part of a defendant's substantive rights.

To apply a law which took effect after the parties' substantive rights have attached, based on the year the case is tried, rather than on when the cause of action accrued four years earlier, is a retrospective application of the non-economic damage caps. The Missouri Constitution prohibits this exact type of application. The trial court in *Klotz* applied the damage cap on non-economic damages, which had gone into effect for cases *tried* after August 28, 2015, to a case in which the cause of action accrued before the law was enacted. The Missouri Supreme Court held that appellant's property right in her cause of action accrued at the time of the treatment, and that such right could not be altered by a subsequent change in the law that affects a litigant's right to pursue claimed damages, no matter if this change is an increase, decrease or abolition of available damages.

The trial court did not follow the rule in *Klotz*. Appellant's claim accrued when she had her Caesarean-section and subsequent treatment at Truman Medical Center in

September 2015. In 2015, the non-economic damages cap that applied was \$400,000. § 538.210.2(1), RSMo (2015). The trial court, however, applied the cap in effect when the case was tried in 2019. §§ 538.210.2(1) & (10), RSMo (2017). This is a retroactive application of a change in the substantive law that the Missouri Constitution prohibits. The trial court's Amended Judgment should be reversed so that the statutory cap in force when Ms. Ordinola's injury accrued can be applied.

### **CONCLUSION**

For these reasons, the Court should vacate the Amended Judgment of the trial court and order a new trial for Respondents Jennifer Reeves, M.D., Kristen Fried, M.D., Shilpa Babbar, M.D., Kathryn Goins, M.D., Kent Burk, M.D., and University Physician Associates.

In the alternative, Respondents requests that the Court remand this case to the trial court, with orders to reduce the amount of plaintiff's award of non-economic damages to \$400,000, and order that future damages, after pro-rata reduction of Appellant's attorneys' fees and expenses, be paid to Appellant in periodic payments over a time period equal to Appellant's life expectancy, pursuant to § 538.220.2.

Respectfully submitted,

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**CERTIFICATE**

I hereby certify that to the best of my knowledge, information and belief and after reasonable inquiry, this brief complies with the limitations of Rule 84.04(i) and 84.06(b). There are 9,827 words in this brief.

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**CERTIFICATE OF SERVICE**

This will certify that on the 21<sup>st</sup> day of September, 2020, a copy of the above and foregoing document was served on the following counsel of record via the Missouri court's eFiling system.

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