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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*[1] (*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.[2] 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.[3]

I. Facts

In *Watts*, the plaintiff alleged the defendants' medical malpractice caused disabling brain injuries to a newborn.[4] 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.[5] 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.[6] 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.[7] 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.[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

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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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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.

**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 is the President of the Federalist Society's St. Louis Lawyers Chapter.*

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 Bernhard & 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-a253-07faaade808c.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 Constiutional 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.[1] 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.[2]

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."[3] 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.[4]

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

composition of the current Supreme Court, which is likely to change in the coming year.

I. The Pension and Health Care Benefits Act

On June 28, 2011, Governor Chris Christie signed into law the Pension and Health Care Benefits Act, a bipartisan reform of the state's underfunded employee pension and health care systems. The Act requires all state employees, including judges, to contribute a higher percentage of their wages to public benefit plans in which they participate. By enacting the Act, the Legislature intended to take an initial step towards ensuring the future solvency of public benefit plans for all state employees and to address fiscal challenges confronting the state during difficult economic times. Over a seven-year period, the Act increases pension contributions for sitting justices and judges from three percent to twelve percent of salary, and judicial contributions to health care benefits from 1.5 percent of salary to thirty-five percent of the required premium.[5] Unlike on previous occasions when the Legislature increased judicial contributions to benefits, the Act did not provide judges with a corresponding increase in wages. Thus, the Act operates to reduce the take-home pay of judges in active service.

II. The Trial Court's Decision

Soon after the Act passed, Superior Court Judge Paul DePascale sued the state, arguing that the law violates Article VI of the New Jersey Constitution, which provides that the "salaries" of judges in active service "shall not be diminished during the term of their appointment."[6]

A trial court agreed with Judge DePascale, holding that it violated the Constitution to increase a sitting judge's mandatory contributions to benefits without an offsetting increase in wages. The trial court based its decision in part on what it perceived to be the "clear and unambiguous" meaning of the word "salaries" in Article VI.[7] In particular, the court reasoned that the term "salary" was at times used in statements by the drafters of the Constitution and in subsequent New Jersey statutes interchangeably with the broader term "compensation," which all parties agreed would cover health and pension benefits.[8] The court further claimed that the "precise issue in this case, whether 'salary' as applied to judges includes pension and health benefits, is one of first impression in New Jersey," but found persuasive a recent state appellate decision holding that a statute protecting the "salary" of municipal employees was broad enough to cover sick, vacation, and personal days.[9]

In addition, the court noted that the overriding purpose of Article VI was to promote judicial independence, and that "the drafters [of the Constitution] intended to give the judges complete protection and every possible safeguard" against legislative interference.[10] In reaching this conclusion, the court looked to the 1947 Constitutional Convention proceedings, which it identified as "perhaps the best indication of drafter[s'] intent."[11] Reviewing those proceedings, the trial court pointed to several statements by drafters identifying the "independence . . . of the judicial branch" as a core purpose underlying Article VI.[12]

Following this decision, the state supreme court took the unusual step of accepting the case for immediate review (or "direct certification"), bypassing the state's intermediate court of appeals, and ordering expedited briefing.

III. The Supreme Court's Decision

The New Jersey Supreme Court affirmed the trial court's decision.[13] The court focused heavily on the purpose of judicial independence served by Article VI of the New Jersey Constitution. The court reached back to the Declaration of Independence, noting that "one of the grievances specifically laid out against King George III was that '[h]e has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.'"[14] Thus, the framers of the U.S. Constitution "were anxious to preserve the independence of the judiciary by ensuring that a judge's livelihood would not be totally dependent on the other branches of government."[15]

The court reasoned that Article VI of the state constitution served a similar function—"to protect judges from attempts by the two other branches of government to influence judicial decision-making through economic means."[16] The court rejected the argument that the term "salaries" in the 1947 Constitution (which remains in effect today) was intended to be any narrower than the term "compensation" in the 1844 Constitution that preceded it.[17] In summary, the court concluded that "nowhere in the annals of the Constitutional Convention is there any evidence that the 1947 No-Diminution Clause was intended to serve a purpose different from the one contained in the Federal Constitution or in our 1844 Constitution."[18]

The court stated that it was "fully cognizant of the serious fiscal issues that confront the State and that led to the passage" of the Act, and that "those issues require resolution."[19] But the court ruled that any such solutions must "conform to the requirements of our Constitution," and concluded that the Act could not be constitutionally applied to reduce the take-home pay of a sitting justice or judge.[20]

Justice Patterson, joined by Justice Hoens, dissented. Justice Patterson argued that the majority did not accord sufficient deference to the Legislature in reviewing the constitutionality of economic legislation.[21] Justice Patterson also looked to how the word "salary" had been used in the New Jersey Constitution over time and in contemporary dictionaries and concluded that it was understood as a "concept distinct from and independent of pension and health benefits."[22] Judge Patterson also identified passages in the 1947 Constitutional Convention proceedings in which delegates had expressly disapproved of enshrining judicial pension rights in the Constitution, and preventing future Legislatures from altering them.[23] As one delegate put it: "Who knows that in some time to come, with depression staring the State in the face and thousands of our citizens needing the necessaries of life, it might not be advisable to alter the pension structure?"[24] Thus, Justice Patterson concluded that the text and extrinsic evidence of the framer's intent supported the constitutionality of the Act.[25] Finally, although Justice Patterson shared her colleagues' concern for judicial independence, she did not believe the Act could be construed as a "legislative attack" on the judiciary, because it applied equally to hundreds of thousands of state employees—including the judges' own staff.[26]

IV. Significance of the Case

DePascale is no longer good law, because New Jersey voters overturned the decision by amending the Constitution by ballot earlier this month. Nevertheless, the court's decision is likely to have continuing significance in political debates about the future of the New Jersey Supreme Court.

The manner in which the decision was overturned is significant. The case was controversial since its inception because it was a lawsuit brought by judges and decided by judges to determine how much judges need to pay the state to fund their own health care and pension benefits. Following the court's decision, the New Jersey Legislature voted by large, bipartisan majorities to place a constitutional amendment on the ballot to overturn the decision, and an overwhelming number of New Jersey voters voted in favor the amendment—with one unofficial tally showing 82.58% voting yes and 17.42% voting no. The most significant constituencies opposing the amendment were the New Jersey Bar Association and the judges themselves. The quick and decisive nature in which the case was overturned indicated widespread public dissatisfaction with the outcome. Thus, the case is likely to continue to shape public attitudes about the court.

The case may also play a role when Governor Christie appoints nominees to fill the two current vacancies on the Supreme Court, which he is likely to do this year. Governor Christie has vowed to appoint judges who will respect the Legislature's prerogative to make key fiscal decisions on behalf of the State, such as how much money to spend on public education—an issue on which the court has played an active role for over 30 years. The Governor may claim the vote on this amendment (from both voters and legislators) as a mandate for judges who respect the Legislature's choices about how best to allocate the State's scarce resources.

**Mr. Johnson practices appellate litigation and employment law in Washington, DC.*

Endnotes

1 *See* DePascale v. State of New Jersey, 47 A.3d 690 (N.J. 2012).
2 *Id.* at 692.
3 *Id.* at 706 (Patterson, J., dissenting).
4 *Id.*
5 *See id.* at 693.
6 N.J. Const. art. VI, § 6.
7 *Id.* at *28–29.
8 *Id.* at *23–28.
9 *Id.* at *32 (citing Hyland v. Twp. of Lebanon, 419 N.J. Super. 375 (App. Div. 2011)).
10 DePascale v. State, No. MER-L-1893-11, 2011 N.J. Super. Unpub. LEXIS2626 (Law Div. Oct. 17, 2011).
11 *DePascale*, N.J. Super. Unpub. LEXIS2626, at *21.
12 *See id.*
13 The majority decision was signed jointly by Justices LaVecchia and Albin, and Judge Wefing, who is temporarily assigned to fill a vacancy on the Court.
14 *See DePascale*, 47 A.3d at 696.
15 *Id.*
16 *Id.* at 697.
17 *See id.* at 698.
18 *Id.*
19 *Id.* at 704.
20 *Id.* at 704–05.
21 *See id.* at 708 (Patterson, J., dissenting).
22 *Id.* at 710.

23 *See id.* at 716–17.
24 *Id.* at 717.
25 *See id.* at 718.
26 *Id.* at 723.

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

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property damage was caused by a fortuitous act, "there is no 'occurrence' within the meaning of a GCL policy."[15]

The Concurrence

While Justice Mims agreed with the majority's reasoning, he disagreed that the reasoning could be limited to the specific CGL policy and the specific facts alleged in the complaint. "Our jurisprudence," he prophesied, "is leading inexorably to a day of reckoning that may surprise many policy holders."[16] This "surprise" is that negligence may never be covered by a GCL insurance policy because proximate causation, a necessary prerequisite to a finding of negligence, requires that an alleged injury be the "natural or probable consequence" of an action. According to Justice Mims, the implication of *AES Corp.* is that, because Virginia equates an "occurrence" with an "accident," GCL "occurrence" provisions do not cover negligence.

The Limited Significance of *AES Corp.*

It is possible that the Virginia Supreme Court's decision will be analyzed and consulted by judges and litigators in other jurisdictions. But, for the reasons set forth below, the author believes its significance is likely to be limited outside Virginia. First, the GCL policy at issue in *AES Corp.* defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful condition."[17] Based on this provision, the Virginia Supreme Court decided that "occurrence" in the GCL policy simply means "accident." It is not the only court to equate these two terms, and the history of the standard GCL policy suggests that the expansion of "accident" to include "occurrence" was intended simply to make clear that an accident could be a continuous rather than abrupt event. Hence, although some observers might say that it might seem to make the term "occurrence" mere surplusage—violating a canon of contract interpretation—the court's equation of "accident" with "occurrence" is defensible on these grounds.

What is much more controversial is the Virginia Supreme Court's interpretation of an "accident" as something that is not the "natural and probable consequence" of the insured's action, but is instead something that happens "unexpectedly."[18] The court took this definition from two past cases interpreting the meaning of the term "accident." The first of these cases does not involve an insurance contract, but rather a state workers' compensation statute.[19] As for the second case, a life insurance policy covering death by accident is a different kind of contract than is the comprehensive GCL at issue in *AES Corp.*, and so on very basic principles of contract interpretation other courts would likely hold that the two contracts should be interpreted differently.[20]

A final reason that the Virginia Supreme Court's opinion in *AES Corp.* will likely have little impact outside the Commonwealth is that judicial adoption of the alternative interpretation of "occurrence" and "accident" under the commercial GCL policy does not necessarily mean that insurers will have a duty to defend against global warming lawsuits such as *Kivalina*. The standard commercial GCL policy (including the one at issue in *AES Corp.*) also contains a "pollution exclusion" clause excluding from coverage "claims of property damage" arising out of the "discharge, release, or escape of pollutants," where "pollutants" are defined to include any "gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes . . . ."[21] Because every human being on the planet emits carbon dioxide when she exhales, there are arguments to be made that carbon dioxide emissions are not a "gaseous irritant" or "contaminant" falling within the GCL pollution exclusion, but others might argue that, given the structure and history of the GCL policy, it is this clause, if any, where the harm allegedly caused by such emissions should be excluded from coverage.

**Jason Scott Johnston is a Professor at the University of Virginia School of Law. Levi W. Swank is a third-year law student at the University of Virginia.*

Endnotes

1 725 S.E.2d 532 (Va. 2012).
2 Lawrence Hurley, *Va. Court Rules That Insurance Doesn't Cover Global Warming Claims*, N.Y. Times, Sept. 16, 2011, http://www.nytimes.com/gwire/2011/09/16/16greenwire-va-court-rules-that-insurance-doesnt-cover-glo-97999.html.
3 *See* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Cal. 2009).
4 *See* Steadfast Ins. Co. v. AES Corp., 2010 Va. Cir. LEXIS 35 (Va. Cir. Ct. Feb. 5, 2010).