

Summary of SC95151, *Jason D. Dodson, and Jason D. Dodson Jr., a Minor, and Eva Raine Didson-Lohse, a Minor, and August William Davis Dodson, a Minor, said Minors appearing by their duly appointed Next Friend, Jason D. Dodson v. Robert P. Ferrera, M.D., and Mercy Clinic Heart and Vascular LLC*

Appeal from the St. Louis County circuit court, Judge Thea A. Sherry

Argued and submitted October 21, 2015; opinion issued April 19, 2016, and modified on the Court's own motion May 24, 2016

Attorneys: The medical providers were represented by Paul N. Venker and Lisa A. Larkin of Williams Venker & Sanders LLC in St. Louis, (314) 345-5000. The Dodson family was represented by Maurice B. Graham, Patrick J. Hagerty, Joan M. Lockwood and Kaitlin A. Bridges of Gray, Ritter & Graham PC in St. Louis, (314) 241-5620; and John G. Simon of The Simon Law Firm in St. Louis, (314) 241-2929.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The family members of a woman who died after a dissection during a heart catheterization, as well as the medical providers they sued for the woman's wrongful death, both appeal from the trial court's judgment finding the medical providers liable, assessing economic damages against the medical providers but reducing the amount of noneconomic damages the jury awarded due to a statutory cap. In a decision written by Judge Mary R. Russell and joined by two other judges and joined in result only by another two judges, the Supreme Court of Missouri affirms the judgment. As this Court previously held in *Sanders v. Ahmed*, the statutory cap on noneconomic damages in wrongful death cases does not violate the state constitutional right to a jury trial. This holding is not impacted by the Court's prior decision in *Watts v. Lester E Cox Medical Center*, which concerned personal injury claims, or *State ex rel. Diehl v. O'Malley* because wrongful death cases are not analogous to cases to which the right to a jury trial attached when the state's first constitution was adopted in 1820. The cap also does not violate equal protection or separation of powers. The trial court did not err in granting a directed verdict on the issue of aggravating circumstances damages at the close of all evidence, nor did it abuse its discretion in allowing certain questioning or evidence to be presented. It also did not err in giving a certain jury instruction or in overruling the medical providers' motions for directed verdict, judgment notwithstanding the verdict or a new trial regarding future economic damages.

In a joint opinion, Judges Zel M. Fischer and Paul C. Wilson concur in result. They write separately to explain why their vote is constrained by this Court's prior holdings in *Sanders* and *Estate of Overbey v. Chad Franklin National Auto Sales* as well as in several other prior cases. These cases cannot be ignored or overruled without a substantial showing that they were decided incorrectly or reached a proper result on improper grounds, but no such showing has been made here.

In an opinion joined by one other judge, Judge George W. Draper III dissents. He questions whether the legislature's imposition of the damages cap is rationally related to its intended purpose of alleviating a perceived malpractice insurance "crisis."

Judge Richard B. Teitelman also dissents. He would reverse the judgment to the extent it applies the statutory damages cap to the jury's award of noneconomic damages. He would find the constitutional right to a jury trial attaches to statutory wrongful death actions, which seek redress for wrongs to a person and are analogous to common law causes of action that traditionally carried the right to a jury trial. Applying the statutory cap violates this right.

Facts: Shannon Dodson was treated at Mercy Hospital St. Louis in February 2011. She was diagnosed with bronchitis, and after a stress echocardiogram indicated her heart might have some abnormalities, Dr. Robert Ferrara performed a heart catheterization for further evaluation. During the procedure, the left main coronary artery of Dodson's heart was dissected, cutting off blood flow to part of her heart. Ferrara called for assistance, but no attempt was made to open the artery until about 30 minutes after the dissection occurred. Doctors were unsuccessful in attempting to place a stent in the artery, and more than 45 minutes after Ferrara noticed the dissection, Dodson was transferred to the operating room. The surgery was unsuccessful, and Dodson died as a result of the dissection. Her husband and children (collectively, the family members) brought a wrongful death action against Ferrara and his employer, Mercy Clinic Heart and Vascular LLC, (collectively, the medical providers). The case was tried to a jury. At the close of all evidence, the trial court directed a verdict in favor of the medical providers on the family members' claim for aggravating circumstances damages (finding the law did not support such damages in this case). The jury returned a verdict in favor of the family members on their negligence claim, awarding them more than \$1.83 million in total economic damages and \$9 million in total noneconomic damages. The court reduced the noneconomic damages award to \$350,000 pursuant to section 538.210.1, RSMo. Both parties appeal.

AFFIRMED.

Court en banc holds: (1) The family members properly preserved their constitutional claims for review. Until the jury returned its verdict awarding noneconomic damages and the medical providers asked the trial court to apply the section 538.210 cap on noneconomic damages, there was no reason for the family members to raise their constitutional challenge to the statutory cap.

(2) The section 538.210 cap on noneconomic damages in wrongful death cases does not violate the right to a jury trial. The state constitution's right to a jury trial means that this right is "beyond the reach of hostile legislation" and is preserved as it existed at common law before the state's first constitution was adopted in 1820.

(a) The family members' issue on appeal is controlled by this Court's 2012 decision in *Sanders v. Ahmed*, which held that an action for wrongful death was not recognized at common law in 1820 when the state's constitution first was adopted but, instead, is a statutory creation subject to statutory caps and limitations. Although *Sanders* analyzed an earlier version of the statute, the 2005 amendments to section 538.210 do not affect the analysis in *Sanders*.

(b) The outcome of this case also is not impacted by this Court's 2012 decision in *Watts v. Lester E. Cox Medical Center*, which held that the statutory cap on damages violated

the right to a jury trial in medical malpractice actions alleging personal injury claims, which were recognized at common law and were not subject to legislative limits on damages when the constitution was adopted in 1820. *Watts* did not overrule *Sanders* but applied only to causes of action to which the right to a jury trial attached at common law.

(c) This case also is not affected by this Court's 2003 decision in *State ex rel. Diehl v. O'Malley*, which held the right to a jury trial attaches if the claim is "analogous to" actions existing at common law before 1820 that carried the right to a jury trial. Although an 1853 case allowed a cause of action to continue after the plaintiff's death, the claim involved injury to property rights (the lost services of the plaintiff's son, who had died), not for wrongful death or negligence leading to death, and the issue involved whether the administrator of the plaintiff's estate could continue the suit after the plaintiff's death.

(d) *Watts* invalidated section 538.210 only to the extent that its limitations infringed on the right to a jury trial for common law personal injury actions. As to other actions, the provision remains valid and enforceable. The remaining provision still coherently and validly limits recovery of noneconomic damages in any action against a health care provider for "death" arising out of medical negligence. There is no reason the legislature would choose not to limit recovery in wrongful death cases, when it validly may do so, simply because it could not limit recovery in personal injury actions.

(2) The section 538.210 cap on noneconomic damages does not violate equal protection. Although the state and federal constitutions guarantee equal rights and opportunities under the law, these guarantees do not mean the state never may make distinctions between individuals or groups of people. The state may treat different groups differently, but it must have adequate justification to treat similarly situated persons differently. The family members can point to no fundamental right that is infringed by section 538.210, and there is a rational basis for the statute. This Court in 1992 rejected an equal protection challenge to the damages cap of this statute, noting the legislature created the cap in an effort to reduce perceived rising medical malpractice premiums and to prevent physicians from leaving high risk medical fields. It is not for this Court to evaluate the wisdom or desirability of the legislature's policy decisions. Even after *Watts*, which distinguished medical malpractice plaintiffs based on whether they brought a statutory wrongful death claim or a common law personal injury claim, the classification is the result of this Court's interpretation of the state constitutional right to a jury trial. The family members challenge only the Court's interpretation of the constitutional provision, not the provision itself, as violating equal protection. Such an argument does not properly raise an equal protection challenge.

(3) The section 538.210 cap on noneconomic damages does not violate separation of powers. This Court previously rejected such an argument in *Sanders*. The limit on damages does not interfere with the jury's ability to render a verdict nor the judge's task of entering judgment; it rather informs those duties.

(4) The trial court did not err in granting a directed verdict on the issue of aggravating circumstances damages at the close of all evidence. Under the Missouri approved instructions, aggravating circumstances damages in a wrongful death case when the theory of liability is

negligence require the jury to find the defendant's conduct showed complete indifference to or a conscious disregard for the safety of others. The family members failed to prove, by clear and convincing evidence, that the medical providers acted with complete indifference to or conscious disregard for Dodson's safety. At the close of the family members' evidence, the trial court was unsure whether the family members had made a submissible case for aggravating circumstances damages. The trial court did not err in delaying its decision regarding the medical providers' motion for directed verdict until after it heard the medical providers' evidence.

(5) The trial court did not abuse its discretion in allowing the family members to question the medical providers' expert witness about the availability of St. Louis doctors to testify as experts in medical malpractice cases against other St. Louis doctors. Evidence of a witness's interest or bias and the witness's relation to or feeling toward a party always is relevant. The witness opened the door to further questioning, and the matter was relevant because he was testifying in favor of a St. Louis doctor. Even had the line of questioning been error, there is no prejudice evident from the record.

(6) The trial court did not abuse its discretion in allowing the family members to play a portion of Ferrara's videotaped deposition. The credibility of witnesses always is relevant. Ferrara opined about the events leading up to Dodson's death and the cause of her death. Whether he spoke with the surgeons who attempted to operate on her is relevant to his credibility as a witness and the value of his opinions about those matters.

(7) The trial court did not err in giving a certain instruction, which directed the jury not to consider insurance coverage while deliberating. The improper injection of insurance coverage in a jury-tried case may constitute reversible error. Even if testimony regarding Dodson's health insurance benefits – in the context of the family members establishing their economic damages – was the only mention of insurance in the case, the medical providers gave no explanation as to how the instruction prejudiced them. But insurance was mentioned at least two other times – through unsolicited comments of a prospective juror during jury selection, and through a hospital bill admitted into evidence that showed the original amount owed for Dodson's medical care as well as the amount actually paid with insurance. The medical providers do not argue insurance coverage was relevant outside the calculation of the family members' economic damages.

(8) The trial court did not err in overruling the medical providers' motions for directed verdict, for judgment notwithstanding the verdict and for a new trial regarding future economic damages. Damages for loss of future earnings must be established with reasonable certainty through the introduction of substantial evidence. The family members' evidence of future economic damages consisted of testimony of Dodson's supervisor and an economic expert, which provided a sufficiently certain foundation on which the jury reasonably could estimate future economic damages.

Opinion concurring in result by Judges Fischer and Wilson: The authors concur with the result of the principal opinion but write separately because they believe this Court's prior opinion in *Sanders v. Ahmed* controls this case. They note that this Court's prior decisions in *State ex rel. Diehl v. O'Malley* and *Scott v. Blue Springs Ford Sales* did not address the question of statutory caps on damages but rather held a statute cannot provide for punitive damages but then preclude

a jury trial to determine those damages. Moreover, in its 2012 decision in *Estate of Overbey v. Chad Franklin National Auto Sales*, this Court held that the constitutional right to a jury trial regarding a claim for punitive damages does not bar enforcing statutory caps on the amount of punitive damages recoverable in a statutory cause of action. *Sanders* reinforced this point – because wrongful death is a statutory cause of action, the constitutional right to a jury trial did not prohibit enforcement of statutory caps on the amount of noneconomic damages recoverable in such an action. This holding was not overruled by *Watts v. Lester E. Cox Medical Centers*, by implication or otherwise – the issues in the two cases were different. More recently, in its 2014 decision in *Lewellen v. Franklin*, this Court solidified the distinction between the constitutional validity of caps on damages, which are permitted for statutory causes of action but not permitted for common law causes of action. These cases have engendered substantial reliance by the legislature and other stakeholders and cannot be ignored or overruled without a substantial showing they were decided incorrectly or reached a proper result on improper grounds. No such showing has been made here.

Dissenting opinion by Judge Draper: The author questions whether the legislature’s imposition of the damages cap in section 538.210, RSMo, is rationally related to its intended purpose of alleviating a perceived malpractice insurance “crisis,” noting several prior opinions and articles questioning or criticizing the underlying support for the crisis characterization.

Dissenting opinion by Judge Teitelman: The author would reverse the judgment to the extent it applies the damages cap to the jury’s award of noneconomic damages. The author would find the constitutional right to a jury trial includes statutory wrongful death actions. The family members’ statutory wrongful death action is “analogous to” common law causes of action that traditionally carried the right to a jury trial when the state’s constitution was adopted in 1820 because it seeks redress for wrongs to a person. He notes the similarity to the cause of action typified in an 1853 case in which a child was killed due to negligence and his father’s estate was allowed to pursue a civil action for damages. As such, the family members have a constitutional right to a jury trial. The author also would find that applying the section 538.210 cap on noneconomic damages violates that right. Although the legislature is free to modify a cause of action it created, this power is subject to constitutional limitations. Once the right to a jury trial attaches, exercise of that right is beyond the reach of hostile legislation, as this Court held in *Watts*.