

Summary of SC90107, *James Klotz and Mary Klotz v. St. Anthony's Medical Center, Michael Shapiro, M.D., and Metro Heart Group, LLC*

Appeal from St. Louis County circuit court, Judge Barbara W. Wallace
Argued and submitted Jan. 14, 2010; opinion issued March 23, 2010

Attorneys: The Klotzes were represented by Louis M. Bograd and Andre M. Mura of the Center for Constitutional Litigation in Washington, D.C., (202) 944-2803, and Mary E. Coffey and Genevieve J. Nichols of Coffey & Nichols LLC in St. Louis, (314) 647-0033. Shapiro and Metro were represented by J. Thaddeus Eckenrode and Lisa H. Howe of Eckenrode Maupin Attorneys at Law in Clayton, (314) 726-6670.

A number of organizations filed briefs as friends of the Court:

Paraquad Inc. was represented by Kevin J. Davison and David M. Zevan of The Law Office of Zevan & Davidson LLC in St. Louis, (314) 588-7200.

The Missouri Chamber of Commerce and Industry, NFIB/Missouri, Missouri Motor Carriers Association, Health Coalition on Liability and Access, Chamber of Commerce of the United States of America, American Tort Reform Association, Physicians Insurers Association of America, American Insurance Association, Property Casualty Insurers Association of America, and National Association of Mutual Insurance Companies were represented by Robert T. Adams of Shook, Hardy & Bacon LLP in Kansas City, (816) 474-6550; Mark A. Behrens and Christopher E. Appel of Shook, Hardy & Bacon LLP in Washington, D.C., (202) 783-8400; H. Sherman Joyce of the American Tort Reform Association in Washington, D.C., (202) 682-1163; Ann W. Spragens and Sean McMurrough of the Property Casualty Insurers Association of America in Des Plaines, Ill., (847) 553-3826; Gregg Dykstra of the National Association of Mutual Insurance Companies in Indianapolis, ((317) 875-5250; Robin S. Conrad and Amar D. Sarwal of the National Chamber Litigation Center Inc. in Washington, D.C., (202) 463-5337; and Allan J. Stein of the American Insurance Association in Washington, D.C., (202) 828-7158.

The American College of Obstetricians and Gynecologists, The Missouri College of Emergency Physicians and The Missouri Association of Rural Health Clinics were represented by Robyn Greifzu Fox and Catherine Vale Jochens of Moser & Marsalek PC in St. Louis, (314) 421-5634.

Missouri State Medical Association and American Medical Association were represented by Harvey M. Tettlebaum, Mark G. Arnold and Robert L. Hess II of Husch Blackwell Sanders LLP in Jefferson City, (573) 635-9118.

Missouri Coalition for Quality Care and National Association for the Advancement of Colored People were represented by Tim Dollar of Dollar, Burns & Becker LC in Kansas City, (816) 876-2600.

AARP was represented by Jay Sushelsky of AARP Foundation Litigation and Michael Schuster of AARP, both in Washington, D.C., (202) 434-2060.

Missouri AFL-CIO was represented by John B. Boyd of Boyd & Kenter PC in Kansas City, (816) 471-4511, and Matthew J. Padberg of The Padberg & Corrigan Law Firm PC in St. Louis, (314) 621-2900.

Missouri Hospital Association was represented by R. Kent Sellers and Jean Paul Bradshaw II of Lathrop & Gage LLP in Kansas City, (816) 292-2000.

Washington University, Saint Louis University and the University of Missouri-Columbia were represented by Stephen G. Reuter and Lisa O. Stump of Lashley & Baer PC in St. Louis, (314) 621-2939; Ann K. Covington of Bryan Cave LLP in Jefferson City, (573) 556-6620; and Robert T. Haar and Susan E. Bindler of Haar & Woods LLP in St. Louis, (314) 241-2224.

Missouri Professionals Mutual was represented by William E. Quirk, Lauren E. Tucker McCubbin and Miriam E. Bailey of Polsinelli Shughart PC in Kansas City, (816) 421-3355.

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: This case involves the appeal of a trial court’s judgment reducing the amount of noneconomic damages – based on a 2005 law – awarded by a jury in a medical malpractice case in which the negligence occurred before the 2005 law took effect. In a per curiam decision that cannot be attributed to any particular judge, joined in by five judges, the Supreme Court of Missouri reversed the trial court’s judgment reducing the amount of damages awarded by the jury to the plaintiffs based on the new cap and remanded (sent back) the case to the trial court to enter judgment in accord with the jury’s verdict. The Court holds that the new damages cap may not be applied to a cause of action that accrued before the cap became law because to do so would violate the constitutional prohibition against retrospective laws. As to the conduct of the trial, the defendants failed to show error or prejudice occurred regarding the testimony of certain expert witnesses, admission of certain evidence, certain arguments made to the jury, use of certain jury instructions, or rulings on certain motions.

In a concurring opinion, Judge Michael A. Wolff writes that the cap on noneconomic damages violates the constitutional right to a trial by jury can be changed only by a vote of the people. In an opinion concurring in result, Judge Richard B. Teitelman writes that the cap on noneconomic damages also violates the state constitution’s guarantee of equal protection under the laws.

Facts: In March 2004, James Klotz’s implanted pacemaker became infected, causing him to suffer sepsis, amputation and organ failure. During its 2005 session, the legislature passed House Bill No. 393, which amended section 538.210, RSMo. The bill lowered the cap on noneconomic damages to \$350,000 and provided that a husband and wife, as a marital unit, only are entitled to one award of \$350,000 in noneconomic damages as opposed to two caps as authorized by prior law. The bill specified that the amended version of section 538.210 applies “to all causes of action filed after August 28, 2005.” In December 2006, James Klotz and his wife, Mary Klotz, filed suit against St. Anthony’s Medical Center for medical malpractice and loss of consortium; in March 2007, they added Dr. Michael Shapiro and Metro Heart Group as defendants. The case proceeded to jury trial in July 2008 based on the second amended petition the Klotzes filed in March 2008. The jury found the three defendants negligent in their medical treatment of James Klotz, assessing 33 percent of the fault to St. Anthony’s and the remaining 67 percent of the fault to Shapiro and Metro. The jury awarded James Klotz nearly \$2.1 million in damages, including \$760,000 in noneconomic damages, and awarded Mary Klotz \$513,000 in damages, including

\$329,000 in noneconomic damages for loss of consortium. Following post-trial motions, the trial court ruled that the award against Shapiro and Metro was governed by the amended version of the cap, while the award against St. Anthony's was governed by the previous version of the cap. As a result, the trial court reduced James Klotz's award of noneconomic damages against Shapiro and Metro from \$509,200 to \$234,500 and reduced Mary Klotz's award of noneconomic damages against Shapiro and Metro from \$220,430 to \$0. The Klotzes appeal, and Shapiro and Metro cross-appeal.

REVERSED AND REMANDED.

Court en banc holds: (1) The new noneconomic damages cap established by HB 393 may not be applied to a cause of action that accrued prior to August 28, 2005. At the time the malpractice here occurred, the legislature had set a cap on noneconomic damages, and James and Mary Klotz were entitled to their own noneconomic damages up to that amount. HB 393, however, reduced the cap on noneconomic damages for all suits filed after August 28, 2005, without regard to causes of action that had accrued prior to that date. It is well-established that article I, section 13 of the Missouri Constitution prohibits laws that are retrospective in operation. This provision has been part of Missouri law since the state adopted its first constitution in 1820. It also is settled law in Missouri that the legislature cannot change the substantive law for a category of damages after a cause of action has accrued. In *State ex rel. St. Louis-San Francisco Railway Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. banc 1974), this Court unanimously held that legislation increasing defendants' exposure to more damages for wrongful death than existed at the time the cause of action accrued was unconstitutional as applied under the constitutional prohibition against retrospective laws. This Court now is bound by *Buder* to conclude that the amended section 538.210 – which purports to decrease the amount of damages a victim of medical malpractice may recover after the cause of action has accrued – unconstitutional as applied to the Klotzes.

(2) The trial court did not err in allowing a particular witness to testify as a medical expert. The admissibility of expert testimony at trial is governed not by section 538.225, RSMo Supp. 2008, which pertains to the filing of a malpractice action against a health care provider, but rather by section 490.065, RSMo 2000, which states a witness may be qualified as an expert by "knowledge, skill, experience, training, or education." Further, there is no requirement that expert testimony at trial be limited to persons in the same specialty as the defendant. The witness here was qualified as an expert because he completed an internal medicine residency, had specialty training in infectious disease and pulmonary disease and treated James Klotz when he was admitted to the hospital in Phoenix. Here, the witness is an infectious disease specialist, and his testimony about the standard of care when a temporary pacemaker is implanted and there is an infection or risk of infection is well within his expertise.

(3) The trial court did not err in allowing a preventive medicine specialist and certified life-care planner to testify for the Klotzes about the future damages and medical expenses that were reasonable and necessary as a result of James Klotz's infection and sepsis. Shapiro and Metro objected to this testimony on the basis that projected costs should be discounted to present value; they did not object on the basis that the damage calculation was speculative. The record shows the admission of this testimony was not speculative and was within the trial court's discretion. While section 538.215, RSMo Supp. 2008, requires the trier of fact to express future damages at present value, this law does not require plaintiffs to offer evidence about future damages in terms

of present value. As such, there was no requirement that the Klotzes offer evidence as to present value. Further, the trial court specifically advised Shapiro and Metro that they could tell the jury in closing argument that the Klotzes' figures pertaining to future economic damages were not reduced to present value and that any such award should be expressed using present value, but Shapiro and Metro failed to make such an argument.

(4) The trial court did not err in admitting into evidence out-of-court statements of two of James Klotz's treating physicians about the source of his infection. These opinions were included in James Klotz's medical records, which Shapiro and Metro stipulated were business records, and were used as support for the expert opinion offered by an internist cardiologist with a Ph.D. in electrophysiology. Further, Shapiro and Metro actually elicited a portion of the testimony they now claim should have been excluded. Admission of these opinions was permitted under the hearsay rule's business records exception governed by section 490.680, RSMo 2000, and under the expert testimony provisions of section 490.065, RSMo 2000. Further, admission of the two treating physicians' opinions did not violate Shapiro's and Metro's Sixth Amendment right to confront witnesses; this protection applies only in criminal cases, which this is not.

(5) Shapiro and Metro fail to show either abuse of discretion or prejudice resulting from the trial court's refusal to allow them to question the preventive medicine specialist who testified about the Klotzes' future damages about the income he makes from his work as an expert witness. The record reflects that the witness was questioned about his work as an expert: how many times a year attorneys contact him about medical malpractice cases; how many depositions he has given in the past decade; how many times he had testified at trial; how much he charges per hour to review files and to testify in medical malpractice cases; what he charged for his retainer in the Klotzes' case; how much he billed the Klotzes for additional work; and how many hours he spent preparing for his deposition and trial testimony in this case.

(6) The trial court did not abuse its discretion in allowing the Klotzes to show the jury, during closing arguments, a printed portion of Shapiro's deposition. This portion of the deposition had been read into evidence, without objection, during the testimony of a defense expert. As such, Shapiro and Metro waived their objection to the use of the deposition during closing arguments.

(7) The trial court's use of the verdict-directing jury instruction was not so vague as to result in a "roving commission" in which the jury could impose liability based on facts not supported by the evidence. Shapiro and Metro fail to explain what is vague about the term "added risk of infection," how the jury might have misinterpreted it or how the instruction prejudiced them. Here, both Shapiro and one of the Klotz's medical experts sufficiently explained the phrase "added risk of infection" in their testimony about the possibility that an infection at the IV site could increase the risk of infection when the pacemaker was implanted.

(8) The trial court did not err in overruling Shapiro and Metro's motion for a mistrial when the jury deadlocked or in giving an oral "hammer" instruction directing the jury to continue to deliberate and to make every reasonable effort to reach a verdict. None of the attorneys objected to the judge speaking to the jurors. The judge told the jurors at 5:15 p.m. that they could deliberate until 6 p.m. and, if they had not reached a verdict by then, they could continue deliberations in the morning. At 5:55 p.m., the jury returned its verdict, signed by nine jurors. Shapiro and Metro's failure to object to the court's encouragement that jurors attempt to reach an agreement constitutes a waiver of their claim of error now. Furthermore, when a jury is

deadlocked, a court properly may remind jurors of the importance of reaching an agreement so long as the court's commentary does not rise to the level of coercion. Here, there is no indication – from Shapiro and Metro or from the record – that the verdict was coerced. Additionally, there was no requirement that this particular “hammer” instruction to the jury be given in writing in a civil case.

(9) The evidence here was sufficient to support the jury's verdict in favor of the Klotzes. Two experts testified that Shapiro's actions in treating James Klotz were below the standard of care and that Shapiro's failures caused or contributed to cause the pacemaker infection, sepsis and amputation. The jury had sufficient evidence to determine that all the alternative theories of liability set forth in the verdict-directing instruction were supported by the evidence.

(10) The trial court did not abuse its discretion in allowing testimony about Shapiro's knowledge of St. Anthony's infection rates through reports detailing data about the number and type of infections at a specific hospital. The fact that Shapiro denied knowledge of this data did not preclude admission of the evidence; the jury was free to disbelieve his denial of knowledge. Further, the evidence was relevant to show how Shapiro could have discovered the risk of an infection and used this information to help James Klotz make an informed decision about proceeding with surgery. That Shapiro may not have appreciated appropriately the extent of the risk of infection does not make inadmissible evidence showing he should have understood the risk. The evidence was not speculative.

(11) The trial court did not err in allowing testimony about the full amount the Klotzes were charged for medical bills. At a hearing about Shapiro and Metro's objection to this testimony, the trial court appropriately considered substantial evidence showing that liens were being asserted against the Klotzes for the difference between the amount billed and the amount paid by insurance and that the Klotzes signed agreements with two providers stating they were responsible for amounts charged regardless of what insurance paid. This was more than adequate evidence under section 490.715.5(2), RSMo 2000, to demonstrate the higher value of the medical treatment rendered.

Concurring opinion by Judge Wolff: The author writes separately to note that the legislative limits in section 538.210 on a jury's determination of damages violate the guarantee of article I, section 22(a) of the Missouri Constitution that “the right of trial by jury as heretofore enjoyed shall remain inviolate” and that only the voters of Missouri are empowered to change this constitutional guarantee. In *Adams By and Through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 907 (Mo. banc 1992), this Court reasoned that because the 1986 version of section 538.210 prescribed the damages remedy, it is a matter of law for the trial court and not for the jury. *Adams*, however, arose from the flawed view then prevalent that the legislature could abolish or modify the right to trial by jury in particular cases. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 92 (Mo. banc 2003), however, this Court held the right to trial by jury is a constitutional right that applies regardless of any statutory provision and that is beyond the reach of legislation to the contrary. This Court should overrule *Adams* to restore the right to trial by jury to its traditional and vital place under our constitution.

Because Missouri law has provided for jury trials in civil actions for damages arising from personal wrongs since before the state's first constitution in 1820, such jury trials were permitted at common law – or “heretofore enjoyed,” in the language of the constitutional guarantee. The

function of the jury is fact-finding, which includes a determination of the amount of a plaintiff's damages. There is a history in Missouri of courts' reluctance to permit judges – who heard the same evidence as the jury – to order a new trial if a plaintiff does not accept a remittitur (a reduction in damages awarded to an amount that is supported by the evidence). After reviewing the varying and uneven results produced by decades of remittitur rulings, this Court temporarily ended the practice of remittitur in *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. banc 1985), finding the use of remittitur “constitutes an invasion of the jury’s function by the trial judge,” an “invasion of a party’s right to a trial by jury and an assumption of the power to weigh the evidence, a function reserved to the trier(s) of fact.” In 1986, section 537.068 was enacted, which permits a court to enter a remittitur order if the court, after reviewing the evidence in support of the jury’s verdict, found the verdict was excessive because the amount of the verdict exceeded fair and reasonable compensation for the plaintiff’s injuries and damages. This Court subsequently reinstated a remittitur procedure in Rule 78.10 that premises remittitur on the court’s authority to grant a new trial, which was consistent with the judge’s common-law power to control verdicts at the time Missouri’s first constitution was adopted.

Because the damages caps impair the right of trial by jury – allowing the jury to determine the facts in a given case and to reach a fair and just verdict, including damages – the right to trial by jury does not “remain inviolate” as guaranteed by the state constitution. There is a key difference between the legislated limits on damages in section 538.210 and remittitur. With remittitur, the court reduces a particular jury award based on the evidence in an individual case, and the plaintiff may reject the reduction and obtain a new jury trial. The legislated damages caps, on the other hand, reduce the amount of a jury’s award in an entire class of cases without regard to the evidence in a particular case and without the option of a new jury trial. As such, the constitutional right to trial by jury is violated. If the jury’s role in such cases is to be abrogated or impaired, the people of Missouri ought to approve it by amending their constitution.

Opinion concurring in result by Judge Teitelman: The author agrees with the result of the principal opinion and the rationale of Judge Wolff’s concurring opinion; he writes separately to emphasize that the caps on noneconomic damages imposed by section 538.210 also violate equal protection under the laws, which is guaranteed by article I, section 2 of the Missouri Constitution. Under this provision, the state cannot treat similarly situated persons differently without adequate justification. The caps imposed by section 538.210 arbitrarily will permit full recovery by those with relatively minor injuries resulting from medical negligence while denying full recovery to those with the most severe, debilitating, painful, lifelong-disabling injuries resulting from medical negligence. In addition, the caps disproportionately will impact the young – who will have to live the longest with their injuries and disabilities – and the economically disadvantaged – who may have trouble finding a lawyer to take on a complex case of medical negligence when the damages are disproportionately noneconomic.