

Summary of SC91867, *Deborah Watts as Next Friend for Naython Kayne Watts v. Lester E. Cox Medical Centers d/b/a Family Medical Care Center, Lester E. Cox Medical Centers, Melissa R. Hermann, M.D., Matthew P. Green, D.O., and William S. Kelly, M.D.*

Appeal from the Greene County circuit court, Judge Dan J. Conklin
Argued and submitted March 27, 2012; opinion issued July 31, 2012

Attorneys: Watts was represented by Andre M. Mura of the Center for Constitutional Litigation in Washington, D.C., (202) 944-2860, and Roger Johnson of Johnson, Vorhees & Martucci in Joplin, (417) 206-0100. Cox was represented by Kent O. Hyde and David E. Overby of Hyde, Love & Overby LLP in Springfield, (417) 831-4046. The center and physicians were represented by Deputy Solicitor Jeremiah J. Morgan of the attorney general's office in Jefferson City, (573) 751-3321.

Several groups filed briefs as friends of the Court: the Missouri Coalition for Quality Care was represented by Tim Dollar and Tom Hershewe of Dollar, Burns & Becker LC in Kansas City, (816) 876-2600; certain law professors were represented by David Zevan of Zevan & Davidson LLC in St. Louis, (314) 588-7200; the Missouri AFL-CIO was represented by John B. Boyd of Boyd & Kenter PC in Kansas City, (816) 471-4511; Paraquad Inc. was represented by Kevin J. Davidson and David M. Zeman of Zevan & Davidson of St. Louis, (314) 588-7200; the Missouri Chamber of Commerce and Industry was represented by Robert T. Adams of Shook Hardy & Bacon LLP in Kansas City, (816) 474-6550, Mark A. Behrens and Carl Silverman of Shook Hardy & Bacon LLP in Washington, D.C., (202) 783-8400, and Richard AuBuchon of Jefferson City, (573) 634-3511; the American Tort Reform Association was represented by H. Sherman Joyce of Washington, D.C., (202) 682-1163; the Property Casualty Insurers Association of America was represented by Sean McMurrugh of Des Plaines, Ill., (847) 553-3826; the Physician Insurers Association of America was represented by Michael C. Stinson of Rockville, Md., (301) 947-9000; the NFIB Small Business Legal Center was represented by Karen R. Harned and Elizabeth Milito of Washington, D.C., (202) 314-2061; the National Chamber Litigation Center Inc. was represented by Robin S. Conrad, Kate Comerford Todd and Sheldon Gilbert of Washington, D.C., (202) 463-5337; the American Insurance Association was represented by Pamela Young of Washington, D.C., (202) 828-7158; the National Association of Mutual Insurance Companies was represented by Gregg Dykstra of Indianapolis, (314) 875-5250; the Missouri Hospital Association was represented by R. Kent Sellers of Lathrop & Gage LLP in Kansas City, (816) 292-2000; the Missouri Organization of Defense Lawyers was represented by Kurt A. Hentz, Jessica L. Hawkins and Lindsay T. Leible of HeplerBroom LLC in St. Louis, (314) 241-6160; Washington University, Saint Louis University and the University of Missouri were represented by Stephen G. Reuter and Lisa O. Stump of Lashly & Baer PC in St. Louis, (314) 621-2939, and Robert T. Haar and Susan E. Bindler of Haar & Woods LLP in St. Louis, (314) 241-2224; the American Congress of Obstetricians and Gynecologists, the Missouri College of Emergency Physicians and the Missouri Association of Rural Health Clinics were represented by Robyn Greifu Fox of Moser & Marsalek PC in St. Louis, (314) 421-5364; and the American Medical Association, American Osteopathic Association, American College of Radiology, Missouri State Medical Association, Missouri Association of Osteopathic Physicians and Surgeons, Missouri Society of the American College of Osteopathic Family Physicians,

Missouri Radiological Society, Missouri Dental Association, Missouri Pharmacy Association and Missouri Health Care Association were represented by Mark G. Arnold of Husch Blackwell LLP in St. Louis, (314) 480-1500, and Harvey M. Tettlebaum of Husch Blackwell LLP in Jefferson City, (573) 635-9118.

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: A woman whose son was born with catastrophic brain injuries filed a medical malpractice suit against the medical center and her doctors for providing negligent health care services. The jury awarded \$1.45 million in non-economic damages. It also awarded \$3.371 million in future medical damages reduced to a present value of more than \$1.747 million. The trial court allowed the providers to pay half the future damages in a lump sum immediately and the other half over 50 years. In a 4-3 decision written by Chief Justice Richard B. Teitelman, the Supreme Court of Missouri affirms the judgment in part, reverses it in part and remands (sends back) the case.

The section 538.210, RSMo 2000, cap on non-economic damages violates the right to trial by jury guaranteed by article I, section 22(a) of the Missouri Constitution, which mandates in pertinent part that “the right of trial by jury as heretofore enjoyed shall remain inviolate.” Once this right attaches, as it does here, the plaintiff has the full benefit of that right free from legislation to the contrary. Section 538.210, however, curtails the determination of damages because it caps the jury’s award of non-economic damages wholly independently of the facts of the case. As such, it necessarily infringes on Watts’ right to trial by jury. Statutory damage caps were not permissible when the constitution was adopted in 1820 and, therefore, remain impermissible. The right to trial by jury cannot “remain inviolate” when an injured party is deprived of the jury’s constitutionally assigned role of determining damages according to the particular facts of the case. To the extent *Adams by and Through Adams v. Children’s Mercy Hospital*, 832 S.W.2d 898, 907 (Mo. banc 1992), holds that the section 538.210 cap on non-economic damages does not violate the right to trial by jury, it is overruled. Because the trial court here reduced the non-economic damages in reliance on *Adams*, that aspect of the judgment is reversed.

The trial court had discretion pursuant to section 538.220.2 as to whether to award future medical damages wholly in periodic payments or in part in a lump sum. The requirement that future medical damages be discounted to present-day value necessarily means that full compensation for those future damages is, in large part, dependent on the statutory interest rate being the same as the rate of health care inflation over the course of the payment schedule. Once a present-value reduction was made, use of an inconsistent future-damages interest rate guaranteed that the jury’s damages award would not actually cover Naython’s future medical damages and, therefore, would take from him the full value of the jury’s award. On remand, the trial court shall enter a new periodic payment schedule that, consistent with the goal of reducing medical malpractice costs, also ensures that Naython will receive the benefit of the jury’s award for future medical care. This portion of the judgment, therefore, is reversed, and the case is remanded. All other aspects of the judgment are affirmed.

Judge Mary R. Russell wrote an opinion concurring in part and dissenting in part. She agrees with the Court's analysis regarding the interest rate and payment schedule issues, but she dissents to the extent the principal opinion overrules this Court's well-reasoned, longstanding precedent in *Adams*. Because section 538.210 establishes the substantive legal limits of a plaintiff's damage remedy, it is a matter of law, not fact, and the trial court applies the law of this section only after the jury completes its fact-finding duty. As such, it does not violate the constitutional right to a jury trial. The majority's reasons for departing from the holding in *Adams* are not persuasive. Section 538.210 does not prevent the jury from assessing damages. The plaintiff is afforded his or her "individual right" to a jury trial when the jury performs its "constitutional task." She further notes that many other states have held that statutes limiting non-economic damages do not violate those states' respective rights to a jury trial, including states with "inviolable" language the same as that in the Missouri Constitution.

Judge Sandra C. Midkiff, a circuit judge in the 16th circuit (Jackson County), sat in this case by special designation in place of Judge Zel M. Fischer.

Facts: Deborah Watts filed a medical malpractice suit alleging that her son, Naython, was born with disabling brain injuries because Lester E. Cox Medical Centers and its associated physicians provided negligent health care services. In October 2006, when she was 39 weeks pregnant, Watts went to a clinic associated with Cox because she was experiencing cramping and decreased fetal movement. Dr. Melissa Hermann, a third-year medical student, examined Watts, and Hermann's findings were signed off on by her supervisor, Dr. William Kelly. Evidence at trial indicated that Hermann did not perform appropriate tests, failed to inform Watts of the significance of decreased fetal movement and failed to perform further diagnostic monitoring. Two days later, Watts was hospitalized due to lack of fetal movement and, at 9:10 a.m., was placed on a fetal monitor, which indicated fetal hypoxia and acidosis. Watts' expert at trial testified the standard of care for these diagnoses required immediate Caesarean-section delivery. Dr. Matthew Green, the second-year medical resident examining Watts, did not begin the Caesarean until 10:45 a.m. Naython was born with catastrophic brain injuries. After trial, the jury returned a verdict in Watts' favor and awarded \$1.45 million in non-economic damages and \$3.371 million in future medical damages, reducing the latter award to present value pursuant to section 538.220, RSMo 2000, which worked out to a present value of \$1,747,600. Cox and the doctors requested that they be permitted to make periodic payments pursuant to section 538.220, and the trial court entered a payment schedule under which half of the future damages would be paid immediately in a lump sum, with the remainder paid over a 50-year period at a statutorily required interest rate of 0.26 percent. Watts appeals, and the doctors cross-appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) The section 538.210, RSMo 2000, cap on non-economic damages violates the right to trial by jury guaranteed by article I, section 22(a) of the Missouri Constitution, which mandates in pertinent part that "the right of trial by jury as heretofore enjoyed shall remain inviolate."

(a) The plain language of article I, section 22(a) first requires a determination of whether an action is within “the right of trial by jury as heretofore enjoyed,” which means that Missouri citizens are entitled to a jury trial in all actions to which they would have been entitled to a jury when the state’s constitution was adopted in 1820. The scope of that right also is defined by common-law limitations on the amount of a jury’s damage award. As such, if Missouri common law (case law as decided by the state’s various appellate courts and based on the old common law of England) entitled a plaintiff to a jury trial for the determination of non-economic damages in a medical negligence action in 1820, then Watts has a state constitutional right to a jury trial on her claim for damages for medical malpractice. English common law recognized medical negligence as one of five types of “private wrongs” that could be redressed in court and also permitted recovery of non-economic damages to give “pecuniary satisfaction” to the party who was wronged. Similarly, Missouri’s territorial laws that predated statehood provided for jury trials in all civil cases alleging at least \$100 in damages. Accordingly, Watts’ action for medical negligence – including her claim for non-economic damages – falls into the same category of cases that were recognized at common law when Missouri adopted its constitution in 1820. As to the scope of the right to jury trial, although English common law recognized the validity of some judicial control over jury verdicts, the United States Supreme Court held in 1935 that there were few common-law precedents authorizing remittitur (a court reduction of a jury verdict) although the procedure was permitted in certain circumstances. Missouri common law recognized judicial remittitur in certain circumstances. More than a century ago, however, this Court refused to remit damages in a personal injury case, finding that “[w]hen we set aside any part of the verdict, we destroy its integrity, and we have no right to set ourselves up as triers of fact, and render another and different verdict.” *Gurley v. Mo. Pac.*, 16 S.W. 11, 17 (Mo. 1891) (holding that, absent passion or prejudice influencing a jury’s verdict, the verdict should be upheld). Although the precedent regarding remittitur is inconsistent, the inconsistency stems from a long-standing reluctance in the common law to tamper with the jury’s constitutional role as the finder of fact. As such, the right to trial by jury “heretofore enjoyed” is not subject to legislative limits on damages.

(b) The plain language of article I, section 22(a) next requires a determination of whether the right to jury trial “remain[s] inviolate” – defined by the dictionary as “free from change or blemish, pure or unbroken” – when a statutory cap requires courts to reduce the jury’s verdict. Missouri law long has recognized that one of the jury’s primary constitutional functions is to determine the plaintiff’s damages. Even though *Adams by and Through Adams v. Children’s Mercy Hospital* held that a cap on non-economic damages did not violate the right to trial by jury, this Court still recognized that the jury’s primary function is fact-finding, including a determination of the plaintiff’s damages. 832 S.W.2d 898, 907 (Mo. banc 1992). Missouri law always has recognized that the jury’s role in a civil case is to determine the facts relating to both liability and damages and to enter a verdict accordingly. *Estate of Overbey v. Chad Franklin Nat’l Auto Sales N. LLC*, 361 S.W.3d 364, 382 (Mo. banc 2012). Like any other type of damages, the amount of non-economic damages is a fact that must be determined by the jury and, as such, is subject to the right to trial by jury. Once this right to a trial by jury attaches, as it does here, the plaintiff has the full benefit of that right free from legislation to the contrary.

Section 538.210, however, curtails the determination of damages because it caps the jury's award of non-economic damages wholly independently of the facts of the case. As such, it necessarily infringes on Watts' right to trial by jury. Statutory damage caps were not permissible when the constitution was adopted in 1820 and, therefore, remain impermissible. The right to trial by jury cannot "remain inviolate" when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case. Other states likewise have concluded that, because the assessment of damages is one of the factual findings assigned to the jury rather than to a judge, any limit on damages that restricts the jury's fact-finding role violates the constitutional right to trial by jury. Likewise, section 538.210 violates the article I, section 22(a) right to trial by jury.

(c) To the extent *Adams* holds that the section 538.210 caps on non-economic damages do not violate the right to trial by jury, it is overruled. Although this Court is hesitant to overrule precedent, it will do so when the precedent, as here, is based on flawed reasoning. It is particularly important to overturn erroneous precedent when necessary to protect the constitutional rights of Missouri citizens. The holding in *Adams* was based on the fact that the trial court applies the cap after the "jury completed its constitutional task" of determining the plaintiff's economic and non-economic damages. 832 S.W.2d at 907. There are four flaws in *Adams*' rationale. First, it fundamentally misconstrues the nature of the right to trial by jury, as statutory limits on damages directly curtail the individual right to one of the most significant constitutional roles the jury performs – determining damages. A cap nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function. Second, *Adams* further misconstrues the right to trial by jury by specifically permitting legislative limitation of an individual constitutional right. This holding is untenable for the simple reason that a statutory limit on the state constitutional right amounts to an impermissible legislative alteration of the constitution. Third, *Adams* cites to *Tull v. United States*, 481 U.S. 412 (1987), for the proposition that the right to jury trial does not extend to the determination of damages. *Tull*, however, is irrelevant because it interprets the federal constitution and deals only with civil penalties, not common-law damages. The United States Supreme Court has so noted when it later held that *Tull* is inapposite in cases in which juries set the amount of damages awarded to successful plaintiffs. *Feltner v. Columbia Pictures Television Inc.*, 523 U.S. 340, 355 (1998). Further, Missouri law long has recognized that the jury's role is precisely to determine both liability and damages and that article I, section 22(a) of the state constitution protects the individual right to a jury determination of damages. Fourth, *Adams* reaches its conclusion without any citation to any applicable Missouri law, relying instead on *Tull* and a case from the supreme court of Virginia, whose constitutional right to a jury trial does not contain the Missouri constitutional requirement that such a right "remain inviolate." Because the trial court here reduced the non-economic damages in reliance on *Adams*, that aspect of the judgment is reversed.

(2) Section 538.220 permits the trial court to consider the needs of the plaintiff and the facts of the particular case when deciding what portion of future medical damages will be paid in a lump sum and what portion will be paid over a period payment schedule that accords with the parameters set out in the statute. This Court previously has held that the general purpose of

chapter 538, RSMo, is to reduce the cost of medical malpractice and that the specific purpose of section 538.220 is to spread that cost over time and to guard against squandering the judgment while reducing future burdens on government social services. Once a defendant requests a periodic payment schedule for future damages, the first sentence of section 538.220.2 plainly requires the trial court to include in its judgment, while sentences toward the end of the section make clear that it is up to the court to determine what portion of future damages are to be included in future payments. As such, the statute expressly leaves the issue of how to pay future damages and at what interest rate in the hands of the trial court.

(3) Although section 538.220.2 gives the trial court discretion as to whether to award future medical damages wholly in periodic payments or in part in a lump sum, the middle portion of the section requires that payments of future medical damages be divided into equal amounts over the recipient's life expectancy and be determined by reference to a particular interest-rate benchmark. As such, it takes from the court and the parties the opportunity to agree on a different interest rate and payment schedule. Accordingly, the doctors' cross-appeal is denied because the statute does not require that all future medical damages be paid according to a payment schedule.

(4) Once the jury discounted the future medical damages to present-day value as required by section 538.215, RSMo 2000, however, it applied a 0.26-percent interest rate that guaranteed its damages award would not actually cover the future medical costs due to inflation in health care costs, thereby taking away from the full value of the award. This portion of the judgment, therefore, is reversed, and the case is remanded for the trial court to enter a new periodic payment schedule that, consistent with the goal of reducing medical malpractice costs, also will ensure that Watts' son will receive the benefit of the jury's award for his future medical care.

Opinion concurring in part and dissenting in part by Judge Russell: The writer agrees with the Court's analysis regarding the interest rate and payment schedule issues, but she dissents to the extent the principal opinion overrules this Court's well-reasoned, longstanding precedent in *Adams* without persuasive justification. *Adams by and Through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 907 (Mo. banc 1992) – holding that section 538.210, RSMo, does not violate the Missouri Constitution's right to a jury trial because, once the jury completes its fact-finding duty of determining liability and the measuring damages, both economic and non-economic – is dispositive in this case. And just this year, the Court upheld section 538.210, RSMo 2000, with regard to statutorily created causes of action. *Sanders v. Ahemed*, 364 S.W.3d 195, 204 (Mo. banc 2012). Because section 538.210 establishes the substantive legal limits of a plaintiff's damage remedy, it is a matter of law, not fact, and the trial court applies the law of this section only after the jury completes its fact-finding duty. As such, it does not violate the constitutional right to a jury trial. Further, this Court noted in *Adams* that the legislature is permitted to abrogate completely a cause of action cognizable under the common law and, therefore, has the power to limit recovery in the same causes of action. The majority's reasons for departing from the holding in *Adams* are not persuasive. Section 538.210 does not prevent the jury from assessing damages. The plaintiff is afforded his or her "individual right" to a jury trial when the jury performs its "constitutional task." Because the author would find that section 538.210 does not violate the state constitution now or in *Adams*, she would uphold the statute consistent with this Court's 20 years of controlling precedent. Further, she notes, many other

states have held that statutes limiting non-economic damages do not violate those states' respective rights to a jury trial, including states with "inviolate" language the same as that in the Missouri Constitution. She also notes that the Virginia case the majority criticized held, just as in *Adams*, that because the trial court applies that state's damages cap only after the jury has fulfilled its fact-finding function, the cap does not infringe on the right to a jury trial.