DON'T STOP 'TIL THE MEDICAL MALPRACTICE VICTIM GETS ENOUGH: *WATTS V. LESTER E. COX MED. CTRS.*, 376 S.W.3D 633 (MO. 2012), AND WHY CAPS ON NONECONOMIC DAMAGES VIOLATE THE RIGHT TO TRIAL BY JURY IN MEDICAL MALPRACTICE CASES

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I. INTRODUCTION

Imagine you are seriously injured due to the services of a health care provider. You have suffered debilitating brain injuries due to the health care provider's negligence, which could have been prevented had the health care provider followed proper procedure. Subsequently, you file suit against the health care provider. After the presentation of evidence by both your attorney and that of the health care providers, the jury finds the health care providers liable and returns a verdict for $4 million in past and future medical damages and $1.5 million for noneconomic damages, due to your pain and suffering. Then, the court, despite the jury's determination of damages, reduces the amount of your awarded noneconomic damages to $350,000 due to a state law. The above hypothetical is very much a reality for a number of medical malpractice plaintiffs in Missouri,[1] whose jury-determined awards for noneconomic damages above $350,000 have been reduced pursuant to a Missouri statute.[2]

These limits apply regardless of the nature of the injury caused and act to limit the noneconomic damages awarded to a plaintiff for nonpecuniary losses, such as the pain and suffering, inconvenience, loss of consortium,

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1. Adams By and Through Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992) (mother and daughter plaintiffs' award of $13,905,000 for noneconomic damages due to medical malpractice reduced to $860,000 in accordance with section 538.210); Sanders v. Ahmed, 364 S.W.3d 195 (Mo. 2012) (husband of decedent's award of $9.2 million in noneconomic damages in a wrongful death suit reduced to $1,265,207.64 pursuant to section 538.210).
2. MO. ANN. STAT. § 538.210 (West 2005) ("In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than $350,000 for noneconomic damages irrespective of the number of defendants.").

and decreased quality of life caused by a defendant health care provider's negligently provided services.[3]

Similar limits on damages in medical injury tort cases have become commonplace in the United States, as virtually every state has adopted tort reform measures that apply regardless of the injury the plaintiff suffers.[4] These limits have been passed principally to combat the sharp rise of medical malpractice insurance rates.[5] Supporters of the limits argue that, despite a lack of evidence and the existence of contrary evidence, limiting damages will help cut insurance premiums[6] by deterring "frivolous" medical malpractice claims and restricting "excessive" damage awards given by juries in such cases.[7] However, studies by the non-partisan U.S. Government Accountability Office (GAO) indicated that, because of the multiple factors that go into whether medical malpractice premiums increase or decrease, there is no direct correlation between a cap on noneconomic damages and lower medical malpractice premium rates.[8] Moreover, another study by the GAO and a study by Martin Weiss, chairman of independent insurance-rating agency Weiss Ratings, discovered medical malpractice insurance rates rose more quickly in states

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3. Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damage Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 516 (2005).
4. Stephen K. Meyer, *The California Statutory Cap on Noneconomic Damages in Medical Malpractice Claims: Implications on the Right to a Trial by Jury*, 32 SANTA CLARA L. REV. 1197, 1198 (1992) ("The professional liability insurance crisis of the last two decades prompted all but one state to prescribe reform legislation aimed at remedying the unmanageable insurance rates levied against health care services.").
5. James L. "Larry" Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 460 (2004).
6. Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury*, 31 U. DAYTON L. REV. 307, 309 (2005) (citing Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L.J. 1263, 1271-72 (2004)).

   > It is hard to understand why the interest groups clamoring for tort reform have been so successful in convincing legislatures that limiting damages for the few negligently injured people whose cases go to trial, win, and recover more noneconomic damages than the amount of a damages cap, will alleviate the periodic cycles that afflict the liability insurance markets.

   Id.
7. Kenneth Owen O'Connor, *Funeral for a Friend: Will the Seventh Amendment Succumb to a Federal Cap on Non-Economic Damages in Medical Malpractice Actions?*, 4 SETON HALL CONST. L.J. 97, 108 (citing Kenneth Jost, *Warring Over Medical Malpractice*, 79 A.B.A. J. 68 (May 1993)).
8. U.S. GEN. ACCOUNTING OFFICE, GAO 03 702, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 4-5 (2003) [hereinafter GAO FACTORS REPORT], *available at* http://www.gao.gov/assets/240/238724.pdf (noting that multiple factors, including decreased interest rates in investment income of medical malpractice insurers, the high level of competition among insurers, and rapidly rising reinsurance rates, contributed to the increasing costs of medical malpractice insurance).

with a cap on noneconomic damages than those that do not have such a cap, which directly contradicts the supporters' claims.[9]

Critics of caps on noneconomic damages also argue that the caps will not effectively reduce medical malpractice premiums because very few claims are filed for medical injuries[10] and even fewer result in an award above the cap.[11] Thus, very few cases will likely result in money being saved by the medical malpractice insurers as a result of the caps on noneconomic damages.

Furthermore, critics have pointed out that, despite the supporters' claims of frivolous lawsuits, the number of medical malpractice cases, as well as tort cases in general, filed per capita has dropped in recent years.[12] Specifically, in Missouri, the number of newly filed medical malpractice claims, which peaked at 3216 in 2005, had fallen to 1708 in 2010, which is below the historical average.[13]

Additionally, although the supporters wanted to cut down on frivolous suits, caps on noneconomic damages have no effect on frivolous suits because non-meritless suits are most often dismissed or settled before damages are determined.[14] Thus, medical malpractice insurance providers

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9. U.S. GEN. ACCOUNTING OFFICE, GAO 03 836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 34-36 (2003) [hereinafter GAO IMPLICATIONS REPORT], *available at* http://www.gao.gov/new.items/d03836.pdf (noting that malpractice claims payments against all physicians between 1996 and 2002 tended to be lower and grew less rapidly in states with noneconomic damages); MARTIN D. WEISS, MELISSA GANNON & STEPHANIE EAKINS, MEDICAL MALPRACTICE CAPS: THE IMPACT OF NON-ECONOMIC DAMAGE CAPS ON PHYSICIAN PREMIUMS, CLAIMS PAYOUT LEVELS, AND AVAILABILITY OF COVERAGE 7-8 (2003), *available at* http://www.weissratings.com/pdf/malpractice.pdf (the median of all states' annual premiums for standard medical malpractice coverage increased thirty-six percent, whereas premiums in states with noneconomic damages caps rose forty-eight percent).

10. Ferdon *ex rel.* Petrucelli v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 472-73 (Wis. 2005) (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 15 (2003) ("Most victims of medical error do not file a claim . . . only 1.53% of those who were injured by medical negligence even filed a claim.")); JOINT ECON. COMM., THE PERVERSE NATURE OF THE MEDICAL LIABILITY SYSTEM (2005) (concluding that only three percent of injured patients actually file suit against their health care provider).

11. MO. DEP'T OF INS., MEDICAL MALPRACTICE INSURANCE IN MISSOURI: THE CURRENT DIFFICULTIES IN PERSPECTIVE 20 (2003) (only 37 of 1288 (2.8 percent) medical malpractice claims closed in Missouri in 2001 were over $250,000 and only 6 (.4 percent) cases reached Missouri's noneconomic cap of $540,000); U.S. GEN. ACCOUNTING OFFICE, GAO/HRD 87-55, MEDICAL MALPRACTICE: CHARACTERISTICS OF CLAIMS CLOSED IN 1984, at 50 (1987) (only 2.1 percent of noneconomic damages awards were over $200,000).

12. Geoff Boehm, *Debunking the Myths: Unraveling the False Premises Behind "Tort Reform,"* YALE J. HEALTH POL'Y L. & ETHICS 357, 358 (2005) (citing NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002, at 28 (2002)).

13. MO. DEP'T OF INS., FIN. INSTS. & PROF'L REGULATION, 2010 MEDICAL MALPRACTICE REPORT, at v (2011).

14. Kevin J. Gfell, *The Constitutional and Economic Implications of a National Cap on Non Economic Damages in Medical Malpractice Actions*, 37 IND. L. REV. 773, 779 (2004).

must still spend money to defend meritless claims,[15] while some individuals who are seriously injured and deserve to receive more than the cap amount in damages will not be adequately compensated.[16]

As evidenced, caps on noneconomic damages have engendered much controversy, in terms of whether they actually reduce the medical malpractice insurance costs they were designed to reduce[17] and what negative effects they may cause.[18] In addition to this, caps on noneconomic damages are alleged to violate the constitutional guarantee of a right to trial by jury because they allow a court to change the jury's award of damages.[19] In deciding whether noneconomic caps violate the right to a jury trial, state courts have varied in their decisions, with some holding that caps do violate the right to a trial by jury and others finding caps constitutional.[20]

In *Watts v. Lester E. Cox Medical Centers*, the Missouri Supreme Court analyzed whether the use of a statutory cap that limits the amount of noneconomic damages a plaintiff can recover in medical negligence claims to $35,000, provided for in Missouri Statute section 538.210, violated the Missouri Constitution's right to trial by jury.[21] The decision in *Watts* was notable because it overruled *Adams v. Children's Mercy Hospital* and held statutory caps on noneconomic damages violate the right to a jury trial.[22] Additionally, the *Watts* decision provides the framework that future courts can use to come to a similar holding. Furthermore, *Watts* will help ensure seriously injured victims of medical negligence in Missouri are adequately compensated for their pain and suffering.

This Note will examine the Missouri Supreme Court's decision in *Watts* and argue why the court's determination that caps on noneconomic

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15. Melissa C. Gregory, *Capping Noneconomic Damages in Medical Malpractice Suits is Not the Panacea of the "Medical Liability Crisis,"* 31 WM. MITCHELL L. REV. 1031, 1046 (2005).
16. Gfell, *supra* note 14, at 775.
17. GAO IMPLICATIONS REPORT, *supra* note 9, at 34-36 (malpractice claims payments against all physicians between 1996 and 2002 tended to be lower and grew less rapidly in states with noneconomic damages); WEISS ET AL., *supra* note 9, at 7-8 (the median of all states' annual premiums for standard medical malpractice coverage increased thirty-six percent, whereas premiums in states with noneconomic damages caps rose forty-eight percent).
18. Gfell, *supra* note 14, at 779 (concluding that some individuals who are seriously injured and deserve to receive more than the cap amount in damages will not be adequately compensated).
19. Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989); Lakin v. Senco Prod., Inc., 987 P.2d 463 (Or. 1999); Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991); Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987).
20. Among the states that have found noneconomic caps to be an unconstitutional violation of the right to a trial by jury are Washington, Oregon, Alabama, and Florida. *See Sofie*, 771 P.2d 711; *Lakin*, 987 P.2d 463; *Moore*, 592 So. 2d 156; *Smith*, 507 So. 2d 1080. The states that have held noneconomic caps to be constitutional are Nebraska, Idaho, Ohio, and Maryland. *See* Gourley *ex rel*. Gourley v. Neb. Methodist Health Sys., 663 N.W.2d 43, 75 (Neb. 2003); Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115 (Idaho 2000); Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007); Murphy v. Edmonds, 601 A.2d 102 (Md. 1992).
21. Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636 (Mo. 2012).
22. *Id.* at 646.

damages in medical malpractice claims violate the constitutional right to a jury trial is appropriate. Before examining *Watts*, Section II of this Note will examine the history of the right to trial by jury in Missouri, as currently embodied in Article I, Section 22(a) of the Missouri Constitution, along with discussing what Missouri courts have determined it guarantees. Section II will then provide insight into section 538.210 and the relevant case law showing the conflicts between section 538.210's caps and Article I, Section 22(a)'s right of trial by jury. Section III recounts the Missouri Supreme Court's decision in *Watts* and outlines the reasoning employed by the court in its finding that a cap on noneconomic damages violates the right to trial by jury. Finally, Section IV will provide an analysis of the case and explain why the decision in *Watts* was appropriate by focusing not only on why statutory caps on noneconomic damages deprive an individual of his right to trial by jury, but also how caps have not lowered medical malpractice insurance premiums and have discriminated against seriously injured medical malpractice victims; thus, these caps should be repealed.

II. LEGAL BACKGROUND

To fully understand the impact of the decision in *Watts*, it is necessary to understand the right to trial by jury as guaranteed in Article I, Section 22(a) of the Missouri Constitution as well as understanding what tasks the cap created by section 538.210 performs. It is also important to understand the relevant case law concerning the constitutionality of section 538.210's cap on noneconomic damages in regards to whether it infringes on the right to trial by jury. The case law discussed will provide context as to how the rationale in *Watts* was reached. Although *Watts* also involved a ruling on the specific periodic payment schedule awarded by the trial court pursuant to section 538.220,[23] it will only be mentioned briefly in Section III because it is outside the main focus of this Note.

A. The Missouri Constitution and the History of the Right to Trial by Jury

The right to a jury trial in Missouri predates Missouri achieving statehood.[24] The right to jury trial was recognized by the Louisiana Territory in March 1804 in a provision that allowed for jury trials in civil

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23. MO. ANN. STAT. § 538.220(2) (2005). The statute reads:
> At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future damages be paid in whole or in part or in periodic or installment payments if the total action exceeds one hundred thousand dollars.

Id.

24. State *ex rel.* Diehl v. O'Malley, 95 S.W.3d 82, 85 (Mo. 2003) (citing Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 MO. L. REV. 595, 596 (2002); MO. TERR. LAWS 4, at 5 (1804)).

cases if either party requested it.[25] After the Louisiana Territory government was established, the right was altered to provide for jury trials in civil cases when over $100 was in controversy and "either of the parties require[d] it."[26] After Missouri achieved statehood, the right to a jury trial became embodied in Article I, Section 22(a) of the Missouri Constitution.[27]

Article I, Section 22(a) provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate."[28] Missouri courts have established that this clause preserves and guarantees the right of trial by jury as it existed under the common law prior to the adoption of the constitution in 1820, and the right cannot be taken away by statute.[29]

Thus, the first step in the analysis of the right to a jury trial in civil actions is to use a historical approach to determine whether the right exists by examining the common law in Missouri at the time of the adoption of the constitution,[30] which was based on the common law of England as of 1607.[31] This mirrors the approach used by the U.S. Supreme Court to determine the right to trial by jury.[32]

In civil cases, Missouri courts have held that the first determination to make is whether the claim being sought can be characterized as essentially "legal," where a jury trial is available, or "equitable," where it is not available.[33] Generally, claims for damages, including noneconomic and punitive damages, are considered "legal,"[34] as was the case in common law, whereas claims for injunctive relief are considered equitable and not entitled to a jury trial.[35] Moreover, Missouri courts have identified specific types of actions that are and are not triable by a jury.[36] Among the suits

25. MO. TERR. LAWS 4, at 5 (1804).
26. *O'Malley*, 95 S.W.3d at 85.
27. MO. CONST. art. I, § 22(a).
28. *Id.*
29. Renshaw v. Reynolds, 297 S.W. 374, 375-76 (Mo. 1927); Hammons v. Ehney, 924 S.W.2d 843, 848 (Mo. 1996); *O'Malley*, 95 S.W.3d at 85.
30. *O'Malley*, 95 S.W.3d at 85.
31. Lee v. Conran, 111 S.W. 1151, 1153 (Mo. 1908) (right to trial by jury in Article I, Section 22(a) "means that all the substantial incidents and consequences, which pertained to the right of trial by jury, are beyond the reach of hostile legislation, and preserved in their ancient substantial extent as existed at common law").
32. *See* Dimick v. Schiedt, 293 U.S. 474, 476 (1935).
33. Plaza Exp. Co. v. Galloway, 280 S.W.2d 17, 24 (Mo. 1955) (citing *Lee*, 111 S.W. at 1153).
34. Jaycox v. Brune, 434 S.W.2d 539, 542 (Mo. 1968).
35. Downey v. United Weatherproofing, 253 S.W.2d 976, 983 (Mo 1953).
36. *See* Vannoy v. Swift & Co., 201 S.W.2d 350, 354 (Mo. 1947); State *ex rel.* Tolbert v. Sweeney, 828 S.W.2d 929, 933 (Mo. 1992) (concluding that the right to trial by jury did not attach to statutorily created actions because there was no such right at common law); Turnbull v. Car Wash Specialties, LLC, 272 S.W.3d 871, 873-74 (Mo. Ct. App. 2008) (stating that Missouri's constitutional right to trial by jury does not extend to equitable causes of action).

recognized as subject to a jury trial are legal and medical malpractice claims.[37]

Along with guaranteeing the benefits of a right to trial by jury in actions recognized at common law, Article I, Section 22(a) also brought with it the limitations imposed on the right to a jury trial that were present at common law.[38] One such limitation imposed on jury trials was the ability of the court to exercise a check on the jury by granting new trials in cases where the verdict was deemed inconsistent with the evidence, through a process known as judicial remittitur.[39] Although judicial remittitur was recognized at common law and thus attaches to the right to trial by jury in both federal and Missouri cases, the U.S. Supreme Court determined very little common law precedent existed to help guide courts in the United States in deciding when judicial remittitur is appropriate.[40]

Although Missouri courts have affirmed that the jury's role in civil cases consists of fact-finding duties, including determining both liability and damages,[41] Missouri has found judicial remittitur appropriate in certain instances and inappropriate in others.[42] However, the Missouri courts have not provided a bright line standard for when judicial remittitur should be utilized by the courts.[43]

In 1985, due to the inconsistent and uneven results in the application of remittitur, the Missouri Supreme Court criticized remittitur, concluding it "constitutes an invasion of the jury's function by the trial judge" and "an invasion of a party's right to trial by jury."[44] After *Firestone v. Crown Redevelopment Corp.*, the Missouri Supreme Court stopped the practice of remittitur.[45] However, the termination of remittitur did not last long as

37. Calhoun v. Lang, 694 S.W.2d 740, 742-43 (Mo. Ct. App. 1985) (concluding that legal malpractice claims are entitled to right to trial by jury); Rice v. State, 8 Mo. 561, 563-64 (Mo. 1844) (concluding that medical negligence claims are an established part of the "civil law").

38. *Lee*, 111 S.W. at 1153.

39. Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 638 (Mo. 2012) (citing THEODORE F.T. PLUNKETT, A CONCISE HISTORY OF THE COMMON LAW 135 (1956)).

40. Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

41. Richardson v. State Highway & Trans. Comm'n, 863 S.W.2d 876, 907 (Mo. 1993) (en banc); Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752, 755 (Mo. 2010); Adams By and Through Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 907 (Mo. 1992).

42. Carr & Co. v. Edwards, 1 Mo. 137, 137 (1821) (judicial remittitur is appropriate "if the jury find [sic] greater damages than the plaintiff has counted for"); Hoyt v. Reed, 16 Mo. 294, 294 (1852) (judicial remittitur is appropriate when the jury includes an item of damages for which the defendant was deemed not liable); Gurley v. Mo. Pac., 16 S.W. 11, 17 (Mo. 1891) (judicial remittitur is not appropriate to remit damages in a personal injury case because "when we set aside any part of the verdict, we destroy its integrity, and we have no right to set ourselves up as triers of facts, and render another and different verdict"). However, judicial remittitur is appropriate if the jury verdict was clearly based on passion and prejudice. *Id.*

43. *Watts*, 376 S.W.3d at 638.

44. Firestone v. Crown Ctr. Redevelopment Corp., 693 S.W.2d 99, 110 (Mo. 1985) (en banc).

45. *Klotz*, 311 S.W.3d at 778 (Wolff, J., concurring).

section 538.210, allowing remittitur in medical malpractice cases, was passed the next year.[46]

B. Caps on Noneconomic Damages and Missouri Case Law Challenging Them as a Violation of the Right to Trial by Jury

In 1986, the Missouri legislature passed the original section 538.210.[47] In 2005, section 538.210 was amended and its current form states:

> In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than $350,000 for noneconomic damages irrespective of the number of defendants.[48]

Section 538.210 was passed in order to lower the cost of medical malpractice insurance costs, similar to the other statutory caps on damages in cases involving health care providers.[49] The idea was that a cap on noneconomic damages would work to reduce the amount of damages collectively awarded against medical malpractice providers, which would then lower malpractice insurance premiums paid by health care providers.[50]

1. Adams By and Through Adams v. Children's Mercy Hospital *and the First Look at the Constitutionality of Section 538.210*

The first case to consider whether section 538.210's cap on noneconomic damages violated the plaintiff's right to trial by jury in a medical malpractice suit was *Adams* in 1992.[51] In *Adams*, Nicole Adams's mother, Julia Adams, brought suit due to injuries Nicole suffered as a result of health care service she received at Children Mercy's Hospital.[52] At trial, the Adams family received $13.905 million in damages, but it was then reduced.[53] The Missouri Supreme Court declared that section 538.210 passed due process concerns because it was rationally related to the legislature's interest in ensuring public health and preserving affordable health care costs by reducing medical malpractice costs.[54]

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46. MO. ANN. STAT. § 538.210 (West 1986).
47. *Id.*
48. MO. ANN. STAT. § 538.210 (West 2005).
49. Adams By and Through Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904 (Mo. 1992).
50. *Id*.
51. *Id*. at 901.
52. *Id*. at 900.
53. *Id*.
54. *Id*. at 904-05.

The court also declared the right to a jury trial was not infringed upon because the jury had completed its fact-finding roles by determining liability and damages before section 538.210 was applied.[55] The court then relied on *Etheridge v. Medical Center Hospital*[56] and *Tull v. United States*[57] to declare that the cap on noneconomic damages merely related to the permissible remedy of a cause of action, which is a matter of law that was properly applied by the court after the jury had performed its constitutional roles.[58] The court also relied on *Demay v. Liberty Foundry Co.*[59] to hold that if a legislature can completely abolish a common law cause of action, it follows that a legislature also has the power to limit the recovery in those causes of action.[60]

2. Klotz. v. St. Anthony's Medical Center *and Judge Wolff's Concurring Opinion Arguing Section 538.210's Cap Violates the Right to Trial by Jury*

In *Klotz v. St. Anthony's Medical Center*, the court held that the 2005 amendments to section 538.210 did not apply retroactively to a medical malpractice suit filed before the amendments took effect.[61] In his concurring opinion, Judge Wolff contended that section 538.210's cap on noneconomic damages violated Article I, Section 22(a)'s right to trial by jury.[62] Wolff argued that *Adams*' reasoning was flawed because the right to a jury trial is beyond the reach of "hostile legislation."[63] Wolff reasoned that, because similar caps limiting the jury's awards did not exist at common law, adding them after the fact to restrict the damages awarded by a jury impermissibly abrogated the jury's constitutional role in determining damages and resulted in the right of trial by jury no longer being "inviolate" as Article I, Section 22(a) guarantees.[64]

3. Sanders v. Ahmed *and Noneconomic Caps Applied to Wrongful Death Suits*

Another important case concerning section 538.210's cap on noneconomic damages was *Sanders v. Ahmed*, which was decided by

55. *Id*. at 907.
56. 376 S.E.2d 525 (Va. 1989).
57. 481 U.S. 412 (1987).
58. *Adams*, 832 S.W.2d at 907.
59. 37 S.W.2d 640 (Mo. 1931).
60. *Adams*, 832 S.W.2d at 907.
61. 311 S.W.3d 752, 755 (Mo. 2010).
62. *Id*. at 773 (Wolff, J., concurring).
63. *Id.* at 774 (citing Lee v. Conran, 111 S.W. 1151, 1153 (Mo. 1908)).
64. *Id*. at 781.

Missouri's Supreme Court on April 3, 2012.[65] *Sanders* involved a wrongful death suit by the husband of the decedent, who suffered serious injuries during a surgery that eventually caused her death.[66] The husband was awarded $9.2 million in noneconomic damages, but the court reduced the award under section 538.210.[67]

The plaintiff in *Sanders* argued that the Missouri Supreme Court had misinterpreted the right to a jury trial in *Adams* because the right to a jury trial includes the right to receive damages determined by the jury without being altered by a legislatively imposed cap.[68] The Missouri Supreme Court, however, did not delve into this issue because it determined that wrongful death suits were not recognized causes of action at common law and instead were statutorily created.[69] Therefore, because the right to a jury trial did not attach to wrongful death suits, the legislature was free to restrict the possible remedy as it deemed fit.[70]

Although the Missouri Supreme Court did not consider whether *Adams* incorrectly interpreted Article I, Section 22(a)'s right to a jury trial, it appeared as if it would have been ready to do so if the cause of action in *Sanders* had been a common law cause of action.[71] Two months later, *Watts* presented the same argument in a medical malpractice suit, and the court decided it was time to reexamine *Adams* and determine whether 538.210's cap on noneconomic damages violates the right to a jury trial.[72]

III. EXPOSITION OF THE CASE

The Missouri Supreme Court faced two primary issues in *Watts*. First, the court had to determine whether section 538.210, which imposes a cap on noneconomic damages for torts based on improper health care, violated Missouri's right to trial by jury.[73] Second, the court had to determine whether the trial court's specific periodic payment schedule of future medical damages issued pursuant to section 538.220 was arbitrary and unreasonable.[74]

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65. 364 S.W.3d 195, 203 (Mo. 2012).
66. *Id.* at 201.
67. *Id.*
68. *Id.* at 202.
69. *Id.* at 203.
70. *Id.*
71. *Id.*
72. Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 635-36 (Mo. 2012).
73. *Id.*
74. *Id.* at 636.

A. Facts and Procedural History

Lester E. Cox Medical Centers (Cox) provided prenatal care for Debra Watts.[75] When roughly thirty-nine weeks pregnant, on October 30, 2006, Debra Watts went to one of Cox's clinics because of a decrease in fetal movement.[76] Watts was examined at this time, but did not undergo any tests or diagnostic monitoring and did not receive an explanation of the significance of decreased fetal movement.[77]

Two days later, on November 1, 2006, Watts was admitted to Cox Medical Center due to a lack of fetal movement and was placed on a fetal monitor at 9:10 AM.[78] According to Watts' expert, Dr. Roberts, the fetal monitor revealed fetal hypoxia and acidosis, which required immediate Caesarean-section delivery.[79] However, Cox doctors did not begin a Caesarian section delivery until over an hour and a half later.[80] As a result, Naython Watts was born with catastrophic brain injuries.[81]

Watts filed a medical malpractice suit against Cox, alleging that Naython was born with serious brain injuries due to his doctors' negligent health care services.[82] The suit went to trial and the jury returned a verdict in favor of Watts and awarded her $1.45 million in noneconomic damages, as well as $3.371 million in future medical damages.[83]

Following section 538.220, the future medical damages were lowered to current value at an annual rate of four percent, which came out to $1,747,600.[84] Cox petitioned to pay the future damages in periodic payments as allowed by section 538.220.[85] In response, the trial court issued a payment schedule that required half of the future damages to be paid in a lump sum immediately and the other half to be paid over a fifty-year duration at an interest rate of .26 percent.[86] The trial court also reduced the amount of noneconomic damages awarded from $1.45 million to $350,000, as mandated by section 538.210.[87]

Debra Watts appealed the trial court's reduction of noneconomic damages pursuant to section 538.210 as being an unconstitutional violation

75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 636-37.
86. *Id.* at 637.
87. *Id.* at 635.

of the right to trial by jury and the section 538.220 periodic payment schedule awarded by the trial court as being arbitrary and unreasonable.[88]

Debra Watts' appeal went directly from the trial court to the Missouri Supreme Court, which sat en banc to hear the appeal because the Missouri Supreme Court possesses exclusive appellate jurisdiction in all cases involving the validity of Missouri statutes.[89]

B. Majority Decision

The court determined that the cap on noneconomic damages in section 538.210 was an unconstitutional violation of the right to trial by jury because, although it allows the jury to perform its constitutional duties, it denies the individual of his or her right to damages awarded by the jury.[90] Furthermore, the court held that the periodic payment schedule set out by the trial court pursuant to section 538.220 was arbitrary and unreasonable because its fifty-year payment schedule, combined with its low interest rate, prevented Watts from receiving the full value of the jury's award.[91]

1. Section 538.210 Violates the Right to Trial by Jury

The majority opinion began by asserting that a statute such as section 538.210 is presumed valid.[92] Therefore, Watts had the burden of proving that section 538.210 "clearly and undoubtedly" violated the constitution.[93]

The court acknowledged that Article I, Section 22(a) of the Missouri Constitution declares "the right of trial by jury as heretofore enjoyed shall remain inviolate" and set up the traditional two-factor right to jury trial test in order to determine if section 538.210 was valid.[94]

The first factor the court considered was whether a medical negligence action and claim for noneconomic damages were entitled to a jury trial when the Missouri Constitution was adopted in 1820.[95] The second factor focused on whether Watts' right to a jury trial remained "inviolate" when section 538.210 reduces the jury's damages award.[96] Because "inviolate" was determined to mean "free from change,"[97] if section 538.210 altered

88. *Id.* at 635-36.
89. *Id.* at 637; MO. CONST. art. V, § 3.
90. *Watts*, 376 S.W.3d at 640.
91. *Id.* at 648.
92. *Id.* at 637.
93. *Id.*
94. *Id.*at 637-38.
95. *Id.*
96. *Id.* at 638.
97. *Id.*

how noneconomic damages were decided in medical malpractice claims at common law, the right to a jury trial would be violated.[98]

In determining whether the first factor was met, the court quickly established that medical negligence was one of five "personal wrongs" recognized at English common law and that English common law permitted recovery of noneconomic damages.[99] Thus, Watts' medical malpractice claim and the jury's determination of noneconomic damages were "heretofore enjoyed" in 1820 and a right to a jury trial attached to both.[100]

The court then determined the scope of Watts' right to a jury trial to determine if section 538.210's cap violated her rights.[101] In doing so, the court noted that judicial remitter was recognized at Missouri common law, but that precedent was inconsistent on when it was appropriate.[102]

Because caps on noneconomic damages were not considered in any precedent and did not exist at common law, the court performed its own analysis of whether the cap on noneconomic damages in section 538.210 allowed the right to a jury trial to remain inviolate.[103] First, the court determined that the amount of damages, including the amount of noneconomic damages, is a fact for the jury to determine and is protected by Missouri's constitutional guarantee of a right to trial by jury.[104]

The court stressed that once the right to a jury trial is established, the plaintiff is entitled to the full benefit of the right and it cannot be altered by the legislature.[105] The court declared that, because the common law did not allow legislative limits on the jury's determination of civil damages, Watts retained the right to trial by jury subject only to remittitur based on the evidence in a case.[106] The court established that statutory caps on damages in cases with common law causes of actions, such as medical malpractice claims, do impermissibly alter the right of trial by jury.[107] The court reasoned that an individual's right to trial by jury is no longer "inviolate" if the individual is denied the jury's constitutional role of determining damages according to the evidence in the case.[108]

The court pointed to other states with constitutions similar to Missouri's that require a right to a jury trial to "remain inviolate" that also concluded that legislatively imposed limits on damages unconstitutionally

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 639.
103. *Id.* at 639-40.
104. *Id.*
105. *Id.* at 640.
106. *Id.*
107. *Id.*
108. *Id.*

strip the jury of its fact-finding duties.[109] In particular, the court agreed with the similar analysis employed in cases from Washington, Oregon, Alabama, and Florida to determine that statutory limits on damages were an unconstitutional infringement on the right to trial by jury.[110] For example, the court used *Sofie v. Fibreboard Corp.* to hold that when a court begins limiting a jury's ability to determine damages, an "invasion of the province of the jury" has occurred, and the right to trial by jury has not remained inviolate.[111]

2. Adams *Should Be Overruled*

The court next addressed why *Adams*, which had held that the cap on noneconomic damages was constitutional, should be overruled.[112] In doing so, the court focused on four flaws in the *Adams* rationale.[113]

First, the court noted that the *Adams* court misconstrued the character of the right to trial by jury.[114] The court asserted that Article I, Section 22(a) both establishes the constitutional role of the jury and guarantees an individual right to trial by jury.[115] Therefore, although section 538.210 allows the jury to perform its constitutional role of determining damages, it unconstitutionally deprives a Missouri citizen of his or her right to the damages awarded by the jury.[116] The court stressed that allowing a jury to determine damages and then automatically limiting the jury's award undermines the jury's determination of damages and makes the jury's role "practically meaningless."[117]

Second, the court asserted that *Adams* also misinterpreted the right to a jury trial because it impermissibly permitted legislative limitation of an individual constitutional right.[118] Here, the court emphasized that any statutory limit on the right to trial by jury is an unconstitutional legislative alteration of the rights guaranteed by the constitution.[119] The court criticized the *Adams* court's argument that if the legislature could abolish a common law cause of action, it could also limit the amount of recovery in those claims.[120] The court asserted that abolishing a cause of action, which resulted in no right to a jury trial because the cause of action no longer

109. *Id.* at 640-41.
110. *Id.*
111. *Id.* (citing Sofie v. Fibreboard Corp., 771 P.2d 711, 716 (Wash. 1989)).
112. *Id.* at 641-46.
113. *Id.* at 642.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 643.

existed, differed from altering an existing cause of action to which the right of a jury trial still attached.[121] The court added that no precedent had held that the legislature can strip individuals of constitutional protections in existing causes of action.[122]

Third, the court held that *Adams* incorrectly relied on *Tull v. United States* to hold that the right to a jury trial does not include the determination of damages.[123] The court distinguished *Tull* because that case interpreted the U.S. Constitution and dealt only with civil penalties owed to the government, which are less fundamental to a jury trial than the determination of common law damages, and the *Tull* court had only held that there was no historical support to prove that the penalties were included in the right to a jury trial.[124]

Last, the court criticized *Adams* because it failed to cite any applicable Missouri precedent when making its decision and instead relied on the Virginia case of *Etheridge v. Medical Center Hospital* and *Tull*.[125] The court noted that *Etheridge* was distinguishable because the Virginia Constitution did not have the same "inviolate" language for the right to a jury trial as is included in Missouri's Constitution, and this different language resulted in a different analysis.[126]

Because of these flaws and because *Adams*'s rationale resulted in a violation of the constitutional right to trial by jury, the court concluded it was proper to overrule *Adams*.[127]

3. The Trial Court's Periodic Payment Schedule Pursuant to Section 538.220 was Arbitrary and Unreasonable

The court then concluded that the trial court's periodic payment schedule that allowed for a payment of half of the future damages in a lump sum and the remaining half to be paid out in periodic payments over fifty years at an interest rate of .26 percent was arbitrary and unreasonable.[128]

The court reasoned that the trial court's fifty-year payment timeline, combined with its low interest rate, would result in Naython Watts not receiving sufficient funds to pay his future medical costs.[129] The court remanded this issue to the trial court and ordered the court to enter a new

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 644.
126. *Id.*
127. *Id.*
128. *Id.* at 648.
129. *Id.*

periodic payment schedule that would allow Naython Watts to pay for his future medical costs.[130]

C. Judge Mary Russell's Partial Concurrence and Partial Dissent

Judge Mary Russell filed a partial dissent in this case because, although she agreed with the majority's analysis of the interest rate and periodic payment schedule, she disagreed with the majority's overruling of *Adams* and felt section 538.210's cap on noneconomic damages was not a violation of the right to trial by jury.[131]

Russell reasoned that the majority disregarded stare decisis and established Missouri constitutional law in overruling *Adams* because *Adams* had declared that section 538.210 did not violate the Missouri Constitution's right to trial by jury in a case with similar medical malpractice claims.[132] Russell argued that once the jury completes the fact-finding tasks of determining liability and measuring damages, it has completed its constitutional role.[133]

Russell then stated that, because section 538.210 establishes the legal limits of a plaintiff's damage remedy, section 538.210 is a matter of law, as opposed to fact.[134] Russell asserted that, because section 538.210's cap is applied only after the jury fulfils its constitutional duties, section 538.210 was not a violation of the right to trial by jury.[135] Also, Russell reasoned that if a legislature can abolish a common law cause of action, it should be able to limit recovery in those cases.[136]

Russell noted other states, which have similar "inviolate" language in their right to trial by jury, have found noneconomic damages constitutional by using *Adams*-like reasoning.[137] Russell also argued that *Etheridge v. Medical Center Hospitals* was applicable because, although Virginia's Constitution was worded differently than Missouri's, the Virginia Supreme Court had interpreted its right to a jury trial to provide the same substantive rights.[138]

Russell concluded that stare decisis, along with the numerous examples of other jurisdictions upholding caps on noneconomic damages

130. *Id.*
131. *Id.* at 649 (Russell, J., dissenting).
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 650-51.
138. *Id.* at 651.

by *Adams*-like reasoning, indicate that the court should have found the cap to be valid.[139]

IV. ANALYSIS

The Missouri Supreme Court's decision in *Watts* that section 538.210's cap on noneconomic damages violates the right to trial by jury was appropriate because altering the jury's determination of noneconomic damages denies an individual his or her right to have damages determined by the jury.[140] Furthermore, studies have shown that, despite what was claimed by proponents of section 538.210 and its cap on noneconomic damages, no medical malpractice insurance crisis existed that needed fixing when section 538.210 was amended in 2005.[141] Moreover, studies have also provided evidence that noneconomic damages do not lower medical malpractice insurance costs because so few cases result in awards above the cap level.[142] The *Watts* decision also helped ensure that seriously injured victims of medical negligence will be properly compensated for the pain and suffering they incur. Thus, Missouri should repeal its cap on noneconomic damages, as it has not achieved its projected goals and infringes on a constitutional right while simultaneously undercompensating seriously injured victims.

A. Section 538.210's Cap on Noneconomic Damages Violates the Constitutional Right to a Jury Trial

The Missouri Supreme Court decided correctly in *Watts* by overruling *Adams* and ruling that section 538.210's cap on noneconomic damages was a violation of the right to trial by jury.[143] First, the court's decision that medical negligence was recognized as a common law cause of action is clearly supported by *Blackstone's Commentaries*, a leading source on the English common law.[144] Additionally, the court's finding that the scope of

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139. *Id.* at 652.

140. *Id.* at 640 (majority opinion).

141. TOM BAKER, THE MEDICAL MALPRACTICE MYTH 51 (2005) (concluding that "the medical malpractice insurance crises of the mid-1980s and the early 2000s did not reflect a sudden or dramatic change in either litigation or behavior or malpractice payments. What changed, instead, were insurance market conditions and the investment and loss predictions built into medical malpractice insurance premiums").

142. MO. DEP'T OF INS., *supra* note 11, at 20 (only 37 of 1288 (2.8 percent) medical malpractice claims closed in Missouri in 2001 were over $250,000 and only 6 (.4 percent) cases reached Missouri's noneconomic cap of $540,000).

143. *Watts*, 376 S.W.3d at 640-46.

144. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *121-123 (William C. Jones ed. 1916); Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752, 755 (Mo. 2010) (Wolff, J., concurring)

the right to a jury trial includes the right to have the jury determine the amount of damages, including non-economic damages, is verified by both U.S. and Missouri precedent.[145]

The *Watts* court was correct to find the right to trial by jury does not remain "inviolate" when section 538.210's cap is applied because it changes the common law determination of damages.[146] Although the right to a jury trial in Missouri includes "all the substantial incidents and consequences" of the common law right to trial by jury, which allowed judicial remittitur in some instances,[147] Missouri had previously refused to remit damages in a personal injury case because "when [a court] sets aside part of the verdict, [it] destroys its integrity, and we have set ourselves up as triers of facts."[148] Furthermore, because Missouri recognized that the right to trial by jury was "beyond the reach of hostile legislation"[149] and nothing similar to caps on noneconomic damages existed at common law,[150] the court properly found that the right to a jury trial, as it was recognized at common law and guaranteed in Article I, Section 22(a) of the Missouri Constitution, was altered by section 538.210's cap.[151] Because any alteration of the right to a jury trial is unconstitutional, it logically follows that section 538.210 was invalid as applied to medical negligence cases.[152]

B. *Adams* Was Correctly Overruled Because its Reasoning was Flawed and Resulted in a Violation of the Right to Trial by Jury

Although the *Adams* court held that section 538.210 did not violate the right to trial by jury because it related to the permissible remedy, which is a matter of law to be applied by the courts,[153] *Watts* correctly held that the extent of damages is an issue of fact for the jury to determine.[154] The *Watts* court then correctly asserted that applying section 538.210 to a jury's determination would make the determination "practically meaningless" and

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(concluding that "civil actions for damages resulting from personal wrongs have been tried by juries since 1820").

145. *Watts*, 376 S.W.3d at 639-40 (citing Richardson v. State Highway & Transp. Comm'n, 863 S.W. 876 (Mo. 1993); *Klotz*, 311 S.W.3d at 755; Adams By and Through Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 907 (Mo. 1992)); Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935); Feitner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998).

146. *Watts*, 376 S.W.3d at 640-41.

147. Gurley v. Mo. Pac., 16 S.W. 11, 17 (Mo. 1891) (remittitur is appropriate if the jury verdict is based on passion or prejudice); *Klotz*, 311 S.W.3d at 777 (Wolff, J., concurring) (remittitur is appropriate if jury verdict is in excess of what plaintiff pleaded).

148. *Gurley*, 16 S.W. at 17.

149. Lee v. Conran, 111 S.W. 1151, 1153 (Mo. 1908).

150. *Watts*, 376 S.W.3d at 639.

151. *Id.* at 640.

152. *Id.*

153. *Id.*

154. *Id.*

"undermine the jury's basic function" of determining damages.[155] Caps on noneconomic damages have this effect because they do not offer any of the safeguards offered by judicial remittitur to ensure the jury's awarded damages are respected and the plaintiff's right to a jury trial is not violated.[156] Instead, caps on noneconomic damages apply regardless of whether the jury's award is supported by the evidence, give no option to the plaintiff to accept a new trial rather than reduced damages, and afford no room for judicial discretion.[157]

Furthermore, although Missouri does allow its legislature to abolish a common law cause of action, the *Watts* court correctly asserted that the legislature was prohibited from altering existing common law causes of action.[158] The court pointed out that abolishing a cause of action removes the existing right to trial by jury, and therefore no constitutional protections remain.[159] However, as in *Watts*, the court noted where the right to a jury trial is still attached, it must remain "inviolate" and cannot be changed by the legislature at all.[160] Furthermore, the *Watts* opinion correctly found the *Adams* court to have erred in relying on *De May v. Liberty Foundry Co.*, because, according to its own language, *Demay* applied only if the cause of action was abolished.[161] Because the right to trial by jury was still attached to Watts' medical negligence action and *Demay* did not support *Adams*' argument, it follows that any action that altered it, including section 538.210's cap on noneconomic damages, represented a constitutional violation of the right to trial by jury.[162] Additionally, *Adams*' reliance on *Tull v. United States* to determine that the right to a jury trial does not include the calculation of damages was clearly overruled by Missouri and U.S. precedent, as established supra.[163]

The *Watts* court also correctly determined that, although generally stare decisis concerns should cause courts to be hesitant to overturn precedent, especially long-standing precedent such as *Adams*, it was important to overrule *Adams* because to do so would prevent the violation

155. *Id.* (citing Atlanta Oculoplastic Surgery P.C. v. Nestlehutt, 691 S.E.2d 218, 222 (Ga. 2010); Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991)).

156. Sofie v. Fibreboard, 771 P.2d 711, 720-21 (Wash. 1989). Judicial remittitur differs from caps because remittitur involves a legal determination that the jury's awarded damages are unsupported by the evidence, is done on a case-by-case basis with a presumption in favor of upholding the jury's award, and gives the plaintiff the option of accepting the reduced amount or having a new trial. *Id.*

157. Lakin v. Senco Prod., Inc., 987 P.2d 463 (Or. 1999).

158. *Watts*, 376 S.W.3d at 640.

159. *Id.* at 642.

160. *Id.* at 638 (citing State *ex rel.* Diehl v. O'Malley, 95 S.W. 3d 85, 92 (Mo. 2003)).

161. *Id.* at 643.

162. *Id.*

163. *Id.* at 640, 643 (citing cases cited *supra* note 145).

of a Missouri citizen's constitutional right to trial by jury.[164] Additionally, because the common law did not permit legislatively imposed limits on the jury's determination of damages,[165] the *Watts* court correctly asserted that the *Adams* court's determination that section 538.210's cap on noneconomic damages was not infringing on an individual's right to trial by jury was made in error.[166] If the *Watts* court had failed to recognize this, the guarantee that the right to trial by jury would remain "inviolate" provided in Article I, Section 22(a) of the Missouri Constitution would not have been honored in medical negligence actions, because the determination of damages would not have been treated as it was at common law.[167] The *Watts* court appropriately prevented this sidestepping of the Missouri Constitution and restored the right to trial by jury back to its common law form, which always left the determination of damages to be performed by the jury, subject only to remittitur if unsupported by the evidence.[168] In doing so, the Missouri Supreme Court evidenced the importance the right to a jury trial plays in our society and made clear that any attempts to alter it, with the exception of allowing causes of action to be completely abolished, would be found unconstitutional.

C. No Medical Malpractice Insurance Crisis Existed to Necessitate Section 538.210 and Caps on Noneconomic Damages Do Not Result in Lowered Medical Malpractice Insurance Costs

Not only was the *Watts* court constitutionally sound in its interpretation of Article I, Section 22(a)'s right to trial by jury, but its decision was also supported by data that shows the supposed medical malpractice crisis, which prompted the statutes passage in 1986, did not exist.[169] Moreover, section 538.210's cap has not caused medical malpractice insurance costs to decrease in the slightest, but instead has resulted in discrimination between victims of medical negligence in several ways.[170]

When House Bill 393, which amended section 538.210 to its current form, was being debated in the Missouri legislature, supporters of section

164. *Id.* at 644.
165. *Id.* at 639.
166. *Id.* at 644.
167. *Id.* at 639.
168. *Id.*
169. Plaintiff-Appellant's Initial Brief at 51-52, Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012) (No. SC 91867), 2011 WL 7646790, at *61-62; Brief for Professors of Law as Amici Curiae Supporting Appellant/Cross-Respondent at 16-20, app. B, Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012), at *17-20.
170. Plaintiff-Appellant's Initial Brief, *supra* note 169, at *43-44; Appellants' Initial Brief, Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752 (Mo. 2010) (No. SC 90107), 2009 WL 5250938, at *48-50.

538.210's cap argued that medical malpractice insurance was experiencing a crisis, as evidenced by recent dramatic increases in medical malpractice insurance rates that were causing doctors to leave Missouri, and that section 538.210's cap would help reduce these rising rates.[171] However, objective information from government sources, including the Missouri Department of Insurance (MDI), proved these claims were falsely made.[172] In its 2003 report on medical malpractice, MDI noted Missouri was currently in its "third underwriting cycle in medical malpractice insurance in the past three decades."[173] Furthermore, MDI added:

> Just as in the previous two underwriting cycles, medical groups joined by many insurers and members of the business community have called for limits on medical liability awards to patients who have suffered major injury from medical negligence. . . . These difficulties, however, find their roots in the insurance underwriting cycle, not at the hands of the victims.[174]

In addition to the MDI, the Missouri Hospital Association (MHA), which advocates for medical liability reform, conceded that the increases in malpractice insurance rates were caused by the insurers' declining investments from the bond market and that "the number of claims and cost of claims have not contributed in a significant way to the sudden increase in medical professional liability coverage."[175] From these reports, it can be determined that medical malpractice insurance rates rose due to the insurers' actions and not due to medical malpractice suits and their rising payouts.

The claim that doctors were leaving Missouri was refuted by the well-respected American Medical Association publication *Physician Characteristics and Distribution in the United States*, which showed that since the 1960s the number of doctors in Missouri had consistently risen.[176] Furthermore, the number of physicians in "high risk" specialties, those who would be most impacted by rising medical malpractice rates, had also consistently risen from 1990 to 2005.[177]

Lastly, the cap on noneconomic damages did not work to bring about a decrease in medical malpractice claims, as predicted by the legislature,

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171. Appellants' Initial Brief, *supra* note 170, at *31.
172. *See* MO. DEP'T OF INS., *supra* note 11.
173. *Id.* at 2.
174. *Id.*
175. MO. HOSP. ASS'N, AN OVERVIEW OF THE MEDICAL MALPRACTICE INSURANCE MARKET FOR PHYSICIANS, at III-IV (2002).
176. Brief for Professors of Law as Amici Curiae, *supra* note 169, at *16-20, app. B (concluding that, after analyzing AMA data in time leading up to H.B. 393's passage, the amount of doctors in Missouri was "holding steady or increasing").
177. Plaintiff-Appellants Initial Brief, *supra* note 169, at *61-62.

because very few cases resulted in damages awarded above the cap.[178] In fact, only 2.8% (37 out of 1708) of medical malpractice claims in Missouri in 2001 resulted in cases with noneconomic damages awards over $250,000, while only six claims exceeded Missouri's then-existing cap of $540,000.[179] Obviously, six cases, or for that matter thirty-seven claims, are not going to result in wide-spread changes for a medical malpractice insurance system that handles thousands of claims annually. Furthermore, caps on noneconomic damages do not lower medical malpractice insurance costs because a multitude of other factors, including decreased income from investments of medical malpractice insurers, the high level of competition among insurers, and rapidly rising reinsurance rates, contributed to the increased costs of medical malpractice insurance.[180]

The caps on noneconomic damages are unnecessary because the number of medical malpractice suits filed has dropped from 3216 in 2005 to 1708 in 2010, which shows medical malpractice insurers are not being overloaded with frivolous claims that could be discouraged by section 538.210.[181]

Instead, the biggest effect of section 538.210's cap and other similar noneconomic caps is that severely injured victims of medical negligence that receive noneconomic damages awards in excess of $350,000 are undercompensated for their injuries based on a decision by the legislature to fix the non-existent medical malpractice insurance crisis.[182] Furthermore, while it is true that some seriously injured medical malpractice claim victims whose damages are predominantly noneconomic in nature will be more likely to get lawyers to accept their case because of the potential for more profitability without caps,[183] the high costs associated with trying a medical malpractice case will still work to deter lawyers from pursuing frivolous claims.[184]

Thus, the fact that section 538.210 violates the constitutional right to a jury trial, combined with the objective data and policy concerns showing caps do not reduce medical malpractice costs, but instead harm severely injured medical malpractice victims, suggests that Missouri should consider repealing section 538.210.

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178. MO. DEP'T OF INS., *supra* note 11, at 20.

179. *Id*.

180. GAO FACTORS REPORT, *supra* note 8, at 4-5.

181. MO. DEP'T OF INS., *supra* note 13, at v.

182. Peck, *supra* note 6, at 309; *see also* Plaintiff-Appellants Initial Brief, *supra* note 169, at *43-44.

183. Jennifer W. Terry, *Caps off to the Juries: Noneconomic Damage Caps in Medical Malpractice Cases Ruled Unconstitutional*, 62 MERCER L. REV. 1315, 1330 (2011).

184. *Id*. at 1329-30. Because of their complex nature, medical malpractice claims require plaintiff attorneys to perform a substantial amount of medical research, conduct thorough discovery, consult with medical professionals, and have medical experts testify at trial. *Id.* These high out-of-pocket expenses will cause attorneys to remain hesitant to accept claims that are unlikely to be successful. *Id.*

V. CONCLUSION

In conclusion, the Missouri Supreme Court correctly decided *Watts v. Lester E. Cox Medical Centers* and, in doing so, protected Missouri citizens' constitutional right to trial by jury that had been unconstitutionally infringed upon by *Adams*. Missouri and U.S. Supreme Court precedent support the *Watts* decision that the determination of damages is a fact-finding matter to be performed by the jury. Additionally, the court properly determined that limiting the amount of damages in a common law cause of action, to which a right to a jury trial still attaches, does differ from abolishing the cause of action, which results in a loss of the right. Following this rationale, the court correctly held that allowing a court to alter a jury's determination of noneconomic damages in a medical negligence case causes the plaintiff's right to a jury trial to not remain "inviolate." Finding otherwise would have caused individuals to be denied the right to have their damages determined by the jury, as the common law provides.

Furthermore, studies have shown that noneconomic damages do not bring about the desired result of lowered medical malpractice insurance claims because few claims result in awards of damages over the cap levels. The *Watts* decision also helps ensure that victims of medical negligence who are seriously injured will be properly compensated for the pain and suffering they incur. Thus, Missouri should consider repealing its cap on noneconomic damages, not only because it is a constitutional violation of the right to trial by jury and results in seriously injured victims of medical malpractice being inadequately compensated, but also because it has not served the purposes it was designed to serve.