NOTE

The Constitutionality of Caps: Upholding Missouri’s Right to Jury Trial and the Non-Economic Damages Debate

Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633 (Mo. 2012) (en banc)

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I. INTRODUCTION

Imagine a loved one who, through no fault of their own, suffers from the terrible consequences of a medical professional’s negligence. Picture a family member who is left paralyzed, unable to ever independently walk or move below the waist again, who will spend most of his or her remaining years sitting in a bed or chair. Imagine the pain and suffering, emotional anguish, physical impairment, and loss of capacity to enjoy life that this person will face on a daily basis. Now imagine that for the rest of this person’s life, the most he or she will be able to recover in non-monetary damages from the negligent medical professional is $350,000, no matter how negligent the care or severe the mental anguish.¹ Until a Supreme Court of Missouri decision in July 2012,² this was not an imaginary situation, but a very real problem facing hundreds³ of Missouri patients and families.

Tort reform is an issue within the health care industry that has seen attention both at the state and national level.⁴ One aspect of tort reform in-
volves capping damages in medical malpractice claims. Missouri has capped damages since 1986 through Missouri Revised Statutes chapter 538, “Tort Actions Based on Improper Health Care.” Within its various sections, chapter 538 includes limits on non-economic damages, how and when damages are paid, the requirement of affidavits by health care professionals confirming merits of the lawsuit, immunity from civil liability for certain health care professionals, and venue for certain actions against health care providers. Under Missouri Revised Statutes section 538.210, a $350,000 non-economic damage cap was in place in 2012 when Watts v. Lester E. Cox Medical Centers was decided.

After a 4-3 decision by the Supreme Court of Missouri that declared the $350,000 statutory cap unconstitutional, supporters of tort reform predicted “dire consequences” for the future of the health care system. Nationwide, supporters of non-economic caps claimed a medical malpractice “crisis” had unfolded, resulting in doctors moving their practices to states with lower malpractice insurance rates, turning away high-risk patients and engaging in “defensive medicine” to avoid potential malpractice lawsuits. Physicians and other health care representatives blamed excessive, frivolous lawsuits and

never finalized. See Damian Stutz, Non-Economic-Damage Award Caps in Wisconsin: Why Ferdon Was (Almost) Right and the Law is Wrong, 2009 Wis. L. Rev. 105, 107, 123 (2009).

5. See Lee Harris, Tort Reform as Carrot-and-Stick, 46 Harv. J. on Legis. 163, 166 (2009). Medical malpractice damages are categorized into three types: economic, non-economic and punitive. Catherine M. Sharkey, Unintended Consequences of Medical Malpractice Damages Caps, 80 N.Y.U. L. Rev. 391, 398 (2005). Economic or pecuniary damages include medical costs, lost wages and rehabilitation expenses. Id. Non-economic damages are “damages arising from non-pecuniary harm including . . . pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium,” and do not include punitive damages. Mo. Rev. Stat. § 538.205(7).


8. Id. § 538.220.

9. Id. § 538.225.

10. Id. § 538.228.

11. Id. § 538.232.

12. Id. § 538.210, held unconstitutional by Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012) (en banc).


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high plaintiff payouts for the rise in malpractice premiums. In contrast, those who opposed the statutory cap celebrated the Watts decision, claiming Missourians had their “constitutional rights restored.” Nationally, plaintiffs’ lawyers and patient advocates claimed states “unconstitutionally restrict[ed] access to the courts” and limited redress of injury when legislators capped damages. Because caps limited recovery at a certain amount regardless of extent or type of injury, plaintiff advocacy groups alleged patients were “squeezed out of a system designed to give them full redress” for the harm they suffered.

This split in opinion raises important questions. Should caps on non-economic damages be constitutional in Missouri? Just how much do non-economic caps affect medical malpractice insurance premiums and the health care system overall? Are caps a fair solution to rising costs of health care or just a quick fix solution to a much more damaged system? This Note will discuss these questions and others involving the constitutionality of caps on non-economic damages and the policy issues that surround this controversial topic.

This Note argues that the Watts decision appropriately invalidated the statutory limits on economic damages, finding non-economic caps on damages unconstitutional. Part II of this Note analyzes the facts and holding of Watts. Part III examines previous constitutional challenges to Missouri Revised Statutes chapter 538 and how the court interpreted constitutional language to reach its decision. Next, Part IV explains the court’s rationale in Watts. Last, Part V explains why the court was correct in declaring non-economic damage caps unconstitutional and explores the policy issues behind statutory limitations on damages.

II. FACTS AND HOLDING

On October 30, 2006, Deborah Watts (Watts) visited “a clinic associated with” the Cox Medical Center (Cox) after experiencing cramping and “decreased fetal movement” in the 39th week of her pregnancy. A third year medical resident, Dr. Herrman, examined Watts, but failed to perform further

17. Williams, supra note 14, at 479.
18. Id.
diagnostic monitoring and applicable tests related to the decreased fetal movement. Dr. Herrman’s supervisor signed off on the examination.

Two days later, “Watts was admitted to the hospital due to lack of fetal movement[4]” and “was placed on a fetal monitor at 9:10 a.m.” According to Watts’ expert Dr. Roberts, the monitor indicated “fetal hypoxia” and “acidosis” by which the standard of care demands immediate delivery by caesarean section. However, Dr. Green, a second year resident who was examining Watts, did not start the caesarean section until one hour and thirty-five minutes later, at 10:45 am. As a result, Watter’s son Naython was born with “catastrophic brain injuries.”

Watts filed a medical malpractice claim against Cox on behalf of her son, asserting that Naython was born with disabling brain injuries caused by the hospital and its associated physicians’ negligent care. The jury found in favor of Watts, awarding $3.371 million in future medical damages and $1.45 million in non-economic damages. As required by Missouri Revised Statutes section 538.210, the trial court reduced Watts’ non-economic damages to $350,000. Watts appealed from the Circuit Court of Greene County, claiming section 538.210 violated multiple provisions of the Missouri Constitution.

After reviewing the case de novo, the Supreme Court of Missouri held that Missouri Revised Statutes section 538.210 was unconstitutional. The court reasoned that the non-economic cap interfered with the jury’s role of determining an injured party’s damages and thus “violate[d] the right to trial by jury guaranteed by article 1, section 22(a) of the Missouri Constitution.” The court reversed the judgment of capped damages pursuant to section 538.210, overruling Adams v. Children’s Mercy Hospital, which held non-economic caps constitutional.

20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. See id.
26. Id.
27. Id.
28. Id. at 635.
29. Id.
30. Id. at 636-37.
31. Id. at 636; see MO. CONST. art. 1, § 22(a) (“That the right of trial by jury as heretofore enjoyed shall remain inviolate[()].
33. Adams, 832 S.W.2d at 900.
III. LEGAL BACKGROUND

This Part will first discuss the history of Missouri Revised Statutes chapter 538, specifically section 538.210 before and after its revision in 2005. Next, this Part will examine chapter 538’s history of constitutional challenges in Missouri. This Part will then explain and analyze phrasing within the Missouri Constitution that guarantees Missouri’s right to trial by jury. Next, this Part will look at the Supreme Court of Missouri’s interpretation of legislative reasoning behind statutory caps and the rising costs of health care. Lastly, this Part will compare different state approaches to non-economic caps by examining why different state courts have upheld or overturned caps based on their respective state constitutions.

A. The History of Missouri Revised Statutes Chapter 538

In 1975, California became the first state to cap non-economic damages at $250,000, a ceiling that remains in effect today. Although in 1975 $250,000 was about the equivalent of one million dollars in today’s money, the cap has not been adjusted for inflation. Other states such as Maryland and Colorado followed in 1986. Currently, more than half of all states have a type of cap in place that limits a plaintiff’s non-economic damages.

Missouri first began to cap damages in medical malpractice claims in 1986 based on concerns about increasing malpractice premium costs and the high number of medical malpractice lawsuits. The 1986 legislation limited a plaintiff’s recovery to $350,000, an amount that was adjusted yearly by the Missouri Department of Insurance to reflect inflation. By 2005, the limit

39. HERMAN, supra note 6, at 5.
40. MO. REV. STAT. § 538.210 (1986) (amended 2005), held unconstitutional by Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012) (en banc); see Medi-
had reached $579,000. In addition, a plaintiff could recover multiple caps from one injury when there was more than one defendant. Because of the increased monetary damages and the republican legislature’s push for additional tort reform, the Missouri legislature modified the statutory provision with several changes in 2005. The new statute took effect August 28, 2005, and returned the non-economic damage cap to $350,000 without an escalator clause for inflation. Until the Watts v. Lester E. Cox Medical Centers decision in July 2012, some kind of limitation on non-economic damages existed in Missouri for the past 26 years.

1. The Original Section 538.210

In 1986, the Missouri legislature enacted chapter 538 in an effort to reform medical malpractice tort claims. Included in chapter 538 was section 538.210, the limitation on non-economic damages. The section stated:

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

cal Malpractice Limits, Mo. DEP’T OF INS., http://insurance.mo.gov/industry/medmal.php (last visited Feb. 12, 2013). Each year, the amount of damages awarded increased. Id. For example, with inflation, the amount in 2004 was $565,000 and in 2005 had reached $579,000. Id.

41. Medical Malpractice Limits, supra note 40.

42. Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560, 571 (Mo. App. E.D. 2002) (defining “per occurrence” as an act by a defendant, not injury to the plaintiff). This decision was one of the main reasons the statutory language was revisited in 2005. See Mo. Med Mal Data Show Court’s Cap Ruling Needs Reversal: Commish, INS. J. (May 14, 2003), http://www.insurancejournal.com/news/midwest/2003/05/14/28933.htm.


46. Watts, 376 S.W.3d 633.


[§350,000] per occurrence for noneconomic damages from any one defendant[.]\(^{49}\)

Additionally, in Missouri Revised Statutes section 538.210.3, the statute provided that when the trier of fact was a jury, the court shall not instruct the jury about the non-economic damage award limitation.\(^{50}\) In section 538.210.4, the statute stated that the limits on non-economic damage awards were to be increased or decreased on January 1st each year in accordance with inflation.\(^{51}\) Section 538.210.5 provided that punitive damages shall be awarded only after the plaintiff showed the health care provider exhibited “willful, wanton or malicious conduct” related to the action that caused the injury.\(^{52}\)

In 2001, the Missouri Court of Appeals, Western District, helped clarify the language in section 538.210 when the court examined what a “plaintiff” meant under the statute.\(^{53}\) In Wright v. Barr, Wright, a patient who suffered atrial fibrillation, was discharged from the hospital after her doctor made no attempt to detect blood clots in her heart.\(^{54}\) A “transesophageal echocardiogram” later detected a clot in her left atrium.\(^{55}\) As a result from the clot going undetected, she suffered from two debilitating strokes in one week and was left in need of 24-hour care.\(^{56}\) Wright sued for negligence and her husband claimed loss of consortium.\(^{57}\) The jury returned a verdict for the Wrights, awarding Mrs. Wright $320,000 for non-economic damages and Mr. Wright $300,000, totaling $620,000.\(^{58}\) The defendant doctor and hospital appealed and filed a motion to reduce the amount of non-economic damages from $620,000 to $528,000 pursuant to section 538.210 and the inflation clause in place.\(^{59}\) The defendants argued that because Mr. Wright’s consortium claim was derivative of Mrs. Wright’s claim, the husband and wife should be considered one plaintiff in accordance with the statute.\(^{60}\)

The Missouri Court of Appeals, Western District, denied the motion to reduce damages and reasoned that because Mr. and Mrs. Wright were sepa-
rate plaintiffs, the statutory cap applied separately to the two claims.\footnote{Id. at 538.} According to the court, based on the statutory language of section 538.210 in 2001, caps applied per plaintiff, and both received separate awards.\footnote{Id. at 564.}

In 2002, the Missouri Court of Appeals, Eastern District, interpreted the meaning of “per occurrence” within section 538.210 in \textit{Scott v. SSM Healthcare St. Louis}.\footnote{Id. at 563.} In \textit{Scott}, Scott and his mother brought an action for medical malpractice after doctors misdiagnosed a sinus infection in Scott’s brain as a minor concussion.\footnote{Id. at 562.} Left untreated, the infection caused Scott’s brain to swell and required skull reconstructive surgery.\footnote{Id. at 561.} Scott sustained serious injuries including paralysis on the right side of his body and a permanent drainage tube in his brain.\footnote{Id. at 570.} The Scotts alleged that two doctors acted below the standard of care: Dr. Koch in misreading Scott’s initial CT scan and Dr. Doumit for failing to advise Scott to return to the hospital after his initial symptoms did not improve.\footnote{Id. at 571.}

The jury ruled for the Scotts and found both Dr. Koch and Dr. Doumit at fault.\footnote{Id. at 570.} The City of St. Louis Circuit Court determined that in the Scotts’ case, two caps could be applied pursuant to section 538.210 because two separate occurrences of malpractice took place.\footnote{Id. at 564.} Thus, the Scotts were able to recover $1,056,000 in non-economic damages, or twice the amount of the $528,000 cap in place that year.\footnote{Id. at 562.} SSM Healthcare appealed and alleged that the court erred in applying more than one statutory damage cap.\footnote{Id. at 570.}

In reaching a decision, the Missouri Court of Appeals, Eastern District, looked at the language within section 538.210 and interpreted the meaning of “occurrence” as used in the statute.\footnote{Id. at 563.} While SSM Healthcare argued that “occurrence” referred to overall death or injury a plaintiff sustained, the Scotts argued “occurrence” meant an act of negligence by a medical profes-

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\footnote{Id. at 562.}

\footnote{Id. at 570.}
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sional. The court reasoned that if the legislature wanted only one cap to apply, regardless of how many individual occurrences of malpractice, the “clearest and most unambiguous way” would have been to leave “per occurrence” out of the statute completely. Looking at this legislative intent, the court held that two caps could be applied when “two separate and distinct ‘occurrences’ of medical malpractice” led to a plaintiff’s injuries, and affirmed the lower court’s decision. Three years later, however, the legislature redefined the statute so that only one damage cap could apply in cases with multiple defendants.

2. The Amended Section 538.210

Several changes and additions were made to the Missouri Revised Statutes section 538.210 in 2005. In 2005, the legislature changed the wording from “no plaintiff shall recover more than [$350,000] for noneconomic damages . . . from any one defendant” to “irrespective of the number of defendants.” This change allowed only one damage award per plaintiff, no matter how many defendants were responsible. The same year, the legislature also removed the inflation clause and restored the maximum non-economic damage award to $350,000, as was originally set in 1986. Replacing the inflation clause, section 538.210.4 stated “any spouse claiming damages for loss of consortium of [his or her] spouse shall be considered to be the same plaintiff as [his or her] spouse[,]” thus eliminating a spouse’s individual non-economic damages and collectively capping damages for the couple at $350,000. Section 538.210.6 was also added in 2005, and stated all individuals asserting a wrongful death claim for the same decedent would be considered one plaintiff, since only one action can be brought under section 537.080 against any one defendant for the death of one person. No additional changes were made to the statute from 2005 to 2012, the year Watts was decided.

Klotz v. St. Anthony’s Medical Center was the first case to reach the Supreme Court of Missouri that challenged the 2005 amended version of section

73. Id.
74. Id. at 571.
75. Id. at 571, 573.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. See MO. REV. STAT. § 538.210 (Supp. 2011).
538.210. The court again clarified section 538.210, this time in terms of when the new cap could be applied to older occurrences of malpractice. In Klotz, a jury previously found St. Anthony’s Medical Center negligent for implanting an infected pacemaker in Klotz that resulted in “sepsis, amputation, and organ failure.” The jury returned verdicts in favor of the Klotzes for Mr. Klotz’s medical malpractice claim and for Mrs. Klotz’s loss of consortium claim. The Klotzes appealed after the trial court reduced Mr. Klotz’s non-economic damages and eliminated Mrs. Klotz’s loss of consortium damages pursuant to section 538.210.4.

The malpractice incident occurred when the previous version of section 538.210 was controlling law, under the pre-amended version with inflation, the Klotzes would have each been permitted damages up to $579,000. However, the new version of section 538.210 reduced the cap to $350,000 for all suits filed after August 28, 2005. The Klotzes did not file suit until December 2006. The Klotzes argued that applying the new cap of $350,000 to a cause of action that occurred before the effective date of the new law “violate[d] the prohibition of retrospective laws.” The Supreme Court of Missouri agreed with the Klotzes and held that the new $350,000 economic damage cap under section 538.210 could not be applied to causes of action before August 28, 2005.

Although Klotz left the issue of constitutionality for a later decision, in his concurring opinion, Judge Richard B. Teitelman criticized section 538.210, claiming the cap harmed the most severely injured, especially young and economically disadvantaged people, while those with minor injuries received full recovery. In his concurring opinion, Judge Michael A. Wolff also expressed his belief that caps on non-economic damages violated the constitutional right to trial by jury guaranteed in article 1, section 22(a) of the Missouri Constitution. Calling the constitutional controversy surrounding section 538.210 an “issue that the court one day will have to confront,”

83. 311 S.W.3d 752, 772 (Mo. 2010) (en banc) (Wolff, J., concurring) (per curiam).
84. Id. at 759-60 (majority opinion).
85. Id. at 758.
86. Id.
87. Id.
88. Id.
89. Id. at 772 (Wolff, J., concurring).
90. Id.
91. Id. at 758 (majority opinion).
92. Id.
93. Id.
94. Id. at 782 (Teitelman, J., concurring).
95. Id. at 773 (Wolff, J., concurring).
Wolff’s concurring opinion foreshadowed the majority decision reached two years later in Watts.96

B. Missouri’s Constitutional Right to Trial by Jury

The right to trial by jury has existed in Missouri since the United States attained jurisdiction over the Louisiana Territory in 1803, predating Missouri statehood.97 The first right to jury trial provision was enacted in 1804 and afforded jury trials in civil cases “if either party requested it.”98 Later, territorial laws provided jury trials “in ‘all civil cases of the value of one hundred dollars . . . if either of the parties require[d] it.’”99 In 1820, Missouri’s state constitution was written and included that the right to a jury trial shall “remain inviolate.”100 In 1875, the phrase “as heretofore enjoyed” was added, “to keep the year 1820 as the point of reference.”101

In Watts, the Supreme Court of Missouri looked at the definition of “inviolate,” which meant “free from change or blemish, pure or unbroken.”102 The court interpreted this phrase to mean if any change is applied to the common law right to a jury trial, “the right to trial by jury does not ‘remain inviolate’ and . . . is [thus] unconstitutional.”103 The court also read the language “heretofore enjoyed” to mean that current day Missouri citizens had the right to a jury trial if a plaintiff was entitled to a jury trial on the same issue in 1820.104

Despite the language in the Missouri Constitution that guarantees a right to a jury trial, Missouri has a history of case decisions, including State ex rel.

98. Id. (citing Mo. Terr. Laws 4, 5 (1804)).
99. Id. (citing Mo. Terr. Laws 58, § 13).
100. Id. (quoting Mo. CONST. art. XIII, § 8 (1820), available at http://digital.library.umsystem.edu/cgi/t/text/pageviewer-idx?c=mocon;cc=mocon;idno=moc0n000027;view=image;seq=1 (last visited Feb. 14, 2013)).
101. Id. at 84-85; see also Mo. CONST. art. II, § 28 (1875), available at https://play.google.com/books/reader?id=0gEbaAAAAYAAJ&printsec=frontcover&output=reader&authuser=0&hl=en&pg=GBS.PA7. The full phrase is now “... heretofore enjoyed shall remain inviolate[,]” MO. CONST. art. I, § 22(a).
103. Id.
104. Id.
Tolbert v. Sweeney and Adams v. Mercy Children’s Hospital that suggest the right to trial by jury could be changed or altered by legislative action. In Tolbert, decided in 1992, the Missouri Court of Appeals, Southern District, held that there was no right to a jury trial in damages cases for employment discrimination because the legislature did not provide for a jury trial. After Tolbert, there were no jury trials in employment discrimination cases for damages in Missouri for eleven years. Similarly, in Adams v. Mercy Children’s Hospital, decided the same year as Tolbert, the Supreme Court of Missouri held that the legislature had the right to “abrogate a cause of action cognizable under common law completely.” The court reasoned that if the legislature has the power to generate and eliminate causes of action, the legislature could also limit the recovery.

Over a decade later in State ex rel. Diehl v. O’Malley, the Supreme Court of Missouri held that the right to a jury trial was “beyond the reach of hostile legislation.” Diehl overturned Tolbert, but did not criticize or even mention the Adams decision. However, in his concurring opinion in Klotz, Judge Wolff called the court’s previous reasoning in Adams “flawed.” Wolff said the Adams decision incorrectly implied that statutory law could overcome the constitutional right to a jury trial. Under the Missouri Constitution, the power to change the right to a jury trial can only be altered by the citizens of Missouri when put to a vote.

Adams heavily relied on a 1931 Missouri case, De May v. Liberty Foundry Company. In De May, Emma De May filed a claim for worker’s compensation after her husband Albert strained himself and developed a hernia while working for the Liberty Foundry Company. Albert later died from a

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105. See State ex rel. Tolbert v. Sweeney, 828 S.W.2d 929, 932 (Mo. App. S.D. 1992), overruled by State ex rel. Diehl v. O’Malley, 95 S.W.3d 82 (Mo. 2003) (en banc); Adams v. Children’s Mercy Hosp., 832 S.W.2d 898, 907 (Mo. 1992) (en banc), overruled by Watts, 376 S.W.3d 633. Under the provisions of the constitution, the power to change the right to a jury trial can only be altered by the citizens of Missouri when put to a vote. MO. CONST. art. XII, § 2(b).

106. Tolbert, 828 S.W.2d at 932.

107. Tolbert, which was decided in 1992, was overturned in 2003 by Diehl, 95 S.W.3d at 92.

108. Adams, 832 S.W.2d at 907.

109. Id.

110. Diehl, 95 S.W.3d at 92 (quoting Lee v. Conran, 111 S.W. 1151, 1153 (Mo. 1908)).

111. See id.


113. Id. at 774.

114. MO. CONST. art. XII, § 2(b).

115. Adams, 832 S.W.2d at 907.

hernia operation. The employer denied that Albert suffered an injury at work or that his death resulted from his employment with the company. The Workmen’s Compensation Commission found for the employer and De May received no compensation. On appeal to the Supreme Court of Missouri, De May alleged that the Workmen’s Compensation Act was unconstitutional and violated the right to trial by jury. The court held that the legislature had the power to grant and take away remedies and that the Act was not in violation of any constitutional provisions. Essentially, Adams relied on this case to show that if the legislature could take away causes of action, the legislature also had the power to limit recovery.

Adams also cited to a Supreme Court of the United States case, Tull v. United States, to support that the right to jury trial did not extend to the jury’s determination of damages. In Tull, the Court held that under the Seventh Amendment there is a right for a jury to determine liability, but there is not a constitutional right for a jury to determine a civil penalty. According to Tull, the only issues placed beyond the power of the legislature are “the most fundamental elements” of a trial by jury, not a civil penalty.

The Adams court also relied on a Virginia case, Etheridge v. Medical Center Hospitals. In Etheridge, Richie Lee Wilson sustained permanent brain damage and paralysis on her left side due to medical negligence after undergoing jawbone surgery. The jury returned a verdict of $2,750,000, but the trial court reduced the verdict to $750,000 under Virginia’s recovery cap section 8.01-581.15. Wilson appealed, alleging the statutory cap violated her right to a jury trial under the Virginia Constitution. The court held that the cap did not violate Wilson’s constitutional right because the cap was applied after the jury completed its fact-finding task. Adams used the

117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 643.
121. *Id.* at 645.
122. *Id.* at 652-53, 656.
124. *Id.*
126. *Id.* (internal quotation marks omitted).
127. *Adams*, 832 S.W.2d at 907.
129. *Id.* at 527.
130. *Id.* at 527-28.
131. *Id.* at 529.
court’s reasoning in Etheridge to reach a similar outcome under Missouri’s constitutional right to trial by jury.\textsuperscript{132}

\textbf{C. Constitutional Challenges of Missouri Revised Statutes Chapter 538}

Several provisions of section 538.210 have been challenged in the courts on constitutional grounds.\textsuperscript{133} This section will look at cases that applied section 538.210 before the Missouri legislature modified the provision and after the changes were made in 2005.

In 1992, \textit{Adams v. Children’s Mercy Hospital} set the precedent for upholding damage caps and remained good law in Missouri for twenty years.\textsuperscript{134} In \textit{Adams}, the Supreme Court of Missouri upheld section 538.210, reducing a young girl’s recovery from the jury’s award of $13 million to comply with the 1986 version of the damages cap.\textsuperscript{135} The lawsuit arose after an eight-year-old girl was administered three times the normal fluid amount of crystalloid solution during skin graft surgery.\textsuperscript{136} In recovery, aware of the amount of crystalloid Adams received, defendant Dr. Mestad removed Adams’ endotracheal tube.\textsuperscript{137} The large amount of fluid administered caused her body to swell and her trachea to close.\textsuperscript{138} No oxygen reached her brain for six minutes, which left her blind, epileptic, and permanently brain damaged.\textsuperscript{139}

Adams argued limiting non-economic damages under section 538.210 violated several provisions of the Missouri Constitution, including right to trial by jury.\textsuperscript{140} The court denied all of Adams’ constitutional challenges.\textsuperscript{141} The court reasoned that the right to trial by jury as guaranteed by the Missouri Constitution was not violated because section 538.210 was “applied after the

\textsuperscript{132} Adams, 832 S.W.2d at 907.
\textsuperscript{133} Passanante & Mefford, supra note 47, at 206. I think this sentence should be deleted. Please see comment above.
\textsuperscript{134} See 832 S.W.2d at 900.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Adams listed nine Missouri constitutional provisions that had been violated: “(1) the open courts provision, Mo. CONST. art. I, § 14; (2) right to trial by jury, Mo. CONST. art. I, § 22(a); (3) equal rights and opportunities, Mo. CONST. art. I, § 2; (4) due process, Mo. CONST. art. I, § 10; (5) special law, Mo. CONST. art. III, § 40(28); (6) privileges and immunities, Mo. CONST. art. I, § 13; (7) one subject requirement, Mo. CONST. art. III, § 23; (8) separation of powers, Mo. CONST. art. III, § 1; and (9) the constitutional directives for amending statutes, Mo. CONST. art. III, § 28.” Id. at 901.
\textsuperscript{141} Id. at 908.
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jury completed its constitutional task” of assessing damages.\(^{142}\) The court also noted that the legislature enacted the provisions “related to the general goal of preserving adequate, affordable health care for all Missourians.”\(^{143}\)

Although caps were still in place following \textit{Adams}, award amounts grew larger each year as inflation increased.\(^{144}\) As courts awarded large sums to plaintiffs in a variety of actions,\(^{145}\) the legislature amended section 538.210 in 2005 limiting cap amounts and multiple plaintiff awards.\(^{146}\) However, even after 2005 many cases continued to apply the pre-amended version of the statute when the instances of malpractice occurred before 2005.\(^{147}\) The only two cases to reach the Supreme Court of Missouri that challenged the new section 538.210 were \textit{Klotz} and \textit{Watts}.\(^{148}\)

In 2012, in \textit{Sanders v. Ahmed}, the pre-amended section 538.210 was challenged in a wrongful death action.\(^{149}\) In \textit{Sanders}, Dr. Ahmed changed Mrs. Sander’s medications, causing a focal seizure resulting in physical and mental deterioration and her death two years later.\(^{150}\) Her husband filed a wrongful death lawsuit against the defendant doctor and his practice.\(^{151}\) The jury returned a verdict of $9.2 million in non-economic damages, but the trial court reduced the damages to $1,265,207.64, pursuant to the pre-amended

\(^{142}\) \textit{Id.} at 907.

\(^{143}\) \textit{Id.} at 904-05. \textit{Adams} was affirmed later that year by the court in \textit{Vincent v. Johnson}, 833 S.W.2d 859, 861-62 (Mo. 1992) (en banc) (holding that limiting a damage award was constitutional after a doctor negligently failed to perform a timely caesarian section, which led to permanent brain damage of a newborn). It is interesting to note the factual similarities between \textit{Vincent} and \textit{Watts} in light of the two very different outcomes.

\(^{144}\) \textit{Medical Malpractice Limits, supra} note 41.

\(^{145}\) \textit{See, e.g.}, LaRose \textit{v. Washington Univ.}, 154 S.W.3d 365, 368-69, 373 (Mo. App. E.D. 2004) (holding that a $690,908.56 damage award for failing to order an ultrasound that would have detected patient’s ovarian cancer and a $71,250 loss of consortium award for patient’s husband was not excessive under section 538.210); Schroeder \textit{v. Lester E. Cox Med. Ctr.}, Inc., 833 S.W.2d 411, 412, 423 (Mo. App. S.D. 1992) (holding that a patient who in a wrongful death action could recover $400,000 in punitive damages under section 538.210.5 after cardiologic solution that had been negligently compounded was used in patient’s surgery, resulting in her death).

\(^{146}\) 2005 Mo. Laws. 651 (codified at MO. STAT. REV. § 538.210 (Supp. 2011), held unconstitutional by \textit{Watts v. Lester E. Cox Med. Ctrs.}, 376 S.W.3d 633 (Mo. 2012) (en banc)).

\(^{147}\) \textit{See, e.g.}, Klotz \textit{v. St. Anthony’s Med. Ctr.}, 311 S.W.3d 752, 758 (Mo. 2010) (en banc) (per curiam); Coleman \textit{v. Meritt}, 292 S.W.3d 339, 344-45 (Mo. App. S.D. 2009) (holding that a patient could recover two damage caps totaling $1,200,000 when two doctors were at fault since caps applied per occurrence under the then-applicable section 538.210).

\(^{148}\) \textit{See Klotz}, 311 S.W.3d 752; \textit{Watts}, 376 S.W.3d 633.

\(^{149}\) 364 S.W.3d 195, 200 (Mo. 2012) (en banc).

\(^{150}\) \textit{Id.} at 195.

\(^{151}\) \textit{Id.}
section 538.210. Mr. Sanders challenged the damages cap, alleging that the statute was unconstitutional because it violated Article I, Section 22(a) of the Missouri Constitution, the right to trial by jury, and Article II, Section 1, the separation of powers.

In the majority decision written by Judge William Ray Price Jr., the Supreme Court of Missouri found that Missouri did not recognize wrongful death when the Missouri Constitution was written; instead, wrongful death was a cause of action created by section 537.080.1. The court concluded that because the legislature created the cause of action, it had the power to define the amount of damages available or negate any cause of action that did not exist before 1820. Thus, the court found that section 538.210 limiting non-economic damages in wrongful death suits did not violate the Missouri Constitution.

Judge George W. Draper III dissented, arguing that the non-economic statutory cap violated the “inviolable” right to trial by jury provided by the Missouri Constitution. He reasoned that after the right to a jury trial attached, it is “beyond the reach of hostile legislation.” The court came to a similar conclusion in Watts, just over three months later, when Chief Justice Richard B. Teitelman wrote the majority decision holding non-economic caps unconstitutional in Missouri.

D. Protecting Missouri’s Health Care System

Missouri’s high court also has a history of recognizing and upholding legislation it believed protected Missouri doctors from high premiums and high numbers of lawsuits. In two noteworthy cases, the court discussed the issue of protecting health care providers and the role chapter 538 played in the health care system.

152. "Id." at 200. Because the incident of negligence took place before the amended section 538.210 took effect in 2005, the damages were adjusted for inflation in 2010 at $632,603.82 per each defendant, totaling $1,265,207.64. "Id." at 202.
155. "Id." at 205.
156. "Id." at 201.
158. "Id." at 251 (quoting State ex rel. Diehl v. O’Malley, 95 S.W.3d 82, 92 (Mo. 2003) (en banc)) (internal quotation marks omitted).
159. Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 635-36 (Mo. 2012) (en banc). Because most of the same judges who decided Sanders also ruled on Watts, it is interesting to note a change in opinion by Judge Stith just three months later. This sentence could be deleted too.
160. See Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 505 (Mo. 1991) (en banc); Budding v. SSM Healthcare Sys., 19 S.W.3d 678, 682 (Mo. 2000) (en banc).
In Mahoney v. Doerhoff Surgical Services, Linda and Richard Mahoney brought a medical malpractice action against Doerhoff Surgical Services.\(^{161}\) After ninety days, Doerhoff moved to dismiss the Mahoneys’ action for failure to adhere with Missouri Revised Statutes section 538.225.\(^{162}\) This statute states that within ninety days of filing a petition against a health care provider for damages, the plaintiff must file an affidavit with the written opinion of a qualified health professional stating that the defendant “failed to use such care” that a reasonable health care provider would “under similar circumstances” and that the failure caused or contributed to the damages claim.\(^{163}\) The Mahoneys’ action was dismissed and they appealed to the Supreme Court of Missouri claiming section 538.225 violated their constitutional right to a jury trial.\(^{164}\) The Mahoneys argued that the statute “unduly burden[ed]” their rights by creating a “screening process” where merits of the case were determined “by [a] health care professional” before being submitted to a jury.\(^{165}\)

The court held that the statute did not violate article 1, section 22(a) of the Missouri Constitution, the constitutional right to a trial by jury,\(^{166}\) and affirmed the dismissal of the Mahoneys’ medical malpractice claim.\(^{167}\) The court reasoned from the history and text of chapter 538 that section 538.225 was a “legislative response to the public concern over the increased cost of health care.”\(^{168}\) The purpose behind the statute, according to the court, was to protect the court system from “ungrounded medical malpractice claims” that lacked merit.\(^{169}\) As a result, the court took the “continued integrity of the health care system” into consideration during its assessment of constitutional challenges.\(^{170}\)

Additionally, in Budding v. SSM Healthcare Systems in 2000, the court looked to the legislature’s intent in creating Missouri Revised Statutes chapter 538 and upheld specific limitations on tort actions against health care professionals.\(^{171}\) In Budding, Denise Budding filed a strict product liability claim against SSM Healthcare System for personal injuries she sustained after receiving defective joint implants.\(^{172}\) The jury returned a verdict for SSM Healthcare System, Budding appealed, and the case was later transferred to

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161. Mahoney, 807 S.W.2d at 505.
162. Id.
163. Id. (quoting MO. REV. STAT. § 538.225(1) (1986)).
164. Id. at 505-06.
165. Id. at 507.
166. Id. at 509.
167. Id. at 513.
168. Id. at 507.
169. Id.
170. Id.
171. 19 S.W.3d 678, 682 (Mo. 2000) (en banc).
172. Id. at 679.
the Supreme Court of Missouri. In its decision, the court discussed “the legislature’s intent in adopting the [several] provisions of [Missouri Revised Statutes] chapter 538.” The court concluded that the legislature’s intent was to “impose specific limitations” on traditional tort actions made against a health care provider, specifically strict products liability in this case. These limitations also included caps on non-economic damages, structured settlements of future damages, and the requirement that a cause of action be dependent on an affidavit submitted by a legally qualified health care provider. Although the court recognized some public policy arguments for imposing strict liability against health care providers, ultimately the court deferred to the legislature’s decision on public policy and affirmed the trial court judgment.

While Mahoney showed the court believed the legislature’s intent behind capping non-economic damages was to limit the increasing costs of health care, Budding demonstrated the court’s belief that legislative intent was to impose limitations on plaintiffs, such as non-economic caps on damages, when actions were brought against health care providers.

E. Non-Economic Damage Cap Statutes and Constitutional Differences Between States

States that impose a non-economic cap vary extensively in the amount a plaintiff can receive and the type of damage the cap covers. Currently, twenty-nine states have enacted statutes that impose some kind of non-economic cap. These include states with newly enacted non-economic

173. Id.
174. Id. at 680.
175. Id.
177. Id. § 538.220.2.
178. Id. § 538.225.1.
179. Budding, 19 S.W.3d at 682.
180. Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 507 (Mo. 1991) (en banc).
181. Budding, 19 S.W.3d at 680.
182. AM. MED. ASS’N, CAPS ON DAMAGES, supra note 38.
caps that went into effect in 2011, including North Carolina, Tennessee, and Oklahoma, as well as caps that were upheld by state supreme courts in 2012 after constitutional challenges in Kansas and Texas.

1. States That Have Overturned Non-Economic Caps

Courts have overturned caps in Missouri in 2012, Georgia and Illinois in 2010, and Alabama, New Hampshire, and Washington in 2011.


previous years. Cap legislation is not permissible in Arizona, Arkansas, Kentucky, Pennsylvania, or Wyoming because caps on non-economic damages are specifically prohibited in their respective state constitutions. Constitutional language has also been used in states like Alabama and Missouri to overturn non-economic caps.

In Moore v. Mobile Infirmary Association, the Supreme Court of Alabama held that the phrasing “shall remain inviolate” “‘freezes’ the right to trial by jury as that right existed in 1901,” the ratification date of Alabama’s Constitution. Since juries in Alabama determined damages for pain and suffering in 1901, imposing a $400,000 limitation for non-economic damages burdened the right to trial by jury and was found unconstitutional.

190. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223 (Ga. 2010) (holding Georgia Code section 51-12-1, which limited non-economic recovery to $350,000, as unconstitutional because it was “violation of the right to trial by jury”).


192. Moore v. Mobile Infirmary Ass’n, 592 So. 2d 156, 170-71 ( Ala. 1991) (holding that Alabama Code section 6-5-544(b) was unconstitutional because the malpractice non-economic cap violated the right to trial by jury and the equal protection guarantee under the Alabama Constitution).


194. Sofie v. Fibreboard Corp., 771 P.2d 711, 723, 728 (Wash. 1989) (holding that Washington Revised Code section 4.56.250, which set limits on the amount of noneconomic damages that could be recovered, violated article I, section 12, of the state constitution (the constitutional right to trial by jury)).

195. ARIZ. CONST. art. II, § 31 (“[n]o law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person”).

196. ARK. CONST. art. V, § 32 (“no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons”).

197. KY. CONST. § 54 (“The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.”).

198. PA. CONST. art. III, § 18 (“in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons”).

199. WYO. CONST. art. X, § 4 (“No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person.”).


201. Moore, 592 So. 2d at 159 (quoting Gilbreath v. Wallace, 292 So. 2d 651, 652 ( Ala. 1974)).

202. Id. at 159, 164.
2. States That Have Upheld Non-Economic Caps

Other states, such as Idaho and Nebraska, with the same “remain inviolate” language in their state constitutions, have interpreted the language differently. In *Kirkland v. Blaine County Medical Centers*, the Supreme Court of Idaho held that the non-economic cap did not violate the right to a jury as it existed at the adoption of the Idaho Constitution, reasoning that the jury was still allowed to “act as the fact finder” and the non-economic cap “simply limit[ed] the legal consequences of the jury’s findings.” Similarly, in *Gourley v. Nebraska Methodist Health System*, the Nebraska Supreme Court held that the trial court applied the non-economic cap “only after the jury has fulfilled its factfinding function,” and thus the cap did not violate Nebraska’s right to a jury trial.

3. Recent Constitutional Challenges to Non-Economic Damage Caps

Currently Florida and Tennessee face ongoing constitutional challenges for non-economic damage caps in court. Indiana and Mississippi also recently handed down decisions in 2013 regarding non-economic damage caps.

A question about the constitutionality of Florida’s non-economic damage cap currently is before the Supreme Court of Florida after being reviewed by the Eleventh Circuit. In *Estate of McCall v. United States*, Michelle McCall’s parents and father of her son sued under the federal Tort Claims Act claiming that Michelle’s death was due to medical malpractice shortly after she gave birth on an air force base. The district court awarded her estate $2,000,000 in non-economic damages, but limited recovery to $1,000,000.
under Florida’s statutory cap section 766.118.\textsuperscript{213} McCall’s estate appealed, and argued the cap violated the United States and Florida Constitutions.\textsuperscript{214}

The Eleventh Circuit found that the “[d]istrict [c]ourt did not err in applying the cap” and that it did not violate the United States Constitution or the Takings Clause of the Florida Constitution.\textsuperscript{215} But because there were no controlling Florida Supreme Court decisions to guide the judges, the Eleventh Circuit asked the Florida Supreme Court to determine whether the cap violated the Florida Constitution.\textsuperscript{216} The Supreme Court of Florida heard oral arguments in February of 2012 but has not yet released an opinion.\textsuperscript{217}

In Tennessee, in February 2012, Maykayla Gummo sustained “catastrophic injuries” from a four-wheeler accident after she drove off an embankment and fell eighty feet into a creek.\textsuperscript{218} In July 2012, her mother Andrea Gummo sued Robert and Shelaena Ward, the owners of the four-wheeler, in federal court in the Middle District of Tennessee.\textsuperscript{219} Gummo challenged the constitutionality of Tennessee’s $750,000 non-economic cap, claiming it violated the right to trial by jury in the Tennessee Constitution.\textsuperscript{220} Because Tennessee’s Constitution is similar to Missouri’s in that it provides that “the right to trial by jury shall remain inviolate[,] . . .”\textsuperscript{221} Gummo relied part on the recent Missouri decision in Watts.\textsuperscript{222} On September 30, 2013, District Judge Kevin H. Sharp filed a memorandum opinion of the court, denying plaintiffs’ request for the court to declare the caps on non-economic damages unconstitutional because the request was “not ripe for consideration” and would not be ripe until plaintiffs obtained “a verdict in excess of one or more of those caps.”\textsuperscript{223}

\textsuperscript{213} Id. at 947.
\textsuperscript{214} Id. at 948. Plaintiffs argued the statutory cap “constitute[d] a taking in violation of the Fifth Amendment” and violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. \textit{Id.}
\textsuperscript{215} Id. at 946; The Takings Clause of the Florida Constitution states “[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.” FLA. CONST. art. X, § 6(a).
\textsuperscript{216} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} MO. CONST. art. I, § 22(a); TENN. CONST. art. I, § 6.
In a wrongful death case in Indiana, the plaintiff alleged medical malpractice when doctors failed to diagnose his wife’s bowel obstruction, resulting in her death.\textsuperscript{224} A jury found in favor of the plaintiff and awarded him $8.5 million in damages, but the award was later reduced to $1.25 million under the Indiana Medical Malpractice Act.\textsuperscript{225} The plaintiff sought an evidentiary hearing to challenge the constitutionality of the cap but the trial court denied the request.\textsuperscript{226} The plaintiff appealed and the case was transferred to the Supreme Court of Indiana.\textsuperscript{227} In January 2013, the court affirmed the trial’s court’s decision, reasoning that the plaintiff “forfeit[s] his opportunity to conduct such a hearing” when he failed to raise the claim before the verdict and waited eight days to object to the reduction of the award.\textsuperscript{228}

In Mississippi, Lisa Learmonth filed suit against Sears after she was in a serious automobile accident with a Sears employee driving a Sears vehicle.\textsuperscript{229} The jury awarded Learmonth $2,218,905.60 in non-economic damages, which was later reduced to $1 million under Mississippi’s damages cap, Mississippi Code section 11-1-60(2)(b).\textsuperscript{230} Sears appealed to the Fifth Circuit and Learmonth cross-appealed, challenging the constitutionality of the damages cap under the Mississippi Constitution.\textsuperscript{231} Because no controlling precedent was found, the Fifth Circuit certified the question of Mississippi’s cap and its constitutionality to the Supreme Court of Mississippi.\textsuperscript{232} In August 2012, the Supreme Court of Mississippi declined to answer the question.\textsuperscript{233} The Fifth Circuit reexamined the issue in October 2012 and in February 2013 upheld the constitutionality of the cap, holding that Learmonth failed to establish that the cap violated the jury guarantee or separation of power provisions under the Mississippi Constitution.\textsuperscript{234}

\section*{IV. The Instant Decision}

In \textit{Watts v. Lester E. Cox Medical Centers}, the Supreme Court of Missouri held that Missouri Revised Statutes section 538.210 violated the right to a trial by jury found in article I, section 22(a) of the Missouri Constitution.\textsuperscript{235}

\begin{footnotes}
\item[225] \textit{Id}.
\item[227] \textit{Id}.
\item[228] \textit{Id} at 55.
\item[229] Sears, Roebuck & Co., v. Learmonth, 95 So. 3d 633, 634 (Miss. 2012).
\item[230] \textit{Id} at 634-35.
\item[231] \textit{Id.} at 635.
\item[232] \textit{Id}.
\item[233] \textit{Id.} at 639.
\item[234] Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 258 (5th Cir. 2013).
\end{footnotes}
In so holding, the court reversed its previous decision, *Adams v. Children’s Mercy Hospital*, which allowed non-economic damages to be capped under the statute.\(^{236}\)

**A. Right to Trial by Jury “Heretofore Enjoyed”**

At trial, Watts argued that the circuit court erred in reducing the “non-economic damages award[. . . because section 538.210 violate[d] the right to trial by jury guaranteed by article I, section 22(a) of the Missouri Constitution.”\(^{237}\) Watts argued it was a plaintiff’s “substantive right” to have damages determined by a jury.\(^{238}\) Because the jury awarded Watts damages in excess of the damages cap, the award could not have its “full and intended effect.”\(^{239}\) Watts stated that the right to trial by jury as “heretofore enjoyed” included the right of a jury to determine non-economic damages because of what was originally allowed in the Missouri Constitution.\(^{240}\)

In response, Cox argued that the jury completed its constitutional task after it resolved disputed facts.\(^{241}\) Thus, Cox reasoned, the jury’s role was completed at the time section 538.210 was applied as a matter of law, and did not violate the Missouri Constitution.\(^{242}\) Cox also argued that the General Assembly had the “power to create, modify, limit, or abrogate causes of action or remedies” without violating the right to trial by jury.\(^{243}\) Cox interpreted the “heretofore enjoyed” phrase in the Missouri Constitution as giving the General Assembly legislative power over the common law, actions and remedies, as was the case when the Missouri Constitution was first written in 1820.\(^{244}\)

The court sided with Watts, holding that the right to a jury trial “heretofore enjoyed” as stated in the Missouri Constitution was not subject to caps on damages because such limits did not exist when the constitution was adopted in 1820.\(^{245}\) The court looked to the state of the common law in 1820 and the history of judicial remittitur to support its conclusion.\(^{246}\)

The court first established Watts’ right to a jury trial on her medical negligence claim for non-economic damages by looking to the origin of Mis-

\(^{236}\) *Id.*


\(^{238}\) *Id.*

\(^{239}\) *Id.*

\(^{240}\) *Id.* at *26, *29-34.


\(^{242}\) *Id.* at *28.

\(^{243}\) *Id.* at *15-16.

\(^{244}\) *Id.* at *22-23.

\(^{245}\) *Watts*, 376 S.W.3d at 639.

\(^{246}\) *Id.*
souri’s common law: English common law. English common law acknowledged medical negligence as a “private wrong,” deserving of redress in court and permitted recovery of non-economic damages to give “pecuniary satisfaction.” The court reasoned that Watt’s action for medical negligence and her claim for non-economic damages fell into the category of “civil actions for damages resulting from personal wrongs” that had been tried by Missouri juries since 1820.

The court also examined the scope of Watts’ right in regard to judicial remittitur. The court found that both English common law and Missouri common law allowed judges to grant plaintiffs new trials when the verdict was “inconsistent with the evidence.” “Although Missouri cases [in the early to mid 1800s] approved of judicial remittitur,” later cases ruled that remittitur was incorrect. Because of “inconsistent precedent” recognizing judicial remittitur as a valid exercise of judicial power, the court reasoned that such inconsistency “stem[med] from a long-standing reluctance in the common law to tamper with the jury’s constitutional role as the finder of fact.” After looking at the history of English and Missouri common law, the court concluded that limits on damage awards “did not exist and were not contemplated” in 1820 as the phrase “heretofore enjoyed” referenced.

B. Right to Trial by Jury to “Remain Inviolate”

Watts also argued that the jury’s determination of damages did not “remain inviolate” when section 538.210 was applied. Watts argued that because the common law in 1820 never recognized legislative authority over juries, pieces of “legislative interference” such as section 538.210 should be declared unconstitutional. Watts also reasoned that the statute violated article II, section 1 of the Missouri Constitution, “the constitutional separation of powers[].” Watts stated that the statutory limitation “invade[d] the trad-
tional judicial function” of evaluating whether an award was extreme or insufficient and instead permitted a “legislative remittitur” that superseded judicial power and took no account of facts on a case-by-case basis.\(^{258}\)

Cox argued that the “remain inviolate” language did not suggest that the right to trial by jury was associated with particular causes of actions or remedies and did not limit the legislative power of the General Assembly.\(^{259}\) Additionally, Cox argued that even if Watts was right, rejecting legislative power “would be pervasive and landscape-altering,” leaving the General Assembly powerless to change a cause of action or remedy for fear of a “‘hostile’ impact” on the right to a jury trial.\(^{260}\)

Considering both arguments, the court looked at whether the right to a jury trial “remain[s] inviolate” after section 538.210 is applied to a damage award.\(^{261}\) The court held that “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.”\(^{262}\) The court stated that one of the longstanding, primary functions of the jury is to determine plaintiff damages.\(^{263}\) Because section 538.210 imposed a cap on the jury’s award independent from the facts of the case and limited the jury’s constitutional role of determining damages, the court decided that section 538.210 “necessarily and unavoidably violate[d] the state constitutional right to trial by jury.”\(^{264}\) The court then looked to other states where limits on damages had been found to violate constitutional right to trial by jury.\(^{265}\) The court found that states such as Washington,\(^{266}\) Oregon,\(^{267}\) Alabama,\(^{268}\) and

\(^{258}\) Id.

\(^{259}\) Initial Brief for Respondent-Appellee, supra note 241, at *21.

\(^{260}\) Id. at *30-31.


\(^{262}\) Id. at 640.

\(^{263}\) Id. at 639-40 (“[T]he jury here assessed liability and determined damages, thus fulfilling its constitutional task.” (quoting Richardson v. State Highway & Transp. Comm’n, 863 S.W.2d 876, 880 (Mo. 1993) (en banc))).

\(^{264}\) Id. at 640.

\(^{265}\) Id. at 640-41.

\(^{266}\) Sofie v. Fibreboard Corp., 771 P.2d 711, 716 (Wash. 1989) (en banc) (holding the Washington constitution protects the jury’s role to determine damages and when limitations are applied the right to a trial by jury inviolate is not preserved).

\(^{267}\) Lakin v. Senco Prods., Inc., 987 P.2d 463, 474 (Or. 1999) (holding a statutory cap violates the right to trial by jury if it prevents the jury’s award from its full effect).

\(^{268}\) Moore v. Mobile Infirmary Ass’n, 592 So. 2d 156, 163 (Ala. 1991) (holding statutory damage caps violate the right to trial by jury because “the trial judge is required summarily to disregard the jury’s assessment of the amount of noneconomic loss, that species of damages lying most peculiarly within the jury’s discretion”).
Florida, whose constitutions also included the “remain inviolate” language, reached similar conclusions: the constitutional right to a jury trial is violated when caps on damages restrict the jury’s fact finding role.

C. Overturning Erroneous Precedent in Adams

In making its decision, the Supreme Court of Missouri also had to determine how the holding in Watts would affect Adams v. Children’s Mercy Hospital. Watts asked the court to overrule Adams. Cox argued that under stare decisis, Missouri’s high court should follow precedent set forth in Adams since controlling law and constitutional principles remained the same since the case was handed down.

After revisiting Adams, Watts argued that the court should follow the reasoning in State ex rel. Diehl v. O’Malley, which held that the decision committed a “fundamental error [ ] in concluding that statutory law [could] trump the constitutional right to jury trial.” The court found “four flaws in Adams rationale.” First, the court found Adams misunderstood the right to trial by jury as provided by the Missouri Constitution. Under Adams, even if the jury performed its constitutional duty and determined damages, a statutory cap denied the plaintiff’s his or her full recovery. After section 538.210 was applied, the court equated the jury’s role to a “meaningless opportunity to assess damages” that “pays lip service to the form of the jury but robs it of its function.”

Second, the court reasoned Adams erroneously allowed a “legislative limitation” to be placed on “an individual constitutional right.” The court found Adams flawed because a statutory limit on the right to a jury trial is an “impermissible legislative alteration of the [c]onstitution.” Additionally, Adams never acknowledged any of the “myriad cases recognizing that a stat-

269. Smith v. Dep’t of Ins., 507 So. 2d 1080, 1088-89 (Fla. 1987) (holding that a plaintiff limited on the amount of damages recovered violates Florida’s right to jury trial and the right of access to courts).
270. Watts, 376 S.W.3d at 640-41.
271. Id. at 637.
272. Id.
274. Initial Brief for Plaintiff-Appellant, supra note 237, at *23 (quoting Klotz v. St. Anthony’s Med. Ctr., 311 S.W.3d 752, 774 (Mo. 2010) (en banc)) (internal quotation marks omitted).
275. Watts, 377 S.W.3d at 642.
276. Id.
277. Id.
278. Id. (quoting Sofie v. Fibreboard Corp., 771 P.2d 711, 721 (Wash. 1989) (en banc)).
279. Id.
280. Id.
ute may not limit constitutional rights." 281 Instead, Adams cited De May v. Liberty Foundry Company. 282 The Adams court reasoned from DeMay that “[i]f the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery . . . .” 283 The Watts court concluded Adams’ reliance on De May was inappropriate as nothing in the case suggested the legislature could deny a plaintiff seeking relief of his or her constitutional rights. 284 If this were the case, the court argued, constitutional protections would only be theoretical privileges that could be withdrawn at any time. 285

Third, Adams cited an inapplicable 1987 Supreme Court of the United States decision, Tull v. United States. 286 In Tull, the right to a jury trial did not extend to a determination of damages in a civil penalty case. 287 Adams, however, dealt with common law damages, not civil penalties. 288

Lastly, the court found Adams was incorrect because the court reached its decision without citing any relevant Missouri law, because the court did not consider DeMay to be “applicable Missouri law.” 289 “Instead, Adams relied[d] on a Virginia case, Etheridge v. Medical Center Hospitals, and Tull.” 290 The Watts court found Adams’ use of Etheridge erroneous because of analytical differences between the Missouri and Virginia Constitutions. 291 While the Virginia Constitution states “trial by jury is preferable to any other, and ought to be held sacred,” 292 it does not contain the same “remain inviolate” phrasing found in the Missouri Constitution that guarantees a right to jury trial. 293

After discussing these four reasons, the court held Adams’ rationale and the cases it relied on to be incorrect. 294 Considering the court’s stare decisis

281. Id. ("[A] statute may not infringe on a constitutional right; if the two are in conflict, then it is the statute rather than the constitution that must give way" (citing Mo. Alliance for Ret. Ams. v. Dep’t of Labor & Indus. Relations, 277 S.W.3d 670, 682 (Mo. 2009) (en banc))).
282. Id. at 642-43.
284. Watts, 376 S.W.3d at 643.
285. Id.
286. Id.
287. Id.
288. Adams, 832 S.W.2d at 901. Additionally, Tull was found to be irrelevant in a right to jury trial analysis in Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998). Watts, 376 S.W.3d at 643.
289. Watts, 376 S.W.3d at 644.
290. Id. (internal citations omitted).
291. Id.
292. VA. CONST. art. I, § 11.
293. MO. CONST. art. I, § 22(a).
294. Watts, 376 S.W.3d at 644.
considerations, the court looked to previous cases where precedent was overturned to protect constitutional rights. The court concluded that Adams was unconstitutional and reversed the judgment that reduced the non-economic damages with regard to section 538.210.

D. The Dissenting Opinion

Judge Mary R. Russell, joined by Judges Breckenridge and Price, dissented, choosing to uphold the statutory cap. Judge Russell felt that although the Watts family experienced a tragic and unfortunate situation, the court had no duty to determine whether section 538.210 was “good policy,” but must only determine whether the legislative provision violated the Missouri Constitution. The dissent argued Adams was longstanding, controlling precedent for over twenty years and should not be overturned. Judge Russell agreed with the court’s analysis in Adams, that section 538.210 did not obstruct the jury’s fact-finding or assessment of damages as it was applied after the jury had “served its constitutional task,” and thus did not violate the Missouri Constitution.

The dissent also discussed other states that agreed with the court’s reasoning in Adams, including states with the same “inviolate” language in their state constitutions as Missouri: Nebraska, Idaho, Ohio, and Maryland. She also disagreed with the majority who criticized Etheridge and distinguished the Virginia and Missouri Constitutions. Judge Russell argued that although the two state constitutions contained “superficial” language differences, both guaranteed a right to jury trial “that existed at common law.” The dissent also pointed to cases that supported Adam’s reasoning in jurisdictions with and without the “inviolate” language.

V. Comment

This Part will explore the criticisms of a cap on non-economic damages in Missouri. First, this Part will discuss how the court chose to apply the constitutional language and the importance of judges in interpreting constitu-

295. Id. (“[W]hile . . . hesitant to overturn precedent, [the court] nonetheless has followed its obligation to do so where necessary to protect the constitutional rights of Missouri’s citizens.”).
296. Id. at 646.
297. Id. at 648-52 (Russell, J., dissenting).
298. Id. at 648.
299. Id. at 649-50.
300. Id. at 649.
301. Id. at 650-51; see supra notes 203-06 and accompanying text.
302. Watts, 376 S.W.3d at 651.
303. Id.
304. Id. at 651-53.
tional rights. Second, this Part will address the many problems with non-economic caps including inconclusive evidence about the effects of caps on insurance premiums and why caps do not improve the availability or quality of physician care.

A. The Importance of Judges’ Constitutional Interpretation

Whether placing a cap on the amount of non-economic damages a plaintiff can recover violates his or her right to a jury trial is a controversial issue that has been addressed by several states. A number of these states have the exact same wording in their respective state constitutions, yet different outcomes have been reached. States are split on this issue because in the end, many judgments depend on how judges interpreted the constitutional language and how they view the jury’s role. In Missouri, the majority of the supreme court interpreted the “remain inviolate” language to mean that a jury must determine damage amounts to complete their “constitutional task” as was done in 1820. Other judges, including the three dissenters in Watts, have interpreted these terms differently: they reason if the cap is applied after the jury has determined damages, the “constitutional task” of providing a jury trial has already been fulfilled. They claimed any statutory changes made to the damage award later are a matter of law, not fact, and do not harm the right to trial by jury.

Whether an individual believes a jury has performed its constitutional duty before or after a damage award is handed down to the plaintiff, the result can have serious consequences. This small, yet crucial difference in reasoning emphasizes the importance of judges in our legal system and the power they have in interpreting constitutional rights. The judiciary’s ability to interpret meaning behind words has become widely accepted as a “permanent and indispensable feature of our constitutional system.” There are two main views about how to interpret constitutional wording: one side argues a constitution should be read the way it was originally understood when it was first drafted. Other judges take the “living document” approach, or the view that a constitution should “grow and evolve over time[.]”

No matter what approach a judge chooses, life-changing judgments can come down to who sits on the bench and what he or she personally believes.

305. See supra Part III.E.
306. See Watts, 376 S.W.3d at 638-40.
307. Id. at 649-50.
308. See id. at 649.
310. Id. at 24-25.
311. Id. at 25.
Ideally, judges practice judicial independence and do not rely on outside influences; they look only to the source of the language, here the respective state constitution. However, this is not always the case. Missouri has a history of cases where judges allowed statutory law to override constitutional rights. \(312\) Rather than interpret the laws of their jurisdiction, judges have deferred to the legislature’s decision on public policy, allowing constitutional rights to be altered and, at times, altogether done away with. \(313\) Even though these “flawed” case decisions have since been overturned, this reasoning may still be prevalent in some courts across the United States today. Judges are subjected to many influences throughout their daily lives that realistically cannot be avoided. \(314\) However, judicial independence is compromised when these outside influences result in judges losing their ability to adjudicate for the parties. \(315\)

Regardless of whether or not an individual believes the “inviolate” language was correctly interpreted, it is still important to know who is sitting on our courts, how they choose to interpret constitutional language and where they stand when it comes to protecting the constitutional rights of Missouri citizens.

B. The Impact of Caps on the Health Care System

Aside from constitutional interpretation, it is important to look at the policy issues non-economic damages caps present. Morally, caps can be a problem as the system benefits the negligent and harms the most seriously injured. \(316\) Many question this “fix” for the health care system that “effectively force[s] the most seriously injured patients to take on a disproportionate share of the costs of medical errors.” \(317\) Even if non-economic caps marginally reduced costs for physician insurance premiums, it is unacceptable to

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312. See Adams v. Children’s Mercy Hosp., 832 S.W.2d 898, 906-07 (Mo. 1992) (finding statutory limits on noneconomic damages constitutional despite the constitutional right to a jury trial), overruled by Watts, 376 S.W.3d 633; see also State ex rel. Tolbert v. Sweeney, 828 S.W.2d 929, 932-33 (Mo. App. S.D. 1992) (denying a right to jury trial in MHRA cases), overruled by State ex rel. Diehl v. O’Malley, 95 S.W.3d 82 (Mo. 2003); see supra notes 105-09 and accompanying text.

313. See Sweeney, 828 S.W.2d at 933.


315. Id.

316. Harris, supra note 5, at 178-79 (“Current tort reform limits on provider liability are unfair because they, in effect, transfer losses from the deserving to the undeserving.”).

317. Williams, supra note 14, at 495 (quoting Jonathan Todres, Toward Healing and Restoration for All: Reframing Medical Malpractice Reform, 39 CONN. L. REV. 667, 694 (2006)).
place the burden on patients who have been hurt. When a cap is in place, it sends a message to Missouri citizens that they do not deserve compensation to the full extent of their injuries and that victims must bear the burden to help preserve the health care system.

When caps are not in place, doctors are more likely to take extra precautions to deter error, rather than face high malpractice liability. A medical error is “the failure of a planned action to be completed as intended . . . or the use of a wrong plan to achieve an aim[].” Studies have shown that as many as 98,000 deaths a year are caused from medical negligence or mistake. This number is astounding, especially when considering 98,000 is two times as many as the number of Americans who die in automobile accidents each year.

While “[t]he potential of an unlimited or 'uncapped' . . . award deters misconduct from health care providers,” a damage cap does little to police misconduct or remove inadequate doctors from practice. Unlike other forms of insurance, doctors’ malpractice insurance premiums are not based on past performance or payout. Because insurance companies do not take a doctor’s skill into account and do not raise premiums for high payouts, there may be less impact on a doctor’s safety precaution when damages remain capped. Additionally, state disciplinary boards do little to discipline doctors for misconduct. According to one study, of the more than 35,000 doctors who received a medical payout between 1990 and 2002, only 7.6% were disciplined by their state board. The same study showed state boards only disciplined 13.3% of doctors with five or more medical malpractice payouts.

318. See Tom Baker & Timothy D. Lytton, Allowing Patients to Waive the Right to Sue for Medical Malpractice: A Response to Thaler and Sunstein, 104 Nw. U. L. REV. 233, 246 (2010) (“Medical liability leads medical providers to make expensive and durable investments in safety that benefit all of their patients.”).

319. INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 28 (Linda T. Kohn et al. eds., 2000).

320. Id. at 1.

321. Id. at 1, 26.

322. Harris, supra note 5, at 177-78 (“Medical malpractice lawsuits with unlimited recovery are a way of policing misconduct and weeding out bad doctors, which neither insurance companies nor physician organizations track satisfactorily.”).

323. Carrie Lynn Vine, Comment, Addressing the Medical Malpractice Insurance Crisis: Alternatives to Damage Caps, 26 N. ILL. U. L. REV. 413, 427-28 (2006) (“[I]n most cases prior claim or payout history does not affect premium rates[].”)

324. Sharkey, supra note 5, at 410 (noting that physicians are not experience-rated and both “negligent and nonnegligent physicians pay similar premiums”).

325. Harris, supra note 5, at 178.


327. Id.
There is also conflicting evidence on whether caps affect medical malpractice insurance premiums, as both sides of the cap debate strongly dispute the other’s findings. With a cap in place, insurance companies pay out less in claims each year; in theory this should result in lower premiums for doctors who are required to have medical malpractice insurance and for consumers who buy health insurance. Yet data shows an inconsistent correlation between damage caps and lowered premiums.

The United States has recently seen a trend in lowered malpractice premium rates across most states, leading experts to believe that caps cannot be the only reason for the decreased rates. Medical malpractice insurance rates vary state by state, but also vary widely within states. “In Detroit, Michigan, a medical malpractice . . . carrier quotes $34,922 for a general internist, but . . . on the other side of the state, in Kalamazoo, [the same coverage] would be $14,143, or 60% less.” This suggests that even within a state with the same non-economic cap, malpractice premiums can widely vary based on city or region. Although differing laws play some role in why premiums vary by state, other factors such as judges, plaintiffs’ lawyers, the willingness to bring a claim, and the rate at which juries award damages also affect premium rates.

Proponents of non-economic damage limits also argue that caps prevent high numbers of frivolous claims from reaching a court. The problem with preventing litigation through caps is that it also discourages claims with merit.

328. Harris, supra note 5, at 180-81.
330. Bryan A. Liang & LiLan Ren, Medical Liability Insurance and Damage Caps: Getting Beyond Band Aids to Substantive Systems Treatment to Improve Quality and Safety in Healthcare, 30 AM J.L. & MED. 501, 505-06 (2004) (“[I]n 1975 California had the highest premiums in the nation” but as a result of the Medical Injury Compensation Reform Act, physicians in California pay premiums in the lowest one-third); Kathryn Zeiler, Medical Malpractice Liability Crisis or Patient Compensation Crisis?, 59 DEPAUL L. REV. 675, 681 (2010) (“Contrary to the assertions of tort reform proponents, closed claims data suggest little connection between the liability system and premium fluctuations.”).
332. Id. (“[I]n 2010, the highest quote for a $1 million/$3 million policy for a general internist is . . . in Miami-Dade County, Florida, where First Professionals Insurance charges $47,431 . . . . The lowest quote is $3,375 throughout Minnesota[].”).
333. Id.
334. Id.
335. Id.
from being filed and reaching a court. Data suggests that most patients who experience negligent care do not file malpractice claims. One study found that only about one in eight patients who experience negligent injuries file a claim. “[T]he problem is not too many claims,” but not enough claims.

Further, a cap’s overall impact on the health care system is minimal because malpractice costs are such a small part of total health care spending. A study by the Congressional Budget Office in 2004 found that “even a reduction of 25 percent to 30 percent in malpractice costs would lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small.” Medical malpractice litigation costs in the United States each year amount to only two percent of total health care spending.

Supporters of caps also argue that limits on non-economic damages keep doctors practicing within the state. However, there is little evidence that shows correlation between the implementation of caps and where or how

337. MICHELLE M. MELLO, MEDICAL MALPRACTICE: IMPACT OF THE CRISIS AND EFFECT OF STATE TORT REFORMS 15, http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2006/rwjf11941/subassets/rwjf11941_1 (instead of discouraging frivolous litigation, damage caps “burden the most severely injured patients”).
338. Williams, supra note 14, at 485.
339. HENRY COHEN, CONG. RESEARCH SERV., RL31692, MEDICAL MALPRACTICE LIABILITY REFORM: LEGAL ISSUES AND FIFTY-STATE SURVEY OF CAPS ON PUNITIVE DAMAGES AND NONECONOMIC DAMAGES 1 (2005), http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL3169202082005.pdf. The study was continued by Harvard School of Public Health researchers, who additionally examined over 1,400 closed medical negligence claims and found that ninety-seven percent of claims were meritorious and eighty percent involved death or serious injury. Studdert et al., supra note 4, at 2025-26.
340. COHEN, supra note 339, at 1.
342. Id. at 6.
343. Id.
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docs choose to practice. Many physicians claim frivolous malpractice suits pressured them in their practice to order unnecessary tests or defer patients out of fear of being sued. However, physician surveys reveal these concerns are unrelated to a doctor’s respective state malpractice protection, including caps on non-economic damages. What is more alarming is that “physicians do not consider medical errors a ‘problem’” when compared to other health care issues such as frivolous claims and malpractice insurance rates. Until physicians start recognizing the real problems within the health care system – the egregious amount of negligent medical errors – the health care system will remain in crisis.

Generally, the use of non-economic damage caps have not consistently reduced rates for insurance premiums, have not deterred doctors from acting negligently, and have not reassured physicians in their practice. Additionally, caps present a moral issue, asking the worst injured patients to subsidize doctors for their negligent errors. States need to look to alternative solutions to fix the health care system to ensure their citizens’ recovery rights instead of relying on caps to “fix” a broken system.

VI. CONCLUSION

After the Watts decision, there are currently no caps on non-economic damages in Missouri. Because some feel the ruling in Watts will lead to a rise in the number of lawsuits and an increase in medical malpractice premiums, some individuals are calling for the General Assembly to restore the non-economic damages cap as a “high priority” issue in 2013. In January 2013, two bills were introduced to recreate a statutory cause of action against health care providers in malpractices cases. The legislature is also consid-

347. Id. at 1590.
350. Gallegos, supra note 16.
ering a constitutional amendment to limit lawsuits against medical professionals.\textsuperscript{352} However, Missouri voters would need to approve such an amendment.\textsuperscript{353} If Missouri overrules the \textit{Watts} decision and reinstates a cap system, many changes should be made to the non-economic cap policy that was in place from 2005 to 2012, including a cap that is adjusted for inflation. However, because of Missouri’s strong constitutional “remain inviolate” language, Missouri will likely have to explore other options besides caps in the future when making decisions about tort reform litigation.

In July of 2012, the Supreme Court of Missouri had an important decision to make: uphold a twenty-six-year-old capped damages policy or reinstate the right to trial by jury as guaranteed under the Missouri Constitution.\textsuperscript{354} After analyzing specific language in the constitution and analyzing the jury’s role, the court made the correct decision in \textit{Watts}, and ruled for individual constitutional rights over legislative measures.\textsuperscript{355} Although policy opinions about non-economic caps remain on both sides of the issue, the court’s decision should be celebrated and recognized as a success for constitutional rights advocates. While many problems with the health care system still remain, instead of looking to ways to reinstate the cap or create a constitutional amendment that will threaten Missouri’s right to jury trial, the General Assembly should explore alternative options to ensure the health care system remains available and affordable in the future.


\textsuperscript{355} \textit{Id.} at 637-46.