

Kansas voters filed suit in the U.S. District Court for the District of Kansas alleging that they were unconstitutionally denied the right to vote in the election for the attorney members of the Commission.¹⁵ Specifically, the plaintiffs argued that limiting the election of these Commission members to licensed attorneys violates the “one person, one vote” principle of the Equal Protection Clause of the Fourteenth Amendment by denying non-attorneys the right to vote. The plaintiffs’ request for a preliminary injunction was denied by the district court and the State’s motion to dismiss was ultimately granted.¹⁶ The plaintiffs promptly appealed to the Tenth Circuit.

In a *per curiam* ruling, the Tenth Circuit affirmed the district court by a vote of 2-1.¹⁷ Although both judges in the majority applied rational basis scrutiny in upholding the attorney-only elections, they did so for different reasons. Generally, laws denying the franchise to a class of otherwise qualified voters are subject to strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment.¹⁸ The Supreme Court has carved out an exception to this rule, however, for “limited purpose” elections that have a disparate impact on the

specific class of citizens permitted to vote.¹⁹ Laws limiting the franchise in such “limited purpose” elections receive only rational basis scrutiny.²⁰

In *Dool*, the non-attorney challengers argued that strict scrutiny was applicable because the election of Commission members is an election of “general interest” affecting all Kansas voters.²¹ In separate concurring opinions, the majority disagreed. Judge Matheson opined that the Commission “performs a limited purpose” and “has a disproportionate effect on the voting population of attorneys.”²² Specifically, Judge Matheson noted that the Commission has a “limited role” and “does not make, administer, or enforce laws” or have “taxing or borrowing authority.”²³ Accordingly, he found that the election of Commission members qualified as a “limited purpose” election warranting deferential rational basis scrutiny.²⁴

Conversely, Judge O’Brien found that the Commission did not fit within the exception for “limited purpose” elections set out in *Ball* and *Salyer*, but he nonetheless applied rational basis scrutiny to uphold the law. To reach this conclusion, Judge O’Brien relied upon a hodgepodge

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DECLINING TO FOLLOW ITS NEIGHBOR MISSOURI, THE KANSAS SUPREME COURT HOLDS NONECONOMIC DAMAGES CAP IN MEDICAL MALPRACTICE CASES CONSTITUTIONAL

by Stephen R. Clark and Kristin E. Weinberg*

The Kansas Supreme Court, in *Miller v. Johnson*,¹ recently upheld Kansas’ statutory cap on non-economic damages in personal injury cases, including medical malpractice cases, as constitutional. Specifically, the Kansas Supreme Court held the cap, set forth in K.S.A. 60-19a02, does not violate Sections 5 and 18 of the Kansas Constitution Bill of Rights providing a right to a jury trial and a right to damages, respectively. This decision is in contrast to its neighboring state’s supreme court, which recently declared a statutory cap on non-economic damages in medical malpractice cases unconstitutional for violation of the right to a jury trial.²

I. Facts

In *Miller*, the appellant-patient sued the appellee-doctor for medical malpractice stemming from a surgery in which the doctor erroneously removed the patient’s left ovary instead of the right ovary.³ After trial, the

jury found the doctor completely at fault and awarded the patient \$759,679.74 in total monetary damages, including \$575,000.00 in non-economic damages.⁴ The district court reduced the non-economic damages award to \$250,000.00 as required by the limitations in K.S.A. 60-19a02.⁵ Both sides appealed, and the Kansas Supreme Court transferred the case from the Court of Appeals.⁶ On appeal, the patient raised four state constitutional challenges to the validity of K.S.A. 60-19a02.

II. Constitutional Challenges and Analysis

First, the patient argued K.S.A. 60-19a02 violates Section 5 of the Kansas Constitution’s Bill of Rights, which provides: “The right of trial by jury shall be inviolate.”⁷ The *Miller* Court acknowledged that: (a) Section 5 “preserves the jury trial right as it historically

existed at common law when our state's constitution came into existence;" (b) medical malpractice claims were historically triable to a jury; and (c) damages, including non-economic damages, were historically a question of fact for Kansas juries in common-law tort actions.⁸

Without much discussion of the historical nature of jury trials in medical malpractice cases or non-economic damages cases, the Kansas Supreme Court determined that K.S.A. 60-19a02 does indeed "encroach[] upon the rights preserved by Section 5," but such encroachment "does not necessarily render K.S.A. 60-19a02 unconstitutional under Section 5."⁹ Section 5 of the Kansas Constitution mirrors article 1, section 22(a) of the Missouri Constitution, under which the Missouri Supreme Court saw fit to declare a statutory

cap on non-economic damages as an unconstitutional infringement on the right to a jury trial.¹⁰ In a strong dissent, Justice Beier took issue with the *Miller* Court majority's failure to discuss the meaning of the term "inviolate" as used in the Kansas Constitution.¹¹ The majority, however, went on to further analyze the patient's Section 5 challenge in conjunction with her next argument.

Second, the patient argued K.S.A. 60-19a02 violates Section 18 of the Kansas Constitution's Bill of Rights, which provides: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."¹² Specifically, she argued that by placing a \$250,000.00 ceiling on noneconomic damages, the

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VIRGINIA SUPREME COURT LIMITS INSURER'S DUTY TO DEFEND IN CLIMATE CHANGE LAWSUITS

by Jason Scott Johnston and Levi W. Swank*

AES Corp. v. Steadfast Insurance Co.,¹ was a closely watched Virginia Supreme Court case that, as the *New York Times* put it, basically asked whether an insurance company has to "foot the bill for a company facing damages over climate change."² The case was significant for the insurance industry and others interested in climate change litigation, because it was the first of its kind to reach an appellate court. The court ultimately held that an insurer has no duty to defend or indemnify against climate change-related injuries under the terms of its general commercial liability (GCL) insurance policy.

The Case

In *Native Village of Kivalina v. ExxonMobil Corp.*, the Native Village of Kivalina, an Inupiat Eskimo community and tribe located on a barrier island in northwest Alaska, sued The AES Corporation (AES) and other energy companies.³ The lawsuit alleged that carbon dioxide emitted by AES contributed to climate change, which in turn exposed Village land to erosion from sea waves when the water would have otherwise been frozen. Steadfast, AES's GCL insurer, obtained a declaratory judgment from a Virginia trial court, holding that it had no duty to defend or indemnify AES in the *Kivalina* litigation

because AES's alleged contribution to global warming was beyond the scope of the indemnity provided by Steadfast's GCL policy.⁴

The Virginia Supreme Court granted AES's appeal on the issue of whether the injuries alleged in the complaint constituted an "occurrence" covered by its insurance policy. The court affirmed the trial court decision on September 16, 2011,⁵ though it later withdrew its opinion after AES petitioned for rehearing.⁶ Despite much speculation that the Virginia Supreme Court would revise its earlier decision,⁷ it issued a nearly identical opinion in the case's final iteration.

Using the "eight corners" approach, comparing the "four corners" of the complaint with the "four corners" of the policy,⁸ the court looked first to the language of Steadfast's GCL policy. The policy obligated Steadfast to defend AES for property damage caused by an "occurrence," which the policy defined as "an accident, including continuous or repeated exposure to substantially the same general harmful condition."⁹ Other Virginia cases defined an "accident" as "an event which creates an effect which is *not* the natural or probable consequence of the means employed and is not intended, designed, or reasonably anticipated."¹⁰ In its complaint, however,

- 7 KAN. STAT. ANN. §§ 20-119, 20-120.
 8 *Id.*
 9 *Id.*
 10 KAN. CONST. art. III, § 5.
 11 KAN. STAT. ANN. §§ 20-132, 20-3007.
 12 KAN. CONST. art. III, § (a), (e).
 13 KAN. CONST. art. III, § 5(b).
 14 Nelson Lund, *May Lawyers be Given the Power To Elect Those who Choose Our Judges? “Merit Selection” and Constitutional Law*, 34 HARV. J.L. & PUB. POL’Y 1043, 1050 (2011).
 15 *Dool*, 2012 WL 4017118 at *1.
 16 *Dool v. Burke*, No. 10-1286-MLB, 2010 WL 4568993 (D. Kan. Nov. 3, 2010).
 17 Judge Terrence L. O’Brien and Judge Scott M. Matheson, Jr., concurring, Senior Judge Monroe G. McKay, in dissent.
 18 *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626–27 (1969).
 19 *Ball v. James*, 451 U.S. 355, 371 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 729 (1973).
 20 *Id.*
 21 *Dool*, 2012 WL 4017118 at *5.
 22 *Id.* at *10–11.
 23 *Id.*
 24 *Id.*
 25 *Id.* at *5.
 26 *Id.* at *5–7 (interpreting *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny).
 27 *Id.* at *7.
 28 *Id.*
 29 *Id.* at *9.
 30 *Id.* at *12.
 31 *Id.* (quoting Lund, *supra* note 14, at 1053).
 32 *Id.*
 33 *Id.* (quoting Lund, *supra* note 14, at 1055).

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cap denies her a remedy guaranteed by Section 18.¹³ Kansas courts interpret Section 18 to provide “an injured party . . . a constitutional right to be made whole and a right to damages for economic and noneconomic losses suffered.”¹⁴

Acknowledging that the “legislature may modify the common law in limited circumstances without violating Section 5,” the Kansas Supreme Court held that a *quid pro quo* analysis applies to both Section 5 and Section 18 claims.¹⁵ A *quid pro quo* analysis is a two-step examination.¹⁶ First, a court must determine “whether the modification to the common-law remedy or the right to jury trial is reasonably necessary in the public interest to promote the public welfare.”¹⁷ Second, the court must “determine whether the legislature substituted an adequate statutory remedy for the modification to the individual right at issue.”¹⁸ In her dissent, Justice Beier strenuously objected to the use of a *quid pro quo* analysis to the patient’s Section 5 claim, noting that none of the

PENNSYLVANIA HIGH COURT HEARS CHALLENGE TO VOTER ID

by Anita Y. Woudenberg

Voter ID laws, defined as laws requiring photo evidence of identification at the polls, are a growing trend across the country. The first states to adopt such laws were Georgia, Indiana, Kansas, and Tennessee. Proponents claim that the impetus behind these laws is to minimize voter fraud by ensuring that those voting are, in fact, the person they claim to be. Opponents view them as an effort to disenfranchise the poor, the infirmed, and the elderly, analogizing the law to the unconstitutional poll taxes historically used to prevent black Americans from voting.

Of these laws, Indiana’s was the first to be challenged in court on grounds that it was voter

discrimination and a violation of federal due process. In 2008, Indiana’s law withstood constitutional scrutiny when the United States Supreme Court held that Indiana’s law did not impose an undue burden on voters.¹ In 2010, the Indiana Supreme Court upheld the law on the grounds that no evidence of an injury resulting from the law was presented.²

Since these rulings, numerous states have adopted substantially similar laws, including Mississippi, Pennsylvania, South Carolina, Texas, and Wisconsin. This article focuses on the state court challenge to Pennsylvania’s voter ID law.

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nineteen states that have considered whether a statutory damages cap violates the right to a jury trial has applied a *quid pro quo* analysis to the determination.¹⁹

Employing the first step of the *quid pro quo* analysis, the *Miller* Court held K.S.A. 60-19a02's non-economic damages cap is reasonably necessary in the public interest to promote the public welfare because "the potential [for the cap to lower insurance premiums] is enough."²⁰ Applying the second step and noting that K.S.A. 60-19a02 "unquestionably functions to deprive [the patient] of a portion of her noneconomic damages . . . ," the *Miller* Court pointed out the patient did receive compensation for her loss, finding it noteworthy that K.S.A. 60-19a02 does not impose a cap on total damages.²¹ The Supreme Court found "the deprivation caused by K.S.A. 60-19a02, although very real, [to be] limited in scope."²² Further, the court found the Kansas Health Care Provider Insurance Availability Act, which mandates that all health care providers maintain professional liability insurance in certain amounts, in addition to the Kansas Health Care Stabilization Fund's excess insurance coverage requirement, "make the prospects for recovery of at least the statutory minimums directly available as a benefit to medical malpractice plaintiffs when there is a finding of liability," which is "something many other tort victims do not have."²³

Based on precedent finding Kansas' statutory mandatory insurance and excess coverage requirements to provide an adequate statutory remedy for the legislature's modification of common-law remedies, the *Miller* Court then determined that although the legislature has not increased the cap to adjust for inflation, such failure has not "sufficiently diluted the substitute remedy to render the present cap unconstitutional" when viewed in light of the other provisions benefiting medical malpractice plaintiffs.²⁴ Accordingly, the *Miller* Court held that the legislature has substituted an adequate remedy for the modification of Section 5 and Section 18's constitutional protections, thereby rendering K.S.A. 60-19a02 non-violative of those sections.²⁵

For her third constitutional challenge to K.S.A. 60-19a02, the patient argued the cap violates the equal protection provisions of Section 1 of the Kansas Constitution Bill of Rights, which provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."²⁶ Section 1 is only an issue if there is different treatment

among similarly situated individuals.²⁷ The patient argued K.S.A. 60-19a02's cap treats women and the elderly differently. Noting that an equal protection challenge to a facially neutral statute requires a disparate impact traced to a discriminatory purpose—and finding no such discriminatory purpose—the *Miller* Court rejected the patient's disparate impact challenge.²⁸

The patient also asserted an equal protection violation claiming the statutory cap treats personal injury plaintiffs differently based on whether their noneconomic damages are greater or less than \$250,000.²⁹ Finding this assertion true, the Kansas Supreme Court had to determine the appropriate level of scrutiny to apply to the classification.³⁰ While noting that Kansas courts have never held the right to a jury trial under Section 5 and the right to a remedy under Section 18 to be fundamental rights for equal protection purposes (therefore precluding application of a strict scrutiny standard), the *Miller* Court determined that because K.S.A. 60-19a02 is "economic legislation," the rational basis test applies.³¹ Thus, K.S.A. 60-19a02's statutory classification must bear some rational relationship to a valid legislative purpose.³² After applying a rational basis analysis, the Kansas Supreme Court concluded: "We hold that it is 'reasonably conceivable' under the rational basis standard that imposing a limit on noneconomic damages furthers the objective of reducing and stabilizing insurance premiums by providing predictability and eliminating the possibility of large noneconomic damages awards."³³

For her final constitutional attack on K.S.A. 60-19a02, the patient argued the statutory cap violates the doctrine of separation of powers because the cap "abolishes the judiciary's authority to order new trials and robs judges of their judicial discretion by functioning as a statutory remittitur effectively usurping the court's power to grant remittiturs."³⁴ The Kansas Supreme Court rejected this challenge, explaining in part that while the cap prevents a trial court from awarding more than \$250,000.00, it does not prevent the trial court from granting a new trial under the rules of civil procedure.³⁵

III. Implications of the Case

The *Miller* decision brings Kansas in line with the numerous other states that have upheld caps on noneconomic damages as constitutional. In light of neighboring Missouri's recent *Watts* decision striking down similar caps, look for plaintiffs to employ new and creative arguments to bring Kansas medical malpractice

defendants into court in Missouri. Such cases will then involve battles over jurisdiction, venue, and choice of law as they wend their way through the courts.

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Endnotes

- 1 Miller v. Johnson, No. SC 99,818 (Kan. Oct. 5, 2012).
- 2 Watts v. Lester E. Cox Medical Centers, ___ S.W.3d ___, 2012 WL 3101657 (No. SC 91867, Mo. July 31, 2012).
- 3 Miller, Slip op. at 9.
- 4 Id. at 9
- 5 Id.
- 6 Id. at 11.
- 7 Id. at 15.
- 8 Id.
- 9 Id. at 16.
- 10 See Watts, No. SC 91867, slip op. at 10–11.
- 11 Miller, slip op. at 73–75.
- 12 Id. at 24.
- 13 Id.
- 14 Id. at 24.
- 15 Id. at 22, 25.
- 16 Id. at 26.
- 17 Id.
- 18 Id.
- 19 Id. at 76.
- 20 Id. at 28–29.
- 21 Id. at 30.
- 22 Id.
- 23 Id. at 31.
- 24 Id. at 35.
- 25 Id.
- 26 Id. at 35.
- 27 Id.
- 28 Id. at 36.
- 29 Id. at 36.
- 30 Id. at 37–38.
- 31 Id. at 37–38.
- 32 Id. at 38.
- 33 Id. at 40.
- 34 Id. at 40–41.
- 35 Id. at 44.

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remain inviolate”⁹ The *Watts* Court explained this provision “requires analysis of two propositions to determine if the cap imposed by section 538.210 violates the state constitutional right to trial by jury.”¹⁰ First, the court had to determine “whether [the] medical negligence action and claim for non-economic damages is included within ‘the right of trial by jury as heretofore enjoyed.’”¹¹ “Heretofore enjoyed” means “that ‘[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted’ in 1820.”¹² Expounding, the court stated: “In the context of this case, the scope of that right also is defined by common law limitations on the amount of a jury’s damage award.”¹³ Thus, “if Missouri common law [in 1820] entitled a plaintiff to a jury trial on the issue of non-economic damages in a medical negligence action [], [the plaintiff] has a state constitutional right to a jury trial on her claim for damages for medical malpractice.”¹⁴ Second, the court had to determine whether application of section 538.210’s cap on non-economic damages left the right to jury trial “inviolable.”¹⁵

Analyzing the first proposition—whether the plaintiff had a right to a jury trial—the *Watts* Court assessed the state of Missouri common law (and the English common law upon which it was based) at the time of the adoption of the Missouri Constitution in 1820.¹⁶ Under applicable law, courts provided redress for medical negligence and permitted recovery of non-economic damages.¹⁷ Reviewing applicable history, the *Watts* Court concluded: “[C]ivil actions for damages resulting from personal wrongs have been tried by juries since 1820,” and “[the plaintiff’s] action for medical negligence, including her claim for non-economic damages, ‘falls into that category’ and is the same type of case that was recognized at common law when the constitution was adopted in 1820.”¹⁸ Put simply, the right to a jury trial attaches to the plaintiff’s claim for non-economic damages caused by medical negligence.¹⁹