STATE COURT
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## Missouri Supreme Court Unanimously Declares Cap on Punitive Damages Unconstitutional

*By Stephen R. Clark* Kristin E. Weinberg***

In *Lewellen v. Franklin* (*Lewellen*),[1] the Missouri Supreme Court unanimously held that a mandatory cap on punitive damages,[2] enacted by the Missouri Legislature in 2005 as part of its comprehensive legislative tort reform, violated a plaintiff's right to a jury trial under the Missouri Constitution. Holding the punitive damages cap unconstitutional as to a fraudulent-misrepresentation claim, the *Lewellen* court unanimously followed the controversial 4-3 split decision in *Watts ex rel. Watts v. Lester E. Cox Medical Centers* (*Watts*),[3] in which the Missouri Supreme Court held a statutory cap on noneconomic damages in medical-negligence cases constitutionally infirm under a plaintiff's constitutional right to a jury trial.

### I. Facts

In *Lewellen*, the plaintiff alleged that the defendants' advertisements for the sale of vehicles constituted fraudulent misrepresentations and violated the Missouri Merchandising Practice Act (MMPA), Mo. Rev. Stat. §§ 407.010 *et seq.*[4] In addition to awarding the plaintiff $25,000 in actual damages, the jury awarded her $1,000,000 in punitive damages on each of her claims.[5] Upon the defendants' motions to cap the punitive damage awards pursuant to Mo. Rev. Stat. § 510.265, the trial court reduced the punitive awards to $500,000 and $539,050.[6] The plaintiff appealed, asserting multiple state constitutional challenges to § 510.265's cap on punitive damages, including that it violated the Missouri Constitution's right to a jury trial.[7] Specifically, the plaintiff argued that the statutory cap on punitive damages strips the jury of its function in determining damages.[8]

### II. Constitutional Right to Jury Trial

Article I, section 22(a) of the Missouri Constitution provides, "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate . . . ." Relying on its 2012 split decision in *Watts*,[9] in which it struck down a statutory cap on noneconomic damages in medical negligence cases under article I, section 22(a)'s right to a jury trial, the Missouri Supreme Court explained that the phrase "shall remain inviolate" "means that any change in the right to a jury determination of damages as it existed in

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## Minnesota Supreme Court Holds Municipality Cannot Revoke Right to Maintain an Existing Commercial Land Use

*By Luke A. Wake**

A difficult and recurring question of municipal law is how, and when, can an existing land-use be phased-out as circumstances in the community change? Obviously land-use planning would be difficult—if not impossible—if the authorities were powerless to control development and or to take steps to eliminate current uses that may be deemed socially undesirable. But, on the other side of the equation, landowners generally want to maintain their property rights to the full

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Ohio's zoning law.[31] Perhaps it will.

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**Endnotes**

1 City of Akron v. Chapman, 116 N.E.2d 697 (Ohio 1953).

2 *See, e.g.*, O.R.C. § 713.15 ("The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or an amendment to the ordinance, may be continued, although such use does not conform with the provisions of such ordinance or amendment ….").

3 Boice v. Vill. of Ottawa Hills, 999 N.E.2d 649 (Ohio 2013).

4 *Id.* at 650.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 Boice v. Vill. of Ottawa Hills, 2011 Ohio 5681, at ¶¶7, 45.

10 *Id.* at ¶48.

11 *Id.*

12 *Id.* at ¶49 (emphasis sic).

13 *Boice*, 999 N.E.2d at 651.

14 *Id.* at 651-52 (internal quotation marks and citation omitted).

15 *Id.* at 652 (internal quotation marks and citation omitted).

16 *See* Kisil v. City of Sandusky, 465 N.E.2d 848 (Ohio 1984), syllabus ("The standard for granting a variance which relates solely to area requirements should be a lesser standard than that applied to variances which relate to use." A successful application need show only "practical difficulties.").

17 *Boice*, 999 N.E.2d at 652-53. See *id.* (" '[T]he factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (*e.g.*, water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.' ") (quoting Duncan v. Middlefield, 491 N.E.2d 692 (Ohio 1986), syllabus).

18 *Id.* at 653-54.

19 110 Ohio St.3d 353, 2006 Ohio 3799, 853 N.E.2d 1115.

20 *See Boice* at 654, citing *Norwood*, 2006 Ohio 3799, at ¶¶34-38.

21 *Norwood* at ¶37, quoting Ohio Const., Art. I, §§ 1, 19.

22 *Boice*, 999 N.E.2d at 653.

23 *Id.* at 653-54.

24 *Id.* at 654.

25 *Id.*

26 *Id.* at 656 (Lanzinger, J., dissenting) (emphasis in the original) (citations omitted).

27 *Id.* at 657 (Lanzinger, J., dissenting).

28 *Id.* (Lanzinger, J., dissenting).

29 *Id.* at 653.

30 *Id.* at 657 (Lanzinger, J., dissenting).

31 *Id.* at 656 (Lanzinger, J., dissenting).

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1820 is unconstitutional."[10] In other words, the *Lewellen* court found its controversial *Watts* decision controlling on the issue of whether application of § 510.265's statutory cap on punitive damages to a cause of action that existed in 1820 violates the right to a jury trial (as it existed in 1820 when the right to a jury trial became a state constitutional right).

Reviewing established cases, the Missouri Supreme Court determined that "there existed a right to a jury determination of the amount of punitive damages in a fraud cause of action in 1820" and that "imposing punitive damages [has been] a peculiar function of the jury" since at least 1820.[11] The *Lewellen* court concluded that § 510.265's cap on punitive damages "necessarily changes and impairs the right of a trial by jury 'as heretofore enjoyed.'"[12] Accordingly, the court held that "because section 510.265 changes the right to a jury determination of punitive damages as it existed in 1820, it unconstitutionally infringes on [a plaintiff's] right to a trial by jury protected by article I, section 22(a) of the Missouri Constitution."[13]

In finding the constitutional infirmity of § 510.265's punitive damages cap, the Missouri Supreme Court rejected the defendant's argument that because the Due Process Clause of the United States Constitution limits punitive damages (by prohibiting "the imposition of grossly excessive or arbitrary punishments on a

tortfeasor"),[14] the state legislature may also limit punitive damages via a statutory cap.[15] Noting that due-process limitations require a punitive damages award to "be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff,"[16] the Missouri Supreme Court explained that "[S]ection 510.265 is not based on the facts or circumstances of the case; it caps the punitive damages award at $500,000 or five times the judgment *regardless* of the facts and circumstances of the particular case."[17] "Bound by *Watts*," the Missouri Supreme Court held that § 510.265's punitive damages cap "curtails the jury's determination of damages and, as a result, necessarily infringes on the right to a trial by jury when applied to a cause of action to which the right to jury trial attaches at common law."[18] "Because a party seeking punitive damages for fraud in 1820 would have had the right to have a jury try the issue of punitive damages, the statutory reduction of [the plaintiff's] punitive damages award against [the defendant] . . . was unconstitutional. "[19]

## III. Implications of the Case

In making its ruling, the court rejected the reasoning of other state supreme courts. As Mark Behrens points out, "[t]his ruling is an extreme outlier. Virtually every other state that has considered the constitutionality of punitive damages caps has held that such laws do not violate the jury trial right because the jury's fact-finding function is preserved."[20] These states include Alaska, Kansas North Carolina, Ohio, Texas, and Virginia.

Unlike its recent *Watts* decision, which was split 4-3 with a swing vote, the Missouri Supreme Court reached an undivided decision in *Lewellen*. Although the composition of the *Watts* court differs from that of the *Lewellen* court, that difference does not explain the shift from a 4-3 split decision to a unanimous decision regarding statutory caps on damages.

For the *Watts* decision, Judge Zel Fischer recused himself for unknown reasons. How *Watts* would have come out had Judge Fischer not recused himself remains an open question. While his joining in the *Lewellen* majority may signal he would have voted with the *Watts* majority, it may also signal that *stare decisis* bound him to vote with the majority in *Lewellen*, regardless of how he would have voted in *Watts*.

Having invalidated statutory caps on both noneconomic damages (in *Watts*) and punitive damages (in *Lewellen*), the Missouri Supreme Court has called into question whether the Missouri Constitution permits *any* legislative attempt to reign in damage awards in common-law causes of action, despite public support for such tort-reform measures.

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## Endnotes

1 Lewellen v. Franklin, No. SC 92871, 2014 Mo. LEXIS 211 (Mo. banc Sept. 9, 2014).

2 Mo. Rev. Stat. § 510.265.1 states: "No award of punitive damages against any defendant shall exceed the greater of: (1) Five hundred thousand dollars; or (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant."

3 376 S.W.3d 633 (Mo. banc 2012).

4 Lewellen, slip op. at 3-5.

5 *Id.* at 1.

6 *Id.* at 7. The plaintiff did not challenge the application of the punitive-damages cap to the punitive award on her MMPA claim ($539,050.00), likely because the Missouri Supreme Court previously held that § 510.265's cap on punitive damages was constitutionally valid as to MMPA claims. *See* Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC, 361 S.W.3d 364, 375-81 (Mo. banc 2012). In Estate of Overbey, the court reasoned that because MMPA claims did not exist in 1820 when the Missouri Constitution first provided a right to a jury trial, the MMPA damages cap did not diminish any rights existing at that time. *Id.*

7 *Lewellen*, slip op. at 7-8.

8 *Id.* at 8.

9 In *Watts*, the plaintiff alleged that the defendants' medical negligence caused brain injuries to a newborn, and the plaintiff received an award of $1,450,000.00 in noneconomic damages, which the trial court reduced pursuant to Mo. Rev. Stat. § 538.210's $350,000.00 cap on noneconomic damages. The *Watts* Court, in a split decision, held that the noneconomic-damages cap violated a plaintiff's right to a jury trial because a plaintiff had a cause of action for non-economic damages in medical negligence cases in 1820. *See Watts*, 376 S.W.3d at 640-41.

10 *Lewellen*, slip op. at 9 (*citing* Watts ex rel. v. Lester E. Cox Medical Centers, 376 S.W.3d 633, 638 (Mo. banc 2012)).

11 *Id.* at 10.

12 *Id.* at 11 (quoting *Watts*, 376 S.W.3d at 640).

13 *Id.* at 11.

14 *Id.* at 11 (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 409 (2003)).

15 *Id.* at 12.

16 *Id.* (quoting *State Farm*, 538 U.S. at 425).

17 *Id.* (emphasis added).

18 *Id.* at 13 (quoting *Watts*, 376 S.W.3d at 640).

19 *Id.*

20 Mark A. Behrens, *Missouri Supreme Court Invalidates State's Legislative Cap on Punitive Damages*, The Legal Pulse (Sept. 11, 2014), http://wlflegalpulse.com/2014/09/11/missouri-supreme-court-invalidates-states-legislative-cap-on-punitive-damages/

# Minnesota Supreme Court Holds Municipality Cannont Revoke Right to Maintain an Existing Commercial Land Use

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extent permitted at common law. This is especially true with regard to existing and long-standing uses that are called into question by recently enacted zoning regimes.

These questions and policy concerns were addressed by the Minnesota Supreme Court in *White, Trustee for Lorraine M. White, Trust Fund, et. al. v. City of Elk River*.[1] The case concerned the right of the White family (the Family) to continue lawfully operating a commercial campground on their land—an ongoing use that had continued since they acquired their property in 1973.[2] The Respondent, City of Elk River (the City), argued that—pursuant to its local zoning regime—it had the power to revoke the Family's right to maintain their campground. But in December, the Minnesota Supreme Court definitively rejected the City's argument—holding that enactment of new zoning restrictions cannot take away the right to maintain an existing use, and that a newly adopted zoning regime cannot require a landowner to waive the right to continue with such uses.

By way of background, the City adopted its first zoning code in 1980. Prior to 1980, the permitted uses of the property would have been defined by common law principles and any state enacted regulations governing the operation and maintenance of campground facilities.[3] But with enactment of the City's new zoning code, only "agricultural" uses were permitted. As such, the campground was technically out-of-compliance under the 1980 code.

This might have arguably subjected the Family to a threat of legal sanctions if the City had sought to strictly enforce the zoning code.[4] Thus, in apparent recognition of this problem, the City amended its zoning code in 1983, so as to allow for commercial campgrounds. But, the amended code required the Family to obtain a "conditional use permit" in order to continue campground operations. Thereafter, in 1984, the Family applied for—and was granted—a conditional use permit. But the question that the Minnesota courts struggled with in *White Trust* was whether the Family's right to continue its campground operations was thereafter contingent upon the continued validity of the 1984 conditional use permit?

The dispute attracted the attention of several *amici*. In support of the Family, the Minnesota Vacation Rental Association and the National Federation of Independent Business Small Business Legal Center (MVRA and NFIB) filed an *amici* brief arguing that the Family's property rights should not be viewed as contingent upon the 1984 permit because such an approach would open the door for municipalities to coerce landowners into waiving protected common law rights in order to avoid the threat of enforcement actions.[5] The Minnesota League of Cities filed an *amicus* brief arguing that a municipality must be understood to have the power to revoke the right to maintain an existing use—if conditions imposed on a permit have been violated—because the threat of revocation serves as an effective enforcement tool that furthers public policy goals in discontinuing non-conforming uses.[6] The dispute came to a head in 2011 when the City Council voted to revoke the Family's right to continue their campground operations because they had failed to abide by conditions imposed on their 1984 permit. Specifically, the record indicates that the City was concerned about campers establishing permanent homes in the park. Accordingly, the 1984 permit was conditioned on the requirement that the campground must prohibit patrons from living on the premises year-round. Decades later, when the property came under scrutiny in 2010, it appeared that this condition had been violated.[7] The City then decided to revoke the 1984 permit after the Family failed to come into compliance within a reasonable timeframe.

With revocation, the City maintained that the Family could no longer operate its campground. But, this assumed that the Family's right to continue lawful operations was made contingent upon the 1984 permit at the time it was issued and accepted.[8] This raised an important question of the background principles of property law in Minnesota, which will affect the way municipalities approach land-use planning in the future. For this reason, the case was also important to landowners throughout the state.[9]