

Summary of SC91492, *Ronald Sanders v. Iftekhar Ahmed, M.D., et al.*

Appeal from the Jackson County circuit court, Judge Robert M. Schieber
Argued and submitted Nov. 2, 2011; opinion issued April 3, 2012

Attorneys: Sanders was represented during arguments by Steven L. Hobson, H. William McIntosh and Meredith R. Myers of The McIntosh Law Firm PC in Kansas City, (816) 221-6464; and Admed was represented by Timothy M. Aylward, Brent G. Wright and John B. McEntee Jr. of Horn Aylward & Bandy LLC in Kansas City, (816) 421-0700, and Norman I. Reichel of Oliver & Reichel PA in Overland Park, Kan., (913) 498-8814.

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: In a wrongful death lawsuit, a man appeals a trial court's reduction of the amount of non-economic damages awarded to him pursuant to a statutory cap, and the doctor appeals the court's decision not to reduce the amount of damages based on the amount of a settlement with other defendants and not to allow him to make periodic payments. In a 5-2 decision written by Judge William Ray Price Jr., the Supreme Court of Missouri affirms the judgment in part, reverses it in part and remands (sends back) the case for further consideration. The legislature has the right to create causes of action and to prescribe their remedies, including giving courts the right to establish a plan for future payments, and did not violate the constitution in doing so here. Because the doctor failed to object and move to strike opinion testimony of the man's expert witness at trial, he waives the right to object to its admissibility now. The man established a submissible case for the jury regarding evidence of what caused the wrongful death. State law requires the doctor to present evidence of the man's settlement with other parties for reduction. Because proper discovery of this evidence was denied the doctor at trial, this portion of the judgment is reversed, and the case is remanded.

In a dissenting opinion, Judge George W. Draper III disagrees that the statutory cap on non-economic damages is not unconstitutional. He believes the Court should find that the statutory cap on non-economic damages is an impermissible burden on the right to a trial by jury and violates the separation of powers as set in the state constitution.

Facts: After her primary care physician admitted her to the hospital in May 2003, Ronald Sanders' wife was seen by Dr. Iftekhar Ahmed, a neurologist, who changed her medications from Dilantin and phenobarbital to Depakote. Three days later, the wife – who had a long history of seizure disorders – became lethargic and suffered a focal seizure. She ultimately was transferred to a long-term care facility and remained bedridden until she died in August 2005. Sanders sued Ahmed and other healthcare providers for medical malpractice and, after his wife died, for wrongful death. He settled with the other defendants, ultimately taking his claims to trial only against Ahmed. The jury issued its verdict in favor of Sanders, awarded him more than \$920,700 in past economic damages and a total of \$9.2 million in non-economic damages (\$1.7 million in past non-economic damages and \$7.5 million in future non-economic damages). Ahmed filed a motion asking the trial court to cap the non-economic damages pursuant to section 538.210, RSMo; to establish a periodic payment plan for him pursuant to section 538.220,

RSMo; and to reduce the damages by the amount of the settlement with the other defendants pursuant to section 537.060, RSMo. The trial court reduced the total non-economic damages to \$1,265,207.64 but overruled Ahmed's other motions. The court also overruled Sanders' motion alleging the damages cap is unconstitutional. Both Sanders and Ahmed appeal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Court en banc holds: (1) The provisions in section 538.210 limiting non-economic damages in wrongful death suits do not violate the right to a jury trial. Article I, section 22(a) of the state constitution provides that the right of a trial by jury "as heretofore enjoyed shall remain inviolate." The phrase "as heretofore enjoyed" has been interpreted to mean that the constitution protects the right as it existed when the constitution first was adopted in 1820 and does not provide a jury trial for proceedings created later. The legislature has the right to create causes of action and, when it has done so, to prescribe their remedies. A claim for damages for wrongful death is statutory, not found at common law. Here, the legislature merely used section 538.210 to limit the recovery available on a cause of action it created.

(2) The limit on damages in section 538.210 also does not violate the separation of powers provided in article II, section 1 of the state constitution. As noted above, because wrongful death was not a claim available at common law, the legislature has the right to create such a claim and to prescribe its remedies. The statutory limit does not interfere with the jury's ability to render a verdict or the judge's task of entering a judgment but instead informs those duties.

(3) The trial court did not err in refusing to award periodic payments for future damages under section 538.220. Courts have the right to establish a plan for future payments except for past damages and attorney contingent fees, which are paid at the time of judgment. After the reduction here, the amount of non-economic damages recoverable is less than the total amount of past non-economic damages awarded by the jury. The trial court has the discretion to assign the total amount of non-economic damages as past non-economic damages to be paid in a lump sum at the time of judgment. The trial court had discretion to refuse to award periodic payments.

(4) The trial court did not err in overruling Ahmed's motions for directed verdict and judgment notwithstanding the verdict. A motion for directed verdict should be filed at the close of the plaintiff's case only if the defendant wants the case determined at that point without additional evidence. A motion for directed verdict at the close of all evidence is required to preserve the issue as presented to the trial court, prior to submission of the case to the jury. After the verdict, a motion for judgment notwithstanding the verdict is necessary to preserve the issues raised for appeal. Here, Sanders made a submissible case for the jury regarding evidence of the cause of his wife's death, and the trial court did not err in so finding.

(5) The trial court did not err in refusing to grant a mistrial based on allegedly improper comments made during closing arguments. Ahmed failed to object and move to strike the opinion testimony of Sanders' expert witness during trial. Failure to object to improper opinion testimony is equivalent to a waiver of the right to object to its admissibility on appeal. Ahmed's claim regarding improper argument is denied because the objection was sustained, he requested no further action from the trial court and he failed to preserve any error for review on appeal.

(6) The trial court erred in overruling Ahmed's motion for discovery of Sanders' settlement with the other defendants. Section 537.060, which allows a defendant to move to reduce liability based on a plaintiff's settlement with another defendant, requires the defendant making the motion to prove the terms of the settlement. Ahmed was unable to prove the terms here because the trial court denied him discovery. The judgment as to this point is reversed, and the case remanded to determine if Ahmed is entitled to a reduction under section 537.060.

Dissenting opinion by Judge Draper: The author disagrees that the statutory cap on non-economic damages does not violate the constitutional right to a trial by jury. It is impossible for the right to trial by jury to remain unblemished when a statute requires reduction of the jury's verdict regardless of the facts of the case. If the right to trial by jury only attaches to common law actions that existed before the state constitution was adopted, then the legislature could abolish common law actions and reenact them as statutory actions with damage limits. Statutory limits imposed on the jury's determination of damages curtail one of the jury's most significant constitutional roles. The limit also violates separation of powers by encroaching on the judicial power to determine whether the jury's assessment is appropriate on a case-by-case basis.