No. SC98977

In the Supreme Court of Missouri

MARIA ORDINOLA VELAZQUEZ,
Appellant-Respondent,

v.

UNIVERSITY PHYSICIAN ASSOCIATES, ET AL.,
Respondents-Appellants,

STATE OF MISSOURI
Intervenor

Appeal from the Circuit Court of Jackson County, No. 1716-CV20186 The Honorable John M. Torrence, Circuit Judge

Brief of *Amici Curiae* the Missouri Association of Trial Attorneys and the American Association for Justice in Support of Appellant-Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTERESTS OF AMICI CURIAE 1

I. Missouri Association of Trial Attorneys 1

II. American Association for Justice 1

INTRODUCTION 2

I. *WATTS* CORRECTLY HELD THAT JURIES ARE JUDGES OF DAMAGES. 3

A. The Jury-Trial Right Applies to Medical Malpractice Actions and the Determination of Compensatory Damages. 3

B. *Watts* Applied these History Lessons in Holding the Prior Medical-Malpractice Damage Caps Unconstitutional. 6

C. Proffered Justifications Cannot Overcome the Categorical Requirement of Trial by Jury. 8

1. Caps do not lower insurance premiums; insurance regulation does. 9

2. Caps do not increase the number of physicians in a state. 11

D. Attempts to Create a "Legal-Conclusion" Override of the Jury's Verdict Still Infringes the Jury's Constitutionally Guaranteed Fact-Finding Role. 14

II. CODIFYING THE COMMON LAW CANNOT MAKE THE INVIOLATE JURY-TRIAL RIGHT INAPPLICABLE. 17

A. The Legislature's Amendment to the Reception Statute Has No Effect on the Scope of the Jury-Trial Right. 17

B. The New Statute Does Not Create a Statutory Cause of Action that Renders the Jury-Trial Right Inapplicable. 19

1. The Constitution prohibits indirect infringements as much as it does direct infringements. 19

2. Codifying a common-law cause of action does not make it a statutory cause of action for jury-trial purposes. 20

3. Section 538.210 Does Not Change the Underlying Cause of Action. 23

C. The Legislative Authority to Change the Common-Law Contributes Nothing to the Analysis. 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 8

Adams By & Through Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992) ... 7

Alpert v. State, 543 S.W.3d 589 (Mo. 2018) 9

Atlanta Oculoplastic Surgery P.C. v. Nestlehutt, 691 S.E.2d 218 (2010) 6, 16, 25

Barry v. Edmunds, 116 U.S. 550 (1886) 5

Bd. of Comm'rs of Tuberculosis Hosp. Dist. of Buchanan Cty. v. Peter, 253 Mo. 520, 161 S.W. 1155 (1913) 20

Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424 (2001) 4, 5

Curtis v. Loether, 415 U.S. 189 (1974) 21

De May v. Liberty Foundry Co., 327 Mo. 495, 37 S.W.2d 640 (1931) 18

Dimick v. Schiedt, 293 U.S. 474 (1935) 25

Dodson v. Ferrara, 491 S.W.3d 542 (Mo. 2016) 20

Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006) 18

Duke Power v. Carolina Envt'l Study Gp., Inc., 438 U.S. 59 (1978) 24, 25

Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014) 9

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) 4, 8, 15

Firestone v. Crown Ctr. Redevelopment Corp., 693 S.W.2d 99 (Mo. 1985) 6

German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914) 11

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 21, 22

Hammons v. Ehney, 924 S.W.2d 843 (Mo. 1996) 19

Hana Fin., Inc. v. Hana Bank, 574 U.S. 418 (2015) 17

Hetzel v. Prince William Cty., 523 U.S. 208 (1998) 6

Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019) 16

Kansas City v. Fishman, 362 Mo. 352, 241 S.W.2d 377 (1951) 25

Klotz v. St. Anthony's Medical Ctr., 311 S.W.3d 752 (Mo. banc 2010) 6

L. v. St. Luke's Hosp., 218 S.W.3d 461 (Mo. Ct. App. 2007) 23

Lord Townshend v. Hughes, 2 Mod. 150, 86 Eng. Rep. 994 (C.P. 1677) 4

Lucas v. United States, 757 S.W.2d 687 (Tex. 1988) 11

Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) 3

Miller v. Fenton, 474 U.S. 104 (1985) 17

Missouri All. for Retired Americans v. Dep't of Lab. & Indus. Rels., 277 S.W.3d 670 (Mo. 2009) 22, 24

Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991) 16

Munn v. Illinois, 94 U.S. 113 (1876) 25

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 5

Pogue v. Swink, 364 Mo. 306, 261 S.W.2d 40 (1953) 18

Rice v. State, 8 Mo. 561 (Mo. 1844) 6

Sanders v. Ahmed, 364 S.W.3d 195 (Mo. 2012) 19, 20, 23

Smith v. Dep't of Ins., 507 So.2d 1080 (Fla. 1987) 16

Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) 16

St. Louis, I.M. & S. Ry. Co. v. Craft, 237 U.S. 648 (1915) 5, 15

State ex inf. Barrett ex rel. Bradshaw v. Hedrick, 294 Mo. 21, 241 S.W. 402 (1922) 18

State ex inf. McKittrick v. Am. Colony Ins. Co., 336 Mo. 406, 80 S.W.2d 876 (1934) 11

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. 2003) 3, 6, 15

State ex rel. St. Louis, K. & N.W. Ry. Co. v. Withrow, 133 Mo. 500, 36 S.W. 43 (1896) 8, 23

State v. Dalton, 134 Mo. App. 517, 114 S.W. 1132 (1908) 18

Tull v. United States, 481 U.S. 412 (1987) 8, 14, 21

*U.S. Term Limits, Inc. v. Thornto*n, 514 U.S. 779 (1995) 19, 20

Vatterott v. Hammerts Iron Works, Inc., 968 S.W.2d 120 (Mo. 1998) 22

Velazquez v. Reeves, No. WD 83485, 2021 WL 560275 (Mo. Ct. App. Feb. 16, 2021) 19, 23

Watts v. Lester E. Cox Med. Centers, 376 S.W.3d 633 (Mo. 2012) ..... *passim*

Weidrick v. Arnold, 835 S.W.2d 843 (Ark. 1992) 4

Wright v. Central DuPage Hosp. Ass'n, 347 N.E.2d 736 (1976) 4

Constitutional Provisions and Statutes

§ 1.010.1, RSMo 17

§1.010.2, RSMo 17

§ 538.210, RSMo 2, 19, 23

Mo. Const. art. I, § 22(a) 1, 3, 18

Mo. Const. art. XI, § 8 3

Mo. Const. of 1820, art. XIII, § 8 3

Tex. Const. art. III, Sec. 66 11

Other Authorities

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Mark A. Finkelstein, *California Civil Section 3333.2 Revisited: Has It Done Its Job?*, 67 S. Cal. L. Rev. 1609 (1994) 10

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Myungho Paik, *et al*., *Damage Caps and the Labor Supply of Physicians: Evidence from the Third Reform Wave*, 18 Am. L. & Econ. Rev. 463 (2016) 12

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William Prosser, Law of Torts (4th ed. 1971) 4

INTERESTS OF AMICI CURIAE

I. Missouri Association of Trial Attorneys

The Missouri Association of Trial Attorneys (MATA) is a nonprofit, professional organization of around 1,400 trial lawyers in Missouri. For more than half a century, MATA members have advanced the interest and protected the rights of individuals throughout the State of Missouri. MATA members have dedicated themselves to promoting the administration of justice, preserving the civil justice system, and ensuring that the citizens of Missouri have access to our courts.

The Missouri Constitution states that "[t]he right to trial by jury as heretofore enjoyed shall remain inviolate." Mo. Const. art. I, § 22(a). The right to have a jury determine the appropriate measure of damages in a civil trial is a crucial part of that right. MATA members commonly represent persons injured by medical negligence. MATA and its members believe the decision handed down by this Court will have significant future effect on the continued viability of medical negligence litigation, the continued right of Missourians to have their civil grievances decided by juries, and thus has implications beyond the facts of this individual case.

II. American Association for Justice

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest

plaintiff trial bar. AAJ members practice law in every state in the United States and primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct. Victims of negligent medical care are frequently represented by AAJ members in their civil suits.

AAJ's mission, set forth in its bylaws, aims to "Preserve the constitutional right to trial by jury" and "Further the rule of law and the civil justice system." To that end, it often participates in cases throughout the country as *amicus curiae*, including in cases where legislation seeks to impose limits on compensation proven before a jury in a fair and proper trial.

MATA and AAJ file this brief solely to address the fundamental right of trial by jury as it applies to the questions before this Court.

INTRODUCTION

In enacting § 538.210, RSMo, the General Assembly did nothing more than codify the common law and append to it a noneconomic damage limitation that this Court correctly found inconsistent with the Missouri Constitution's guarantee of a right to trial by jury. Its actions did not transform the common law cause of action into a statutory one that did not exist at common law and is still subject to the constitutional mandate that jurors are the judges of damages. By substituting the legislature's damage assessment for that of a jury after a full and fair trial, the statute denies the inviolate right to a jury trial as heretofore enjoyed,

ARGUMENT

I. *WATTS* CORRECTLY HELD THAT JURIES ARE JUDGES OF DAMAGES.

A. The Jury-Trial Right Applies to Medical Malpractice Actions and the Determination of Compensatory Damages.

Article I, Section 22(a) of the Missouri Constitution provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." It continues a pledge dating back to the Missouri Constitution of 1820 that "the right of trial by jury shall remain inviolate." Mo. Const. of 1820, art. XIII, § 8. The use of the term "inviolate" renders the guarantee of unique and transcendent import, not subject to the balancing tests applicable to other fundamental constitutional rights. The term conveys an unparalleled mandate because only jury-trial rights are held inviolate under the Constitution: first, in Article I, Section 22(a) for trials generally; and, second, with respect to the jury's responsibility for determining just compensation for corporations affected by eminent domain. Mo. Const. art. XI, § 8.

Both in its original incarnation and its current one where "heretofore" continues the treatment it received when first promulgated, the scope of the right is measured by a historical test of the kind employed for the U.S. Constitution's Seventh Amendment. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 84 (Mo. 2003). *Cf. Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (describing a two-part test that asks whether the cause of action was "tried at law at the time of the founding or is at least analogous to one that was" and "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.").

Medical malpractice actions plainly satisfy that historical criteria. Cases for medical negligence were recognized at common law long before the Missouri or even the nation were founded, and the cases were tried before juries. *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 638 (Mo. 2012) (finding medical malpractice actions and noneconomic damages entrenched in the English common law and that jury trials in all civil cases were a Missouri territorial guarantee). *See also Wright v. Central DuPage Hosp. Ass'n*, 347 N.E.2d 736, 742 (1976) (recognizing that actions for medical malpractice are rooted in Anglo-American common-law); *Weidrick v. Arnold*, 835 S.W.2d 843, 846 (Ark. 1992) (citing William Prosser, Law of Torts, § 32, p. 161 n.32 (4th ed. 1971), to recognize that medical malpractice "had its origins at common law" and that the first recorded case dates back to the year 1374); Allan McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549, 550 (1959).

Moreover, as this Court's precedents hold, "Missouri law long has recognized that one of the jury's primary functions is to determine the plaintiff's damages." *Watts*, 376 S.W.3d at 639. Indeed, the U.S. Supreme Court held it has "long been recognized that 'by the law the jury are judges of the damages.'" *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (quoting *Lord Townshend v. Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-95 (C.P. 1677)). The "measure of actual damages suffered . . . presents a question of historical or predictive fact." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001). Under the Seventh Amendment's coverage of the jury-trial right similar in all substantive respects to Missouri's cognate constitutional guarantee for causes of action that existed at common law, the jury's factual findings,

which include the determination of compensatory damages may not be disregarded, abridged, or made to mean something different when reduced to judgment. *See id*. at 440 n.12.

Nor does noneconomic damages receive different treatment. As a part of a plaintiff's compensation for the harm suffered, "damages for pain and suffering . . . involves only a question of fact." *St. Louis, I.M. & S. Ry. Co. v. Craft*, 237 U.S. 648, 661 (1915), cited with approval in *Cooper Indus.*, 532 U.S. at 437. Of course, noneconomic damages include much more than pain and suffering, but also compensate for physical impairment such as loss of a limb, disfigurement, loss of capacity to enjoy life, and loss of consortium. Damages, 34 Mo. Prac., Personal Injury and Torts Handbook § 28:12 (2020 ed.). To the claim sometimes made that noneconomic damages are uncertain and unpredictable, the same may be said of economic damages, which include projections of future lost wages and lost earning capacity. *Id*. *See, e.g.*, Frank A. Sloan *et al*, Suing for Medical Malpractice (1993) (finding congruity between economic and noneconomic damages). Moreover, "[c]ontrary to the assertion that awards for so-called noneconomic damages are capricious and erratic, leading researchers of medical malpractice and product liability concur that such awards track the seriousness of injury." Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093, 1120 (1996).

Still, particularly because no single size fits all in determining recoverable damages, courts have long recognized that "it is the peculiar function of the jury to determine the amount by their verdict." *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (quoted with approval in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 16 (1991)).

B. *Watts* Applied these History Lessons in Holding the Prior Medical-Malpractice Damage Caps Unconstitutional.

Watts examined the applicable historical terrain and concluded that the Missouri Constitution guarantees a right "to trial by jury on [a] claim for non-economic damages caused by medical negligence." *Watts*, 376 S.W.3d at 638. It found that medical malpractice cases were a subset of the civil actions for damages, including noneconomic damages, that were "tried by juries since 1820." *Id*. (citing *Diehl*, 95 S.W.3d at 92; *Rice v. State*, 8 Mo. 561 (Mo. 1844) (which found medical negligence claims a "well settled" part of the "civil law"); *Klotz v. St. Anthony's Medical Ctr.*, 311 S.W.3d 752, 775 (Mo. banc 2010) (Wolff, J., concurring); *Atlanta Oculoplastic Surgery P.C. v. Nestlehutt*, 691 S.E.2d 218, 222 (2010) ("non-economic damages have long been recognized as an element of total damages in tort cases, including those involving medical negligence").

It further considered the integrity with which Missouri traditionally treated juries' determinations of damages. Only judicial remittitur existed in early Missouri practice to suggest a reduction of the jury's damage assessment if it exceeded the supporting evidence. *Watts*, 376 S.W.3d at 639. *See also Firestone v. Crown Ctr. Redevelopment Corp*., 693 S.W.2d 99, 108 (Mo. 1985) ("remittitur by the trial court constitutes a ruling upon the weight of the evidence"). However, historic remittitur practice also allows a plaintiff refusing a remittitur to elect a new jury trial, as a means of preserving the jury-trial right to trial, which includes jury-assessed damages. *See Hetzel v. Prince William Cty.*, 523 U.S. 208, 211 (1998) (per curiam) (holding that an appellate court's "writ of mandamus, requiring the District Court to enter judgment for a lesser amount than that

determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment.").

Watts also established that it was beyond dispute that "one of the jury's primary functions is to determine the plaintiff's damages," noting that even *Adams By & Through Adams v. Children's Mercy Hosp*., 832 S.W.2d 898 (Mo. 1992), the case *Watts* overturned, recognized that the "jury's primary function [of] fact-finding . . . include[d] a determination of a plaintiff's damages." *Watts*, 376 S.W.3d at 639 (quoting *Adams*, 832 S.W.2d at 907). It further held that the "amount of noneconomic damages is a fact that must be determined by the jury," subject to the inviolate jury-trial right. *Id*. at 640. It therefore followed that the "right to trial by jury cannot 'remain inviolate' when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case." *Id*. at 640.

Watts also rejected several rationales to rule otherwise that were accepted in *Adams* and are now proffered by several of Respondent's *amici*. In that rejected approach, the jury assesses damages according to the evidence, but then the court applies the "law" by limiting the amount that will be rendered in judgment. *Watts* recognized the flawed reasoning the *Adams* approach propagates because the jury-right attaches to a civil cause of action because damages, rather than some equitable remedy, are at issue, and the determination of damages is an inviolate jury function, free from legislative override. *Id.* at 642.

It also rejected the idea that the legislature's authority to create or abolish common law causes of action included a lesser power to limit it, distinguishing that power with

respect to the common law from any authority to infringe or degrade a constitutional right. *Id*. at 643. *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511 (1996) (calling the "greater-includes-the-lesser" argument "inconsistent with both logic and well-settled doctrine" when used to claim a State's regulatory power is greater than its power to infringe constitutional rights).

Finally, the *Watts* Court criticized *Adams* for its misinterpretation of *Tull v. United States*, 481 U.S. 412 (1987), erroneously ascribing to it "the proposition that the right to jury trial does not extend to the determination of damages." *Watts*, 376 S.W.3d at 643. *Watts* recognized that the U.S. Supreme Court had authoritatively refuted that reading of *Tull*, which concerned only whether the Seventh Amendment required juries to assess civil penalties payable to the federal government under the Clean Water Act, not under a common-law cause of action. *Feltner*, 523 U.S. at 355 (cited by *Watts*, 376 S.W.3d at 643).

C. Proffered Justifications Cannot Overcome the Categorical Requirement of Trial by Jury.

By adopting the term "inviolate," the framers of Missouri's Constitution set a categorical limitation on statutory interference with the jury-trial right and eschewed the types of balancing tests that are applied to other fundamental constitutional rights. *Compare State ex rel. St. Louis, K. & N.W. Ry. Co. v. Withrow*, 133 Mo. 500, 36 S.W. 43, 48 (1896) (jury-trial guarantee "means that all the substantial incidents and consequences, which pertained to the right of trial by jury, are beyond the reach of hostile legislation and are preserved in their ancient substantial extent as existed at common law."), *with*,

Alpert v. State, 543 S.W.3d 589, 596 (Mo. 2018) (applying strict scrutiny to laws regulating the right to bear arms and permitting regulation to advance a compelling interest). For that reason, the policy rationales for caps offered by Respondent's *amici* in support of overruling *Watts* count for naught, and this Court should decline the invitation.

1. Caps do not lower insurance premiums; insurance regulation does.

Even so, a quick examination of the proffered policy reasons demonstrate that they are wanting. Several of Respondent's *amici* suggest that caps produce lower medical-malpractice insurance premiums, which, in turn, makes health care more affordable and available. *See, e.g.*, Amici Curiae Brief of American Medical Association and Missouri State Medical Association ["AMA Am. Br."] 25-29. Judicial decisions and authoritative studies demonstrate the fallacy of that claim. For example, the Florida Supreme Court recognized that, while the state imposed non-economic damage caps during the years from 2003 to 2010, four of the state's medical-malpractice insurers enjoyed a 4300 percent increase in net income and did not pass along any savings to Florida physicians. *Estate of McCall v. United States*, 134 So. 3d 894, 914 (Fla. 2014).

Indeed, *amici* also engage in an act of misdirection when they incorrectly suggest that premiums must cover payouts in order to tie damages to premium increases. *See* Brief for the Chamber of Commerce *et al*. ("Chamber Am. Br.") 15. To the contrary, it is well understood that insurers build hefty reserves, which they grow through investments, to pay claims, rather than rely on premiums. As a blue-ribbon task force of the American Bar Association concluded, when investment income decreases, insurance premiums rise to replace the lost growth; when investments boom, insurers cut premiums to

"unrealistically low" levels in a bid to increase their market share and then have to raise them again dramatically when the boom ends. Robert B. McKay, *Rethinking the Tort Liability System: A Report From the ABA Action Commission*, 32 Vill. L. Rev. 1219, 1219-20, 1221 (1987). The well-documented phenomenon, known as the insurance cycle, results in "more or less violent cyclical swings of boom and bust, profitability and loss." *Id*. at 1219. *See also* Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DePaul L. Rev. 393, 396 (2005) (describing the insurance cycle as "alternating periods in which insurance is priced below cost (a 'soft' market) and periods in which insurance is priced above cost (a 'hard' market)."

If caps achieved health-care nirvana, as Respondents' *amici* suggest, California, which first capped medical-malpractice noneconomic damages in 1975 and continues to maintain that same noneconomic-damage cap of $250,000, would not have seen doctors' premiums continue to rise, more than 400 percent in the months following the cap's enactment, Note, Todd M. Kossow, *Fein v. Permanente Medical Group: Future Trends in Damage Limitation Adjudication*, 80 Nw. U.L. Rev. 1643, 1649 (1986), and sharply for the next decade. U.S. General Accounting Office, Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms, "Case Study on California" 12, 22 (Dec. 1986); Mark A. Finkelstein, *California Civil Section 3333.2 Revisited: Has It Done Its Job?*, 67 S. Cal. L. Rev. 1609, 1617-18 (1994). Malpractice insurance rates stabilized only after the state enacted strict insurance regulation through a voter initiative in 1988. Office of Legislative Research, Connecticut General Assembly,

No. 2004-R-0591, "California Medical Malpractice Premiums," at 1 (July 29, 2004), available at https://www.cga.ct.gov/2004/rpt/2004-R-0591.htm.

Obviously, Missouri has plenary authority to regulate insurance premiums. *See German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914) (affirming state regulation of insurance rates); *State ex inf. McKittrick v. Am. Colony Ins. Co.*, 336 Mo. 406, 80 S.W.2d 876, 877 (1934) (prohibiting insurers from collecting premiums in excess of approved lawful rates). This may be accomplished without invading medical-malpractice plaintiffs' constitutionally guaranteed rights.

2. Caps do not increase the number of physicians in a state.

Moreover, the damage caps did nothing to stem the flow of physicians from California. A 2001 California Medical Association report, "And Then There Were None: The Coming Physician Supply Problem," laid the entire blame for both early retirement and an exodus from the state of doctors on low pay and the outsized prevalence of managed care in California, not because of lawsuits or the size of verdicts. Rhonda L. Rundle, "California Physicians Group Claims Doctors Are Fleeing State's Low Pay," Wall St. J. (July 16, 2001), https://www.wsj.com/articles/SB99523235631571067.

Texas also provides an ideal testing ground for the effects of damage caps. In 2003, voters approved an initiative that amended the state constitution to permit legislated damage caps, Tex. Const. art. III, Sec. 66, which, without the new amendment, could not pass constitutional muster. *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988). As a result, the state comprises an unusually helpful laboratory to test the before-and-after effects of caps. Researchers, using data from the Texas Department of Health

Services that accurately provides the number of working physicians, looked at the availability of doctors before and after the caps, concluding that:

> Physician supply was not stunted prior to reform, and it did not measurably improve after reform. This is true whether one looks at the number of patient care physicians in Texas, the number of Texas physicians in high malpractice-risk specialties and in rural areas, or the number of physicians per capita in Texas relative to other states.

David A. Hyman, *et al*., *Does Tort Reform Affect Physician Supply? Evidence from Texas*, 442 Int'l Rev. L. & Econ. 203, 217 (2015). *See also* Myungho Paik, *et al*., *Damage Caps and the Labor Supply of Physicians: Evidence from the Third Reform Wave*, 18 Am. L. & Econ. Rev. 463, 463 (2016) (examining data from nine states with noneconomic damage caps and finding "no evidence that cap adoption leads to an increase in total patient care physicians, or in specialties that face high liability risk (with a possible exception for plastic surgeons), or in rural physicians.").

Studies also show that a small number of physicians account for a significant portion of paid malpractice claims. *See, e.g.,* David M. Studdert, *et al*., *Prevalence and Characteristics of Physicians Prone to Malpractice Claims,* N. Engl. J. Med. 354, 354 (Jan. 28, 2016) ("Approximately 1% of all physicians accounted for 32% of paid claims."). Moreover, those physicians who disproportionately commit malpractice on a repeat basis are the most likely to stop practicing medicine, but those repeat offenders who continue to practice are "strongly and positively associated with their risks of incurring more." David M. Studdert, *et al*., *Changes in Practice among Physicians with Malpractice Claims*, N. Engl. J. Med. 1247, 1251, 1254 (Mar. 28, 2019). The studies

suggest that caps have little to do with physician supply, but that malpractice lawsuits help identify practitioners who are a threat to patient safety.

3. Caps produce the trends that they are supposed to remedy.

One effect that caps do produce is to skew medical-malpractice lawsuits to those involving the most catastrophic injuries. Smaller cases are cut out of the system as too costly to bring when damages are limited, according to researchers at the American Bar Foundation. Stephen Daniels & Joanne Martin, *Damage Caps and Access to Justice: Lessons from Texas,* 96 Or. L. Rev. 635, 660-71 (2018). *See also* Mohammad Hossein Rahmati, *et al*., *Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980-2010,* Northwestern Law & Econ Research Paper No. 13-29, at 20 (Aug. 4, 2015), available at https://ssrn.com/abstract=2462942 or http://dx.doi.org/10.2139/ssrn.2462942 (examining Illinois data and concluding that, with caps, smaller damage cases "all but disappeared" and led to an "increase in mean and median payouts [that] led many to conclude that the med mal system has become more generous to plaintiffs, when the opposite was closer to reality.").

Finally, research establishes that capping noneconomic damages has an especially adverse effect on classes of plaintiffs whose damages are disproportionately noneconomic due to lower claims for lost income, such as seniors, children, women, and the poor, who also often suffer from substandard medical care. *See generally* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263 (2004).

Thus, while policy rationales cannot justify invasion of the jury-trial right, the rationales proffered do not pan out.

D. Attempts to Create a "Legal-Conclusion" Override of the Jury's Verdict Still Infringes the Jury's Constitutionally Guaranteed Fact-Finding Role.

Several of Respondents' *amici* suggest that this Court should return to the rationale it adopted in *Adams* and that have guided some other courts and hold that the jury's damage determination is a finding of fact that is subject to being overridden by the application of law to that fact. As discussed, *Watts* recognized that this rationale in *Adams* emanated from misconstruing the Supreme Court's decision in *Tull*, which *Feltner* cleared up. *Watts*, 376 S.W.3d at 643.

Tull upheld, against a Seventh Amendment jury-trial challenge, civil penalties under the Clean Water Act, a federal statute that created a cause of action that was neither recognized as nor analogous to a common law cause of action, so the Seventh Amendment did not apply. The Clean Water Act allowed a judge to set the civil penalty after a jury determined liability. In *Tull*, the Supreme Court held that "a determination of a civil penalty is not an essential function of a jury trial," and that Congress "may delegate that determination to trial judges." 481 U.S. at 427. Many courts, including the *Adams* court, mistakenly read that statement to support the notion that, after the jury determines the facts, a judge may then apply the law to the damages awarded, even though *Tull* took pains to emphasize that its ruling was limited to unique statutory, rather than common law-based, causes of action. *Id.* at 414-16.

The misunderstanding was made plain in *Feltner*, where the U.S. Supreme Court unanimously held that, where the cause of action does not exist as a matter of legislative grace, "if a party so demands, a jury must determine the actual amount of . . . damages." *Id*. at 354-55. *Feltner* further stated: "there is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff." *Id*. at 355 (emphasis added). In response to an argument based on *Tull* that the jury had completed its task by rendering a verdict, *Feltner* called *Tull* "inapposite." *Id*. *Feltner* further held that any other approach to finalizing the award of damages that overrode the jury's assessment would fail "'to preserve the substance of the common-law right of trial by jury.'" *Id*. (citation omitted).

This Court has described Missouri's jury-trial right as "a more emphatic statement of the right than the simply stated guarantee" of the Seventh Amendment, although it uses the same historical analysis. *Diehl*, 95 S.W.3d at 84. *Feltner*, which extensively reviews that historical basis, thus provides the correct basis for determining the scope of Missouri's "more emphatic" protection of the jury-trial right.

The U.S. Supreme Court has long held that compensation for "pain and suffering . . . involves only a question of fact." *Craft*, 237 U.S. at 661. Allowing the legislature to override that fact under the fiction that the jury's factual determination of the extent of the injury in monetary terms must yield to another monetary amount determined by the legislature plainly denigrates and substitutes the legislative judgment for the jury's. It is not the application of a legal conclusion to jury-determined facts. *Watts* correctly held that the cap "directly curtails the jury's determination of damages and, as a result,

necessarily infringes on the right to trial by jury." 376 S.W.3d at 640. A number of sister courts agree. *See Hilburn v. Enerpipe Ltd*., 442 P.3d 509, 524 (Kan. 2019) ("the cap's effect is to disturb the jury's finding of fact on the amount of the award … [and] substitutes the Legislature's nonspecific judgment for the jury's specific judgment. The people deprived the Legislature of that power when they made the right to trial by jury inviolate."); *Nestlehutt*, 691 S.E.2d at 223 (medical-malpractice damages cap "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 727 (Wash. 1989) (holding cap unconstitutional because the "damages determination [i]s a constitutionally-consigned jury function"); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 162 (Ala. 1991) ("in cases involving damages incapable of precise measurement, a party has a constitutionally protected right to receive the amount of damages fixed by a jury unless the verdict is so flawed by bias, passion, prejudice, corruption, or improper motive as to lose its constitutional protection."); *Smith v. Dep't of Ins*., 507 So.2d 1080, 1088-89 (Fla. 1987) (per curiam) ("plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right.")

Rather than sit as a brooding omnipresence aside from the facts, the damages determination is a purely factual undertaking. Moreover, the "application-of-legal-standard-to-fact sort of question . . . has typically been resolved by juries." *Hana Fin.,*

Inc. v. Hana Bank, 574 U.S. 418, 423-24 (2015). *See also Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate . . . question").

Like the common law that preexisted 1820, *Watts* provides the correct tableau on which to determine the question before this Court.

II. CODIFYING THE COMMON LAW CANNOT MAKE THE INVIOLATE JURY-TRIAL RIGHT INAPPLICABLE.

A. The Legislature's Amendment to the Reception Statute Has No Effect on the Scope of the Jury-Trial Right.

To avoid the application of *Watts* to a legislated cap on noneconomic damages, the Legislature passed two bills. In one, in 2015, the General Assembly amended the state reception statute, the first provision of state law, which "receives" the common law of England as the state's common law with some exceptions. *See* § 1.010.1, RSMo. The new enactment created an additional exception by "exclud[ing] from this section 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, it being the intent of the general assembly to replace those claims with statutory causes of action." *Id*. at §1.010.2.

The expression of intent suggests two false motivations and ineffective premises for the amendment. First, to the extent the General Assembly believed denying the applicability of the English common law was necessary to enable it to create a true statutory cause of action, the amendment was unnecessary and redundant of authority that already resides in the legislature. Courts of this state have long recognized that the common law may be expressly repealed by statute or by implication when a statute and

the common law cannot operate as a rule of decision at the same time. *See State v. Dalton*, 134 Mo. App. 517, 114 S.W. 1132, 1135 (1908).

For example, the workers compensation system constitutes a legislative departure from the common law that created an entirely new right and remedy that "were wholly unknown at common law," and thus not violative of the "right of trial by jury as it existed at common law." *De May v. Liberty Foundry Co.*, 327 Mo. 495, 511, 37 S.W.2d 640, 648 (1931). No similar amendment to the reception statute was necessary to enable the enactment of a workers compensation system that had no accompanying right to a jury trial.

Second, to the extent that the General Assembly believed that amending the reception statute could redefine the scope of Article I, Section 22(a)'s right to trial by jury, it was wrong. A statute cannot amend a provision of the Constitution. *State ex inf. Barrett ex rel. Bradshaw v. Hedrick*, 294 Mo. 21, 241 S.W. 402, 421 (1922). *See also Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. 2006). Instead, statutes must yield to the higher authority of a constitution. *Pogue v. Swink*, 364 Mo. 306, 310, 261 S.W.2d 40, 43 (1953).

The jury-trial right is guaranteed inviolate "as heretofore enjoyed." Mo. Const. art. I, § 22(a). An enactment in 2015 cannot change that reference point to the English common law as it existed and was applied in the United States in 1820, when the jury-trial-right language was first adopted in the Missouri Constitution. The General Assembly may not somehow retroactively change what was "heretofore enjoyed." Instead, section 22(a) "protects the right as it existed when the constitution was adopted," *Hammons v.*

Ehney, 924 S.W.2d 843, 848 (Mo. 1996), and "creates a 'cutoff' at which point the right is evaluated." *Sanders v. Ahmed*, 364 S.W.3d 195, 203 (Mo. 2012). The reception statute amendment, then, cannot affect the analysis this Court undertakes.

B. The New Statute Does Not Create a Statutory Cause of Action that Renders the Jury-Trial Right Inapplicable.

In transferring this case to this Court, the Court of Appeals accurately described the new version of § 538.210, RSMo, as being "identical to the common-law cause of action which previously existed," save for its imposition of limitations on damages. *Velazquez v. Reeves*, No. WD 83485, 2021 WL 560275, at *4 (Mo. Ct. App. Feb. 16, 2021). It added that the "'new' cause of action appears to be subject to the same substantive standards, and the same procedural framework, as the earlier common-law action." *Id*. For that reason, the statute is properly characterized as having codified the common law cause of action that previously existed in order to add the damage caps this Court found violative of the jury-trial right in *Watts*. As such, it is ineffective for three essential reasons.

1. The Constitution prohibits indirect infringements as much as it does direct infringements.

First, because the only possible legislative purpose in enacting the law was to evade the holding of *Watts* by relabeling the common law cause of action for medical malpractice as "statutory," the attempt falls under the principle that what the Constitution forbids a legislature from indirectly doing what it prohibits more directly. *See U.S. Term Limits, Inc. v. Thornto*n, 514 U.S. 779, 829 (1995) ("'[c]onstitutional rights would be of little value if they could be . . . indirectly denied.'") (citations omitted). For that reason,

"the Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections." *Id*. (citations omitted). *Cf. Bd. of Comm'rs of Tuberculosis Hosp. Dist. of Buchanan Cty. v. Peter*, 253 Mo. 520, 161 S.W. 1155, 1159 (1913) (a "provision of the Constitution may neither be struck down by the General Assembly nor ignored, nor evaded by deft indirection.").

2. Codifying a common-law cause of action does not make it a statutory cause of action for jury-trial purposes.

Second, codifying the common law does not make a cause of action a statutory one that is not subject to the jury-trial right. A statutory cause of action is one that did not exist at common law, but exists as a matter of legislative grace. Wrongful death is an example of a cause of action due solely to legislative enactment because it was not recognized at common law. *Sanders*, 364 S.W.3d at 203. It then follows, as it did with wrongful death, that the "legislature has the power to define the remedy available if it creates the cause of action." *Id*. *See also Dodson v. Ferrara*, 491 S.W.3d 542, 554 (Mo. 2016).

However, when the cause of action is one that preexists the statute, legislative authority is more circumscribed. When answering the same question about a statutory replacement for a preexisting common-law cause of action for Seventh Amendment purposes, the U.S. Supreme Court held that:

> Although "the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791," the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41-42 (1989) (citing *Curtis v. Loether*, 415 U.S. 189, 193 (1974)).

The requisite federal analysis requires a court first to "'compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity.'" *Id*. (quoting *Tull*, 481 U.S. at 417). Then, a court "examine[s] the remedy sought and determine[s] whether it is legal or equitable in nature." *Id*. (quoting *Tull*, 481 U.S. at 417-18). Noting that the second inquiry is weightier than the first, the Court then held that "[i]f, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder." *Id*. (footnote omitted). Thus, a historically based *cause of action* retains the litigant's Seventh Amendment "right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right.'" *Id*. at 42 n.4.

As *Granfinanciera* further explained that "Congress' power to block application of the Seventh Amendment to a cause of action has limits." *Id*. at 51. Those limits allow a legislature to deny trials by jury in actions at law only in cases where "public rights" are litigated, meaning "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights." *Id*. (internal quotation marks and citation omitted). On the other hand, "[w]holly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated" by the "public rights" authority to impair the jury-trial right. *Id*.

Critically, the Court held that while "Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders, … it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Id*. at 51-52. In other words, Congress may not "conjure away the Seventh Amendment" by designating the cause of action as statutory. *Id.*

Under this constitutional mandate, the legislature may still "fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable." *Id*. at 52. The classic example of that authority properly exercised is workers compensation, which established an exclusive system outside the tort system for the no-fault compensation of workers injured on the job. *See Missouri All. for Retired Americans v. Dep't of Lab. & Indus. Rels.*, 277 S.W.3d 670, 679 (Mo. 2009). Workers compensation "supplants the common law in determining the remedies for on-the-job injuries" by doing away with common law defenses such as contributory negligence that "frequently barred [employees] from recovery" and instituting a non-judicial and non-jury system that utilizes a "relatively simple and nontechnical method of compensation for injuries sustained on the job, while placing the burden of such losses on the employers." *Vatterott v. Hammerts Iron Works, Inc.*, 968 S.W.2d 120, 121 (Mo. 1998). Section 538.210, RSMo, does nothing like that.

3. Section 538.210 Does Not Change the Underlying Cause of Action.

As the Court of Appeals recognized, § 538.210, RSMo, did not alter the cause of action, the substantive standards, or the procedural framework for bringing a medical-malpractice case. *Velasquez*, 2021 WL 560275, at *4. As before, claims are tried as a legal action in a court of law before a jury.

Equally important, § 538.210, RSMo, does not creates a statutory cause of action that did not exist at common law. Instead, it declares that the "elements of such cause of action are that the health care provider failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession and that such failure directly caused or contributed to cause the plaintiff's injury or death." § 538.210, RSMo. These elements are no different than that of the common-law cause of action that preexisted the statute. *Cf. L. v. St. Luke's Hosp.*, 218 S.W.3d 461, 466 (Mo. Ct. App. 2007) (laying out the elements of a medical malpractice action at common law). The two are substantively identical. Thus, the new Section 538.210 is not merely analogous to the common-law cause of action, which is sufficient under *Granfinanciera* to apply the full force of the jury-trial right, but *it is the common-law cause of action*, repeated in statutory form. This Court has repeatedly held that the jury-trial right secures "'all the substantial incidents and consequences, which pertained to the right of trial by jury,'" and placed them "'beyond the reach of hostile legislation [by] preserv[ing them] in their ancient substantial extent as existed at common law.'" *Sanders*, 364 S.W.3d at 203 (quoting *Withrow*, 133 Mo. 500, 36 S.W. at 48). Codifying the common law cannot take the cause of action out of Section 22(a)'s constitutional reach.

C. The Legislative Authority to Change the Common-Law Contributes Nothing to the Analysis.

Several of Respondents' *amici* argue that the General Assembly retains the power to change the common law, *see, e.g.,* AMA Am. Br. 15, using workers compensation as an example. However, as previously discussed, workers compensation created a no-fault compensation system outside of the court system where juries are not required and thus complies with the *Granfinanciera* principle. The point *amici* make – that the legislature can change the common law – is wholly unexceptionable and largely beside the point.

It would be one thing if the General Assembly created a no-fault system of medical malpractice compensation, as it has to take workers compensation out of the tort system. *See Missouri All. for Retired Americans*, 277 S.W.3d at 679. That would constitute the exercise of the unquestioned authority to change the common law. However, that is not what the General Assembly did. It merely codified the preexisting common law and imposed a damage cap. That does not make it a statutory cause of action unknown to the common law, as wrongful death is. Instead, it continues a cause of action that existed at common law prior to 1820.

Several *amici* also invoke *Duke Power v. Carolina Envt'l Study Gp., Inc.*, 438 U.S. 59 (1978), as upholding a damage cap statute that changed the common law, but their analysis of the case falls short of understanding its holding. *Duke Power* addressed the constitutionality of the Price-Anderson Act, in which Congress sought to spur the development of nuclear power by establishing a $560 million fund per incident, taxed to nuclear power plants, to satisfy claims for compensation following a nuclear accident. *Id*.

at 65. Critical to the Court's decision upholding the act was the statute's requirement that the nuclear industry was required to waive all defenses, thus becoming subject to strict liability, and that Congress established itself as a guarantor against liability in excess of the $560 million ceiling, should a jury assess a higher amount. *Id*. at 65, 66-67, 85-87. It thus fully respected and reflected the jury's entire damage assessment and was utterly unlike § 538.210, RSMo.

At bottom, the General Assembly did not change the common law. As the Georgia Supreme Court unanimously held in response to the same "change" argument that Respondent and its *amici* make, "we do not agree with the notion that this general authority [to replace the common law] empowers the Legislature to abrogate *constitutional* rights that may inhere in common law causes of action." *Nestlehutt*, 691 S.E.2d at 223. The U.S. Supreme Court has agreed. Like Missouri, it recognizes that, except for property rights created at common law, the common law, "may be changed at the will, or even at the whim, of the legislature, *unless prevented by constitutional limitations*." *Munn v. Illinois*, 94 U.S. 113, 134 (1876). Here, constitutional limitations apply. The General Assembly did not "deal with the common law, *qua* common law, but to alter the Constitution" by attempting to remove the jury's authority over damages. *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935). And, altering the Constitution is beyond the General Assembly's otherwise considerable authority because the Constitution acts as a limitation on legislative power. *See Kansas City v. Fishman*, 362 Mo. 352, 355, 241 S.W.2d 377, 379 (1951).

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's decision that § 538.210, RSMo, is constitutional and declare that provision unconstitutional so that the jury's verdict can be restored in the case at bar.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that I signed the original version of this brief and that this brief contains all other information required by Rule 55.03. I further certify that this brief complies with the limitations contained in Rule 84.06(b) and contains a total of 8,305 words, excluding those sections specified in Rule 84.06(b).

By: /s/Anthony J. Meyer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed with the court's EM/ECF system on April 14, 2021. That system will service copies on all those requesting notice.

By: /s/Anthony J. Meyer