

# STATE COURT Docket Watch®

WINTER  
2012-2013

INSIDE

## MISSOURI SUPREME COURT OVERRULES 20 YEARS OF PRECEDENT IN HOLDING NONECONOMIC DAMAGES CAP IN MEDICAL MALPRACTICE CASES UNCONSTITUTIONAL

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

Overruling its own twenty-year precedent in *Adams By and Through Adams v. Children's Mercy Hospital* (*Adams*), the Missouri Supreme Court, in a four-to-three decision, held in *Watts v. Lester E. Cox Medical Centers* (*Watts*) that the cap on non-economic damages in medical malpractice cases in Mo. Rev. Stat. § 538.210, passed as part of the comprehensive tort reform passed by the Missouri Legislature in 2005, violates article I, section 22(a) of the Missouri Constitution's right to trial by jury.<sup>2</sup> The Missouri Supreme Court also held that Mo. Rev. Stat. § 538.220 grants a trial judge authority to determine the manner by which future damages shall be paid, including what amount shall be paid in future installments.<sup>3</sup>

### I. Facts

In *Watts*, the plaintiff alleged the defendants' medical malpractice caused disabling brain injuries to a newborn.<sup>4</sup> The jury returned a verdict in favor of the

plaintiff and awarded \$1,450,000.00 in non-economic damages and \$3,371,000.00 in future medical damages.<sup>5</sup> The trial court entered judgment reducing the non-economic damage award to section 538.210's \$350,000.00 cap and established a payment schedule under section 538.220 for the future medical damages spanning fifty years.<sup>6</sup> Lodging several state constitutional challenges to section 538.210's cap, including that it violated the Missouri Constitution's right of trial by jury, the plaintiff appealed.<sup>7</sup> The respondents argued that *Adams*, where the Missouri Supreme Court held that section 538.210's statutory cap on non-economic damages does not violate the state constitutional right to a trial by jury, controlled.<sup>8</sup>

### 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 ... continued page 8

Tenth Circuit Rejects Challenge to Judicial Merit Selection Process in Kansas

Kansas Supreme Court Holds Noneconomic Damages Cap in Medical Malpractice Constitutional

Virginia Supreme Court Limits Insurer's Duty to Defend in Climate Change Lawsuits

Pennsylvania High Court Hears Challenge to Voter ID Law

## NEW JERSEY VOTERS OVERWHELMINGLY APPROVE CONSTITUTIONAL AMENDMENT TO OVERTURN JUDICIAL PENSIONS CASE

by Thomas M. Johnson, Jr.\*

On Election Day 2012, New Jersey voters overwhelmingly approved the New Jersey Judicial Salary and Benefits Amendment to the state constitution, which "allow[s] contributions set by law to be taken from the salaries of Supreme Court Justices and Superior Court Judges for their employee benefits." The amendment overturned a recent New Jersey Supreme Court decision, *DePascale v. State of New Jersey*, in which the court struck down the bipartisan Pension and Health

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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.

*\*Mr. Clark is founding principal and Ms. Weinberg is an associate attorney with Clark Law Firm, LLC in St. Louis, Missouri, concentrating in complex commercial litigation and state constitutional litigation. Mr. Clark also is licensed in Kansas. Mr. Clark is the President of the Federalist Society's St. Louis Lawyers Chapter.*

## 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.

# MISSOURI SUPREME COURT HOLDS NONECONOMIC DAMAGES CAP IN MEDICAL MALPRACTICE UNCONSTITUTIONAL

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remain inviolate . . . .”<sup>9</sup> 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.”<sup>10</sup> 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.’”<sup>11</sup> “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.”<sup>12</sup> 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.”<sup>13</sup> 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.”<sup>14</sup> 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.”<sup>15</sup>

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.<sup>16</sup> Under applicable law, courts provided redress for medical negligence and permitted recovery of non-economic damages.<sup>17</sup> 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.”<sup>18</sup> Put simply, the right to a jury trial attaches to the plaintiff’s claim for non-economic damages caused by medical negligence.<sup>19</sup>

The court also determined that Missouri and English common law as of 1820 defined the “scope of [the plaintiff’s] right to a jury trial, like the existence of th[at] right.”<sup>20</sup> Evaluating select precedent, the Missouri Supreme Court concluded “history demonstrates that statutory caps on damage awards simply did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820 guaranteeing that the right to trial by jury as heretofore enjoyed shall remain inviolate, [and therefore] [t]he right to trial by jury ‘heretofore enjoyed’ was not subject to legislative limits on damages.”<sup>21</sup>

Considering the second proposition—whether the right to a jury trial “‘remain[s] inviolate’ when a statutory cap requires courts to reduce the jury’s verdict”—the *Watts* Court explained: “[I]f the statutory cap changes the common law right to a jury determination of damages, the right to trial by jury does not ‘remain inviolate’ and the cap is unconstitutional.”<sup>22</sup> One of a jury’s “primary functions is to determine the plaintiff’s damages,” so “the amount of non-economic damages is a fact that must be determined by the jury and is subject to the protections of the article I, section 22(a) right to trial by jury.”<sup>23</sup>

The *Watts* Court also explained: “Once the right to a trial by jury attaches, . . . the plaintiff has the full benefit of that right free from the reach of hostile legislation.”<sup>24</sup> Because section 538.210’s cap on a jury’s award of non-economic damages “operates wholly independent of the facts of the case,” it “directly curtails the jury’s determination of damages and, as a result, necessarily infringes on the right to trial by jury when applied to a cause of action to which the right to jury trial attaches at common law.”<sup>25</sup> Since Missouri’s common law in 1820 “did not provide for legislative limits on the jury’s assessment of civil damages, Missouri citizens retain their individual right to trial by jury subject only to judicial remittitur based on the evidence in the case.”<sup>26</sup>

The court’s determination of section 538.210’s constitutional invalidity resulted in its conclusion that *Adams* violates article I, section 22(a)’s right to a jury determination of damages.<sup>27</sup> The *Watts* Court rejected the *Adams* Court’s reasoning that section 538.210’s cap is substantive law, not a fact issue, and it does not limit the jury’s constitutional role in determining damages because “the jury remains free to award damages consistent with the evidence in the case” and the trial court applies the cap after the jury fulfills its constitutional duty of determining damages.<sup>28</sup>

After holding section 538.210’s cap on noneconomic damages in medical malpractice actions unconstitutional, the Missouri Supreme Court interpreted section 538.220 to give a trial court the discretion to consider the needs of a medical malpractice plaintiff and the facts of a particular case in deciding what portion of future medical damages will be in a lump sum and what portion will be paid in installments.<sup>29</sup> Reviewing the trial court’s decision to require a payment schedule spanning fifty years at an inconsistent interest rate, the Missouri Supreme Court held that the trial court abused its discretion because its payment schedule “guaranteed that the jury’s damages award would not actually cover [ ] future medical damages and, therefore, would take from [the plaintiff] the full value of the jury’s award.”<sup>30</sup> Accordingly, the *Watts* Court remanded the case for the entry of a new periodic payment schedule to guarantee the plaintiff’s receipt of the benefit of the jury’s award for future medical care.<sup>31</sup>

### III. Dissent—Majority Leaps into a New Era of Law

In a strong dissent, the Honorable Mary R. Russell, joined by Judges Breckenridge and Price, argued that *Adams* controls the decision and that the majority opinion “overrules this Court’s well-reasoned, longstanding precedent in *Adams* without persuasive justification” and described the opinion as “a wholesale departure from the unequivocal law of this state and leaps into a new era of law.”<sup>32</sup>

### IV. The Swing Vote

Commentators have noted that a swing judge cast the deciding vote in the 4-3 decision.<sup>33</sup> A member of the court, Judge Zel Fischer, a Republican appointee, recused himself for reasons unknown.<sup>34</sup> The Chief Justice, a Democrat appointee who wrote the majority opinion, appointed a state trial court judge, Judge Sandra Midkiff, a Democrat appointee, to sit on the court in place of Judge Fischer in this case.<sup>35</sup> Judge Midkiff voted with the majority to overrule the *Adams* case and find the statute unconstitutional.<sup>36</sup>

### V. Implications of the Case

The *Watts* decision brings Missouri into the split among jurisdictions on the issue of whether statutory caps on noneconomic damages violate an individual’s constitutional right to a jury trial. The decision guts a major component of tort reform passed by the Missouri Legislature in 2005. Since the passage of the tort reform damages caps, Plaintiffs’ lawyers have been reluctant to

bring medical malpractice cases. It is widely believed that the removal of those caps will lead to an increase in medical malpractice cases being brought in Missouri.

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## Endnotes

1 Adams By and Through Adams v. Children's Mercy Hospital, 832 S.W.2d 898 (Mo. banc 1992).

2 Watts v. Lester E. Cox Medical Centers, No. SC 91867, slip op. at 2-3 (Mo. July 31, 2012).

3 *Id.* at 3.

4 *Id.* at 1.

5 *Id.*

6 *Id.* at 1-2.

7 *Id.* at 2.

8 *Id.*

9 *Id.* at 6.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* at 6-7.

14 *Id.* at 7.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 8.

19 *Id.*

20 *Id.*

21 *Id.* at 10.

22 *Id.* at 7.

23 *Id.* at 10-11.

24 *Id.*

25 *Id.* at 11-12.

26 *Id.* at 12.

27 *Id.*

28 *Id.* at 14. *See also id.*, dissenting op. at 3-4 (Russell, J., concurring in part and dissenting in part).

29 *Id.* at 26 (majority opinion).

30 *Id.* at 26.

31 *Id.* at 26-27.

32 *Id.*, dissenting op. at 2 (Russell, J., concurring in part and dissenting in part).

33 Blythe Bernhardt & Virginia Young, *Medical Malpractice Cap is Struck Down by Missouri Supreme Court*, ST. LOUIS POST-DISPATCH, Aug. 1, 2012, available at <http://www.stltoday.com/news/state->

[and-regional/missouri/medical-malpractice-cap-is-struck-down-by-missouri-supreme-court/article\\_7bb71afd-add3-5cde-a253-07faade808c.html](http://www.stltoday.com/news/state-and-regional/missouri/medical-malpractice-cap-is-struck-down-by-missouri-supreme-court/article_7bb71afd-add3-5cde-a253-07faade808c.html)); Scott Lauck, *Court Tosses Medical Malpractice Damage Cap*, Missouri Lawyers Weekly, Aug. 6, 2012, at 1.; Scott Lauck, *Circuit Judge Lands Starring Role in Damage Cap Case*, Missouri Lawyers Weekly, Aug. 6, 2012, at 9.

34 *Id.*

35 *Id.*; Watts v. Lester E. Cox Medical Centers, No. SC 91867 (Order dated March 13, 2012 signed by Chief Justice Richard B. Teitelman).

36 *Id.*

## NEW JERSEY VOTERS OVERWHELMINGLY APPROVE CONSTITUTIONAL AMENDMENT TO OVERTURN JUDICIAL PENSIONS CASE

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Care Benefits Act, to the extent that it required judges to pay more for their employee benefits.<sup>1</sup> In *DePascale*, the court noted that Article VI of the state constitution prohibits the Legislature from reducing the “salaries” of judges in active service, and held that increases in health care and pension contributions effectively reduce judicial “salaries” by reducing take-home pay. In particular, the court emphasized that the framers of the Constitution adopted Section VI to protect the independence of the judiciary, which the court believed was threatened by the Act.<sup>2</sup>

The decision provoked a vigorous dissent (the vote was 3-2) by Justice Anne Patterson, Governor Chris Christie's first appointee to the court, who criticized the majority for disregarding the “strong presumption of constitutionality” afforded to acts of the legislature, “[p]articularly in matters of fiscal policy.”<sup>3</sup> Also, in Justice Patterson's view, a “law that governs the pension and health benefit contributions of more than one-half million state and local government employees” cannot be understood as an “assault” on judicial independence.<sup>4</sup>

This article provides a brief history of the Pension and Health Care Benefits Act and the *DePascale* litigation challenging it. It also discusses ways in which this decision is likely to have continuing significance in the debate in New Jersey about the proper role of the judiciary and the