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THE BRIEF DEMISE OF REMITTITUR: THE ROLE OF JUDGES IN SHAPING REMEDIES LAW

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Among the underrated remedies decisions discussed in this Symposium, there is a particular episode in Missouri that highlights the tension between the judiciary and the legislature in shaping remedies law. In two 1985 companion cases, the Missouri Supreme Court eliminated remittitur as a common law remedy in the state, finding inconsistency and abuse in the doctrine's application by trial judges. Just two years later, however, the Missouri legislature reinstated remittitur as a remedy by statute—without addressing any of the concerns raised by the state's supreme court. Given the criticism of the court's action as unwarranted activism, the legislature's failure to address the court's reasoning is particularly ironic since the court was actively limiting its own authority. In analyzing the arguments of the Missouri Supreme Court against remittitur and the legislature's failure to address them, this Article attempts to highlight some of the tensions between the legislative and judicial branches inherent to the creation of judicial procedure, as well as to shed light on this previously overlooked episode in remedies law.

One of the questions posed for the 2007 Remedies Discussion Forum sought opinions deserving of the title of "most underrated remedies decision." In response, this Article proposes for that distinction a decision (expressed in each of two companion cases) that did not have a lasting effect but is noteworthy for that very point. In 1985, the Missouri Supreme Court decided to abolish remittitur in *Firestone v. Crown Center Redevelopment Corp.*[1] and, in its

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1. 693 S.W.2d 99 (Mo. 1985) (en banc), *superseded by statute*, MO. REV. STAT. § 537.068 (2008).

companion case, *Kenton v. Hyatt Hotels Corp.*[2] Thus, for approximately twenty-four months, the option of remittitur did not exist in the state of Missouri.[3] The court's decision to abolish remittitur in *Firestone* and *Kenton* was an underrated one even though—indeed *because*—it was quickly reversed by the Missouri legislature with no apparent regard for the reasoning expressed by the court.[4] The whole episode failed to provoke any serious discussion of the ramifications or implications for the judicial role in shaping remedies jurisprudence. Nor did it provoke discussion over the proper relationship between the judiciary and the legislature on either substantive or procedural issues in the field of remedies.

This Article suggests that these judicial opinions and the subsequent legislative response were quite significant and thus are worthy of further attention and discussion. To begin with, the court eliminated a remedial tool that had long been within a judge's discretion, citing the failure of lower court judges to use that tool properly.[5] In so doing, the court reasoned in practical terms about how judges make certain remedial determinations and wrote (perhaps surprisingly) candidly about the problems facing judges who must make those remedial determinations without sufficient guidance.[6] The relatively swift legislative response to the court's dramatic but mindful move shows, by contrast, a certain disregard for the judicial perspective and for the specific concerns advanced by those with everyday experience in the implementation of this remedial option. It provides a striking example of underappreciation for a valuable resource of knowledge and practical experience in the application of remedies law.

The court's dramatic step, however short-lived in its practical effect, says a great deal about the important role judges might (and

2. 693 S.W.2d 83 (Mo. 1985) (en banc). *Firestone* and *Kenton* were decided on the same day, arose out of the same factual event, and had the common issue of the propriety of remittitur. However, as a technical matter, the original decision of the Missouri Supreme Court to abolish the doctrine of remittitur occurred in the *Firestone* case and was then followed as precedent (with what the court saw as further justification) in the *Kenton* case. *See id.* at 86 (acknowledging the principles set forth in *Firestone* and reversing the trial court's decision to grant remittitur based on those principles).

3. *Firestone* was decided on June 25, 1985, and the Missouri legislature enacted its remittitur statute effective July 1, 1987. *See* 693 S.W.2d at 110.

4. *See* § 537.068.

5. *See Firestone*, 693 S.W.2d at 110.

6. *See id.*

arguably should) play in assessing and determining their own capacity for remedial decisionmaking. The legislative response to these cases, in turn, shows the tension between the judiciary and the legislature in the area of rulemaking authority.[7] *Firestone* and *Kenton* demonstrate the potential pitfalls of remittitur in a way that reveals the doctrine as fundamentally *judicial*. Properly considered, the decisions may be used to raise the general awareness of the role the judiciary can, and perhaps *should*, play in shaping both the jurisprudence and the day-to-day practice of remedial decisionmaking.

What follows is divided into three parts. The first section provides a brief examination of remittitur to put the doctrine in its proper context for the discussion that follows. The second section describes and explains the *Firestone* and *Kenton* cases, emphasizing the importance of the court's reasoning behind the elimination of remittitur. The third section suggests that this episode can offer insight into the jurisprudence of remedies and explains why the decisions still deserve attention after being largely ignored for so many years.

I. THE REMITTITUR OPTION

It is, of course, possible to overstate the importance of remittitur. In formal terms, remittitur is merely an option for a party to a lawsuit to consider.[8] The party may choose to take a reduction in damages or opt for a new trial.[9] Remittitur is not a binding or authoritative change in the amount of damages to be crammed down the parties' throats.[10] Furthermore, if the judge believes a jury's award of damages is truly erroneous, she can simply grant a motion for a new trial unconditionally.[11] Thus, in theory, remittitur is arguably not of crucial importance. In *practice*, however, it is potentially a very powerful tool for a judge to have at her disposal. It is one of many

7. The fuzzy distinction between laws of substance and procedure where remittitur is concerned, which gives rise to particular tension here, is discussed further below. *See infra* Part III.

8. *See* 66 C.J.S. *New Trial* § 271 (2008).

9. *See id.*

10. *See id.*

11. In Missouri, as the *Firestone* court points out, this was already, and remains, a straightforward matter of statutory law. *Firestone*, 693 S.W.2d at 110 (citing MO. SUP. CT. R. 78.01–.02); *see also, e.g.*, FED. R. CIV. P. 59.

means by which a judge can exert a strong influence without definitively or dispositively imposing her authority. In practice, remittitur effectively eliminates the likelihood that a new trial will actually go forward.[12] In issuing a remittitur, a judge *effectively* redetermines, in final form, the amount of damages that a plaintiff will receive. Whether and how such power will be implemented necessarily implicates issues of judicial ethics and practical judgment.

There is not tremendous consistency in the versions of remittitur employed in various state court systems across the country. In some states it is embodied in a rule of civil procedure[13] or in legislation similar to that of Missouri.[14] In other states it remains a matter of common law.[15] Some courts find authority in more than one of these sources. For example, a court may simultaneously state that the authority for remittitur is implicit in the state's version of Federal Rule of Civil Procedure 59 and that the authority is a longstanding matter of inherent judicial power.[16] While wording of the standards may vary, the decision whether to grant a remittitur is generally committed to the sound discretion of the trial court.[17] Many courts, working with the same lack of specificity or guidance found in the Missouri statute, simply look to the standard of "excessiveness" of the verdict.[18] However, in some jurisdictions, that idea of "excessiveness" is filled out with a more specific standard of proof[19]

12. Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 739–46 (2003) (demonstrating the illusory nature of the alternative "option" of remittitur for plaintiffs). The scholarly interest in remittitur has largely been limited to the issue of whether it violates the jury trial right. The Missouri Supreme Court did not attack the doctrine on this basis. In fact, prior Missouri case law had raised that issue and concluded that remittitur did not violate the jury trial right. *See, e.g.*, Counts v. Thompson, 222 S.W.2d 487, 495 (Mo. 1949). It is the fact that the court attacked remittitur on entirely pragmatic rather than theoretical grounds that makes these cases so noteworthy.

13. *See, e.g.*, IDAHO R. CIV. P. 59.1.

14. *See, e.g.*, FLA. STAT. ANN. § 768.74 (West 1986).

15. *See, e.g.*, Banegura v. Taylor, 541 A.2d 969, 976 (Md. 1988).

16. *See, e.g.*, Shepherd v. Looper, 732 S.W.2d 150, 152 (Ark. 1987) (implicit in ARK. R. CIV. P. 59); S. & C. Transp. Co. v. Barnes, 85 S.W.2d 721, 723 (Ark. 1935) (matter of inherent authority).

17. *See, e.g.*, Hash v. Hogan, 453 P.2d 468, 472 (Alaska 1969); Boynton v. Figueroa, 913 A.2d 697, 709 (N.H. 2006).

18. *See, e.g.*, *Hash*, 453 P.2d at 472; *Shepherd*, 732 S.W.2d at 151; *Banegura*, 541 A.2d at 976.

19. *See, e.g.*, GA. CODE ANN. § 51-12-12 (2008) (stating specifically a preponderance of evidence standard).

or a list of factors to help define "adequacy" or "excessiveness" of the amount.[20] Some versions make review of the amount of a judgment a matter appropriate for sua sponte consideration by the judge.[21] Others allow review upon motion by one of the parties.[22] These examples provide only a small sampling of the wide-ranging variety in the scope and logistics of remittitur in the state courts. This sampling is, however, sufficient to demonstrate the absence of any uniform workable version of the doctrine that would conclusively answer the concerns expressed by the Missouri court.

In any of these permutations, remittitur is fundamentally a judicially focused doctrine. Its implementation is a matter of judicial "sense"—a tool for fairness, discretion, situation sense, and practical wisdom. A judge consults her conscience and considers whether it is, for example, "shocked" by the amount of damages awarded by a jury. It is not only a matter of judgment, but one that will necessarily be unique to each case.[23] As such, it is a doctrine that implicates matters of practical judicial ethics, broadly defined, insofar as judges will be guided by an internal compass of right and wrong, both as to the substance of the issue before them and as to the level of involvement appropriate to their judicial role.

Remittitur has faced criticism before. It has somewhat shaky roots in the common law of England, for example,[24] but is nonetheless widely considered a legitimate common law doctrine in the United States.[25] Beyond its pedigree, there have been more current challenges focusing on its constitutional legitimacy. Most commonly, the argument is that remittitur interferes with the Seventh Amendment guarantee against reexamination of facts determined by

20. *See, e.g.*, FLA. STAT. ANN. § 768.74(5)(a)–(e) (West 1986).

21. In Connecticut, "[i]f the court at the conclusion of the trial concludes that the verdict is excessive as a matter of law, it shall order a remittitur and, upon failure of the party so ordered to remit the amount ordered by the court, it shall set aside the verdict and order a new trial. If the court concludes that the verdict is inadequate as a matter of law, it shall order an additur, and upon failure of the party so ordered to add the amount ordered by the court, it shall set aside the verdict and order a new trial." CONN. GEN. STAT. ANN. § 52-216a (West 2008).

22. *See, e.g.*, ME. R. CIV. P. 59(a).

23. *See* Firestone v. Crown Ctr. Redev. Corp., 693 S.W.2d 99, 108 (Mo. 1985) (en banc) ("[T]here is no precise formula for determining whether a verdict is excessive; each case has been considered on its own facts."), *superseded by statute*, MO. REV. STAT. § 537.068 (2008).

24. There are questions about whether remittitur existed in the English corpus as of 1791. *See* Thomas, *supra* note 12, at 747.

25. *See* Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 696–97 (2004).

juries.[26] However, neither the common law pedigree nor the constitutionality of remittitur played a major role in the abolishment of the doctrine in Missouri. Rather, the Missouri Supreme Court abolished the doctrine as a matter of practical judicial concern.[27]

II. THE CASES AND THE LEGISLATIVE RESPONSE

A. The Cases: Firestone and Kenton

Both *Firestone* and *Kenton* arose out of the tragic skywalk collapse at the Kansas City Hyatt Regency hotel on July 17, 1981, in which 114 people died and many more were injured.[28] The jury in *Firestone* reached a verdict for the plaintiff and awarded $15 million in compensatory damages.[29] The defendants sought a new trial, attacking the verdict as excessive.[30] The defendants made no claim of misconduct by counsel or the court in attacking the verdict. There was no claim of passion or prejudice of the jury.[31] Instead, the defendants simply attacked the amount of the jury's award as erroneous as a matter of fact. As a result of this defense motion, the trial court remitted the damages to $12.75 million as a condition to denial of a new trial to defendants (a reduction of 15 percent).[32] Both sides appealed the remittitur order.[33] The defendants sought a further reduction to $7.5 million (for a net 50 percent reduction in the jury verdict).[34] The plaintiffs sought a restoration of the remitted $2.25

26. *See, e.g.*, U.S. CONST. amend. VII; Thomas, *supra* note 12, at 751. When, for the bulk of the second half of the twentieth century, the Oregon Supreme Court maintained that there was no remittitur power invested in its state courts, that too was decided as a matter of interpretation of the state constitution, rather than any practical concern with the functioning of the doctrine. *See* Van Lom v. Schneiderman, 210 P.2d 461, 472 (Or. 1949) (interpreting 1910 amendment to article VII, section 3 of Oregon Constitution); *see also* Honda Motor Co. v. Oberg, 512 U.S. 415, 418 (1994) (requiring allowance of judicial review of the amount of punitive damages awarded as a matter of due process).

27. Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83, 98 (Mo. 1985) (en banc) (following *Firestone*, 693 S.W.2d at 110).

28. *Id.* at 85; *Firestone*, 693 S.W.2d at 101.

29. *Firestone*, 693 S.W.2d at 101.

30. *Id.* at 108.

31. *Id.*

32. *Id.*

33. *Id.* at 101.

34. *Id.*

million.[35] The Supreme Court of Missouri, sitting en banc, reinstated the original jury verdict of $15 million and abolished the doctrine of remittitur.[36] This latter ruling is the primary matter of concern to which we shall return momentarily.

In *Kenton*, a rising third-year law student sued the Hyatt Hotels Corporation, along with other defendants, for injuries she suffered in the same incident.[37] The defendants had stipulated to liability and the parties had agreed to try only the issue of compensatory damages.[38] The jury awarded Ms. Kenton a total of $4 million in compensatory damages.[39] In response to a post-trial motion by defendants, the trial judge issued a remittitur of $250,000 as a condition to avoid a new trial.[40] This represented a reduction of the jury's verdict by only 6.25 percent. There is no indication of how the trial court arrived at this precise figure. Even if the trial court had credited all of the plaintiff's *highest* estimates on various elements of damages, the total damages would have been only roughly $3.2 million.[41] Thus, the trial court's determination that the appropriate amount of damages was $3.75 million as opposed to $4 million is puzzling.[42] Just as in *Firestone*, both sides appealed the order.[43] The court of appeals affirmed the judgment but transferred the case to the state's high court for further consideration.[44] Before the Missouri Supreme Court, the defendants argued that any amount of compensatory

35. *Id.* Although an order granting a remittitur as a means of avoiding a new trial is typically not considered a final appealable order, Missouri Rule of Appellate Procedure 78.10 permits a plaintiff to go ahead and remit the damages as ordered, in order to avoid going through with a new trial and then file a cross-appeal challenging the remittitur order when and if the losing party appeals.

36. *Firestone*, 693 S.W.2d at 110.

37. *See* Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83, 85 (Mo. 1985) (en banc).

38. The parties in an entire group of cases had stipulated that punitive damages would be allocated, subject to an aggregate cap, in proportion to the amount of compensatories awarded. *Id.* at 95. By removing liability issues from the arguments to be made before the jury, the defendants presumably sought to avoid the presentation of evidence that might impassion the jury to reach a higher damages amount.

39. *Id.* at 85.

40. *Id.* at 98.

41. *Id.* at 97.

42. *Id.* (noting plaintiff's evidence provided a range between $2.3 million and $3.2 million in compensatories).

43. *Id.* at 86.

44. *Id.* Under state law, this transfer led to the Missouri Supreme Court taking the case as an original appeal. MO. CONST. art. V, § 10.

damages above $2 million would shock the conscience.[45] The plaintiff argued that the original amount determined by the jury should be reinstated.[46] The court ruled for the plaintiff on reinstatement of the full jury verdict and then went further, referencing its decision in *Firestone* and making additional arguments in support of its determination that remittitur would thereafter be abolished in the state of Missouri.[47]

In considering the basic standard for reviewing a claim of excess in *Firestone*, the court noted: "[T]here is no precise formula for determining whether a verdict is excessive; each case has been considered on its own facts. . . . '[t]he ultimate test is what fairly and reasonably compensates plaintiff for the injuries sustained.'"[48] The defense's vague allegation of error did not impress the court, which noted that the jury in *Firestone* had heard conflicting expert testimony and that ultimately "[t]he jury is vested with a broad discretion in fixing fair and reasonable compensation to an injured party, and the [evidence of plaintiff's injuries presented in the instant case] substantiates the jury's award."[49] On this record, the court found that there was no justification for the trial court judge to have exercised the discretion to remit *any* portion of the damages.[50]

Having found no justification for any amount of remittitur in *Firestone*, the court considered, entirely sua sponte, the more general problems of remittitur, apparently finding this case to show that problem in particular relief. The problems in the application of the doctrine had been noted in prior instances by the state appellate courts.[51] The Missouri Supreme Court itself had questioned the doctrine a little over a decade earlier, determining at that time that the case before it was not the proper vehicle for full-scale

45. *See Kenton*, 693 S.W.2d at 97. Other than the fact that it represents half of the jury's verdict, it is unclear what this figure was based on. It is also perhaps noteworthy, in considering this proposed amount, that what would in the defendant's assertion "shock the conscience" would be lower than the bottom end of the plaintiff's suggested range of damages. *See id.*

46. *Id.* at 86.

47. *Id.*

48. Firestone v. Crown Ctr. Redev. Corp., 693 S.W.2d 99, 108 (Mo. 1985) (en banc) (citations omitted), *superseded by statute*, MO. REV. STAT. § 537.068 (2008).

49. *Id.* at 109–10 (citation omitted).

50. *Id.* at 110.

51. *See* Worley v. Tucker Nevils, Inc., 503 S.W.2d 417, 423 (Mo. 1973) (citing court of appeals opinion below, which in turn cites a previous court of appeals opinion in *Effinger v. Bank of St. Louis*, 467 S.W.2d 291, 297 (Mo. Ct. App. 1971)).

consideration of a change of approach to remittitur doctrine.[52] Noting that there was no authority for the doctrine other than the precedent of past practice in the state, and citing the specific example of the companion case *Kenton*, the court in *Firestone* pointed to the "confusion and inconsistency" that have plagued the application of the doctrine.[53] The court acknowledged the "worthy purpose" of the doctrine ("bringing uniformity to verdicts and judgments for unliquidated damages"), but found that the inconsistencies in application to particular cases had undermined that purpose.[54] The court found especial fault with the fact that remittitur could not effectively serve the purpose of judicial economy as long as the remittitur itself was subject to appeal.[55] The court found adequate protection for litigants and adequate means of judicial control of jury verdicts in the state rules permitting outright (rather than conditional) grants of new trials.[56] On that reasoning, the court concluded, broadly and absolutely, "that remittitur shall no longer be employed in Missouri."[57]

In *Firestone*, the problem of remittitur was thus the fault of the doctrine itself: the standard was too confusing and imprecise to be applied consistently and was therefore ineffective at serving its supposed purpose.[58] The arguments presented for abolishing remittitur in the *Kenton* case are somewhat different, and arguably more powerful, but much more briefly stated. Like the defendants in *Firestone*, the defendants in *Kenton* complained on appeal that the

52. *Firestone*, 693 S.W.2d at 110 (citing *Worley*, 503 S.W.2d at 424, 428). In *Worley*, concurring and dissenting judges emphasized that the case before them was inappropriate for a wholesale reconsideration of remittitur. *Worley*, 503 S.W.2d at 424, 428 (Donnely, C.J., concurring; Bardgett, Seiler & Morgan, JJ., dissenting). The majority opinion in *Worley* is interesting background for *Firestone* and *Kenton*, though, as it details a disagreement with the court of appeals about the propriety of appellate review of remittitur orders. As of 1973, as the majority opinion demonstrates, it was the court of appeals that questioned the workings of remittitur, and the supreme court that insisted on its legitimacy. *See id.* at 423 (majority opinion).

53. *Firestone*, 693 S.W.2d at 110.

54. *Id.*

55. *Id.* Of course, there is also a point to be made about the potential ineffectiveness of a remittitur ruling in the fact that if the new trial option is taken, there is no carryover effect of the remittitur ruling, so that the new trial might easily result in another excessive verdict, requiring (in theory) yet another new trial.

56. *Id.* (citing MO. SUP. CT. R. 78.01–.02).

57. *Id.* One judge dissented, but did not write to express whether the basis of that dissent was related to the abolishment of remittitur. *Id.* (Welliver, J., dissenting).

58. *See id.*

amount remitted was insufficient to correct the original verdict.[59] In *Kenton*, however, the defendants gave slightly more definition to the basis for their allegation of error. According to the opinion, the defendants argued that:

> [A]s a matter of law the jury's verdict greatly exceeded the upper limits of "fair and reasonable compensation," the proper measure of damages, and that the verdict was, as the trial court itself recognized, the erroneous product of a mistaken evaluation of highly incendiary evidence and [was] improperly disproportionate to awards for comparable or more severe injuries.[60]

The Missouri Supreme Court, reviewing this allegation, noted particularly the jury's discretion in the first instance to assess the damages, and its "far better position" to determine fair and reasonable compensation for the plaintiff's damages.[61] The court noted the wide "range between the damage extremes of inadequacy and excessiveness" within which the jury has "virtually unfettered discretion" and need not specify the allocation of amounts for particular elements.[62]

Having thus emphasized the discretion peculiar to the jury in such cases, the court looked to the standard to be employed by the trial judge in reviewing the jury's verdict in the first instance and found that "[t]here is no exact formula to determine whether a verdict is excessive; each case is considered on its own facts. The ultimate test is what fairly and reasonably compensates plaintiff for the injuries sustained."[63] The supreme court found that the trial court abused its discretion in the *Kenton* case by remitting a "miniscule percentage" of the total verdict, referring to this exercise of discretion as "judicial hairsplitting."[64] The supreme court explained that the trial court's action was only one example of "the extremes to

59. Each apparently thought a more reasonable amount would be half of the original jury verdict rendered against it, although those two amounts are quite far apart: $2 million for Ms. Kenton and $7.5 million for Ms. Firestone. *Id.* at 101; Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83, 86 (Mo. 1985) (en banc).

60. *Kenton*, 693 S.W.2d at 97.

61. *Id.* (citations omitted).

62. *Id.* at 98 (quoting Chrisler v. Holiday Valley, Inc., 580 S.W.2d 309, 312 (Mo. Ct. App. 1979)).

63. *Id.* (citations omitted).

64. *Id.*

which the remittitur practice has fallen," and, in accordance with the holding of *Firestone*, held that the order of remittitur in the case had to be set aside.[65] The supreme court incorporated by reference the arguments about remittitur made in *Firestone* as "equally applicable here."[66]

Thus, the reasoning expressed in support of the *Kenton* decision does not seem to be based as much on the fault of the doctrine as in *Firestone*. Instead, the reasoning in *Kenton* seems to be based on the fault of the judges who are applying remittitur as a means of tinkering with jury verdicts, rather than correcting gross errors. In the view of the Missouri Supreme Court, in cases like *Kenton* (and it is important that the court does not see that case as unique in presenting this particular problem) trial judges had been abusing the remittitur doctrine by simply substituting their own assessments of the proper amount of damages for those of the juries, without confining themselves to the correction of extremes.[67]

In both opinions, the court notes the problematic lack of a precise formula for assessing or reviewing damage amounts.[68] Thus, the court underscores the extent to which this decisionmaking function of the judicial role is fundamentally committed to judicial "sense" or "judgment" particular to the facts of any given case.[69] As with other matters of judicial discretion, the use of remittitur and the determination of the proper amount to be remitted calls for a certain element of judicial art or craft—what Karl Llewellyn referred to as "situation sense"[70] or what Aristotle referred to as "practical wisdom."[71] When the highest court of the state throws up its hands and declares that such a fundamentally judicially driven doctrine has been so misapplied or is so incapable of consistent application that it

65. *Id.*

66. *Id.* It is interesting that the court chose to make *Firestone* the precedential case on this issue, since the reasoning concerning abuse in *Kenton* seems more compelling. Perhaps this was deliberately done to avoid the focus on abuse of discretion and instead to fault the doctrine itself as a matter of public relations, but it is unclear from the text of the opinions. At any rate, this is just another question that makes these opinions worthy of further attention.

67. *See id.*

68. *See id.* at 95; *see also* Firestone v. Crown Ctr. Redev. Corp., 693 S.W.2d 99, 108 (Mo. 1985) (en banc), *superseded by statute*, MO. REV. STAT. § 537.068 (2008).

69. *See Kenton*, 693 S.W.2d at 95; *see also Firestone* 693 S.W.2d at 108.

70. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 121 (1960).

71. ARISTOTLE, NICOMACHEAN ETHICS, bk. VI, ch. 5, at 1140a24–30 (Joe Sachs trans., Focus Publ'g 2002).

must be removed from the array of a judge's tools, it is necessarily a matter of tremendous significance. Such a decision is of great significance because it reflects on both the role of the judge and the doctrine of remittitur itself.

While the court's rulings in these two cases stood, judges were required to limit their grants of new trials on damages issues to those in which juries had truly gone beyond the bounds of reason.[72] In those cases, rather than substituting their own judgments as to more accurate amounts of damages for those of juries, judges would simply grant requests for new trials unconditionally.[73] Under such a regime, judges would have to think in more black and white terms. Indeed, they would have to return to a truer meaning of the phrase "shocks the conscience."

B. The Legislative Response: A New Statute

Firestone and *Kenton* would be noteworthy remedies opinions even without any further chapters in the story. However, the response of the state legislature makes them even more interesting as a matter of remedies jurisprudence and judicial ethics theory, and makes it even more surprising that these cases have garnered so little attention. On January 6, 1987, the Final Report of the Missouri Task Force on Liability Insurance suggested to the Missouri General Assembly that remittitur should be reinstated (and additur established) by statute, for the dual purposes of achieving equitable compensation and avoiding the need to retry cases.[74] Effective July 1, 1987, the Missouri legislature put remittitur back into state law by statute.[75] The statute, which relates specifically to "Torts and Actions for Damages,"[76] provides (in pertinent part) that: "A court

72. *See Firestone*, 693 S.W.2d at 110.

73. *See id.*

74. Bishop v. Cummines, 870 S.W.2d 922, 924 n.3 (Mo. Ct. App. 1994) (citing THE MO. TASK FORCE ON LIAB. INS., FINAL REPORT 25 (1987)).

75. MO. REV. STAT. § 537.068 (2008). One might stop to wonder about the lobbying forces that may have prompted the legislature to reinstate this doctrine: whether the impetus came from some specific interest group, whether the legislation was fought by another interest group, and so on. However, the answers to those questions are irrelevant to the discussion here. Whatever the impetus, it is not the forces behind the reestablishment of remittitur but the fact of that reestablishment—the manner and content of this move by the legislature—that matters for the purposes of this Article.

76. *Id.* This would thus clearly apply to later cases along the same lines as *Kenton* and *Firestone*.

may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages."[77]

What makes this development so noteworthy is not just that the legislature reversed the decision of the Missouri Supreme Court—that is not so unusual a sequence of events—but that in doing so the lawmakers failed to address any of the concerns expressed by the judiciary. It is the judiciary that has the practical experience with implementation of the common law doctrine, the constitutional authority to develop rules and procedures for the courts and to oversee the discipline of judges, and now the responsibility to implement the statute the legislature enacted. All of these factors counsel in favor of giving adequate credence and even deference to the input of the leaders of the judiciary in order to address their practical concerns. Furthermore, there is surely enough concern already about judicial overreaching and activism without adding more areas in which judges will be asked to substitute their judgment for that of a fact-finding jury, heedless of judicial disinclination to do so. By not only reinstating remittitur but also establishing additur, the legislature achieved a net *increase* in judicial discretion where the judiciary perceived abuse of that discretion.

The legislature provided no detailed statutory language to address the state supreme court's specific concerns about the ambiguity of the remittitur standard or the need to cabin judicial discretion more effectively.[78] If anything, the legislature provided *less* guidance than had been available previously. The statute does not even incorporate, for example, any list of considerations the courts had previously used as a matter of common law for assessing the propriety of damages amounts.[79] Nor does the statute incorporate

77. *Id.* The statute goes on to codify the remedy of additur with the mirror image of the standard for remittitur.

78. *Id.*

79. *See* Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83, 98 (Mo. 1985) (en banc). No doubt courts might still consider those factors, but the legislature seems to have taken no trouble to consider the factors (or the concerns expressed by the Missouri Supreme Court about ambiguity and inconsistency). Furthermore, the legislature has failed to assure judges that these factors were proper or relevant for the statutory doctrine they intended to enact.

the standards, such as "shocking the judicial conscience," which had previously appeared in some common law analyses.[80]

Explicit incorporation of such standards might in some small way have dealt with the particular concern the court showed in *Kenton* about restricting the use of remittitur to correct extremes rather than to permit tinkering with jury verdict amounts.[81] A jury verdict might very easily exceed "fair and reasonable" compensation by a small percentage in the view of a trial court. The standard in the statute thus seems to invite the very same possibility of mere substitution of judgment by the trial court that was such a concern to the court in *Kenton*.[82] Finally, in terms of the lack of guidance from the legislature, there is no indication of a standard of proof to be used.[83] It is one thing to ask how far the amount of damages has to be from what the judge would have considered to be accurate or even within a range of reasonableness. It is another to ask whether that difference must be proven to the judge by a preponderance of the evidence, by clear and convincing evidence, or by some other standard. Without improvements in the specificity of guidance and without additional fetters on the discretion of the lower court judges, there is nothing in the legislative response to address the very problems that led the Missouri Supreme Court to announce that the doctrine was not properly achieving its purposes.

The purposes of remittitur that were announced to the General Assembly in the task force report were those of promoting judicial economy and achieving equitable compensation (correcting jury awards that are "unfair" or "unreasonable").[84] Given that the leaders of the state judiciary had determined that the mechanism of remittitur was too imprecise and prone to confusion, inconsistency, and even abuse by their fellow judges, the legislature might have done better to find an entirely different mechanism to achieve its goals.

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80. *See, e.g.*, Wilkins v. Cash Register Serv. Co., 518 S.W.2d 736, 753 (Mo. Ct. App. 1975).

81. The Court of Appeals for the Western District of Missouri has indicated, though, that rules of interpretation and application from before the abrogation of the doctrine are still helpful in interpreting the new statute. *See* Bishop v. Cummines, 870 S.W.2d 922, 924 (Mo. Ct. App. 1994). This may be useful in supporting the use of other interpretive phrases, but it does nothing constructive to solve the problems the Missouri Supreme Court found with consistent application of the rule as it stood before 1985.

82. *See Kenton*, 693 S.W.2d at 98.

83. *See* § 537.068.

84. *Bishop*, 870 S.W.2d at 924 n.3 (citing THE MO. TASK FORCE ON LIAB. INS., *supra* note 74, at 25).

Even if the legislature determined that remittitur was still the best possible mechanism, it should have directly addressed the difficulties observed by those who make these decisions regularly in practice, at least by providing greater clarity or precision. If the legislature believed there was a problem with excessive jury verdicts that called for a remedy short of unconditionally granting a new trial, and if they believed that the intermediate remedy was so straightforward as not to require more specific guidance, perhaps they might have taken a different approach entirely. Perhaps they might have acted more clearly within their own province, for example, by setting statutory caps based on specific criteria. At a bare minimum, the legislature might have made a gesture at establishing specific criteria for judges to use in reaching case-by-case determinations on remittitur orders, rather than simply reinstating the doctrine without addressing the problems identified by the leaders of the state's judicial branch.

The statutory language is, of course, permissive, not mandatory: "A court *may* enter a remittitur order."[85] Thus, even under the statutory regime, it is arguable that judges might simply exercise their discretion never to use remittitur. But this arrangement fails to address the problem of lower court *abuse* noted in *Kenton*.[86] After all, remittitur was never mandatory under the common law scheme either, and yet the problem of abuse existed.[87] Furthermore, as long as remittitur is present in the statute, unhappy litigants will continue to make arguments to trial judges about why they *should* take advantage of this option. Therefore, judges cannot so easily avoid making these determinations. This scenario presents an interesting example for discussion of the role of the judiciary in establishing the practical workings of doctrines they are so involved in implementing.

III. THE CONTINUING IMPORTANCE OF THE MISSOURI REMITTITUR EPISODE

The *Firestone* and *Kenton* opinions and the legislative action that followed have received very little judicial or scholarly attention. Neither opinion has been cited by courts outside of Missouri on

85. § 537.068 (emphasis added).

86. 693 S.W.2d at 98.

87. *See* Thomas, *supra* note 25, at 696–97.

issues related to remittitur. Neither has received serious attention in scholarly work, though the cases and the statute have occasionally garnered mention in various practice manuals, treatises, and A.L.R. entries, which note this example of a court's dissatisfaction with the doctrine of remittitur but provide no further discussion.[88] There is a student case comment on *Firestone*, written shortly after the decision was issued, but it fails to grapple with the crucial issues at stake here.[89] And, the only law review citation to *Kenton* that deals with the court's abolishment of remittitur appears in an article written by one of the Missouri Supreme Court judges who could not sit on the pair of cases due to a personal conflict.[90] More than a decade after the decisions were issued, Judge Blackmar called the court's sua sponte abolishment of remittitur "an unwarranted exercise of [judicial] activism, supported by no good reason."[91] This brings us to the really interesting and important questions regarding judicial involvement in the development of remedial jurisprudence.

This Article cannot pretend to establish any conclusive definition of what constitutes judicial "activism." That is a very complicated question that merits more extensive analysis than is possible here, requiring as it does, a fully worked-out theory of the judicial role. It is, however, at least possible to say this much: it cannot be that we desire a judiciary that is wholly passive. It would not matter so much who served in the judicial branch if we did not understand that judges' personalities—their backgrounds, their skills, and so on—matter.[92] Despite the prevalence of statements about

88. *See, e.g.*, JACOB A. STEIN, STEIN TREATISE § 22:41 (3d ed. 2008);11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2815 (2d ed. 2008); Kristine Cordier Karnezis, Annotation, *Validity of State Statutory Caps on Punitive Damages*, 103 A.L.R. FED. 379 (2002).

89. Donald K. Anton, Comment, *The Missouri Aberration: Abolition of Remittitur*, 30 ST. LOUIS U. L.J. 1195 (1986). Due to its timing, of course, after detailing the facts and reasoning of the case and providing some history of remittitur, the comment focuses its evaluative section on whether the holding should apply to cases currently pending. *Id.* at 1215–17. Even considering its timing between the decision and the legislative response, though, it is surprising that the comment fails to consider the additional reasoning provided by the *Kenton* case. In criticizing the extreme nature of the decision, the comment gives no weight to the special perspective of the decisionmakers on misuse of remittitur by their lower court colleagues.

90. *See* Charles B. Blackmar, *Judicial Activism*, 42 ST. LOUIS. U. L.J. 753, 775–76 (1998). (The nature of the personal conflict is not evident).

91. *Id.* at 776.

92. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166–77 (1921). Missouri is a shining example of concern for proper selection of judges, being at the forefront of reform in developing a nonpartisan merit selection plan, commonly known as the

judges as umpires or judges only declaring the law,[93] it would be naïve to imagine that judges in a common law system are not *called on* to make law in certain circumscribed ways.[94] Thus, "activism" in and of itself should not be considered a dirty word. In particular, it should not be a dirty word where the subject of the "activism" has to do with the judicial role itself, and has (as in this case) to do not with arrogating additional authority to the role, but rather exercising increased self-restraint due to perceived overreaching in a particular area. The "activism" of *Firestone* and *Kenton* thus comes in an area in which we should *hope* for activism—where judges consider their roles and candidly address their concerns about the implementation of doctrines that are judicially driven. Judges have a perspective here and a credibility that only they can provide about the role and the day-to-day decisionmaking of the judge.

And indeed, as one might expect, Judge Blackmar's article on judicial activism concerns itself primarily with those instances of "activism" that impose particular ideologies on cases regarding matters of social policy.[95] The example of *Kenton*, however, seems a bit out of place in his discussion, because it appears that the reason for Judge Blackmar's label of "activism" in this case does not arise from the imposition of personal agendas. Rather, his use of the label of "activism" with regard to *Kenton* apparently arises from the fact that none of the parties to the cases *argued* for abolishing remittitur.[96] Blackmar specifically notes that it was the independent idea of the majority of the state supreme court to take this step.[97]

Surely this is not (or at any rate should not be) what complaints about "judicial activism" are really concerned about. After all, the very idea of the common law is premised upon the development of

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Missouri Plan, for its state judiciary. *See* Missouri Nonpartisan Court Plan, http://www.courts.missouri.gov/page.asp?id=297 (last visited Jan.13, 2009), for a description of the plan.

93. *See, e.g., Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of J. John G. Roberts Jr.), *available at* http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html.

94. *See, e.g.*, CARDOZO, *supra* note 92, at 98–141 (discussing "the [j]udge as a [l]egislator").

95. *See generally* Blackmar, *supra* note 90.

96. *See id.* at 775–76.

97. *Id.* at 775. For further discussion of the kind of "active" or "involved" judging in which judges supply reasoning not suggested by the parties, see, for example, Sarah M.R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251 (2004).

legal standards through case law, so it is not unusual for a court to issue a holding that has applicability beyond the case actually being decided. Perhaps more importantly, judges, tasked among other things with looking out for the integrity of the corpus of the common law, have a different perspective and a different agenda than the litigants. The litigants have only their own interests at stake—they want only for this specific remittitur order to stand or fall—so there is no reason for them to make more global arguments. It would take a bold litigant indeed to argue that judges should eliminate an aspect of their discretionary powers. Litigants simply cannot be expected to have the interest or the perspective to make such an argument. If judges, on the other hand, were only to take into account the concerns of the parties before them and not to concern themselves with their obligations to the law itself and the system in which they administer justice, things could very easily get off track or develop inconsistently and inefficiently. The system benefits from this higher level of oversight by the highest court. This may be "activism," but only insofar as the word is taken to mean that judges are actively involved in performing their roles.

The court certainly did not *need* to use these cases as an opportunity to make a general rule about remittitur. Thus, the charge of judicial activism does at least present an interesting set of questions about proper venues for general rulemaking regarding efficient use of judicial resources. *Kenton*, rather than *Firestone*, would arguably have been the better primary poster case for abolishing remittitur because of the starker "judicial hairsplitting" and the absence of any conceivable rational basis for the amount of the remittitur. However, stepping back from the choice between those two cases for the initial decision, it is arguably most efficient for the court to make a change to a common law doctrine in the common law itself—that is, in a case that illustrates the need for the change.

The Supreme Court of Missouri does have constitutionally authorized rulemaking authority, so if remittitur is properly considered a rule of procedure, the authority would have been there as well.[98] Would it have been better, then, to make a rule in that

98. MO. CONST. art. V, § 5. The fact that the appeals in *Firestone* and *Kenton* were made at least in part according to the procedure embodied in Missouri Rule of Appellate Procedure 78.10

venue to abolish a doctrine that had not been encompassed by those rules previously?[99] If that was in fact the case, and if the majority in fact exhibited such unwarranted activism, why then did the dissenting judge not write to explain? And why did Judge Blackmar not explain as much when he labeled the case an example of judicial activism in his law review article?[100] Judge Blackmar states that the holding was "supported by no good reason" without offering either any criticism of the reasons given in the opinion or any substantive arguments of his own against the court's decision.[101]

Assuming that we can move past the stigma of the word "activism," there remains the further question of whether this was "unwarranted" activism.[102] There is, of course, a large body of scholarship on the tension between judicial and legislative rulemaking authority.[103] The general problem of judicial rulemaking authority is a far larger problem than can be tackled in this brief Article, but *Firestone* and *Kenton* reveal a specific problem within that field that has received inadequate attention. There is particular tension on rulemaking authority of the courts as between rules of procedure and rules of substance.[104] There is generally more acceptance of an active role for the judiciary in developing rules of procedure because they have to do with practical matters of managing the cases before them.[105] For the purposes of a discussion (such as those in *Firestone* and *Kenton*) that is fundamentally about

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demonstrates that the authority to make a relevant rule existed here. *See supra* note 35 and accompanying text.

99. It could be argued that the substance of the court's action was within its power and that the rulemaking mechanism would have been preferable due to the recusals in the cases that kept two of the judges from sitting. Presumably the full complement of the court could have contributed to a rulemaking effort. If that were the case, though, and if it were, for example, either the basis for Judge Welliver's dissent or for Judge Blackmar's criticism, one would expect such a straightforward objection to have been stated. One might even reasonably expect the majority to have responded to such an objection. However, if that was in fact the basis of any frustration with the court's action, it is nowhere expressed.

100. *See* Blackmar, *supra* note 90, at 776.

101. *Id.*

102. *Id.*

103. The proper resolution of this tension has long been a matter of scholarly debate. *See, e.g.*, JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977); Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952); James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIAMI L. REV. 507 (2002).

104. *See, e.g.*, sources cited *supra* note 103.

105. *See, e.g.*, sources cited *supra* note 103.

the mechanics and standards for application to specific cases, remittitur looks much more like a rule of procedure than one of substance.[106]

If remittitur is a rule or doctrine of procedure, and is at the same time so fundamentally about on-the-ground practical judgment, then the Missouri Supreme Court's determination to abolish it looks less like an "unwarranted" arrogation of power for the judiciary. The real issue here is not just about procedure or substantive remedies. It is about the fundamental nature of the judge's practical involvement in the case. Guidelines for judges need to be as clear as possible if there is to be sufficient uniformity of application and results to assure the judiciary, the parties, and the public that the process is legitimate.

There is a common sentiment among appellate judges that in order to write a dissent, one's indignation must exceed one's inertia on the matter. No reasoning is provided for Judge Welliver's lone dissenting vote in *Firestone* and *Kenton*.[107] Instead, the only reasoning provided is that of a majority whose indignation at the demonstrated problems with remittitur practice outstripped the inertia that might have led it to limit its holding to mere reversal of erroneous remittitur orders in the two cases before it.[108]

Concerns about judicial activism tend to arise out of the reality that the law is underdetermined.[109] When judges fill the gaps, we

106. There is an argument to be made that it is a substantive rule of remedies because of its typical practical effect of changing the amount of damages the prevailing party will receive, but that argument about effect might be made about almost any rule of procedure. For a fuller discussion of the debate between procedural and substantive status for remedies issues and the role of judges and legislatures in establishing remedial rules, see, for example, Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 679–87 (2001). For an argument that remedies are a hybrid of procedure and substance, or at any rate fall somewhere between the two, see, for example, DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 8 (3d ed. 2002). If there is a distinction worth drawing here, remittitur belongs on the procedural side. As an organizational matter, rules about remittitur are typically found in procedural sections of codes and statutes, incorporated as they typically are in the procedures for seeking and granting new trials. In Missouri, during the brief period when remittitur was abolished, the Eighth Circuit focused on the remedy's procedural aspects. The Eighth Circuit panel, sitting on a diversity case applying Missouri state law, particularly noted that as remittitur is a rule of procedure, federal rules of procedure apply to the issue, and the panel need not pay any heed to the abolishment of the doctrine in Missouri. *See* Hale v. Firestone Tire & Rubber Co., 820 F.2d 928, 936 n.1 (8th Cir. 1987).

107. Firestone v. Crown Ctr. Redev. Corp., 693 S.W.2d 99, 110 (Mo. 1985) (en banc) (Welliver, J., dissenting), *superseded by statute*, MO. REV. STAT. § 537.068 (1987); Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83, 98 (Mo. 1985) (en banc) (Welliver, J., dissenting).

108. *See Firestone*, 693 S.W.2d at 110; *see also Kenton*, 693 S.W.2d at 98.

109. *See, e.g.*, CARDOZO, *supra* note 92, at 14–15.

want them, as far as possible, to be guided by law in doing so, even if there is no definitive answer.[110] So, for example, we look for analogical reasoning based on related prior case law.[111] Such reasoning gives the public confidence that judges are putting their own ideologies as far as possible to one side and looking to the integrity of the development of the law in determining how to fill a gap. Put another way, public confidence in the legitimacy of judicial decisionmaking rests on an idea that even where the law is not "determined," it is at least in some consistent way "determinable." Surely this is no less true on matters in the area of remedies law, which affects more than anything else the civil litigant's bottom line. If public confidence is threatened when judges take too "active" a role in the cases before them, it makes little sense for the legislature to demand that they take a more active role where their leadership suggests they cannot reliably do so.

Judges, especially those who sit on the highest courts of their jurisdictions, are in a position to see patterns. They not only see the patterns that develop in cases brought to them for resolution of inconsistent results, but they also oversee discipline of lower court judges. This puts them in a position to see patterns of where those judges fail and where litigants or other members of the public question the work done by lower court judges. One might argue that lower court judges can also see patterns, and therefore ought to have remittitur powers to make judgments more consistent. However, that was one of the very tasks at which the Missouri Supreme Court found the lower courts had failed.[112]

Legislatures, one might argue, can see patterns as well. After all, that ought to be one of their great advantages over courts for the lawmaking function. They need not limit themselves to looking just at a case brought before them with legally circumscribed and fact-bound issues, but can instead look at an issue writ large and seek all kinds of input from a variety of sources. The lack of guidance—the lack of response to the concerns of the judiciary regarding the

110. *See id. passim*; *see also, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

111. *See* CARDOZO, *supra* note 92, at 19–20; *see also, e.g.*, Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

112. *See Firestone*, 693 S.W.2d at 110 (citing inconsistency in remittitur practice as a reason for abolishing it).

implementation of remittitur practice—gives the impression that the legislature did not in this instance put that special perspective to good use. Part of the input that the legislature should have taken into account here, after all, is that of the judiciary. Indeed, that would be true whenever a judicially implemented common law doctrine like this one is concerned, whether the legislature was specifically responding to an action by the judiciary or not. Judges know the task of judging. That does not mean that they should always and in every instance have absolute power to change the rules and laws that govern their work. It does mean, however, that if legislatures insist that judges use a particular tool, they should sufficiently respect judicial concerns to provide the guidance that the judges say they lack.

Perhaps Judge Blackmar's label of "unwarranted" is a reference not to the chosen mechanism (case law versus rulemaking) for effecting the change, but rather a reference to the *extent* of the change to long-established law. One might argue that the court could have addressed at least one of the general problems it saw without entirely eliminating the option of remittitur. The court might, after all, have made an attempt to provide on its own the more detailed guidance it noted as missing. However, the majority, particularly in the reasoning of *Firestone*, indicated that while there is a lack of guidance, that is a problem intrinsic to the tool of remittitur.[113] The remittitur standard does not, according to this line of reasoning, lend itself to sufficiently consistent use. Perhaps more importantly, the reasoning in *Kenton* adds the majority's belief that the problem would not be solved with clarity alone because lower court judges were not trying in good faith to accomplish the proper goals for which the doctrine had been developed.[114]

In addition to calling the court's holding "unwarranted" activism, Judge Blackmar also complains that it was "supported by no good reason."[115] As discussed above, in registering this dissatisfaction, he did not provide any specific explanation of the inadequacy of the court's stated reasons or indicate any additional reasons weighing against the court's decision. The reasons relied

113. *See id.* at 110.

114. *See* Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83, 98 (Mo. 1985) (en banc).

115. Blackmar, *supra* note 90, at 776.

upon by the majority are worthy of serious consideration, certainly beyond whatever consideration (if any) the legislature gave to them in reversing the effect of the holding. Even setting aside what is perhaps the most compelling reason—the misuse of the tool of remittitur—there are other compelling justifications for the court's exercise of judgment here.

On the issue of judicial economy, it is true that that goal is not well served when remittitur orders may simply be appealed anyway.[116] The legislature has done nothing to address that concern. On the issue of options remaining to the lower courts in the absence of remittitur power, it is true that the power to grant a new trial still exists,[117] and there is nothing to stop settlements occurring at a lower amount between the original trial and the new trial. Perhaps, then, the threat of a new trial has even more powerful force in the absence of a remittitur option. Certainly it should be more effective at keeping lower court judges to exercising that authority only in cases in which the damages awarded truly are "excessive" rather than simply "more than this judge would have awarded."

To the extent that the purpose of remittitur is to make for better uniformity or consistency of judgments, it has apparently not succeeded there either. And, after all, what other reasons could there have been—what judicial motivation could have prompted this action if not the extreme frustration the opinions express with regard to the practical workings of remittitur? Why would the majority go to this extreme of removing an aspect of judicial discretion if it were not essential to do so? Even if the legislative branch is not content to let such a decision rest with the judiciary, at a minimum, the reasons given and the concerns expressed by the judicial branch certainly deserve greater attention than they received in this instance.

IV. CONCLUSION

This Article has not attempted to resolve the question of the proper role of the judiciary in rulemaking where remedies are concerned. Instead, it has attempted to illuminate the important issues at stake where that question is concerned, and has suggested that closer attention to what the judiciary says is warranted. It has

116. *See Firestone*, 693 S.W.2d at 110.

117. *Id.*

pointed out these two Missouri cases as particularly underrated examples of such judicial contributions and the legislative reaction they provoked as an underrated example of the tension between the judicial and legislative branches where remedies law is concerned. This whole remittitur episode raises important issues about the role of the judiciary in the development of both theory and practice governing remedial decisionmaking and therefore merits further attention and discussion on a broader scale, both as a matter of remedies law and as a matter of judicial ethics particular to the remedies context.