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Jorell Kuttenkuler

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ABSTRACT

In November 2018, the United States District Court in Western Missouri decided the case of *Jiles v. Schuster Co.,* holding that Missouri's No Pay No Play statute was unconstitutional in that it placed a cap on non-economic damages. Missouri's No Pay No Play statute requires that uninsured motorists (specifically the driver of the vehicle) waive the right to collect non-economic damages from a driver who has insurance in the case of an accident, even when the insured driver is the one at fault. In his order, Judge Bough relied on *Watts v. Lester E. Cox Med. Ctrs.* to find the No Pay No Play statute violated Missouri's constitution in that it infringed on the right to a trial by jury. The Missouri Supreme Court has yet to decide on the constitutionality of the No Pay No Play statute, but a few state trial courts have already found the statute unconstitutional, using similar logic as Judge Bough applies in *Jiles v. Schuster Co.* The reasoning those courts have found the No Pay No Play statute unconstitutional is that the courts construe it as a statutory cap on damages, which Missouri has already determined violated the right to a trial by jury. Missouri is not the first state to find that statutory caps on damages are unconstitutional but it is the first to apply this principle to the No Pay No Play statute. Thus, Missouri stands at a precipice, and any future decision in its highest court may have a domino effect on other states.

This article analyzes the effects of *Jiles v. Schuster Co.* by looking at the case governing the decision, *Watts v. Lester E. Cox Med. Ctrs.* Evidence suggests Missouri has not historically upheld the "inviolate" right to a jury determination of damages, as established in that case, and thus casts doubt on the final decision reached in *Watts v. Lester E. Cox Med. Ctrs.* In *Watts*, the Supreme Court of Missouri found that statutory caps on non-economic damages stemming from medical malpractice were unconstitutional. Recent cases, such as *Jiles*, support the conclusion that the No Pay No Play statute falls within the same purview and likely is a violation of the Missouri Constitution. However, No Pay No Play could survive the challenge due to potential flaws in *Watts* and cases that have distinguished it.

I. INTRODUCTION

Despite a Missouri Statute that requires drivers of motor vehicles to carry motor vehicle insurance,[1] more than $107 million was paid out by insurance companies due to injuries caused by uninsured motorists in 2017 alone.[2] This has been a consistent problem for Missouri and many other states.[3] Missouri, and other states, have attempted to rid the problem of uninsured motorists by allowing the state to suspend the license of a person who is caught driving without the proper car insurance.[4] Additionally, Missouri has also made driving without motor vehicle insurance a misdemeanor offense.[5] However, driving without motor vehicle insurance is common; in fact, nearly 14% of all drivers on Missouri roads in 2009 did not have insurance.[6] In response to this problem, the Missouri legislature enacted a statute in 2013 aimed at reducing the amount of uninsured motorists on Missouri roads, affectionately known as "No Pay No Play."[7] This statute requires uninsured motorists (specifically the driver of the vehicle) to waive the right to collect non-economic damages from a driver who has proper insurance in the case of an accident, even when the insured driver is the one at fault.[8]

The Missouri No Pay No Play statute went unchallenged until 2017, when Joshua Gilmore, an uninsured motorist, brought a cause of action against Katherine Page.[9] In *Gilmore v. Page*, Katherine Page attempted to pursue an affirmative defense under Missouri's No Pay No Play statute.[10] However, before dismissing the case, Judge Robert Koffman issued an order stating that No Pay No Play violated Missouri's Constitutional right to trial by jury, and thus the statute had to be struck down.[11] In his order, Judge Koffman cited *Watts v. Lester E. Cox Medical Center*s as the authority for his decision.[12] In *Watts*, the Missouri Supreme Court found that statutory caps on non-economic damages breached the "inviolate" right to trial by jury in Missouri's Constitution.[13] Judge Koffman dismissed the case in *Gilmore v. Page*[14] and there was no appeal. In the years following *Gilmore v. Page*, there have been additional decisions in Missouri state trial courts that have reached the same conclusion,[15] although no challenge has yet reached Missouri's highest court.[16]

1. *See* MO. REV. STAT. § 303.025 - § 303.041 (2019).
2. Private Passenger Automobile Insurance: A Review of the Market in Missouri, MISSOURI DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS & PROFESSIONAL REGISTRATION (July 2018), https://insurance.mo.gov/reports/documents/PrivatePassengerAutomobileInsuranceInMOrev7-11-2017.pdf [hereinafter MO Insurance Market Review].
3. *See One in Eight Drivers: Countrywide Rate Increases as Several States Experience Significant Decrease*, INSURANCE RESEARCH COUNCIL (Oct. 9, 2017), https://www.insurance-research.org/sites/default/files/downloads/UMNR1005.pdf
4. MO. REV. STAT. § 303.041 (2019).
5. MO. REV. STAT. § 303.025 (2019).
6. Recession Marked by Bump in Uninsured Motorists, INSURANCE RESEARCH COUNCIL (April 21, 2011), https://www.insurance-research.org/sites/default/files/downloads/IRCUM2011_042111.pdf.
7. MO. REV. STAT. § 303.390 (2019).
8. *Id.*
9. Gilmore v. Page, No. 17PT-CC00092 (July 31, 2017).
10. *Id.*
11. *Id.*
12. *Id.*
13. Watts ex rel Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633, 636 (Mo. banc 2012).
14. Gilmore v. Page, No. 17PT-CC00092 (July 31, 2017).
15. Howard v. Mulkins, No. 1716-CV08520 (Oct. 17, 2018).
16. *See* Gilmore, No. 17PT-CC00092 (July 31, 2017); Howard, No. 1716-CV08520 (Oct. 17, 2018).

However, the state issue reached the United States District Court for the Western District of Missouri in *Jiles v. Schuster Co.*[17] In deciding this case, Judge Stephen Bough used analysis from *Watts v. Lester E. Cox Medical Centers* (as did state trial courts) to determine that No Pay No Play violates Missouri's Constitutional right to trial by jury.[18]

This article analyzes the effects of *Jiles v. Schuster Co.* by looking at the case governing the decision, *Watts v. Lester E. Cox Med. Ctrs*. Part II of this article addresses Missouri's No Pay No Play statute and its similarities to statutes in other states . Additionally, this section will review the number of states that have allowed statutory caps on non-economic damages and how many states have found them unconstitutional; particular focus will be on the states that find them to be a violation of the right to 'trial by jury' (the same rationale that was used in *Watts*). In doing this, the section will review the Missouri Constitution's text regarding trial by jury. Part III of this article reviews the rationale behind *Watts v. Lester E. Cox Medical Centers* in finding that statutory caps on non-economic damages are unconstitutional because these caps breach the right to trial by jury. Part IV of this article challenges the rationale underlying the *Watts* decision, in which the court indicated that since statutory caps did not exist when the Missouri Constitution was ratified in 1820, they cannot be valid today. This section addresses potential flaws in this idea, focusing on historical inaccuracies as well as the notion that the people of Missouri already recognized one way to limit damages decided by a jury in 1820, judicial remittitur. Part V applies the *Watts* analysis to No Pay No Play and finds that it is likely unconstitutional, as well. However, the section addresses how, even if found unconstitutional in its current form, Missouri's No Pay No Play statute may survive with only minor changes.

II. MISSOURI V. OTHER STATES – NO PAY NO PLAY & CAPS ON NON-ECONOMIC DAMAGES

Most states require that drivers of motor vehicles possess a certain amount of insurance.[19] In Missouri, that minimum is $25,000 for bodily injury per person ($50,000 per accident), $25,000 per accident for property damage, and uninsured motorist coverage of $25,000 for bodily injury ($50,000 per accident).[20] The rationale for requiring insurance is to ensure that "automobile accident victims are not left without a means to recover for their injuries from a judgment-proof tortfeasor."[21] Missouri is not the only state to have No Pay No Play statutes to aid in this goal. In fact, there are currently ten other states that have similar laws: Alaska,[22]

17. Jiles v. Schuster Co., 357 F. Supp. 3d 908 (W.D. Mo. 2018).
18. *Id*. at 916.
19. *See e.g.* CAL. CIV. PROC. CODE § 3333.4 (Deering 2020); MICH. COMP. LAWS. ANN. § 500.3135(2)(c) (LexisNexis 2020); N.D. CENT. CODE § 26.1-41-25 (2019).
20. Motor Vehicle Insurance (Financial Responsibility), MISSOURI DEPARTMENT OF REVENUE, https://dor.mo.gov/drivers/insurinfo.php (last visited April 20, 2020).
21. Caviglia v. Royals Tours of America, 842 A.2d 125, 129 (N.J. 2004).
22. ALASKA STAT. § 09.65.320 (2019).

California,[23] Indiana,[24] Iowa,[25] Kansas,[26] Louisiana,[27] Michigan,[28] New Jersey,[29] North Dakota,[30] and Oregon.[31] Most of these states' laws contain similar language to Missouri's No Pay No Play Statute, which reads:

1. An uninsured motorist shall waive the ability to have a cause of action or otherwise collect for noneconomic loss against a person who is in compliance with the financial responsibility laws of this chapter due to a motor vehicle accident in which the insured driver is alleged to be at fault…

Such waiver shall not apply if it can be proven that the accident was caused, in whole or in part, by a tort-feasor who operated a motor vehicle under the influence of drugs or alcohol, or who is convicted of involuntary manslaughter…

2. The provisions of this section shall not apply to an uninsured motorist whose immediately previous insurance policy meeting the requirements of section 303.190 was terminated or nonrenewed for failure to pay the premium, unless notice of termination or nonrenewal for failure to pay such premium was provided by such insurer at least six months prior to the time of the accident.[32]

Note that that in most of these states, the waiver applies strictly to non-economic damages. There are limitations to the application of the statute, including when the insured person was under the influence of drugs or alcohol or in the act of committing a felony, still permit recovery of these damages in certain situations.[33] Louisiana is a unique state in that it bars the uninsured motorist from receiving the *first* $15,000 in bodily injury and the *first* $25,000 in property damages, anything beyond this ceiling can be recovered.[34] In Michigan, *all* damages are barred from recovery.[35]

In these ten states, challenges to the constitutionality of their No Pay No Play statutes are not uncommon.[36] In both Louisiana and New Jersey, courts found their No Pay No Play statutes constitutional.[37] In *Progressive Sec. Ins. Co. v. Foster*, the Louisiana Supreme Court ruled against a challenge to the No Pay No Play statute where the plaintiff argued the statute was excessive and violated Louisiana's Constitutional protections against cruel and unusual punishment.[38] In upholding the

23. CAL. CIV. PROC. CODE § 3333.4 (Deering 2020).
24. *See* IND. CODE § 34-30-29.2-1 (2020); IND. CODE § 34-30-29.2-2 (2020).
25. IOWA CODE § 613.20 (2019).
26. KAN. STAT. ANN. § 40-3130 (2020).
27. LA. REV. STAT. ANN. § 32:866 (2019).
28. MICH. COMP. LAWS. ANN. § 500.3135(2)(c) (LexisNexis 2020).
29. N.J. STAT. ANN. § 39:6A-4.5 (2020).
30. N.D. CENT. CODE § 26.1-41-25 (2019).
31. OR. REV. STAT. § 31.715 (2020).
32. MO. REV. STAT. § 303.390 (2019); *see also e.g.* ALASKA STAT. § 09.65.320 (2019); IOWA CODE § 613.2; KAN. STAT. ANN. § 40-3130 (2020).
33. *See e.g.* MO. REV. STAT. § 303.390; IND. CODE § 34-30-29.2-2 (2020); KAN. STAT. ANN. § 40-3130; OR. REV. STAT. § 31.715.
34. LA. REV. STAT. ANN. § 32:866 (2019).
35. MICH. COMP. LAWS. ANN. § 500.3135(2)(c) (LexisNexis 2020) It is worth noting that Michigan is a true 'no fault' state when it comes to motor vehicle accidents, complicating the issue, and causing for what seems like a draconian statute.
36. *See* e.g. Progressive Sec. Ins. v. Foster, 711 So. 2d 675 (La. 1998); Caviglia v. Royals Tours of America, 842 A.2d 125 (N.J. 2004); Montgomery v. Potter, 341 P. 3d 660 (Ok. 2014).
37. Progressive Sec. Ins., 711 So. 2d at 694; Caviglia, 842 A.2d at 137.
38. Progressive Sec. Ins., 711 So. 2d at 680-82.

statute, the court emphasized that uninsured motorists were in violation of the law and that driving is a privilege, not a right.[39] Additionally, the Louisiana Supreme Court further indicated that the government is not the beneficiary, thus the limitations placed by the legislature do not amount to a punishment.[40] In response to the subsequent challenge on grounds that No Pay No Play violates Equal Protection (under both Louisiana's Constitution and the U.S. Constitution) the court identified that while the statute did classify a group of people, it was only to a level that required the lowest level of scrutiny.[41] The court upheld their No Pay No Play statute on the grounds that there was legitimate government interest in enforcing the insurance requirements as well as addressing the high cost of insurance due to these uninsured motorists.[42] Similarly, New Jersey upheld their No Pay No Play statute on due process grounds, holding that the statute does not implicate a fundamental right and it furthers a legitimate state interest.[43]

In fact, so far only one state has found No Pay No Play statutes unconstitutional when the issue reached a state's supreme court.[44] In *Montgomery v. Potter*, the Oklahoma Supreme Court dealt with a challenge claiming No Pay No Play violated a section of Oklahoma's Constitution that required the legislature to treat all people the same as it pertained to the rules of evidence.[45] The court found that No Pay No Play statutes inevitably created a different class of individuals and held them to a much stricter standard than others in automobile negligence cases, thus violating that section of the Oklahoma Constitution.[46] None of the challenges to No Pay No Play statutes in other states have centered around the right to trial by jury,[47] as it did in *Jiles v. Schuster Co.* and its predecessors.[48]

While there have been relatively few explicit challenges to No Pay No Play statutes, there have been myriad challenges in the related area of statutory caps on non-economic damages in certain causes of actions regarding personal injury or medical malpractice. Judge Bough in *Jiles v. Schuster Co.*, casted Missouri's No Pay No Play as unconstitutional because it is a cap on non-economic damages prevented by *Watts.*[49] While no other state has yet related No Pay No Play statues to statutory caps in other fields (such as medical malpractice)[50], it is helpful to review how statutory caps in these fields have been addressed on the national landscape. As of today, nine states maintain caps on non-economic damages in product liability

39. *See Id*. at 682.

40. *See Id.* The court argued that the government could not be the beneficiaries as the government did not receive the money as a fine, rather the real beneficiaries were the insured citizens and the insurers of the state, as indicated by a projected reduction in insurance costs to the drivers and insurance companies. *Id.* at note 12.

41. *See Id*. at 686.

42. *See Id*. at 687-88.

43. Caviglia v. Royals Tours of America, 842 A.2d 125, 135-136 (N.J. 2004).

44. Montgomery v. Potter, 341 P. 3d 660, 662 (Ok. 2014)

45. *Id*. at 660

46. *Id.*

47. *See e.g.* Progressive Sec. Ins. v. Foster, 711 So. 2d 675 (La. 1998); Caviglia v. Royals Tours of America, 842 A.2d 125 (N.J. 2004); Montgomery v. Potter, 341 P. 3d 660 (Ok. 2014).

48. *See* Gilmore v. Page, No. 17PT-CC00092 (July 31, 2017); Howard v. Mulkins, No. 1716-CV08520 (Oct. 17, 2018); Jiles v. Schuster Co., 357 F. Supp. 3d 908 (W.D. Mo. 2018).

49. Jiles, 357 F. Supp. 3d at 916 (W.D. Mo. 2018).

50. *See e.g.* Progressive Sec. Ins. v. Foster, 711 So. 2d 675 (La. 1998); Caviglia v. Royals Tours of America, 842 A.2d 125 (N.J. 2004); Montgomery v. Potter, 341 P. 3d 660 (Ok. 2014).

cases, and 24 states maintain them in medical malpractice cases.[51] In all, approximately 28 states have some sort of cap on non-economic damages in some form.[52]

Several of these states have faced challenges that such caps on non-economic damages in products liability or medical malpractice cases inherently violate the right to trial by jury, as did the court in *Watts*.[53] Judge Bough framed the constitutionality of the Missouri No Pay No Play statute by using the *Watts* analysis, stating that No Pay No Play violates this right to trial by jury under the Missouri Constitution.[54] Many states that have faced challenges to these statutory caps as violative of the right to trial by jury in product liability or medical malpractice cases have similar constitutional language to Missouri's, which says, "That the right of trial by jury as heretofore enjoyed shall remain inviolate…"[55] However, the results of these challenges have been fairly split.

On one hand, five states have found that statutory caps on damages violate the right to trial by jury because "the jury's fact-finding function included the determination of damages. This can only lead to the conclusion that [the right to trial by jury]…protects the jury's role to determine damages."[56] On the other hand, there have been eight states that have similar provisions in their constitutions but these states have determined that statutory caps on non-economic damages do not violate the right to trial by jury.[57] In their reasoning, the jury still acts as finders of fact but statutory caps activate after the jury completes their constitutional role.[58] Other states have determined the jury trial guarantee does not give the jury free reign to decide any fact that it wishes.[59] Because of the vast differences in approaches it is important to specifically analyze each state's rationale in reaching their outcome on their No Pay No Play statute. This article will focus on Missouri's landmark case, *Watts v. Lester E. Cox Medical Centers*.

III. THE WATTS EX REL WATTS V. LESTER E. COX MEDICAL CENTERS DECISION

Since Judge Bough relied on *Watts* in his decision establishing that Missouri's No Pay No Play was unconstitutional, it is important to understand the rationale

51. Rhatican, Ray, *Hilburn and Non-Economic Damage Caps*, 4-1 BUS., ENTREPRENEURSHIP, & TAX L.REV. (forthcoming Spring 2020).

52. *Fact Sheet: Caps on Compensatory Damages: A State Law Summary,* CENTER FOR JUSTICE AND DEMOCRACY AT NEW YORK LAW SCHOOL, https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary#_ftnref5 (last visited March 7, 2020).

53. *See* Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989); Moore v. Mobile Infirmary Ass'n, 592 So.2d 156 (Ala. 1991); Hilburn v. Enterpipe Ltd., 442 P.3d 509 (Kan. 2019); Watts v. Lester E. Cox Medical Centers, 276 S.W.3d 633 (Mo. banc 2012).

54. Gilmore v. Page, No. 17PT-CC00092 (July 31, 2017).

55. MO. CONST. art. I, § 22(a); *see also* NEB. CONST. art. I, § 6; IDAHO CONST. art. I, § 7; OHIO CONST. art. I, § 5; KAN. CONST. art. I, § 5.

56. Sofie, 711 P.2d at 716; *see also* Moore, 592 So.2d at 163; Hilburn, 442 P.3d at 522-523; Smith v. Dep't of Ins. 507 So. 2d 1080, 88-89 (Fla. 1987).

57. *See* Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115 (2000); Johnson v. St. Vincent Hospital, Inc., 404 N.E.2d 585 (Ind. 1980)(overruled on other grounds by In re Stephens, 867 N.E.2d 148 (Ind. 2007)); Gourley v. Nebraska Methodist Health Sys. Inc., 663 V.W.2d 43 (Neb. 2003); Tam v. Eighth Jud. Dist. Ct., 358 P.2d 234, 238 (Nev. 2015); Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007); Murphy v. Edmonds, 601 A.2d 102 (Md. 1992); Matter of Certif. of Questions of Law, 544 N.W.2d 183 (S.D. 1996); Horton v. Oregon Health & Science Univ., 376 P.3d 998 (Or. 2016).

58. *See e.g*. Kirkland, 4 P.3d at 1118; Johnson, 404 N.E. 2d at 602-603.

59. *See e.g.* Gourley, 663 N.W.2d at 78-79; Tam, 358 P.3d at 238.

used by the Missouri Supreme Court in that case. *Watts* is of particular interest because it overturned the precedent that statutory caps on non-economic damages in Missouri were valid.[60] In *Watts*, the case centered around a pregnant woman, Deborah Watts, who went to the medical center for care relating to her pregnancy.[61] Complications required Deborah Watts to undergo an immediate Caesarian-section delivery to protect the health of the fetus.[62] However, there were delays in the delivery and Naython Watts was born with catastrophic brain injuries.[63] Deborah Watts sued the Medical Center alleging negligence on behalf of the doctors who initially saw her, as well as those doctors who delayed in completing the Caesarian-section delivery.[64] The jury determined that the Cox Medical Center was negligent and responsible for the brain injuries to Naython Watts and awarded $3.371 million in future medical damages and $1.45 million in non-economic damages.[65] One of the main issues in the case was a statutory cap limiting the amount of non-economic damages in medical malpractice cases.[66] This statute limited recovery to only $350,000 for non-economic damages.[67] Deborah Watts challenged the constitutionality of this statute, and the Missouri Supreme Court ultimately decided that the statute violated the Missouri Constitution's right to trial by jury.[68]

In concluding, the court analyzed Watts's claimed violation of the right to trial by jury by first deciding two questions: whether the medical negligence claim was included in the "right of trial by jury heretofore enjoyed" in the Missouri Constitution and then determining if statutory caps infringe on the "inviolate" right of trial by jury.[69] The judges first looked at the text of Missouri's Constitution. The relevant portion of Section 22(a) states: "That the right of trial by jury as *heretofore enjoyed* shall remain *inviolate* . . ."[70] The court defined "heretofore enjoyed" to mean that "the citizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled when the Missouri Constitution was adopted in 1820."[71] In answering the first question, the court ultimately performed extensive historical analysis.[72] The court established that, at the time Missouri's Constitution was ratified in 1820, there was already a common law action for a civil wrong done against another.[73] The court additionally looked back through the English common law and Missouri Territory laws to determine that Missouri had indeed provided jury trials "in all cases of the value of one hundred dollars…if either party requires it."[74] The court addressed that non-economic damages were recognized by the English

60. *See* Adams By and Through Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 907 (Mo. banc. 1992).
61. *See* Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 635-636 (Mo. banc. 2012)
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *See* MO. REV. STAT. § 538.210 (2019).
67. Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 637 (Mo. banc. 2012).
68. *Id*. at 648.
69. *Id*. at 637-368.
70. MO. CONST. art. I, § 22(a) (emphasis added).
71. Watts, 376 S.W.3d at 638 (quoting State ex rel. Diehl v. O'Malley 95 S.W.3d 82, 85 (Mo. banc 2003)).
72. Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 638 (Mo. banc. 2012).
73. *Id.*
74. Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 638 (Mo. banc. 2012).

common law to give "the sufferer pecuniary satisfaction."[75] Because of this, Deborah Watts's claim for a jury decision was appropriate in the realm of medical negligence.[76] Notably, the court stressed that, at the time of the Missouri Constitution's ratification, the common law did recognize judicial remittitur as a potential limit on jury damages.[77] The court stated that by the 17th century, English common law authorized judges to, "exercise control over juries…in which the verdict was inconsistent with the evidence."[78] The court, however, implied that this procedure was rarely used and precedent limited judicial interference in damages, finding, " a common law reluctance to tamper with the jury's constitutional role as the finder of fact."[79]

The next question the court addressed was whether statutory caps inherently violated this right as they defined it.[80] First, the court established that Missouri law had long recognized the jury's role was ". . . to [assess] liability and [determine] damages, thus fulfilling its constitutional task."[81] Despite the fact that *Adams v. Children's Mercy Hospital* (the reigning precedent at the time) had found that non-economic statutory caps were constitutional, that court recognized the jury's role as the sole finder of fact and determiner of damages.[82] It was here the Missouri Supreme Court found the ammunition needed to overturn *Adam v. Children's Mercy Hospital*. The court found that the statute which placed a cap on non-economic damages (specifically the non-economic cap in medical malpractice cases) infringed on the jury's ability to determine necessary relief.[83] While *Adams* had indicated that the matter of the limitation was an issue of law and took place after the jury had fulfilled its role, the court in *Watts* established that such a limitation undermines the jury's basic function, determining damages, which is a part of their role as finders of fact.[84] The court further explains that trial by jury is a fundamental right; if there is conflict between a fundamental constitutional right and a statute, "it is the statute . . . that must give way."[85] While the court was reluctant to overturn recent precedent as set out in *Adams*, the court thought it necessary since the statute violated a constitutional right, stating, "[m]oreover, no set of judges ought to have the right to tie the hands of their successors on constitutional questions, any more than one general assembly should those of its successors on legislative matters."[86] Ultimately, the decision established a two-prong test to determine if a statutory cap on non-economic damages was in violation of the Missouri constitutional right to trial by jury: the first prong is whether the cause of action existed in 1820 (as it was "heretofore enjoyed") and the second prong is whether the cap changed the jury's constitutional role in determining damages.[87]

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75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 639 (Mo. banc. 2012).
80. *Id*. at 640.
81. *Id.*
82. *Id.* (quoting Adams by and Through Adams v. Children's Mercy Hosp., 832 S.W. 898, 907 (Mo. Banc 1992)).
83. *See Id.* at 642.
84. Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 642 (Mo. banc. 2012).
85. *Id.*
86. *Id*. at 644 (quoting Mountain Grove Bank v. Douglas Cnty., 47 S.W. 944, 947 (Mo. 1898)).
87. *See* Jiles v. Schuster Co., 357 F. Supp.3d 908, 914-915 (W.D. Mo. 2018).

IV. FLAWS IN RATIONALE AND HISTORICAL ANALYSIS OF WATTS

In overturning *Adams*, the court in *Watts* reversed a precedent that had existed for 20 years, and the decision has since been used to address causes of action beyond medical malpractice cases.[88] Because the case is referenced as the determining factor in Missouri to decide the fate of the No Pay No Play statute, one must heavily scrutinize the case. Potential flaws arise in the historical analysis the court used in defining the right of trial by jury. In *Watts*, the court established that to understand the nature of said right, one must assess the common law of Missouri at the time the Missouri Constitution was adopted in 1820.[89] The court admits one must look at English common law because of the major role it played in establishing both early United States and Missouri common law.[90] The Missouri Supreme Court then concludes that this type of action for a personal wrong was recognized in English common law and jury trials were used in these types of actions.[91] The *Watts* court missed an opportunity to properly analyze how English common law defined this right to jury trial, and to determine if there was any basis that prevented intervention into jury determination of damages. In Oregon, the Oregon Supreme Court took the opportunity to perform such analysis in *Horton v. Oregon Health & Science University*.[92] It did so in response to an earlier case, *Lakin v. Senco Products, Inc.*, where the Supreme Court of Oregon found that statutory caps on damages were unconstitutional.[93] In *Horton*, the Oregon Supreme Court found that the *Lakin* court failed to properly analyze early United States history as well as proper English common law.[94] This is particularly important as common law from England and the early United States reflects on Missouri as much as it did on Oregon, which the *Watts* court acknowledges. [95]

The *Watts* court lays out that medical negligence existed in English common law and that non-economic damages were recoverable for such actions.[96] However, as the *Horton* court put it, this is not sufficient to " . . . say what the right [of trial by jury] encompasses."[97] The Missouri Supreme Court in *Watts* analyzed Blackstone's writings in his *Commentaries on the Laws of England* and concluded that the jury's right to determine damages is absolute.[98] But diving further into the commentary does not yield as simple of an answer as the *Watts* court implies. In espousing the need for jury trials, Blackstone establishes that leaving decisions of law and fact entirely to a judge would inevitably result in bias.[99] However, he also explains that if the decision of fact and law were left only to a jury, then the people's decisions would be capricious with a new rule of law every day.[100] It was avoidance of

88. *Id*. at 916.
89. *See* Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 638 (Mo. banc. 2012).
90. *Id.*
91. *Id.*
92. *See* Horton v. Oregon Health & Science University, 376 P.3d 998, 1036-37 (Or. 2016)
93. 987 P.2d 463 (Or. 1999).
94. *See* Horton, 376 P.2d at 1040.
95. *See* Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 638 (Mo. banc. 2012).
96. *See Id*.
97. Horton, 376 P.2d at 1036.
98. *See* Watts, 376 S.W.3d at 638.
99. *See* Horton, 376 P.2d at 1037 (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 379 (1st ed. 1768).
100. *Id.* (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 379-380 (1st ed. 1768).

these extremes that made a procedural split so valuable to a civil jury system because

"[A] competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth" and because it "preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens."[101]

But, as the court in *Horton* remarks, despite the benefits of such a structure to jury trials, there is nothing in Blackstone's writings that indicates the existence of a substantive limit on courts or parliament to "define the legal principles that create and limit a person's liability."[102] Nor does the division of authority Blackstone cites approvingly reflect a check on the law making authority of parliament.[103] The benefit of a jury trial in this manner was the "fair application of the law to the facts in an individual case, not in any limitation that the civil jury trial placed on the legislature's lawmaking authority."[104] In fact, one bit of writing from Blackstone espouses the continued role of the legislature and courts: "the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men . . . and that, when once the fact is ascertained, the *law* must of course redress it."[105] The fact that " . . . the law must…redress it" implies a more complicated role the common law and Parliamentary laws should play in these trials; it does not act as a limit as there is no mention of a specific limitation on that legislative power.[106] English common law seemingly does not place the same limitations on the legislature, nor on the role of the jury in determining damages, as the *Watts* court does. English common law seems fairly silent on the issue of statutory caps but it also does not clearly establish the jury is the sole determiner of damages.

This English common law spilled over into the early United States at the time of the writing of the Constitution. Although the Constitutional Convention initially recognized and included a right to trial by jury in criminal cases,[107] it was not so in civil cases.[108] It was not until near the close of the convention that the issue regarding civil trials was brought up.[109] Following the mention of the necessity for such a provision, members of the convention argued whether it was better to explicitly state this right, or if Congress could be trusted to establish it in certain types of cases. [110] In a similar vein, Alexander Hamilton discusses the issue at length in the Federalist Papers, specifically the Federalist No. 83.[111] His argument opposed inclusion of a right to trial by jury for civil cases in the Constitution.[112] He felt jury

101. *Id*. at 1037-38 (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 379-380 (1st ed. 1768).
102. *Id.* at 1038.
103. *Id.*
104. Horton v. Or. Health & Sci. Univ., 36 P.3d 998, 1038 (Or. 2016).
105. *Id.* (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 380 (1st ed. 1768) (emphasis added).
106. *See Id.*
107. *See* U.S. CONST. art. III, §2, cl. 3.
108. *See* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587-588 (1911).
109. *Id.*
110. *Id.*
111. *See* The Federalist No. 83 (Alexander Hamilton).
112. *See Id.*

trials for criminal cases would eventually fill any necessary voids.[113] For him, leaving out an explicit right to a jury in civil trials did not eliminate the right, rather it was still protected by state constitutions and by Congress who determined what type of civil trials juries would serve in.[114] Hamilton noted that one argument for the right was to prevent corrupt judges and in one explicit area "[acted] as a safeguard against an oppressive exercise of the power of taxation."[115] But in dealing with the issue, Hamilton suggested that right to trial in civil cases did not act as a limitation on the authority of the legislature. He stated, "It is evident that it can have no influence upon the legislature, in regard to the *amount* of taxes to be laid, to the *objects* upon which they are to be imposed, or to the *rule* by which they are to be apportioned."[116] This hints that Hamilton, and early thought on the issue, did not clearly place a limitation on the legislature in how the law is applied as the legislature still had some role. There is nothing that establishes that a statutory cap could not exist at this time. Silence in common law may indicate something *did not* exist at a specific time (it seems clear statutory caps were not around at this point), but one must not make the mistake to conclude that it *could not* exist.

Of course, the right to trial by jury in civil cases was ultimately deemed necessary and was included in the Bill of Rights as the 7th Amendment.[117] However, this does not undercut the argument laid forth by Hamilton, nor clarify a jury's role in these cases. The *Horton* court suggests that the founders felt members of the convention had alternative reasons for including the 7th Amendment, namely that a jury in these cases would more likely favor local interests rather than foreign ones.[118] The text of 7th Amendment itself does not immediately clear up any ambiguity. The Amendment states,

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[119]

The exact meaning of these words was not expressly defined. It was not until 1812 that it was made somewhat clear through judicial interpretation.[120] In *United States v. Wonson*, future Supreme Court Justice Joseph Story wrote the majority opinion, and held that, "Beyond all question, the [right to trial by jury in civil cases] is not the common law of any state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence."[121] As we have seen, the English common law jury trials in high regard, but does not clearly address a legislature's role regarding damages in such trials. To hold that this silence means legislative caps inevitably violate the right to trial by jury, because it infringes on the juries determination of damages, goes too far.

The purpose of this historical analysis was not to definitively express what Missouri's right to trial by jury in its constitution *actually* encompassed in 1820, but rather it was to show that the court in *Watts* lacked a deep analysis in coming to

113. *See Id.*
114. *See Id.*
115. *See Id.*
116. *See* The Federalist No. 83 (Alexander Hamilton)(emphasis in original).
117. U.S. Const. amend. VII.
118. Horton v. Or. Health & Sci. Univ., 36 P.3d 998, 1039-40 (Or. 2016).
119. U.S. Const. amend. VII.
120. United States v. Wonson, 28 F. Cas. 745 (D. Mass. 1812).
121. *Id.* at 750.

its conclusion.[122] At the very least, the issue seems debatable and the court needs a more in-depth analysis to explain its historical findings. One of the main issues with the *Watts* decision is that it often conflates modern day principles with those that existed in Missouri in 1820. The court states that analysis begins with the right as it existed in 1820 saying, "the scope of [Deborah] Watts' right to a jury trial, like the existence of the right, also is defined by Missouri common law when the Missouri Constitution was adopted in 1820."[123] It is one thing to state how *today's* juries in Missouri are the ultimate finders of fact, with finding of damages as part of their constitutional function,[124] as opposed to saying how these rights existed at the time in 1820. As we have seen, the *prior* common law from England and the early United States does not clearly set out a limitation on the legislature, nor clearly establish the role of a jury.[125] It seems incorrect to say that it is historically evident the jury should be the sole determiner or damages, which inevitably places a limit on a legislature in establishing causes of actions. There does not seem to be such evidence prior to 1820 indisputably showing that determination of damages is *solely* in the hands of the jury with no input from the legislature.

This becomes apparent in the *Watts* court's analysis of judicial remittitur. Remittitur is defined as "[a]n order awarding a new trial, or damages amount lower than that awarded by the jury. . ."[126] It has been recognized federally as far back as 1822, where Justice Story, sitting at circuit, established, "[when] the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the [excessive damages]."[127] Thus, it is incomplete to say as of the 1820s the jury's role as determiner of damages is absolute with no input from any other bodies. If the jury was the sole determiner of damages, then even judicial remittitur could not exist. In *Watts*, the court recognized that judicial remittitur existed in the early common law of the United States and Missouri.[128] The court found that Missouri had long recognized judicial remittitur dating back to the period immediately after Missouri's Constitution was ratified.[129] More so, the *Watts* court followed U.S. Supreme Court precedent in holding that judicial remittitur was a part of the United States common law and part of the federal constitutional jury right.[130] However, the *Watts* court then found that the "precedent regarding judicial remittitur is inconsistent precedent . . . "[131] The court reaches this conclusion by citing later cases showing that, eventually, Missouri began to recognize limitations on judicial use of remittitur.[132] Ultimately, the *Watts* court found judicial remittitur is not a valid exercise of judicial power, using cases as recent at 1985 as its basis.[133] This

122. Citation needed
123. Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 638 (Mo. banc. 2012).
124. *Id.* at 640.
125. Citation needed
126. BLACK'S LAW DICTIONARY "remittitur" (9th ed. 2009).
127. Blunt v. Little, 3 F. Cas. 760, 761-62 (C.C.D. Mass 1822)
128. Watts, 376 S.W.3d at 638.
129. Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 638 (Mo. banc. 2012). (citing Carr & Co. v. Edwards, 1 Mo. 137, 137 (Mo. 1821); Hoyt v. Reed, 16 Mo. 294, 294 (Mo. 1852)).
130. *Id.* (citing Dimick v. Schiedt, 293 U.S.474, 482-483 (1935)).
131. Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 639 (Mo. banc. 2012).
132. *Id.* (citing Rodney v. St. Louis S.W. Ry., 30 S.W. 150, 150 (Mo. 1895); Firestone v. Crown Ctr. Redevelopment Corp., 693 S.W.2d 99, 110 (Mo. Banc 1985)).
133. *Id.* (citing Rodney v. St. Louis S.W. Ry., 30 S.W. 150, 150 (Mo. 1895); Firestone v. Crown Ctr. Redevelopment Corp., 693 S.W.2d 99, 110 (Mo. Banc 1985)).

conflation invalidates the earlier point the *Watts* court made: what matters is how the law was defined in 1820, not how it is defined in the modern day. The common law has changed since 1820, that much is clear. Without a more extensive historical analysis, it seems imprecise to say that later standards applied the same as in 1820, especially given how earlier cases, much closer to the Missouri Constitution ratification date, upheld judicial remittitur.

Indeed, the *Watts* court cites this remittitur precedent (as finding it an invalid use of judicial power) as a "long-standing reluctance in the common law to tamper with the jury's constitutional role as the finder of fact."[134] It is "long standing" from a modern viewpoint, it was not "long standing" in 1820. This article takes the stance that the court in *Watts* recognizes this, because rather than continuing to address judicial remittitur it simply moves on to conclude, "history demonstrates that statutory caps on damage awards did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820…" and "the right to trial by jury 'heretofore enjoyed' was not subject to legislative limits on damages."[135] However, this too is conflating the issue that silence in the common law necessarily means there can be no statutory caps on damages. Asking only if *statutory* caps existed at the time of Missouri's ratifying its constitution is too limited a question. The better question is to ask whether *any* limitations on a jury's finding of damages existed in 1820 Missouri. *Any* limitation that existed in 1820 would cast doubt on the courts finding that it is the jury's absolute and sole right to determine damages.[136] It is clear that *judicial* limitation through remittitur existed,[137] dating all the way back to 1820,[138] no matter how more modern courts view their use. This begs the question, if judicial limitations existed, why can there not be statutory limitations on damages? Again, a historical analysis reveals no express mention of legislative limitations on a jury's determination of damages, nor that the jury holds the right alone. The weakness in the *Watts* decision is that its limited historical analysis overturns a 20-year precedent that had validated statutory caps on non-economic damages.[139] This is the foundation of the dissent in *Watts*, which finds that there is no conclusive reason to overturn precedent.[140] The dissent continues that statutory caps had been found constitutional in other jurisdictions and that there must be more to overturn *Adams*.[141] It is this weakness that should lead Missouri courts to question *Watts*, should cases involving No Pay No Play (or similar issues) reach them.

134. *Id.* at 639.
135. *Id.*
136. *See* Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 640 (Mo. banc. 2012)(the court implies that damage determination in an action is limited only to the jury's findings.)
137. *See e.g.* Dimick v. Schiedt, 293 U.S.474, 482-483 (1935); Hoyt v. Reed, 16 Mo. 294, 294 (Mo. 1852).
138. Carr & Co. v. Edwards, 1 Mo. 137, 137 (Mo. 1821).
139. *See* Adams by and Through Adams v. Children's Mercy Hosp., 832 S.W. 898 (Mo. banc 1992).
140. Watts ex rel Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 649 (Mo. banc. 2012)(Russell, M., dissenting).
141. *Id.* at 650-652(Russell, M. dissenting).

V. IS THE NO PAY NO PLAY STATUTE DOOMED?

Given how the No Pay No Play statute has been addressed in trial courts, it seems a decision by the Missouri Supreme Court is necessary.[142] These cases finding No Pay No Play unconstitutional have followed the precedent established by *Watts*, and do not challenge any findings from the Missouri Supreme Court. Assuming the Missouri Supreme Court chooses to follow the *Watts* precedent, will the No Pay No Play statute be found unconstitutional? Using *Jiles* as a guide to how the Missouri Supreme Court may rule, the answer seems to be yes.[143] In *Jiles,* Judge Bough found that the civil action for an automobile accident existed in 1820, as it fell under the umbrella of negligence and "personal wrong", thus satisfying the first prong from *Watts*.[144] No Pay No Play also satisfies the second prong of *Watts*, because the total limitation of non-economic damages for the uninsured driver acts as a statutory cap on a jury's determination of damages similar to the caps in medical malpractice cases from *Watts*.[145] If such a case reaches the Missouri Supreme Court, assuming the court chooses to continue current precedent, it is likely that the No Pay No Play statute will be found unconstitutional.

However, despite this, the Missouri Supreme Court could distinguish the No Pay No Play statue from the result in *Watts*. As we have seen, the *Watts* decision created a two-prong test for determining if a statutory limitation on a cause of action violates the right to trial by jury: First, the cause of action must have existed back in 1820 at common law, and second, the limitation must interfere with the jury's determination of damages.[146] There have been subsequent cases that have used this analysis in distinguishing themselves from *Watts*.[147] The first case*, Dieser v. St. Anthony's Medical Center*, was distinguished by a finding that post-judgment interest was not something created by a common law cause of action in 1820.[148] Rather, post judgment interest was something created by statute after 1820, and thus its restriction in medical negligence cases does not directly curtail a jury's determination of damages. Hence, the legislature could limit post-judgment interest in these types of cases.[149] In the next case, *Dodson v. Ferrara*, the Missouri Supreme Court determined that in wrongful death cases the legislature *can* impose statutory caps on non-economic damages.[150] Its reasoning was that "wrongful death" was separate from the "personal wrong" as set out in *Watts*.[151] Since this cause of action, wrongful death, was not recognized until it was later implemented by statute, it did not exist at common law in 1820 and was thus did not violate the right to trial by jury as "heretofore enjoyed."[152] One of the most interesting aspects of the case was the Equal Protection analysis done after the court concluded that limitation in wrongful

142. *See* Gilmore v. Page, No. 17PT-CC00092 (July 31, 2017); Howard v. Mulkins, No. 1716-CV08520 (Oct. 17, 2018); Jiles v. Schuster Co., 357 F. Supp. 3d 908 (W.D. Mo. 2018).
143. *See* Jiles, 357 F. Supp.3d at 916.
144. *Id.* at 914.
145. *Id.* at 916.
146. Jiles v. Schuster Co., 357 F. Supp. 3d 908, 914-915 (W.D. Mo. 2018).
147. *See* Dodson v. Ferrara, 497 S.W.3d 542, 556 (Mo. banc 2016); Dieser v. St. Anthony's Med. Ctr., 498 S.W.3d 419, 433-434 (Mo. banc 2016).
148. Dieser, 498 S.W.3d at 426-427.
149. *Id.* at 433-434.
150. Dodson, 497 S.W.3d at 555.
151. *See Id.* at 555-556.
152. *See* Dodson v. Ferrara, 497 S.W.3d 542, 555-556 (Mo. banc 2016).

death cases did not violate the constitutional right to trial by jury.[153] In that analysis, the court found that such a statutory limitation did not invalidate a fundamental right or create a suspect group classification.[154] The law would be upheld on rational basis review if there was any legitimate state interest in the law, notwithstanding personal feelings on the statute.[155] The court found that the state's interest in rising medical malpractice insurance was enough to survive rational basis review.[156] It is possible that the Missouri Supreme Court could find No Pay No Play, an affirmative defense, falls outside of potential common law causes of action from 1820 since it is after the advent of automobiles. However, based on Judge Bough's analysis in *Jiles*, this is unlikely.[157] If the court turns to an Equal Protection analysis, it is possible they find rising insurance costs are enough to withstand rational basis review, much like the court in *Progressive Sec. Ins. v. Foster*. [158]

It is important to recognize that *Watts* did not invalidate the legislature's ability to create a statutory cause of action,[159] nor does it necessarily diminish their ability to eliminate causes of action.[160] This is noticeable in the revival of Missouri Statute §538.210, which was revised in 2015 and re-established statutory caps on non-economic damages in medical malpractice claims.[161] Interestingly, it is eerily similar to the statute found unconstitutional in *Watts*.[162] The Senate bill that effectuated the change made a major adjustment to another statute, §1.010.[163] The original section of §1.010 read,

1. The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.[164]

The interesting part of the Senate Bill in 2015 added a second clause to this statute, that was adopted into the current law, which reads,

"The general assembly expressly excludes from this section the common law of England as it relates to claims arising out of the rendering of or failure to render

153. *See Id*. at 559-560.
154. *See Id.*
155. *See Id.*
156. *See Id*. at 561.
157. *See* Jiles v. Schuster Co., 357 F. Supp. 3d 908, 914-915 (W.D. Mo. 2018).
158. Progressive Sec. Ins. v. Foster, 711 So. 2d 675, 682 (La. 1998)
159. *See* Sanders v. Ahmed, 364 S.W.3d 195, 205 (Mo. banc 2012); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 907 (Mo. banc 1992); Dodson v. Ferrara, 497 S.W.3d 542, 555-556 (Mo. banc 2016).
160. *See* Adams, 832 S.W.2d at 907.
161. *See* MO. REV. STAT. § 528.210 cl.1 (2019).
162. *See* Watts ex rel Watts v. Lester E. Cox Medical Centers, 276 S.W.3d 633, 640 (Mo. banc 2012).
163. S.B. 239, 98th Gen. Assemb., Reg. Sess. (Mo. 2015).
164. MO. REV. STAT. § 1.010 cl.1 (2015).

health care services by a health care provider, it being the intent of the general assembly to replace those claims with statutory causes of action."[165]

This lead to a statutorily created cause of action for medical malpractice claims, retaining statutory caps on non-economic damages.[166] Since the legislature has created this "new" cause of action, *Watts* analysis would no longer apply.[167] This poses potentially good news to the No Pay No Play statute because, even if initially found unconstitutional, altering or creating a new statutory cause of action in specific uninsured motorist automobile accidents may see the No Pay No Play statute substantively survive. Similar rewording in §1.010 from the 2015 Senate Bill seems necessary to reestablish the No Pay No Play statute. Such legislative collaboration to achieve this result may seem unlikely, but when the No Pay No Play statute was originally passed in the legislature it had strong support, even surviving a gubernatorial veto.[168] This level of support may lead the legislature to do much the same as it did for § 568.210, create a new statutory cause of action that eliminates the original common law cause of action.

VI. CONCLUSION

Missouri sits at a precipice of deciding the fate of its No Pay No Play statute. While Missouri would not be the first state to find their No Pay No Play statute unconstitutional, it would be the first to do so under the right to trial by jury. This could have effects on other states that have No Pay No Play statutes, especially those with similarly worded provisions regarding the right to trial by jury in their constitutions. If any of these states have already placed limitation on statutory caps in other causes of action, they could use Missouri as evidence to invalidate their own No Pay No Play statues. The Missouri Supreme Court in *Watts* found that Missouri's right to trial by jury inherently invalidated any statutory limitation on damages as long as the cause of action existed in 1820 and the statute violated jury's determination of damages.

While *Watts* remains unchallenged precedent, the decision seems historically flawed and is in need of close scrutiny to determine whether it should remain the law of Missouri. *Watts* does not truly analyze the history of English common law and United States common law as it applied to the right of trial by jury as enshrined by the Missouri Constitution. The decision also makes the mistake of conflating modern precedent with common law as it existed in 1820, when the Missouri Constitution was ratified. The court misconstrues that since statutory caps did not exist in 1820, that they could not exist. Silence in common law should not construed in this manner without close scrutiny.

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165. *See* S.B. 239, 98th Gen. Assemb., Reg. Sess. (Mo. 2015); *see also* MO. REV. STAT. § 1.010 cl.2 (2019).

166. *See* MO. REV. STAT. § 528.210 cl.1. For comparison, here is the original language as it appeared in 2005, "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 three hundred fifty thousand dollars per occurrence for noneconomic damages from any one defendant as defendant is defined in subsection 2 of this section irrespective of the number of defendants. *See* MO. REV. STAT. § 528.210 cl.1 (2005).

167. *See* Dodson v. Ferrara, 497 S.W.3d 542, 556 (Mo. banc 2016); Dieser v. St. Anthony's Med. Ctr., 498 S.W.3d 419, 433-434 (Mo. banc 2016).

168. *See* H.B. 339, 97th Gen. Asssemb., reg. Sess. (Mo. 2013).

However, while *Watts* is a flawed decision, it remains the law of the state. It seems evident, from cases like *Jiles*, that the No Pay No Play statute is likely to be found unconstitutional using this *Watts* analysis. This does not necessarily spell the end of the No Pay No Play statute in Missouri. Future cases have distinguished other specific causes of action and defenses that do not fall under the *Watts* analysis. The Missouri Supreme Court may determine the No Pay No Play statute should also be distinguished. Lastly, the legislature has recently adopted statutes that eliminate common law causes of action and create statutory causes of action in its place.[169] This was used to resurrect statutory caps on non-economic damages in medical malpractice claims, and the overwhelming support for the No Pay No Play statue among the legislature during its passage may lend it to such treatment[170]. It is important to watch how the Missouri Supreme Court would address the issue and if there would be any response from the Missouri legislature.

Retaining the No Pay No Play statute is important to reduce the potential costs of uninsured motorists on Missouri roads.[171] Even reducing the number of uninsured motorists by a small amount may reduce both the cost of insurance and litigation.[172] It also serves to further ensure compliance with Missouri laws. Harsher punishments have worked to reduce the number of drunk drivers on the road and their impact[173] and there is evidence to show that No Pay No Play statutes can reduce the number of uninsured drivers, even if by only a modest amount.[174]

169. *Compare* Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 907 (Mo. banc 1992) *with* MO. REV. STAT. § 528.210 cl.1 (2005) and MO. REV. STAT. § 1.010 cl.1.

170. *See* H.B. 339, 97th Gen. Asssemb., reg. Sess. (Mo. 2013). There was enough support for No Pay No Play to survive a gubernatorial veto from then Governor, Jay Nixon.

171. MO Insurance Market Review, *supra* note 2.

172. *See Id*.; *New Study Finds Properly Enforced No Pay, No Play Laws Moderately Reduce Uninsured Motorists and May Also Trim Auto Insurance Costs*, INSURANCE RESEARCH COUNCIL (Dec. 4, 2012), https://www.insurance-research.org/sites/default/files/downloads/NoPayNewsRelease_Final.pdf.

173. Benjamin Hansen, *Punishment and Deterrence: Evidence from Drunk Driving*, 105(a) Am. Econ. Rev. 1581, 1592 (2015).

174. *New Study Finds Properly Enforced No Pay, No Play Laws Moderately Reduce Uninsured Motorists and May Also Trim Auto Insurance Costs*, INSURANCE RESEARCH COUNCIL (Dec. 4, 2012), https://www.insurance-research.org/sites/default/files/downloads/NoPayNewsRelease_Final.pdf.