

WD83485

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MARIA DEL CARMEN ORDINOLA VELAZQUEZ
Appellant-Respondent,

v.

UNIVERSITY PHYSICIAN ASSOCIATES, *et al.*
Respondents-Appellants.

On Appeal from the Circuit Court of Jackson County
The Honorable John M. Torrence, Circuit Judge
Case No. 1716-CV20186

BRIEF OF THE APPELLANT-RESPONDENT

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RESPONDENT MARIA ORDINOLA**

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PRELIMINARY STATEMENT

This is an appeal from a medical malpractice case. In the fall of 2015, plaintiff Maria Ordinola, a patient at Truman Medical Center, became a victim of medical malpractice at the hands of the respondents-appellants, suffering permanent injury and twice narrowly escaping death. Two years later, after a full and fair trial on the merits, a Jackson County jury awarded plaintiff \$1,030,000, comprised of \$30,000 in economic damages and \$1,000,000 in noneconomic damages. After the verdict and pursuant to § 538.210 (2015), the circuit court, over Ordinola's objection, reduced the noneconomic damage award to \$748,828, the cap for "catastrophic" noneconomic damages in effect at the time of the verdict under the statute.

The mandatory statutory reduction of Ordinola's noneconomic damages, applied here to eliminate over a quarter of a million dollars of the jury's award, violates the right of trial by jury. Art. I, sect. 22(a) of the Missouri Constitution, adopted by the people in 1820, guarantees "that the right of trial by jury as heretofore enjoyed shall remain inviolate." At the time our state Constitution was adopted civil actions for damages resulting from personal wrongs were being tried by juries, and an action for medical negligence, including a claim for noneconomic damages, falls into that category and is the same type of case that was recognized at common law when the Constitution was adopted in 1820. In 1820, the jury determined the amount of damages at common law and

legislative limits on damages were unheard of. The application of a statutory cap to damages awarded by a jury in a cause of action that existed in 1820 necessarily changes and impairs the right of a trial by jury as heretofore enjoyed. Because section 538.210 changes the right to a jury determination of noneconomic damages as it existed in 1820, when our state Constitution was adopted, it unconstitutionally infringes on Ordinola's right to a trial by jury.

This Court should affirm the circuit court's judgment except for the portion reducing the noneconomic damages award. That portion should be vacated, and the Court should enter judgment awarding Ordinola the full amount of the jury's award.

JURISDICTIONAL STATEMENT

Separate appeals were initiated by defendants (Respondents-Appellants) in the court of appeals. Plaintiff Ordinola (Appellant-Respondent) cross-appealed and moved for transfer to the Missouri Supreme Court. All appeals have been consolidated into the instant appeal.

The issues raised by Respondents-Appellants do not fall within the exclusive jurisdiction of the Missouri Supreme Court and therefore the Court of Appeals has general appellate jurisdiction over their appeal. Plaintiff was first injured due to the alleged negligence of defendant in the western portion of Jackson County, MO, and venue was proper there pursuant to §§ 508.010.4 and

478.461 RSMo; accordingly, the Court of Appeals for the Western District has jurisdiction by virtue of § 477.070 RSMo.

Appellant-Respondent Ordinola's sole issue on appeal concerns the validity of a Missouri statute, § 538.210 (2015). Article V, section 3 of the Missouri Constitution vests the Missouri Supreme Court with exclusive appellate jurisdiction in all cases involving the validity of a statute of this state. The Missouri Supreme Court also has jurisdiction over any other issue that may be presented, even if such issues standing alone would not otherwise be directly appealable to the Missouri Supreme Court. *See State ex rel Union Elec. Co. v. Public Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985).

The constitutional challenge raised in this case is real and substantial. The statute violates plaintiff's right to trial by jury as guaranteed by art. I, sec. 22(a) of the Missouri Constitution, and the Missouri Supreme Court has so held in addressing the former version of the statute's caps in medical malpractice actions. *See Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. banc 2012). And with respect to the case at bar, even the trial judge who applied the statutory caps noted in *dictum* in his Amended Judgment, "[f]or what it's worth, this Court finds [plaintiff's] challenge to be not only colorable, but, in fact, the Court finds the argument to be persuasive." D38 p.3; D41 p. 3, App. A4.

STATEMENT OF FACTS

Appellant-respondent Maria Ordinola (hereinafter “Ordinola”) filed her medical negligence suit against the respondents-appellants physicians and University Physician Associates (the employer of the respondents-appellants attending doctors) on August 24th, 2017, in the Circuit Court of Jackson County, Western Division. D2 p.1-3.¹ In her petition, Ordinola alleged that following the C-section delivery of her child, respondents-appellants physicians negligently and carelessly proceeded with an elective tubal ligation at which time they failed to properly suture Ordinola’s left fallopian tube causing her life-threatening intra-abdominal bleeding and massive blood loss, which went misdiagnosed and untreated for hours. D2 p.5-9. In Ordinola’s petition, she pled that “plaintiff wishes to raise as early as possible Constitutional objections concerning” § 538.210 RSMo (2015) limiting recovery for non-economic damages, including that it violates her right to a jury trial guaranteed by the Missouri Constitution. D2 p.3-4; App.11-13.

¹ Multiple appeals were filed by the parties resulting in the filing of a Legal File by Ordinola and a Legal File and Supplemental Legal File by respondents-appellants. Ordinola’s references are to the Legal File she filed on June 4th, 2020.

Ordinola alleged multiple acts of medical malpractice in her Petition, centering around respondents-appellants physicians' negligent performance of the tubal ligation, specifically in failing to properly supervise and/or suture the left fallopian tube, and failing to timely diagnose the massive internal bleeding during the hours after the procedures. D2 p.8-11. As a result of this negligence, Ordinola experienced permanent, progressive and catastrophic injuries and damages, including, but not limited to, cardiac arrest/resuscitation twice, massive internal bleeding, several surgeries, a complete hysterectomy, a laceration to her bladder, permanent leakage of urine through her vagina, pain during urination and extreme pain with sexual relations. D2, p.10-11.

Trial commenced on October 21st, 2019. D41 p. 1; App.2. On October 30th, 2019, the jury returned a verdict in favor of Ordinola and against respondents-appellants in the total amount of \$1,030,000. D41 p.2; App.3. In the verdict, the jury itemized the damages as follows: \$30,000 past economic, \$300,000 past non-economic and \$700,000 future non-economic. D41 p.2; App.3.

Respondents-appellants filed motions for remittitur asking the circuit court to reduce the total non-economic damages award to \$400,000 pursuant to § 538.210.2(1) RSMo (2015), the amount of the cap for non-catastrophic injuries. D9 p.1-2; D11 p.1-2; App.11. Ordinola filed suggestions opposing respondents-appellants' motions on the grounds, *inter alia*, that § 538.210 violated the right to a jury trial under art. 1, sect. 22(a) of the Missouri

Constitution and the Missouri Supreme Court's holding in *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. banc 2012). D13 p.1-2; D14 p.1-2; App.8 and 11. Ordinola also argued that if the Court applied the statutory caps over her objection, that the cap for catastrophic personal injury, as defined by § 538.205(1) RSMo (2015), would apply, not the non-catastrophic, due to permanent organ failure in the function of her bladder which permanently leaks urine into her vagina. D13 p.2; D14 p2; App.9.

On January 6th, 2019, the circuit court entered its initial Judgment on Jury Verdict (dated Dec. 31, 2019). D31. In denying Ordinola's constitutional challenge to the statute, the court held:

First, with regard to Plaintiff's challenge to the constitutionality of Section 538.210 RSMo, the Court denies Plaintiff's request to find that said statute violates the Constitution of the State of Missouri. For what it's worth, this Court finds such a challenge to be not only colorable, but, in fact, the Court finds the argument to be persuasive. However, this Court is bound by the holdings of the appellate courts in this State and will defer to existing case law.

D31 p.3-4; App.11-13. (Also included in the later filed Amended Judgment at D41 p.3-4; App.4-5.) The trial court further held that: "[w]ith regard to the classification of Plaintiff's injuries, the Court finds that Plaintiff suffered a 'catastrophic personal injury' as defined in Section 538.205.1(e)," and then

reduced the total noneconomic damages from \$1,000,000 down to \$748,828, the maximum amount allowed under the statute for catastrophic injury. D31 p.4; App.9-10. (Also retained in the later filed Amended Judgment at D41 p. 4; App.5.)

On January 7th, 2020, defendant Mou filed a Motion to Amend Judgment. D32. On January 15th, 2020, Ordinola also filed a motion to modify or amend the judgment, challenging the constitutionality of the statute, arguing that the circuit court did in fact have power to hold the statute unconstitutional and that since case law supported the challenge, the court was not properly deferring to existing case law. D36 p.1-4. Both motions were authorized after-trial motions under Rule 75.01, Missouri Supreme Court Rules. D32 p.1; D36 p.1.

On January 10th, 2020, while defendant Mou's after-trial motion was pending, respondents-appellants physicians and respondent-appellant University Physicians Associates filed their first Notices of Appeal as to the initial judgment. D33 and D34

On March 2nd, 2020, the trial court entered its orders ruling on the pending after-trial motions, denying Ordinola's (D39) but granting defendant Mou's (D37), and entered an Amended Judgment on Jury Verdict pursuant to Rule 75.01. D38 and D41; App.2-7. The Amended Judgment became a new judgment for all purposes. Rule 78.07(d). D38 and D41; App.2-7. Upon

expiration of 30 days, the judgment became final (Rule 81.05(a)) and within the ensuing 10 days (on April 9th, 2020), Ordinola filed her cross appeal by filing a timely Notice of Appeal (Rule 81.04(a)). D40.

On May 15th, 2020, respondents-appellants filed a motion for leave to file a late notice of appeal as to the Amended Judgment. (Respondents-appellants Supp. Legal File, D146, hereinafter referred to as Resp.Supp.LF.) On May 18th, 2020, Ordinola filed suggestions in opposition to respondents-appellants' motion for leave to file their Notice of Appeal out of time arguing that they failed to file an affidavit showing that the delay was not due to culpable negligence as required by Rule 81.07(a). After a Special Order was issued by the Court of Appeals, respondents-appellants filed their Notice of Appeal as to the Amended Judgment on June 1st, 2020. Resp.Supp.LF D153. All pending appeals have been consolidated into the instant appeal.

On June 4th, 2020, Ordinola filed a motion to transfer this case to the Missouri Supreme Court. On July 17th, 2020, the Court entered its Order advising Ordinola's motion to transfer to the Missouri Supreme Court Before Opinion will be taken with the case.

POINT RELIED ON

The trial court erred in reducing pursuant to § 538.210 (2015) the total noneconomic damages awarded to plaintiff Ordinola in her medical negligence claim because § 538.210 violates the right to trial by jury guaranteed by art. I, sec. 22(a) of the Missouri Constitution, in that, as understood at common law at the time the Constitution was adopted in 1820, that right encompasses the substantive right to have the plaintiff's damages in such a cause of action determined by the jury; the jury here determined that Ordinola's noneconomic injuries merited an award of damages in excess of the statutory limitation; and § 538.210 thereby unconstitutionally prevented the jury's award from having its full intended effect.

Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. banc 2012)

Lewellen v. Franklin, 441 S.W.3d 136 (Mo. banc 2014)

Dodson v. Ferrara, 491 S.W.3d 542 (Mo. banc 2016)

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003)

ARGUMENT

Point Relied On

The trial court erred in reducing pursuant to § 538.210 (2015) the total noneconomic damages awarded to plaintiff Ordinola in her medical negligence claim because § 538.210 violates the right to trial by jury guaranteed by art. I, sec. 22(a) of the Missouri Constitution, in that, as understood at common law at the time the Constitution was adopted in 1820, that right encompasses the substantive right to have the plaintiff's damages in such a cause of action determined by the jury; the jury here determined that Ordinola's noneconomic injuries merited an award of damages in excess of the statutory limitation; and § 538.210 thereby unconstitutionally prevented the jury's award from having its full intended effect.

Standard of Review

A challenge to the constitutional validity of a statute is subject to *de novo* review. *Watts v. Lester E. Cox Med. Ctrs*, 376 S.W.3d 633, 637 (Mo. banc 2012). "A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *Id.* Appellant-respondent Ordinola has the burden of proving that the statute "clearly and undoubtedly" violates the Constitution. *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.”

Id. at 642.

Statutory Background

The statute at issue in this case, § 538.210, concerns the legislative caps on noneconomic damages in medical malpractice personal injury (non-death) actions.² § 538.210.2 provides in pertinent part:

(1) In any action against a health care provider for damages for personal injury arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than four hundred thousand dollars for noneconomic damages irrespective of the number of defendants.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, in any action against a health care provider for

² All statutory references are to RSMo 2015, the version in effect at the time of the events giving rise to this action, unless otherwise indicated. In 2017 the Missouri legislature amended § 538.210 concerning provisions not pertinent to the issues on this appeal, but some paragraphs were renumbered in the process.

damages for a catastrophic personal injury arising out of the rendering or failure to render health care services, no plaintiff shall recover more than seven hundred thousand dollars for noneconomic damages irrespective of the number of defendants.

Id. Noneconomic damages are defined as “damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages.” § 538.205(8). Catastrophic injury is defined as an injury resulting in quadriplegia, paraplegia, the loss of two or more limbs, significant and permanent cognitive impairment, irreversible failure of a major organ system, or significant loss of vision. § 538.205(1).

In 2012, in *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. banc 2012), the Missouri Supreme Court struck down the immediately preceding version of the statute, § 538.210 (2005), which imposed a \$350,000 cap on noneconomic damages in medical malpractice cases, as violative of art. I, sec. 22(a) of the Missouri Constitution as adopted in 1820, which guarantees that “the right to trial by jury as heretofore enjoyed shall remain inviolate.” The Court determined that civil actions for damages resulting from personal wrongs have been tried by juries since 1820 and that Watts’s action for medical negligence, including her claim for noneconomic damages, “is the same type of

case that was recognized at common law when the constitution was adopted in 1820.” *Id.* at 638. The Court held that § 538.210 RSMo (2005) was therefore unconstitutional because “it infringes on the jury’s constitutionally protected purpose of determining the amount of damages sustained by an injured party.” *Id.* at 636. “Such a limitation was not permitted at common law when Missouri’s constitution first was adopted in 1820 and, therefore, violates the right to trial by jury guaranteed by article 1, section 22(a) of the Missouri Constitution.” *Id.*

In 2015, the Missouri legislature’s response to the Missouri Supreme Court’s holding in *Watts* was to legislatively abolish the common law cause of action for medical negligence, create a “new” cause of action with the same elements, and re-impose statutory caps on noneconomic damages that may be awarded by a jury. § 538.210.1.³

³ § 538.210.1 provides:

A statutory cause of action for damages against a health care provider for personal injury or death arising out of the rendering of or failure to render health care services is hereby created, replacing any such common law cause of action. The elements of such cause of action are that the health care provider failed to use that degree of skill and learning ordinarily used under the same

Now, in the instant action, Ordinola challenges the constitutionality of the legislature's latest attempt to again impose limitations on noneconomic damages in medical malpractice actions. It is contrary to the Missouri Supreme Court's express holding in *Watts*. As the Court held, "[o]nce the right to a trial by jury attaches ... the plaintiff has the full benefit of that right *free from the reach of hostile legislation*." *Watts*, 376 S.W.3d at 640 (emphasis added). Sec. 538.210 is constitutionally invalid for the same reason as its predecessor. It violates art. 1, sec. 22(a) of the Missouri Constitution and fundamentally alters the right to a jury trial in a personal injury medical malpractice claim as it existed prior to 1820 by infringing on the jury's constitutionally protected purpose of determining the amount of damages sustained by an injured party. As Judge Wolff wrote in his concurring opinion in *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 774 (Mo. banc 2010), "the limit on noneconomic damages violates the right to trial by jury.... The constitutional status of the right to trial by jury can be changed only by the people voting affirmatively for such a change in their constitution. Mo. Const. art. XII." *Id.*

or similar circumstances by members of the defendant's profession and that such failure directly caused or contributed to cause the plaintiff's injury or death.

Ordinola has properly preserved for review her constitutional challenge to the validity of § 538.210, RSMo. She raised her constitutional objections to the statute in a timely fashion and with the requisite specificity. *See eg., Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989). Ordinola challenged the constitutionality of the statute in her Petition, including, *inter alia*, her specific assertion that the statutory caps violate the right to trial by jury as guaranteed by art. 1, sec. 22(a) of the Missouri Constitution. D2 p.3-4. Her constitutional objections were reasserted in opposition to respondents-appellants' motions for remittitur (D13 and D14) and in Ordinola's authorized post-trial motion. D36.

A. Section 538.210 Violates the Right to Trial by Jury

The cap on noneconomic damages imposed by § 538.210 violates the right to trial by jury as guaranteed by art. I, sec. 22(a) of the Missouri Constitution which assures that "the right to trial by jury as heretofore enjoyed shall remain inviolate." This issue was previously resolved in *Watts*, which controls here.

In *Watts*, the plaintiff, a victim of medical malpractice, received a jury verdict of \$1,450,000 in noneconomic damages, which the trial court reduced to \$350,000 pursuant to the statutory cap under § 538.210 (2005). *Watts*, 376 S.W.3d at 635. The plaintiff challenged the constitutionality of the statute on the grounds, *inter alia*, that it violated the plaintiff's right to trial by jury as guaranteed by art. 1, sec. 22(a) of the Missouri Constitution which provides that

the right to trial by jury as heretofore enjoyed shall remain inviolate. *Id.* The Missouri Supreme Court agreed. *Id.* at 636.

The Court explained that “the plain language of article I, section 22(a) requires analysis of two propositions to determine if the cap imposed by section 538.210 violates the state constitutional right to trial by jury.” *Id.* at 637. The first portion requires a determination of whether the plaintiff’s action and claim for noneconomic damages is included within “the right of trial by jury as heretofore enjoyed.” *Id.* The second portion requires the Court to determine whether the right to trial by jury remains inviolate when a statutory cap requires courts to reduce the jury’s verdict. *Id.* at 638. If the statutory cap changes the common law right to a jury determination of damages, the right to trial by jury does not “remain inviolate” and the cap is unconstitutional. *Id.*

The criteria for both propositions were fulfilled in *Watts* resulting in the court declaring the cap on noneconomic damages unconstitutional, and both are fulfilled in the case at bar requiring the same result. Each is discussed in turn below.

- 1. Ordinola’s action and claim for noneconomic damages is included within “the right to trial by jury as heretofore enjoyed.”**

With respect to the first proposition, “the phrase ‘heretofore enjoyed’ means ‘[c]itizens of Missouri are entitled to a jury trial in all actions to which

they would have been entitled to a jury when the Missouri Constitution was adopted' in 1820." *Watts*, 376 S.W.3d at 638 (quoting with approval *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003)). The *Watts* court held that to determine the nature of the right to trial by jury as "heretofore enjoyed," a court must assess the state of the common law when the Missouri Constitution was adopted in 1820. *Watts*, 376 S.W.3d at 638. The Court easily demonstrated that at the time our state Constitution was adopted, civil actions for damages resulting from personal wrongs were being tried by juries, that an action for medical negligence, including a claim for noneconomic damages, "*falls into that category*" and "*is the same type of case that was recognized at common law when the constitution was adopted in 1820.*" *Id.* (emphasis added).

Ordinola's claim for medical negligence in the instant action is *the same type of case* that was recognized at common law when the Constitution was adopted in 1820. The elements of her claim are identical to the new statutory claim.⁴ The only distinction is that since the decision in *Watts* the Missouri legislators abolished the common law cause of action for medical negligence and

⁴ There has been no substantive change whatsoever in the definition of negligence for health care providers, damages, or verdict director since the common law claim was replaced by the statutory claim. See MAI 11.06, MAI 21.01, 21.05.

created a “new” cause of action with identical elements but added caps on recovery for noneconomic damages. In the context of constitutional validity, however, this is a distinction without a difference. The nature of the statutory action and the elements supporting the claim are identical to the common law claim. The legislature has not *created* a new cause of action at all, they merely *codified* it.⁵ At the end of the day, the legislature has done nothing more than that which the Missouri Supreme Court expressly held it may not do, *i.e.*, impose caps on noneconomic damages in a personal injury medical malpractice cause of action.

⁵ *Cf. eg., Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012) concerning a wrongful death action; *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931) and *Missouri Alliance v. Dept. of Labor*, 277 S.W.3d 670 (Mo. banc 2009), concerning the Missouri Workers’ Compensation system; and *Overby v. Chad Franklin National Auto Sales North, LLC*, 361 S.W.3d 364 (Mo. banc 2012), concerning the Missouri Merchandising Practices Act. In these cases, caps or other legislative restrictions on the right to jury trial were upheld on the basis that the legislature may create new claims that did not exist at common law when the Constitution was adopted, and in doing so, are free to define the substantive claims, including remedies, as the legislature sees fit.

The legislature's effort to impose caps by abolishing the medical negligence cause of action and creating an identical "new" action arises, to use Judge Wolff's words, "from the flawed view... that the right to trial by jury [can] be modified or abolished legislatively in particular cases." *Klotz*, 311 S.W.3d at 773 (Wolff, J., concurring). The Missouri Supreme Court has *per force* implicitly, if not expressly, rejected this "flawed view" in favor of the priority of our Constitution over legislative enactments in holding that "the right to trial by jury is a constitutional right, applies 'regardless of any statutory provision,' and is 'beyond the reach of hostile legislation.'" *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 92 (Mo. banc 2003) (quoting with approval *Lee v. Conran*, 111 S.W. 1151, 1153 (Mo. 1908)). As Judge Wolff declared, "there is a right to a jury trial in court actions for damages *that cannot be legislated away*." *Klotz*, 311 S.W.3d at 774 (emphasis added). This line of reasoning was iterated in *Watts* as part of the Court's rationale for overruling *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. banc 1992). *Adams*, the Court held, misconstrued the right to trial by jury because it specifically permitted legislative limitation of an individual constitutional right. *Watts*, 376 S.W.3d at 642. The Court explained:

Adams justifies the section 538.210 damage cap because the jury nominally is permitted to find the facts while the judge statutorily is required to make a separate legal determination that applies the damages cap. The unavoidable result of this rationale is that right

to trial by jury is directly subject to legislative limitation. *This holding is untenable for the simple reason that a statutory limit on the state constitutional right to trial by jury amounts to an impermissible legislative alteration of the Constitution. Diehl*, 95 S.W.3d at 85, 92 (“[t]he right to trial by jury, where it applies, is a constitutional right, applies ‘regardless of any statutory provision,’ and is ‘beyond the reach of hostile legislation’ ”) (citing *Lee v. Conran*, 213 Mo. 404, 111 S.W. 1151, 1153 (1908)); *see also Missouri Alliance for Retired Am. v. Dept. of Labor and Indust. Relations*, 277 S.W.3d 670, 682 (Mo. banc 2009) (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).

Watts, 376 S.W.3d at 642 (emphasis added). Further, the Court explained, “*Adams* did not acknowledge, must less distinguish, the myriad cases recognizing that a statute may not limit constitutional rights, which are beyond the reach of hostile legislation.” *Id.* Stated more directly, “statutes cannot limit constitutional rights.” *Id.* at 643. To hold otherwise “would make constitutional protections of only theoretical value – they would exist only unless and until limited by the legislature. Such rights would not be rights at all but merely privileges that could be withdrawn.” *Id.*

The Missouri Supreme Court broached this issue most recently in *Dodson v. Ferrara*, 491 S.W.3d 542 (Mo. 2016). In *Dodson*, the Court struck down a constitutional challenge to caps in wrongful death cases. In doing so, the Court noted the distinguishing fact that wrongful death actions *never existed at common law*. The Court acknowledged, consistent with its prior holding in *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012), that "the legislature has the power to define the remedy available if it *creates* the cause of action." *Dodson*, 491 S.W.3d at 556 (quoting *Sanders*) (emphasis added). "To hold otherwise," the Court explained in *Sanders* (again quoted with approval in *Dodson*), would be to tell the legislature it could not legislate; it could not create nor negate causes of action, and in doing so could not prescribe the measure of damages for the same. This Court never has so held and declines to do so now." *Dodson*, 491 S.W.3d at 556 (quoting *Sanders*). However, in further clarification, the Court went on to say specifically:

The General Assembly may negate causes of action or their remedies that did not exist prior to 1820. The judiciary has the duty to prescribe the trial process and to protect those rights to jury trial as existed prior to 1820.

Dodson, 491 S.W.3d at 556 (emphasis added).

The legislature in this case, in contravention of the cautionary holding in *Sanders* and *Dodson*, negated a cause of action that *existed* at the time the

Missouri Constitution was adopted. At that juncture, the people's constitutional rights were implicated, and the judiciary has the duty to protect those rights to jury trial as existed prior to 1820. To hold otherwise would be to not only render meaningless the foregoing holdings in *Watts*, *Sanders*, and *Dodson*, but, even worse, it would render meaningless art. I, sec. 22(a)'s guarantee that the right to jury trial as heretofore enjoyed shall remain inviolate. To hold otherwise would render constitutional protections "rights" in name only. They would exist only unless and until vanquished or limited by the legislature.

As Judge Wolff observed in *Klotz*, "*Adams*' fundamental error is in concluding that statutory law can trump the constitutional right to jury trial." *Klotz*, 311 S.W.3d at 774. At common law, the scope of the jury trial right included the right to have a jury determine the amount of damages due in a personal injury action. *Id.* at 774-78. "The constitutional status of the right to trial by jury can be changed only by the people voting affirmatively for such change in their constitution. Mo. Const. art. XII." *Klotz*, 311 S.W.3d at 774 (Wolff, J. concurring).

Notably, the Supreme Court of Kansas also recently held, on grounds similar to Missouri, that the cap on noneconomic damages in Kansas was unconstitutional. *Hilburn v. Enerpipe, Ltd.*, 442 P.3d 509, 514 (Kan. 2019). Like Missouri, section 5 of the Kansas Constitution Bill of Rights declares that "the right of trial by jury shall be inviolate." Like Missouri, Kansas has held

that this provision preserves the jury trial right as it historically existed at common law when Kansas's Constitution came into existence. *Hilburn*, 442 P.3d at 514. Determination of noneconomic damages was a fundamental part of a jury trial at common law in Kansas and protected by section 5 of the Kansas Constitution. *Id.* Citing and quoting the Missouri Supreme Court's decision in *Watts*, the Kansas Supreme Court held in *Hilburn* that the "individual 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." *Hilburn*, 442 P.3d at 514-515 (quoting *Watts*, 376 S.W.3d at 640). In so holding, the Court in *Hilburn* acknowledged that, while it may be within the power of the legislature to modify the common law, "what may have been a mere common-law right to jury trial on the day before ratification of section 5 was no longer a mere common-law right from ratification onward." *Hilburn*, 442 P.3d at 516 (quoting *Miller v. Johnson*, 295 Kan. 636, 705, 289 P.3d 1098 (2012) (Beier, J., concurring in part and dissenting in part)). The Court further acknowledged that:

Ratification expressed the people's choice to elevate the common-law right to jury trial to enumerated constitutional status. That status put it beyond everyday legislative meddling. The people entrusted juries with the task of deciding damages. The legislature's unwillingness to [entrust juries with deciding

damages] ... requires endorsement by the people before it can enjoy the force of law.

Hilburn, 442 P.3d at 516 (citations omitted).

In so holding, the Court in *Hilburn* cites to the same fundamental distinction drawn by the United States Supreme Court decades ago:

The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution. The distinction is *fundamental*....

Hilburn, 442 P.3d at 516 (quoting with approval *Dimick v. Schiedt*, 293 U.S. 474, 487, 55 S.Ct. 296, 79 L.Ed. 603 (1935) (emphasis added). See also *Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Fa. 731, 736, 691 S.E.2d 218 (2010) (general legislative authority to modify common law does not permit abrogation of constitutional rights). This fundamental distinction underlies the very framework of our democracy, as the Eastern District of the Missouri Court of Appeals has recently reminded us:

As Alexander Hamilton explained in *The Federalist* No. 78, the Constitution is “fundamental law” as an expression of “the

intention of *the people*.” THE FEDERALIST NO. 78 (Alexander Hamilton). He said the Constitution is “superior” to a statute which is the “intention” of the “*representatives* of the people.” *Id.* *Neuner v. City of St. Louis*, 536 S.W.3d 750, 764 (Mo. App. E.D. 2017) (emphasis added).

The Court in *Hilburn* reasoned further:

Giving the legislature the authority to limit damages by changing the common law, or otherwise, violates § 5 of the Kansas Bill of Rights by taking the damage question away from the jury. A written constitution is adopted for the purpose of limiting the power of government. Providing that trial by jury shall be inviolate is a limitation on government as a protection of individual rights. There is no question the legislature has the power to change or abolish the common law. That, however, does not change the Kansas Constitution. A later change in the common law does not affect the meaning of § 5. Its meaning was fixed in 1859. The proper method of constitutional change is by amendment, not legislation. ... It is axiomatic that [any] act of the legislature is subject to the limitations contained in the Constitution, and where such act exceeds the bounds of authority vested in the legislature

and violates the limitations of the Constitution, it is null and void
and it is the duty of courts to so declare.

Hilburn, 442 P.3d at 516-17 (citations omitted).

Bringing it all back to Missouri, and simply stated, § 538.210 does not pass the first portion of the test for constitutional validity under *Watts*. Ordinola's medical negligence action and claim for noneconomic damages is included within "the right of trial by jury as heretofore enjoyed." It falls into the category and is the same type of case that was recognized at common law when the Missouri Constitution was adopted in 1820. The legislative act of replacing the common law cause of action with an identical statutory claim, so that it may impose caps, does not change that ultimate fact and is of no import in this constitutional analysis. No new action was legislatively created. Instead, only rights recognized and in existence at the time our state Constitution was adopted were abolished, recreated, and modified. Again, while the legislature may negate causes of action or their remedies *that did not exist prior to 1820*, the judiciary has the duty to protect those rights to jury trial *as existed prior to 1820*. *Sanders*, 364 S.W.3d at 205; *Watts*, 491 S.W.3d at 556. The right to jury trial prior to 1820 *included* causes of action like the plaintiff's personal injury medical negligence action as well as her claim for noneconomic damages. To hold that the legislature may abolish the plaintiff's rights under these circumstances would render superfluous the right to trial by jury with respect

to any claims that existed in 1820, let alone medical negligence actions. All common law claims would become subject to such legislative action as occurred here with medical negligence claims. Instead, if there is to be a fundamental change to the right to jury trial that attached to common law personal injury medical negligence claims that existed at the time the Missouri Constitution was adopted, the proper method is by *amendment of the Constitution by the people*, not by act of the legislature. And where the legislature oversteps and violates the limits of the Constitution, as it has here, it is the right and the duty of the Court to act and so declare and in so doing safeguard and give promise to the constitutional guarantee that the right to trial by jury as heretofore enjoyed shall remain inviolate.

2. The right to trial by jury does not “remain inviolate” when a statutory cap requires a court to reduce the jury’s verdict.

With respect to the second proposition, *i.e.*, whether the right to trial by jury “remain[s] inviolate” when a statutory cap requires courts to reduce the jury’s verdict, this too is controlled by *Watts*. The *Watts*’ Court answered this question in the affirmative with respect to caps on noneconomic damages in medical negligence personal injury actions. The Court held that where a statutory cap changes the common law right to a jury determination of damages, the right to trial by jury does not “remain inviolate,” and the cap is unconstitutional. *Watts*, 376 S.W.3d at 638.

The *Watts*' Court reasoned that Missouri law has long recognized that the amount of plaintiff's damages, including the amount of noneconomic damages, is a fact that must be determined by the jury and that, as a primary function of a jury, it is subject to the protections of the art. I, sec. 22(a) right to trial by jury. *Id.* at 639-40. The Court explained that once that right attaches, "the plaintiff has the benefit of that right free from the reach of hostile legislation." *Id.* at 640. A statutory cap imposes a limit on a jury's award wholly independent of the facts of the case, and as such, "curtails the jury's determination of damages, and, as a result necessarily infringes on the right to trial by jury when applied to a cause of action to which the right to jury trial attached at common law." *Id.* "Because the common law did not provide for caps on civil damages, the people retain their individual right to trial by jury subject only to judicial remittitur based on the evidence in the case. Statutory damage caps were not permissible in 1820 and, pursuant to the plain language of article I, section 22(a), remain impermissible today." *Id.* The Court held that statutory caps on damages in cases in which the right to trial by jury applies necessarily changes and impairs the right of trial by jury "as heretofore enjoyed." *Id.* The Court concluded that the individual 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. *Id.* "Section 538.210 necessarily and unavoidably violates the state constitutional right to trial by jury." *Id.*

The holding in *Watts* was reaffirmed and followed in the case of *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. banc 2014), where the Missouri Supreme Court held that a statute which imposed limits on punitive damages in a common law fraud action was violative of Missouri’s right to jury trial. The Court concisely applied its reasoning from *Watts*, which merits quoting at length:

Though *Watts* struck down a cap on noneconomic damages in a medical negligence case, it is controlling on the issue of whether application of the statutory cap on punitive damages in section 510.265 in a cause of action that existed in 1820 violates the right to a jury trial. As noted in *Watts*, the phrase “shall remain inviolate” in article I, section 22(a) means that any change in the right to a jury determination of damages as it existed in 1820 is unconstitutional. *Id.* at 638. The Court in *Watts* recognized that, in 1820, the jury determined the amount of damages at common law and there were no legislative limits on damages. *Id.* at 639-40. The Court, therefore, concluded that application of a statutory cap to damages awarded by a jury in a cause of action that existed in 1820 “necessarily changes and impairs the right of a trial by jury ‘as heretofore enjoyed.’” *Id.* at 640.

Lewellen, 441 S.W.3d at 143.

The Court continued:

As in *Watts* there existed a right to a jury determination of the amount of punitive damages in a fraud case of action in 1820. Actions for fraud in which only damages were sought were tried by juries in 1820. Additionally, determination of the amount of punitive damages was a function for the jury in 1820... Under the common law as it existed at the time the Missouri Constitution was adopted, imposing punitive damages was a peculiar function of the jury...

In *Blue Springs Ford* [*Scott v. Blue Springs Ford Sales, Inc.* 176 S.W.3d 140 (Mo. banc 2005)], this Court held that a claimant seeking damages on a claim brought pursuant to the Missouri Human Rights Act had a right to have a jury determine punitive damages. 176 S.W.3d at 142. The guarantee of a jury trial in the Missouri Constitution was violated by a statute providing for punitive damages but precluding a jury from determining punitive damages. *Id.* The Court, again, in *Overbey*, iterated its holding in *Blue Springs Ford* that there is a right to a jury trial on punitive damages. 361 S.W.3d at 375.

Therefore, under *Watts*, *Blue Springs, Ford*, and *Overbey*, the punitive damages cap by section 510.265 “necessarily changes and

impairs the right of a trial by jury ‘as heretofore enjoyed.’ *Watts*, 376 S.W.3d at 640. Because section 510.265 changes the right to a jury determination of punitive damages as it existed in 1820, it unconstitutionally infringes on Ms. Lewellen’s right to a trial by jury protected by article I, section 22(a) of the Missouri Constitution.

Lewellen, 441 S.W.3d 143-44.

The Court concluded:

[B]ound by *Watts*, this Court holds that the punitive damages cap in section 510.265 ‘curtails the jury’s determination of damages and, as a result, necessarily infringes on the right to a trial by jury when applied to a cause of action to which the right to jury trial attaches at common law.’ [*Watts* 376 S.W.3d] at 640. Because a party seeking punitive damages for fraud in 1820 would have had the right to have a jury try the issue of punitive damages, the statutory reduction of Ms. Lewellen’s punitive damages award against Mr. Franklin pursuant to section 510.265 was unconstitutional.

Lewellen, 441 S.W.3d at 145.

Watts and *Lewellen* are controlling in the case at bar with regard to the second proposition in determining the constitutional validity of the statutory caps. The right to jury trial does not “remain inviolate” when a statutory cap

requires the court to reduce the jury's verdict in a personal injury medical malpractice action. A party would have a right to a jury determination of damages, including noneconomic, at common law when the Missouri Constitution was adopted. The statute impermissibly changes the jury's determination of damages, and therefore the right to trial by jury, as it attached in 1820, does not "remain inviolate." The restrictions on damages necessarily infringe on the right to trial by jury and the statutory caps are therefore unconstitutional.

CONCLUSION AND RELIEF SOUGHT

Judge Wolff, in his concurring opinion in *Klotz, supra*, aptly summarized the magnitude of the matter before the Court and what should be done about it:

In the Federalist Papers, No. 83, Alexander Hamilton said that the framers of the United States Constitution "if they agree in nothing else, concur at least in the value they set upon the trial by jury." If there were any differences among them, some would regard the right as "a valuable safeguard to liberty," while others would consider it "as the very palladium of free government." The historical reticence of the courts to overturn verdicts except in the rare circumstances when a verdict does not comport with the

evidence shows a deference to the 12 men and women who constitute this basic unit of democracy. That legislation even would be enacted to interfere with the jury's decision was unheard of when the voters of Missouri adopted our state's constitution.

When the people adopted the state constitution, they provided that the right to trial by jury “shall remain inviolate.” That is a remarkably clear statement of the importance of the right. If the jury’s role is to be abrogated or impaired, then the people ought to approve it by amending their constitution.

Klotz, 311 S.W.3d at 781 (Wolff, J., concurring).

The Missouri legislature has attempted an end-run around our state’s Constitution. It abrogated and impaired the jury’s role in determining damages in an action that clearly existed at common law when the Constitution was adopted. Personal injury actions resulting from medical negligence existed in 1820. Juries assessed the damages, including noneconomic, in such cases, at the time the Constitution was adopted. A cap on such damages interferes and infringes upon the jury’s assessment of damages and would have been unheard of when Missouri voters adopted our state’s Constitution. The statutory cap on damages violates the people’s right to trial by jury as guaranteed by our state’s Constitution. This Court should strike down this hostile legislation and protect

the people's rights so that the right to trial by jury in such instances shall remain inviolate as the Missouri Constitution guarantees.

For the foregoing reasons, and because there is no need for further proceedings in the circuit court, appellant-respondent Ordinola prays this Court affirm the circuit court's judgment, except for the portion reducing the noneconomic damages award assessed against respondents-appellants pursuant to § 510.210, and enter judgment as the circuit court ought to have entered to reflect the full amount of the damages award against respondents-appellants assessed by the jury. See Rule 84.14; *Lewellen v. Franklin*, 441 S.W.3d 136, 139 (Mo. 2014).

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word in Century Schoolbook size 13 font, which is not smaller than Times New Roman, 13-point font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and the Missouri Court of Appeals Western District Special Rule 41, as this brief contains 7,466 words.

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Certificate of Service

The undersigned attorney for appellant-respondent Ordinola certifies that a pdf copy of the foregoing Brief of the Appellant-Respondent and accompanying Appendix were filed pursuant to Rule 108.08 with the Court's E-filing system causing the same to be served upon all counsel of record this 23rd day of July, 2020.

/s/ Russell S. Dameron

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