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Rachel Lawrence

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NOTE

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

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

RACHEL LAWRENCE*

I. INTRODUCTION

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

Tort reform is an issue within the health care industry that has seen attention both at the state and national level.⁴ One aspect of tort reform in-

* B.J., University of Missouri, 2011; J.D. Candidate, University of Missouri School of Law, 2014; Associate Member, *Missouri Law Review*, 2012-2013. Special thanks to my advisor Professor Peters for his guidance and great knowledge of health care law. Thank you to my parents for their endless support throughout law school and to my editors and fellow members of the *Missouri Law Review* who made this Note possible.

1. See MO. REV. STAT. § 538.210 (Supp. 2011), held unconstitutional by *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (en banc).

2. *Watts*, 376 S.W.3d at 648.

3. See 2011 *Missouri Medical Malpractice Insurance Report*, MO. DEP'T OF INS., FIN. INSTS. & PROF'L REGISTRATION vii (2012), <http://insurance.mo.gov/reports/medmal/documents/2011MissouriMedicalMalpracticeReport.pdf>.

4. See David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2025 (2006), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMsa054479>. "In 2005, President George W. Bush proposed a nationwide \$250,000 cap" on non-economic damages, but it was

volves capping damages in medical malpractice claims.⁵ Missouri has capped damages since 1986 through Missouri Revised Statutes chapter 538, “Tort Actions Based on Improper Health Care.”⁶ Within its various sections, chapter 538 includes limits on non-economic damages,⁷ how and when damages are paid,⁸ the requirement of affidavits by health care professionals confirming merits of the lawsuit,⁹ immunity from civil liability for certain health care professionals,¹⁰ and venue for certain actions against health care providers.¹¹ Under Missouri Revised Statutes section 538.210, a \$350,000 non-economic damage cap was in place in 2012 when *Watts v. Lester E. Cox Medical Centers* was decided.¹²

After a 4-3 decision by the Supreme Court of Missouri that declared the \$350,000 statutory cap unconstitutional, supporters of tort reform predicted “dire consequences” for the future of the health care system.¹³ Nationwide, supporters of non-economic caps claimed a medical malpractice “crisis” had unfolded, resulting in doctors moving their practices to states with lower malpractice insurance rates, turning away high-risk patients and engaging in “defensive medicine” to avoid potential malpractice lawsuits.¹⁴ Physicians and other health care representatives blamed excessive, frivolous lawsuits and

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

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

6. See JEFFREY HERMAN, MISSOURI TORT REFORM AND MEDICAL MALPRACTICE 5 (2012), <http://www.covermissouri.org/docs/MOTortReformv2.pdf>.

7. MO. REV. STAT. §§ 538.210, 538.215.

8. *Id.* § 538.220.

9. *Id.* § 538.225.

10. *Id.* § 538.228.

11. *Id.* § 538.232.

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

13. See *Missouri Court Overturns 2005 Cap on Liability Lawsuits*, THE EXAMINER, July 31, 2012, <http://washingtonexaminer.com/mo.-court-overturns-2005-cap-on-liability-lawsuits/article/feed/2018257>.

14. Alan G. Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice “Crisis”*, 23 STAN. L. & POL’Y REV. 477, 478 (2012).

high plaintiff payouts for the rise in malpractice premiums.¹⁵ In contrast, those who opposed the statutory cap celebrated the *Watts* decision, claiming Missourians had their “constitutional rights restored.”¹⁶ Nationally, plaintiffs’ lawyers and patient advocates claimed states “unconstitutionally restrict[ed] access to the courts” and limited redress of injury when legislators capped damages.¹⁷ Because caps limited recovery at a certain amount regardless of extent or type of injury, plaintiff advocacy groups alleged patients were “squeezed out of a system designed to give them full redress” for the harm they suffered.¹⁸

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

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

II. FACTS AND HOLDING

On October 30, 2006, Deborah Watts (Watts) visited “a clinic associated with” the Cox Medical Center (Cox) after experiencing cramping and “decreased fetal movement” in the 39th week of her pregnancy.¹⁹ A third year medical resident, Dr. Herrman, examined Watts, but failed to perform further

15. Alec Shelby Bayer, *Looking Beyond the Easy Fix and Delving into the Roots of the Real Medical Malpractice Crisis*, 5 HOUS. J. HEALTH L. & POL’Y 111, 116 (2005).

16. Alicia Gallegos, *Medical Liability: Court Strikes Down Noneconomic Damages Cap*, AM. MED. NEWS (Aug. 13, 2012), <http://www.ama-assn.org/amednews/2012/08/13/gvsa0813.htm>.

17. Williams, *supra* note 14, at 479.

18. *Id.*

19. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 636 (Mo. 2012) (en banc).

diagnostic monitoring and applicable tests related to the decreased fetal movement.²⁰ Dr. Herrman's supervisor signed off on the examination.²¹

Two days later, "Watts was admitted to the hospital due to lack of fetal movement[]" and "was placed on a fetal monitor at 9:10 a.m."²² According to Watts' expert Dr. Roberts, the monitor indicated "fetal hypoxia" and "acidosis" by which the standard of care demands immediate delivery by caesarean section.²³ However, Dr. Green, a second year resident who was examining Watts, did not start the caesarean section until one hour and thirty-five minutes later, at 10:45 am.²⁴ As a result, Watt's son Naython was born with "catastrophic brain injuries."²⁵

Watts filed a medical malpractice claim against Cox on behalf of her son, asserting that Naython was born with disabling brain injuries caused by the hospital and its associated physicians' negligent care.²⁶ The jury found in favor of Watts, awarding \$3.371 million in future medical damages and \$1.45 million in non-economic damages.²⁷ As required by Missouri Revised Statutes section 538.210, the trial court reduced Watts' non-economic damages to \$350,000.²⁸ Watts appealed from the Circuit Court of Greene County, claiming section 538.210 violated multiple provisions of the Missouri Constitution.²⁹

After reviewing the case de novo, the Supreme Court of Missouri held that Missouri Revised Statutes section 538.210 was unconstitutional.³⁰ The court reasoned that the non-economic cap interfered with the jury's role of determining an injured party's damages and thus "violate[d] the right to trial by jury guaranteed by article 1, section 22(a) of the Missouri Constitution."³¹ The court reversed the judgment of capped damages pursuant to section 538.210, overruling *Adams v. Children's Mercy Hospital*,³² which held non-economic caps constitutional.³³

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *See id.*

26. *Id.*

27. *Id.*

28. *Id.* at 635.

29. *Id.*

30. *Id.* at 636-37.

31. *Id.* at 636; *see* MO. CONST. art. 1, § 22(a) ("That the right of trial by jury as heretofore enjoyed shall remain inviolate[]").

32. *Watts*, 376 S.W.3d at 646; *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 900 (Mo. 1992) (en banc), *overruled by Watts*, 376 S.W.3d 633.

33. *Adams*, 832 S.W.2d at 900.

III. LEGAL BACKGROUND

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

A. *The History of Missouri Revised Statutes Chapter 538*

In 1975, California became the first state to cap non-economic damages at \$250,000, a ceiling that remains in effect today.³⁴ Although in 1975 \$250,000 was about the equivalent of one million dollars in today's money, the cap has not been adjusted for inflation.³⁵ Other states such as Maryland³⁶ and Colorado³⁷ followed in 1986. Currently, more than half of all states have a type of cap in place that limits a plaintiff's non-economic damages.³⁸

Missouri first began to cap damages in medical malpractice claims in 1986 based on concerns about increasing malpractice premium costs and the high number of medical malpractice lawsuits.³⁹ The 1986 legislation limited a plaintiff's recovery to \$350,000, an amount that was adjusted yearly by the Missouri Department of Insurance to reflect inflation.⁴⁰ By 2005, the limit

34. Medical Injury Compensation Reform Act (MICRA), § 24.6, 1975 Cal. Stat. 3949, 3969 (codified as amended at CAL. CIV. CODE § 3333.2 (West, Westlaw through 2012 Reg. Sess.)).

35. CAL. CIV. CODE § 3333.2. According to the Bureau of Labor Statistics CPI inflation calculator, \$250,000 in 1975 was worth \$1,066,886.62 in 2012. *CPI Inflation Calculator*, U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=250%2C000&year1=1975&year2=2012> (last visited Feb. 12, 2013).

36. Act of May 13, 1986, ch. 639, § 11-108, 1986 Md. Laws 2347 (codified as amended at MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (West, Westlaw through 2012 Reg. Sess.)).

37. Act effective July 1, 1986, ch. 107, § 1, 1986 Colo. Sess. Laws 677 (codified as amended at COLO. REV. STAT. ANN. § 13-21-102.5 (West, Westlaw through 2012 Sess.)).

38. See AM. MED. ASS'N, CAPS ON DAMAGES (2011), <http://www.ama-assn.org/resources/doc/arc/capsdamages.pdf>; *infra* note 183.

39. HERMAN, *supra* note 6, at 5.

40. MO. REV. STAT. § 538.210 (1986) (amended 2005), *held unconstitutional by* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012) (en banc); *see Medi-*

had reached \$579,000.⁴¹ In addition, a plaintiff could recover multiple caps from one injury when there was more than one defendant.⁴² Because of the increased monetary damages and the republican legislature's push for additional tort reform,⁴³ the Missouri legislature modified the statutory provision with several changes in 2005.⁴⁴ The new statute took effect August 28, 2005, and returned the non-economic damage cap to \$350,000 without an escalator clause for inflation.⁴⁵ Until the *Watts v. Lester E. Cox Medical Centers* decision in July 2012,⁴⁶ some kind of limitation on non-economic damages existed in Missouri for the past 26 years.

1. The Original Section 538.210

In 1986, the Missouri legislature enacted chapter 538 in an effort to reform medical malpractice tort claims.⁴⁷ Included in chapter 538 was section 538.210, the limitation on non-economic damages.⁴⁸ The section stated:

In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than

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

41. *Medical Malpractice Limits*, *supra* note 40.

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

43. Stephanie K. Jones, *Missouri Supreme Court Strikes Down Non-Economic Damage Cap*, INS. J. (Aug. 2, 2012), <http://www.insurancejournal.com/news/midwest/2012/08/02/257980.htm>.

44. HERMAN, *supra* note 6, at 5. Section 538.210 was amended in 2005 by House Bill 393, H.B. 393, 2005 93d. Gen. Assemb., 1st Reg. Sess. (Mo. 2005). 2005 Mo. Laws 651; see *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 758 (Mo. 2010) (en banc) (per curiam) (involving a claim under the amended section 538.210).

45. MO. REV. STAT. § 538.210 (Supp. 2011), *held unconstitutional by* *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (en banc).

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

47. Paul J. Passanante & Dawn M. Mefford, *Anticipated Constitutional Challenges to Tort Reform*, 62 J. MO. B. 206, 206 (2006).

48. MO. REV. STAT. § 538.210 (1986) (amended 2005), *held unconstitutional by* *Watts*, 376 S.W.3d 633.

[\$350,000] per occurrence for noneconomic damages from any one defendant[.]⁴⁹

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

In 2001, the Missouri Court of Appeals, Western District, helped clarify the language in section 538.210 when the court examined what a “plaintiff” meant under the statute.⁵³ In *Wright v. Barr*, Wright, a patient who suffered atrial fibrillation, was discharged from the hospital after her doctor made no attempt to detect blood clots in her heart.⁵⁴ A “transesophageal echocardiogram” later detected a clot in her left atrium.⁵⁵ As a result from the clot going undetected, she suffered from two debilitating strokes in one week and was left in need of 24-hour care.⁵⁶ Wright sued for negligence and her husband claimed loss of consortium.⁵⁷ The jury returned a verdict for the Wrights, awarding Mrs. Wright \$320,000 for non-economic damages and Mr. Wright \$300,000, totaling \$620,000.⁵⁸ The defendant doctor and hospital appealed and filed a motion to reduce the amount of non-economic damages from \$620,000 to \$528,000 pursuant to section 538.210 and the inflation clause in place.⁵⁹ The defendants argued that because Mr. Wright’s consortium claim was derivative of Mrs. Wright’s claim, the husband and wife should be considered one plaintiff in accordance with the statute.⁶⁰

The Missouri Court of Appeals, Western District, denied the motion to reduce damages and reasoned that because Mr. and Mrs. Wright were sepa-

49. *Id.* § 538.210.1.

50. *Id.* § 538.210.3.

51. *Id.* § 538.210.4. Awards were increased or decreased in accordance with the Implicit Price Deflator for Personal Consumption Expenditures, published by the Bureau of Economic Analysis of the United States Department of Commerce. *Id.*

52. *Id.* § 538.210.5.

53. *Wright v. Barr*, 62 S.W.3d 509, 536 (Mo. App. W.D. 2001).

54. *Id.* at 516-19.

55. *Id.* at 519.

56. *Id.* at 519, 523.

57. *Id.* at 515.

58. *Id.* at 523.

59. *Id.* at 535.

60. *Id.*

rate plaintiffs, the statutory cap applied separately to the two claims.⁶¹ According to the court, based on the statutory language of section 538.210 in 2001, caps applied per plaintiff, and both received separate awards.⁶²

In 2002, the Missouri Court of Appeals, Eastern District, interpreted the meaning of “per occurrence” within section 538.210 in *Scott v. SSM Healthcare St. Louis*.⁶³ In *Scott*, Scott and his mother brought an action for medical malpractice after doctors misdiagnosed a sinus infection in Scott’s brain as a minor concussion.⁶⁴ Left untreated, the infection caused Scott’s brain to swell and required skull reconstructive surgery.⁶⁵ Scott sustained serious injuries including paralysis on the right side of his body and a permanent drainage tube in his brain.⁶⁶ The Scotts alleged that two doctors acted below the standard of care: Dr. Koch in misreading Scott’s initial CT scan and Dr. Doumit for failing to advise Scott to return to the hospital after his initial symptoms did not improve.⁶⁷

The jury ruled for the Scotts and found both Dr. Koch and Dr. Doumit at fault.⁶⁸ The City of St. Louis Circuit Court determined that in the Scotts’ case, two caps could be applied pursuant to section 538.210 because two separate occurrences of malpractice took place.⁶⁹ Thus, the Scotts were able to recover \$1,056,000 in non-economic damages, or twice the amount of the \$528,000 cap in place that year.⁷⁰ SSM Healthcare appealed and alleged that the court erred in applying more than one statutory damage cap.⁷¹

In reaching a decision, the Missouri Court of Appeals, Eastern District, looked at the language within section 538.210 and interpreted the meaning of “occurrence” as used in the statute.⁷² While SSM Healthcare argued that “occurrence” referred to overall death or injury a plaintiff sustained, the Scotts argued “occurrence” meant an act of negligence by a medical profes-

61. *Id.* at 538.

62. *Id.* However, in Missouri wrongful death cases, separate family members were often treated as one plaintiff under section 538.210 before 2005. *See Cook v. Newman*, 142 S.W.3d 880, 888 (Mo. App. E.D. 2004) (en banc) (holding that the surviving spouse and two children of a woman who died as a result of malpractice were to be treated as one plaintiff for the purposes of section 538.210); *Burns v. Elk River Ambulance, Inc.*, 55 S.W.3d 466, 485-87 (Mo. App. S.D. 2001) (holding that one statutory cap should be applied even though the decedent’s mother and father were both entitled to recover for the wrongful death).

63. 70 S.W.3d 560, 570-71 (Mo. App. E.D. 2002).

64. *Id.* at 563.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 564.

69. *Id.*

70. *Id.*

71. *Id.* at 562.

72. *Id.* at 570.

sional.⁷³ The court reasoned that if the legislature wanted only one cap to apply, regardless of how many individual occurrences of malpractice, the “clearest and most unambiguous way” would have been to leave “per occurrence” out of the statute completely.⁷⁴ Looking at this legislative intent, the court held that two caps could be applied when “two separate and distinct ‘occurrences’ of medical malpractice” led to a plaintiff’s injuries, and affirmed the lower court’s decision.⁷⁵ Three years later, however, the legislature redefined the statute so that only one damage cap could apply in cases with multiple defendants.⁷⁶

2. The Amended Section 538.210

Several changes and additions were made to the Missouri Revised Statutes section 538.210 in 2005. In 2005, the legislature changed the wording from “no plaintiff shall recover more than [\$350,000] for noneconomic damages . . . from any one defendant” to “irrespective of the number of defendants.”⁷⁷ This change allowed only one damage award per plaintiff, no matter how many defendants were responsible.⁷⁸ The same year, the legislature also removed the inflation clause and restored the maximum non-economic damage award to \$350,000, as was originally set in 1986.⁷⁹ Replacing the inflation clause, section 538.210.4 stated “any spouse claiming damages for loss of consortium of [his or her] spouse shall be considered to be the same plaintiff as [his or her] spouse[,]” thus eliminating a spouse’s individual non-economic damages and collectively capping damages for the couple at \$350,000.⁸⁰ Section 538.210.6 was also added in 2005, and stated all individuals asserting a wrongful death claim for the same decedent would be considered one plaintiff, since only one action can be brought under section 537.080 against any one defendant for the death of one person.⁸¹ No additional changes were made to the statute from 2005 to 2012, the year *Watts* was decided.⁸²

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

73. *Id.*

74. *Id.* at 571.

75. *Id.* at 571, 573.

76. 2005 Mo. Laws 651-21 (“no plaintiff shall recover more than three hundred fifty thousand dollars for noneconomic damages irrespective of the number of defendants”) (codified at MO. REV. STAT. § 538.210.1 (Supp. 2011), *held unconstitutional* by *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (en banc)).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* MO. REV. STAT. § 538.210 (Supp. 2011).

538.210.⁸³ The court again clarified section 538.210, this time in terms of when the new cap could be applied to older occurrences of malpractice.⁸⁴ In *Klotz*, a jury previously found St. Anthony's Medical Center negligent for implanting an infected pacemaker in Klotz that resulted in "sepsis, amputation, and organ failure."⁸⁵ The jury returned verdicts in favor of the Klotzes for Mr. Klotz's medical malpractice claim and for Mrs. Klotz's loss of consortium claim.⁸⁶ The Klotzes appealed after the trial court reduced Mr. Klotz's non-economic damages and eliminated Mrs. Klotz's loss of consortium damages pursuant to section 538.210.4.⁸⁷

The malpractice incident occurred when the previous version of section 538.210 was controlling law,⁸⁸ under the pre-amended version with inflation, the Klotzes would have each been permitted damages up to \$579,000.⁸⁹ However, the new version of section 538.210 reduced the cap to \$350,000 for all suits filed after August 28, 2005.⁹⁰ The Klotzes did not file suit until December 2006.⁹¹ The Klotzes argued that applying the new cap of \$350,000 to a cause of action that occurred before the effective date of the new law "violate[d] the prohibition of retrospective laws."⁹² The Supreme Court of Missouri agreed with the Klotzes and held that the new \$350,000 economic damage cap under section 538.210 could not be applied to causes of action before August 28, 2005.⁹³

Although *Klotz* left the issue of constitutionality for a later decision, in his concurring opinion, Judge Richard B. Teitelman criticized section 538.210, claiming the cap harmed the most severely injured, especially young and economically disadvantaged people, while those with minor injuries received full recovery.⁹⁴ In his concurring opinion, Judge Michael A. Wolff also expressed his belief that caps on non-economic damages violated the constitutional right to trial by jury guaranteed in article 1, section 22(a) of the Missouri Constitution.⁹⁵ Calling the constitutional controversy surrounding section 538.210 an "issue that the court one day will have to confront,"

83. 311 S.W.3d 752, 772 (Mo. 2010) (en banc) (Wolff, J., concurring) (per curiam).

84. *Id.* at 759-60 (majority opinion).

85. *Id.* at 758.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 772 (Wolff, J., concurring).

90. *Id.*

91. *Id.* at 758 (majority opinion).

92. *Id.*

93. *Id.*

94. *Id.* at 782 (Teitelman, J., concurring).

95. *Id.* at 773 (Wolff, J., concurring).

Wolff's concurring opinion foreshadowed the majority decision reached two years later in *Watts*.⁹⁶

B. Missouri's Constitutional Right to Trial by Jury

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

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

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

96. *Id.*; see also *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (en banc) (holding section 538.210 unconstitutional as a violation of the right to trial by jury). Wolff did not participate in the *Watts* decision because he retired from the court in August 2011. See *Judge Michael A. Wolff, Supreme Court of Missouri*, YOUR MO. COURTS, <http://www.courts.mo.gov/page.jsp?id=153> (last visited Feb. 14, 2013).

97. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. 2003) (en banc).

98. *Id.* (citing Mo. Terr. Laws 4, 5 (1804)).

99. *Id.* (citing Mo. Terr. Laws 58, § 13).

100. *Id.* (quoting MO. CONST. art. XIII, § 8 (1820), available at <http://digital.library.umsystem.edu/cgi/t/text/pageviewer-idx?c=mocon;cc=mocon;sid=e100841c261ee37206da7238b649faee;rgn=full%20text;idno=mocoon000027;view=image;seq=1> (last visited Feb. 14, 2013)).

101. *Id.* at 84-85; see also MO. CONST. art. II, § 28 (1875), available at <https://play.google.com/books/reader?id=0gEbAAAAYAAJ&printsec=frontcover&output=reader&authuser=0&hl=en&pg=GBS.PA7>. The full phrase is now ". . . heretofore enjoyed shall remain inviolate[.]" MO. CONST. art. I, § 22(a).

102. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 638 (Mo. 2012) (en banc) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (1993)).

103. *Id.*

104. *Id.*

Tolbert v. Sweeney and *Adams v. Mercy Children's Hospital* that suggest the right to trial by jury could be changed or altered by legislative action.¹⁰⁵ In *Tolbert*, decided in 1992, the Missouri Court of Appeals, Southern District, held that there was no right to a jury trial in damages cases for employment discrimination because the legislature did not provide for a jury trial.¹⁰⁶ After *Tolbert*, there were no jury trials in employment discrimination cases for damages in Missouri for eleven years.¹⁰⁷ Similarly, in *Adams v. Mercy Children's Hospital*, decided the same year as *Tolbert*, the Supreme Court of Missouri held that the legislature had the right to "abrogate a cause of action cognizable under common law completely."¹⁰⁸ The court reasoned that if the legislature has the power to generate and eliminate causes of action, the legislature could also limit the recovery.¹⁰⁹

Over a decade later in *State ex rel. Diehl v. O'Malley*, the Supreme Court of Missouri held that the right to a jury trial was "beyond the reach of hostile legislation."¹¹⁰ *Diehl* overturned *Tolbert*, but did not criticize or even mention the *Adams* decision.¹¹¹ However, in his concurring opinion in *Klotz*, Judge Wolff called the court's previous reasoning in *Adams* "flawed."¹¹² Wolff said the *Adams* decision incorrectly implied that statutory law could overcome the constitutional right to a jury trial.¹¹³ Under the Missouri Constitution, the power to change the right to a jury trial can only be altered by the citizens of Missouri when put to a vote.¹¹⁴

Adams heavily relied on a 1931 Missouri case, *De May v. Liberty Foundry Company*.¹¹⁵ In *De May*, Emma De May filed a claim for worker's compensation after her husband Albert strained himself and developed a hernia while working for the Liberty Foundry Company.¹¹⁶ Albert later died from a

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

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

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

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

109. *Id.*

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

111. See *id.*

112. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 773 (Mo. 2010) (en banc) (Wolff, J., concurring) (per curiam).

113. *Id.* at 774.

114. MO. CONST. art. XII, § 2(b).

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

116. *De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 642 (Mo. 1931).

hernia operation.¹¹⁷ The employer denied that Albert suffered an injury at work or that his death resulted from his employment with the company.¹¹⁸ The Workmen's Compensation Commission found for the employer and De May received no compensation.¹¹⁹ On appeal to the Supreme Court of Missouri,¹²⁰ De May alleged that the Workmen's Compensation Act was unconstitutional and violated the right to trial by jury.¹²¹ The court held that the legislature had the power to grant and take away remedies and that the Act was not in violation of any constitutional provisions.¹²² Essentially, *Adams* relied on this case to show that if the legislature could take away causes of action, the legislature also had the power to limit recovery.¹²³

Adams also cited to a Supreme Court of the United States case, *Tull v. United States*, to support that the right to jury trial did not extend to the jury's determination of damages.¹²⁴ In *Tull*, the Court held that under the Seventh Amendment there is a right for a jury to determine liability, but there is not a constitutional right for a jury to determine a civil penalty.¹²⁵ According to *Tull*, the only issues placed beyond the power of the legislature are "the most fundamental elements" of a trial by jury, not a civil penalty.¹²⁶

The *Adams* court also relied on a Virginia case, *Etheridge v. Medical Center Hospitals*.¹²⁷ In *Etheridge*, Richie Lee Wilson sustained permanent brain damage and paralysis on her left side due to medical negligence after undergoing jawbone surgery.¹²⁸ The jury returned a verdict of \$2,750,000, but the trial court reduced the verdict to \$750,000 under Virginia's recovery cap section 8.01-581.15.¹²⁹ Wilson appealed, alleging the statutory cap violated her right to a jury trial under the Virginia Constitution.¹³⁰ The court held that the cap did not violate Wilson's constitutional right because the cap was applied after the jury completed its fact-finding task.¹³¹ *Adams* used the

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 643.

121. *Id.* at 645.

122. *Id.* at 652-53, 656.

123. See *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. 1992) (en banc), *overruled by* *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (en banc).

124. *Id.*

125. *Tull v. United States*, 481 U.S. 412, 426 (1987).

126. *Id.* (internal quotation marks omitted).

127. *Adams*, 832 S.W.2d at 907.

128. *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 526-27 (Va. 1989).

129. *Id.* at 527.

130. *Id.* at 527-28.

131. *Id.* at 529.

court's reasoning in *Etheridge* to reach a similar outcome under Missouri's constitutional right to trial by jury.¹³²

C. *Constitutional Challenges of Missouri Revised Statutes Chapter 538*

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

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

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

132. *Adams*, 832 S.W.2d at 907.

133. Passanante & Mefford, *supra* note 47, at 206. I think this sentence should be deleted. Please see comment above.

134. *See* 832 S.W.2d at 900.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Adams listed nine Missouri constitutional provisions that had been violated: "(1) the open courts provision, MO. CONST. art. I, § 14; (2) right to trial by jury, MO. CONST. art. I, § 22(a); (3) equal rights and opportunities, MO. CONST. art. I, § 2; (4) due process, MO. CONST. art. I, § 10; (5) special law, MO. CONST. art. III, § 40(28); (6) privileges and immunities, MO. CONST. art. I, § 13; (7) one subject requirement, MO. CONST. art. III, § 23; (8) separation of powers, MO. CONST. art. III, § 1; and (9) the constitutional directives for amending statutes, MO. CONST. art. III, § 28." *Id.* at 901.

141. *Id.* at 908.

jury completed its constitutional task” of assessing damages.¹⁴² The court also noted that the legislature enacted the provisions “related to the general goal of preserving adequate, affordable health care for all Missourians.”¹⁴³

Although caps were still in place following *Adams*, award amounts grew larger each year as inflation increased.¹⁴⁴ As courts awarded large sums to plaintiffs in a variety of actions,¹⁴⁵ the legislature amended section 538.210 in 2005 limiting cap amounts and multiple plaintiff awards.¹⁴⁶ However, even after 2005 many cases continued to apply the pre-amended version of the statute when the instances of malpractice occurred before 2005.¹⁴⁷ The only two cases to reach the Supreme Court of Missouri that challenged the new section 538.210 were *Klotz* and *Watts*.¹⁴⁸

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

142. *Id.* at 907.

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

144. *Medical Malpractice Limits*, *supra* note 41.

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

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

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

148. *See Klotz*, 311 S.W.3d 752; *Watts*, 376 S.W.3d 633.

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

150. *Id.* at 201.

151. *Id.*

section 538.210.¹⁵² Mr. Sanders challenged the damages cap, alleging that the statute was unconstitutional because it violated article I, section 22(a) of the Missouri Constitution, the right to trial by jury, and article II, section I, the separation of powers.¹⁵³

In the majority decision written by Judge William Ray Price Jr., the Supreme Court of Missouri found that Missouri did not recognize wrongful death when the Missouri Constitution was written; instead, wrongful death was a cause of action created by section 537.080.1.¹⁵⁴ The court concluded that because the legislature created the cause of action, it had the power to define the amount of damages available or negate any cause of action that did not exist before 1820.¹⁵⁵ Thus, the court found that section 538.210 limiting non-economic damages in wrongful death suits did not violate the Missouri Constitution.¹⁵⁶

Judge George W. Draper III dissented, arguing that the non-economic statutory cap violated the “inviolable” right to trial by jury provided by the Missouri Constitution.¹⁵⁷ He reasoned that after the right to a jury trial attached, it is “beyond the reach of hostile legislation.”¹⁵⁸ The court came to a similar conclusion in *Watts*, just over three months later, when Chief Justice Richard B. Teitelman wrote the majority decision holding non-economic caps unconstitutional in Missouri.¹⁵⁹

D. Protecting Missouri’s Health Care System

Missouri’s high court also has a history of recognizing and upholding legislation it believed protected Missouri doctors from high premiums and high numbers of lawsuits.¹⁶⁰ In two noteworthy cases, the court discussed the issue of protecting health care providers and the role chapter 538 played in the health care system.

152. *Id.* at 200. Because the incident of negligence took place before the amended section 538.210 took effect in 2005, the damages were adjusted for inflation in 2010 at \$632,603.82 per each defendant, totaling \$1,265,207.64. *Id.* at 202.

153. *Id.* at 202-05.

154. *Id.* at 200, 203.

155. *Id.* at 205.

156. *Id.* at 201.

157. *Id.* at 214 (Draper, J., dissenting).

158. *Id.* at 251 (quoting *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 92 (Mo. 2003) (en banc)) (internal quotation marks omitted).

159. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 635-36 (Mo. 2012) (en banc). Because most of the same judges who decided *Sanders* also ruled on *Watts*, it is interesting to note a change in opinion by Judge Stith just three months later. This sentence could be deleted too

160. See *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 505 (Mo. 1991) (en banc); *Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678, 682 (Mo. 2000) (en banc).

In *Mahoney v. Doerhoff Surgical Services*, Linda and Richard Mahoney brought a medical malpractice action against Doerhoff Surgical Services.¹⁶¹ After ninety days, Doerhoff moved to dismiss the Mahoneys' action for failure to adhere with Missouri Revised Statutes section 538.225.¹⁶² This statute states that within ninety days of filing a petition against a health care provider for damages, the plaintiff must file an affidavit with the written opinion of a qualified health professional stating that the defendant "failed to use such care" that a reasonable health care provider would "under similar circumstances" and that the failure caused or contributed to the damages claim.¹⁶³ The Mahoneys' action was dismissed and they appealed to the Supreme Court of Missouri claiming section 538.225 violated their constitutional right to a jury trial.¹⁶⁴ The Mahoneys argued that the statute "unduly burden[ed]" their rights by creating a "screening process" where merits of the case were determined "by [a] health care professional" before being submitted to a jury.¹⁶⁵

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

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

161. *Mahoney*, 807 S.W.2d at 505.

162. *Id.*

163. *Id.* (quoting MO. REV. STAT. § 538.225(1) (1986)).

164. *Id.* at 505-06.

165. *Id.* at 507.

166. *Id.* at 509.

167. *Id.* at 513.

168. *Id.* at 507.

169. *Id.*

170. *Id.*

171. 19 S.W.3d 678, 682 (Mo. 2000) (en banc).

172. *Id.* at 679.

the Supreme Court of Missouri.¹⁷³ In its decision, the court discussed “the legislature’s intent in adopting the [several] provisions of [Missouri Revised Statutes] chapter 538.”¹⁷⁴ The court concluded that the legislature’s intent was to “impose specific limitations” on traditional tort actions made against a health care provider, specifically strict products liability in this case.¹⁷⁵ These limitations also included caps on non-economic damages,¹⁷⁶ structured settlements of future damages,¹⁷⁷ and the requirement that a cause of action be dependent on an affidavit submitted by a legally qualified health care provider.¹⁷⁸ Although the court recognized some public policy arguments for imposing strict liability against health care providers, ultimately the court deferred to the legislature’s decision on public policy and affirmed the trial court judgment.¹⁷⁹

While *Mahoney* showed the court believed the legislature’s intent behind capping non-economic damages was to limit the increasing costs of health care,¹⁸⁰ *Budding* demonstrated the court’s belief that legislative intent was to impose limitations on plaintiffs, such as non-economic caps on damages, when actions were brought against health care providers.¹⁸¹

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

States that impose a non-economic cap vary extensively in the amount a plaintiff can receive and the type of damage the cap covers.¹⁸² Currently, twenty-nine states have enacted statutes that impose some kind of non-economic cap.¹⁸³ These include states with newly enacted non-economic

173. *Id.*

174. *Id.* at 680.

175. *Id.*

176. *See* MO. REV. STAT. § 538.210.1 (1994).

177. *Id.* § 538.220.2.

178. *Id.* § 538.225.1.

179. *Budding*, 19 S.W.3d at 682.

180. *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 507 (Mo. 1991) (en banc).

181. *Budding*, 19 S.W.3d at 680.

182. AM. MED. ASS’N, CAPS ON DAMAGES, *supra* note 38.

183. ALASKA STAT. ANN. § 09.17.010 (West, Westlaw through 2012 2nd Reg. Sess. and 3d Special Sess. of the 27th Legis.); CAL. CIV. CODE § 3333.2 (West, Westlaw through 2012 Reg. Sess. Laws); COLO. REV. STAT. ANN. § 13-21-102.5 (West, Westlaw through Ch. 2 of the 1st Reg. Sess. of the 69th Gen. Assembly); FLA. STAT. § 766.118 (2011); HAW. REV. STAT. § 663-8.7 (West, Westlaw through 2012 Reg. Sess.); IDAHO CODE ANN. § 6-1603 (West, Westlaw through end of 2012 2nd Reg. Sess.); IND. CODE ANN. § 34-18-14-3 (West, Westlaw through 2012 2nd Reg. Sess.); KAN. STAT. ANN. § 60-19a02 (2005); LA. REV. STAT. ANN. § 40:1299.42 (West, Westlaw through the 2012 Reg. Sess.), *unconstitutional as applied by* *Oliver v. Mag-*

caps that went into effect in 2011, including North Carolina,¹⁸⁴ Tennessee,¹⁸⁵ and Oklahoma,¹⁸⁶ as well as caps that were upheld by state supreme courts in 2012 after constitutional challenges in Kansas¹⁸⁷ and Texas.¹⁸⁸

1. States That Have Overturned Non-Economic Caps

Courts have overturned caps in Missouri in 2012,¹⁸⁹ Georgia¹⁹⁰ and Illinois¹⁹¹ in 2010, and Alabama,¹⁹² New Hampshire,¹⁹³ and Washington¹⁹⁴ in

nolia Clinic, 71 So. 3d 1170 (La. Ct. App. 2011); ME. REV. STAT. tit. 18-A, § 2-804 (2012); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (West, Westlaw through 2012 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 231, § 60H (West, Westlaw through Ch. 464 of the 2012 2nd Annual Sess.); MISS. CODE ANN. § 11-1-60 (West, Westlaw through end of 2012 Reg. Sess.); MONT. CODE ANN. § 25-9-411 (West, Westlaw through all 2011 laws); NEB. REV. STAT. ANN. § 44-2825 (West, Westlaw through the 102nd Legis. 2nd Reg. Sess.); NEV. REV. STAT. ANN. § 41A.035 (West, Westlaw through the 2011 76th Reg. Sess.); N.M. STAT. ANN. § 41-5-6 (West, Westlaw through the 2nd Reg. Sess. of the 50th Legis.); N.C. GEN. STAT. ANN. § 90-21.19 (West, Westlaw through end of the 2012 Reg. Sess.); N.D. CENT. CODE ANN. § 32-42-02 (West, Westlaw through the 2011 Reg. & Special Sess.); OHIO REV. CODE ANN. § 2323.43 (West, Westlaw through all 2011 laws); OKLA. STAT. ANN. tit. 23, § 61.2 (West, Westlaw through Ch. 370 of the 2nd Reg. Sess. of the 53d Legis.); OR. REV. STAT. ANN. § 31.710 (West, Westlaw through end of the 2012 Reg. Sess.), *held unconstitutional by* Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999); S.C. CODE ANN. § 15-32-220 (West, Westlaw through end of 2012 Reg. Sess.); S.D. CODIFIED LAWS § 21-3-11 (West, Westlaw through 2012 Reg. Sess.); TENN. CODE ANN. § 29-39-102 (West, Westlaw through end of 2012 2nd Reg. Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2011); UTAH CODE ANN. § 78B-3-410 (West, Westlaw through 2012 4th Spec. Sess.); W. VA. CODE ANN. § 55-7B-8 (West, Westlaw through end of the 2012 1st Extraordinary Sess.); WIS. STAT. ANN. § 893.55(4)(d) (West, Westlaw through end of the 2012 1st Extraordinary Sess.). Additionally, Virginia currently has a \$2 million dollar cap on total damages for recovery. VA. CODE ANN. § 8.01-581.15 (West, Westlaw through end of 2012 Reg. Sess. & end of 2012 Spec. Sess. I).

184. An Act to Reform the Laws Relating to Money Judgment Appeal Bonds, Bifurcation of Trials in Civil Cases, and Medical Liability, § 7, 2011 N.C. Sess. Laws 1712.

185. Tennessee Civil Justice Act of 2011, ch. 510, § 10, 2011 Tenn. Pub. Acts H.B. 2008.

186. Alicia Gallegos, *Oklahoma Enacts Caps on Noneconomic Damages*, AM. MED. NEWS (Apr. 25, 2011), <http://www.amednews.com/article/20110425/government/304259957/7/>.

187. Tony Rizzo, *Kansas High Court Upholds Cap on Malpractice Damages*, KAN. CITY STAR, Oct. 5, 2012, <http://www.kansascity.com/2012/10/05/3849007/kansas-high-court-upholds-malpractice.html>.

188. Alicia Gallegos, *Appeals Court Upholds Often-Cited Medical Liability Damage Cap*, AM. MED. NEWS (Sept. 23, 2012), <http://www.ama-assn.org/amednews/2012/09/24/prsb0924.htm>.

189. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 636 (Mo. 2012) (en banc).

previous years. Cap legislation is not permissible in Arizona,¹⁹⁵ Arkansas,¹⁹⁶ Kentucky,¹⁹⁷ Pennsylvania,¹⁹⁸ or Wyoming¹⁹⁹ because caps on non-economic damages are specifically prohibited in their respective state constitutions. Constitutional language has also been used in states like Alabama and Missouri to overturn non-economic caps.²⁰⁰

In *Moore v. Mobile Infirmary Association*, the Supreme Court of Alabama held that the phrasing “shall remain inviolate” “freezes” the right to trial by jury as that right existed in 1901,²⁰¹ the ratification date of Alabama’s Constitution. Since juries in Alabama determined damages for pain and suffering in 1901, imposing a \$400,000 limitation for non-economic damages burdened the right to trial by jury and was found unconstitutional.²⁰²

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

191. *LeBron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010) (holding Illinois’ limitation on noneconomic damages in medical malpractice actions in Illinois Compiled Statutes section 2-1706.5 in violation of the separation of powers clause in the Illinois Constitution).

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

193. *Brannigan v. Usitalo*, 587 A.2d 1232, 1233 (N.H. 1991) (holding New Hampshire’s statute section 508:4-d capping recovery for non-economic loss as unconstitutional because it violated the equal protection provisions of the state constitution).

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

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

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

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

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

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

200. *See, e.g.*, *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 159 (Ala. 1991); *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 638-39 (Mo. 2012) (en banc).

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

202. *Id.* at 159, 164.

2. States That Have Upheld Non-Economic Caps

Other states, such as Idaho and Nebraska, with the same “remain inviolate” language in their state constitutions,²⁰³ have interpreted the language differently.²⁰⁴ In *Kirkland v. Blaine County Medical Centers*, the Supreme Court of Idaho held that the non-economic cap did not violate the right to a jury as it existed at the adoption of the Idaho Constitution, reasoning that the jury was still allowed to “act as the fact finder” and the non-economic cap “simply limit[ed] the legal consequences of the jury’s findings.”²⁰⁵ Similarly, in *Gourley v. Nebraska Methodist Health System*, the Nebraska Supreme Court held that the trial court applied the non-economic cap “only after the jury has fulfilled its factfinding function,” and thus the cap did not violate Nebraska’s right to a jury trial.²⁰⁶

3. Recent Constitutional Challenges to Non-Economic Damage Caps

Currently Florida²⁰⁷ and Tennessee²⁰⁸ face ongoing constitutional challenges for non-economic damage caps in court. Indiana²⁰⁹ and Mississippi²¹⁰ also recently handed down decisions in 2013 regarding non-economic damage caps.

A question about the constitutionality of Florida’s non-economic damage cap currently is before the Supreme Court of Florida after being reviewed by the Eleventh Circuit.²¹¹ In *Estate of McCall v. United States*, Michelle McCall’s parents and father of her son sued under the federal Tort Claims Act claiming that Michelle’s death was due to medical malpractice shortly after she gave birth on an air force base.²¹² The district court awarded her estate \$2,000,000 in non-economic damages, but limited recovery to \$1,000,000

203. IDAHO CONST. art. I, § 7 (“[t]he right of trial by jury shall remain inviolate”); NEB. CONST. art. I, § 6 (“[t]he right of trial by jury shall remain inviolate”).

204. *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1117-20 (Idaho 2000); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 75 (Neb. 2003).

205. *Kirkland*, 4 P.3d at 1120.

206. *Gourley*, 663 N.W.2d at 75.

207. *Estate of McCall v. United States*, 642 F.3d 944, 953 (11th Cir. 2011) (re-manding challenges to the noneconomic damage cap under state constitutional law to the Florida Supreme Court).

208. *See* Complaint, *Gummo v. Ward*, No. 2:12-cv-00060 (M.D. Tenn. July 2, 2012), 2012 WL 2566916.

209. *Plank v. Cmty. Hosps. Of Ind., Inc.*, 981 N.E.2d 49 (Ind. 2013).

210. *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 258 (5th Cir. 2013).

211. *McCall*, 642 F.3d at 946.

212. *Id.* at 946-47.

under Florida's statutory cap section 766.118.²¹³ McCall's estate appealed, and argued the cap violated the United States and Florida Constitutions.²¹⁴

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

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

213. *Id.* at 947.

214. *Id.* at 948. Plaintiffs argued the statutory cap "constitute[d] a taking in violation of the Fifth Amendment" and violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id.*

215. *Id.* at 946; The Takings Clause of the Florida Constitution states "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." FLA. CONST. art. X, § 6(a).

216. *Id.*

217. The Supreme Court of Florida heard oral arguments on *Estate of Michelle Evette McCall v. United States* on February 9, 2012. *Oral Argument Schedule & Briefs*, FLA. SUPREME COURT, http://www.floridasupremecourt.org/pub_info/summaries/oa02-12.shtml (last visited Feb. 15, 2013).

218. David L. Hudson Jr., *More States See Tort Limits Challenged as Unconstitutional*, ABA J. (Apr. 1, 2013), <http://ht.ly/jRfmr>.

219. *Id.*

220. *Id.*

221. MO. CONST. art. I, § 22(a); TENN. CONST. art. I, § 6.

222. See Complaint, *Gummo v. Ward*, No. 2:12-cv-00060 (M.D. Tenn. July 2, 2012), 2012 WL 2566916, at *9.

223. *Gummo v. Ward*, 2013 WL 5446074, at *1-2 (M.D. Tenn. 2013).

In a wrongful death case in Indiana, the plaintiff alleged medical malpractice when doctors failed to diagnose his wife's bowel obstruction, resulting in her death.²²⁴ A jury found in favor of the plaintiff and awarded him \$8.5 million in damages, but the award was later reduced to \$1.25 million under the Indiana Medical Malpractice Act.²²⁵ The plaintiff sought an evidentiary hearing to challenge the constitutionality of the cap but the trial court denied the request.²²⁶ The plaintiff appealed and the case was transferred to the Supreme Court of Indiana.²²⁷ In January 2013, the court affirmed the trial's courts decision, reasoning that the plaintiff "forfeited his opportunity to conduct such a hearing" when he failed to raise the claim before the verdict and waited eight days to object to the reduction of the award.²²⁸

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

IV. THE INSTANT DECISION

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

224. *Plank v. Cmty. Hosps. of Ind., Inc.*, 956 N.E.2d 731, 733 (Ind. Ct. App. 2011), *vacated*, 981 N.E.2d 49 (Ind. 2013).

225. *Id.*

226. *Plank v. Cmty. Hosps. Of Ind., Inc.*, 981 N.E.2d 49, 50 (Ind. 2013).

227. *Id.*

228. *Id.* at 55.

229. *Sears, Roebuck & Co., v. Learmonth*, 95 So. 3d 633, 634 (Miss. 2012).

230. *Id.* at 634-35.

231. *Id.* at 635.

232. *Id.*

233. *Id.* at 639.

234. *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 258 (5th Cir. 2013).

235. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 636 (Mo. 2012) (en banc).

In so holding, the court reversed its previous decision, *Adams v. Children's Mercy Hospital*, which allowed non-economic damages to be capped under the statute.²³⁶

A. Right to Trial by Jury "Heretofore Enjoyed"

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

In response, Cox argued that the jury completed its constitutional task after it resolved disputed facts.²⁴¹ Thus, Cox reasoned, the jury's role was completed at the time section 538.210 was applied as a matter of law, and did not violate the Missouri Constitution.²⁴² Cox also argued that the General Assembly had the "power to create, modify, limit, or abrogate causes of action or remedies" without violating the right to trial by jury.²⁴³ Cox interpreted the "heretofore enjoyed" phrase in the Missouri Constitution as giving the General Assembly legislative power over the common law, actions and remedies, as was the case when the Missouri Constitution was first written in 1820.²⁴⁴

The court sided with Watts, holding that the right to a jury trial "heretofore enjoyed" as stated in the Missouri Constitution was not subject to caps on damages because such limits did not exist when the constitution was adopted in 1820.²⁴⁵ The court looked to the state of the common law in 1820 and the history of judicial remittitur to support its conclusion.²⁴⁶

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

236. *Id.*

237. Initial Brief for Plaintiff-Appellant, *Watts*, 376 S.W.3d 633 (No. SC91867), 2011 MO S. Ct. Briefs LEXIS 204, at *9.

238. *Id.*

239. *Id.*

240. *Id.* at *26, *29-34.

241. Initial Brief for Respondent-Appellee, *Watts*, 376 S.W.3d 633 (No. SC91867), 2012 MO S. Ct. Briefs LEXIS 9, at *26.

242. *Id.* at *28.

243. *Id.* at *15-16.

244. *Id.* at *22-23.

245. *Watts*, 376 S.W.3d at 639.

246. *Id.*

souri's common law: English common law.²⁴⁷ English common law acknowledged medical negligence as a "private wrong," deserving of redress in court and permitted recovery of non-economic damages to give "pecuniary satisfaction."²⁴⁸ The court reasoned that Watt's action for medical negligence and her claim for non-economic damages fell into the category of "civil actions for damages resulting from personal wrongs" that had been tried by Missouri juries since 1820.²⁴⁹

The court also examined the scope of Watts' right in regard to judicial remittitur.²⁵⁰ The court found that both English common law and Missouri common law allowed judges to grant plaintiffs new trials when the verdict was "inconsistent with the evidence."²⁵¹ "Although Missouri cases [in the early to mid 1800s] approved of judicial remittitur," later cases ruled that remittitur was incorrect.²⁵² Because of "inconsistent precedent" recognizing judicial remittitur as a valid exercise of judicial power, the court reasoned that such inconsistency "stem[med] from a long-standing reluctance in the common law to tamper with the jury's constitutional role as the finder of fact."²⁵³ After looking at the history of English and Missouri common law, the court concluded that limits on damage awards "did not exist and were not contemplated" in 1820 as the phrase "heretofore enjoyed" referenced.²⁵⁴

B. Right to Trial by Jury to "Remain Inviolable"

Watts also argued that the jury's determination of damages did not "remain inviolate" when section 538.210 was applied.²⁵⁵ Watts argued that because the common law in 1820 never recognized legislative authority over juries, pieces of "legislative interference" such as section 538.210 should be declared unconstitutional.²⁵⁶ Watts also reasoned that the statute violated article II, section 1 of the Missouri Constitution, "the constitutional separation of powers[.]"²⁵⁷ Watts stated that the statutory limitation "invade[d] the tradi-

247. *Id.* at 638.

248. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 116, 122 (David S. Berkowitz & Samuel E. Thorne eds., Garland Publ'g 1978) (1783).

249. *Watts*, 376 S.W.3d at 638.

250. *Id.* at 639.

251. *Id.* at 638.

252. *Id.* at 639. Compare *Carr & Co. v. Edwards*, 1 Mo. 137, 137 (Mo. 1821) (stating "if the jury find greater damages than the plaintiff has counted for, and the Court render judgment according to such finding, it is error"), with *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. 1985) (holding that judicial remittitur was not a valid exercise of judicial power).

253. *Watts*, 376 S.W.3d at 639.

254. *Id.*

255. Initial Brief for Plaintiff-Appellant, *supra* note 237, at *39-40.

256. *Id.* at *40, *47.

257. *Id.* at *10.

tional judicial function” of evaluating whether an award was extreme or insufficient and instead permitted a “legislative remittitur” that superseded judicial power and took no account of facts on a case-by-case basis.²⁵⁸

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

Considering both arguments, the court looked at whether the right to a jury trial “remain[s] inviolate” after section 538.210 is applied to a damage award.²⁶¹ The court held that “the right to trial by jury cannot ‘remain inviolate’ when an injured party is deprived of the jury’s constitutionally assigned role of determining damages according to the particular facts of the case.”²⁶² The court stated that one of the longstanding, primary functions of the jury is to determine plaintiff damages.²⁶³ Because section 538.210 imposed a cap on the jury’s award independent from the facts of the case and limited the jury’s constitutional role of determining damages, the court decided that section 538.210 “necessarily and unavoidably violate[d] the state constitutional right to trial by jury.”²⁶⁴ The court then looked to other states where limits on damages had been found to violate constitutional right to trial by jury.²⁶⁵ The court found that states such as Washington,²⁶⁶ Oregon,²⁶⁷ Alabama,²⁶⁸ and

258. *Id.*

259. Initial Brief for Respondent-Appellee, *supra* note 241, at *21.

260. *Id.* at *30-31.

261. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 637-38 (Mo. 2012) (en banc).

262. *Id.* at 640.

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

264. *Id.* at 640.

265. *Id.* at 640-41.

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

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

268. *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 163 (Ala. 1991) (holding statutory damage caps violate the right to trial by jury because “the trial judge is required summarily to disregard the jury’s assessment of the amount of noneconomic loss, that species of damages lying most peculiarly within the jury’s discretion”).

Florida,²⁶⁹ whose constitutions also included the “remain inviolate” language, reached similar conclusions: the constitutional right to a jury trial is violated when caps on damages restrict the jury’s fact finding role.²⁷⁰

C. Overturning Erroneous Precedent in Adams

In making its decision, the Supreme Court of Missouri also had to determine how the holding in *Watts* would affect *Adams v. Children’s Mercy Hospital*.²⁷¹ *Watts* asked the court to overrule *Adams*.²⁷² Cox argued that under stare decisis, Missouri’s high court should follow precedent set forth in *Adams* since controlling law and constitutional principles remained the same since the case was handed down.²⁷³

After revisiting *Adams*, *Watts* argued that the court should follow the reasoning in *State ex rel. Diehl v. O’Malley*, which held that the decision committed a “fundamental error [] in concluding that statutory law [could] trump the constitutional right to jury trial.”²⁷⁴ The court found “four flaws in *Adams* rationale.”²⁷⁵ First, the court found *Adams* misunderstood the right to trial by jury as provided by the Missouri Constitution.²⁷⁶ Under *Adams*, even if the jury performed its constitutional duty and determined damages, a statutory cap denied the plaintiff’s his or her full recovery.²⁷⁷ After section 538.210 was applied, the court equated the jury’s role to a “meaningless opportunity to assess damages” that “pays lip service to the form of the jury but robs it of its function.”²⁷⁸

Second, the court reasoned *Adams* erroneously allowed a “legislative limitation” to be placed on “an individual constitutional right.”²⁷⁹ The court found *Adams* flawed because a statutory limit on the right to a jury trial is an “impermissible legislative alteration of the [c]onstitution.”²⁸⁰ Additionally, *Adams* never acknowledged any of the “myriad cases recognizing that a stat-

269. *Smith v. Dep’t of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987) (holding that a plaintiff limited on the amount of damages recovered violates Florida’s right to jury trial and the right of access to courts).

270. *Watts*, 376 S.W.3d at 640-41.

271. *Id.* at 637.

272. *Id.*

273. Initial Brief for Respondent-Appellee, *supra* note 241, at *4-5, *11-14.

274. Initial Brief for Plaintiff-Appellant, *supra* note 237, at *23 (quoting *Klotz v. St. Anthony’s Med. Ctr.*, 311 S.W.3d 752, 774 (Mo. 2010) (en banc)) (internal quotation marks omitted).

275. *Watts*, 377 S.W.3d at 642.

276. *Id.*

277. *Id.*

278. *Id.* (quoting *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (Wash. 1989) (en banc)).

279. *Id.*

280. *Id.*

ute may not limit constitutional rights.”²⁸¹ Instead, *Adams* cited *De May v. Liberty Foundry Company*.²⁸² The *Adams* court reasoned from *DeMay* that “[i]f the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery”²⁸³ The *Watts* court concluded *Adams*’ reliance on *De May* was inappropriate as nothing in the case suggested the legislature could deny a plaintiff seeking relief of his or her constitutional rights.²⁸⁴ If this were the case, the court argued, constitutional protections would only be theoretical privileges that could be withdrawn at any time.²⁸⁵

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

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

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

281. *Id.* (“[A] statute may not infringe on a constitutional right; if the two are in conflict, then it is the statute rather than the constitution that must give way” (citing *Mo. Alliance for Ret. Ams. v. Dep’t of Labor & Indus. Relations*, 277 S.W.3d 670, 682 (Mo. 2009) (en banc))).

282. *Id.* at 642-43.

283. *Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. 1992) (en banc), *overruled by Watts*, 376 S.W.3d 633.

284. *Watts*, 376 S.W.3d at 643.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Adams*, 832 S.W.2d at 901. Additionally, *Tull* was found to be irrelevant in a right to jury trial analysis in *Felmer v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). *Watts*, 376 S.W.3d at 643.

289. *Watts*, 376 S.W.3d at 644.

290. *Id.* (internal citations omitted).

291. *Id.*

292. VA. CONST. art. I, § 11.

293. MO. CONST. art. I, § 22(a).

294. *Watts*, 376 S.W.3d at 644.

considerations, the court looked to previous cases where precedent was overturned to protect constitutional rights.²⁹⁵ The court concluded that *Adams* was unconstitutional and reversed the judgment that reduced the non-economic damages with regard to section 538.210.²⁹⁶

D. The Dissenting Opinion

Judge Mary R. Russell, joined by Judges Breckenridge and Price, dissented, choosing to uphold the statutory cap.²⁹⁷ Judge Russell felt that although the Watts family experienced a tragic and unfortunate situation, the court had no duty to determine whether section 538.210 was “good policy,” but must only determine whether the legislative provision violated the Missouri Constitution.²⁹⁸ The dissent argued *Adams* was longstanding, controlling precedent for over twenty years and should not be overturned.²⁹⁹ Judge Russell agreed with the court’s analysis in *Adams*, that section 538.210 did not obstruct the jury’s fact-finding or assessment of damages as it was applied after the jury had “served its constitutional task,” and thus did not violate the Missouri Constitution.³⁰⁰

The dissent also discussed other states that agreed with the court’s reasoning in *Adams*, including states with the same “inviolate” language in their state constitutions as Missouri: Nebraska, Idaho, Ohio, and Maryland.³⁰¹ She also disagreed with the majority who criticized *Etheridge* and distinguished the Virginia and Missouri Constitutions.³⁰² Judge Russell argued that although the two state constitutions contained “superficial” language differences, both guaranteed a right to jury trial “that existed at common law.”³⁰³ The dissent also pointed to cases that supported *Adam*’s reasoning in jurisdictions with and without the “inviolate” language.³⁰⁴

V. COMMENT

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

295. *Id.* (“[W]hile . . . hesitant to overturn precedent, [the court] nonetheless has followed its obligation to do so where necessary to protect the constitutional rights of Missouri’s citizens.”).

296. *Id.* at 646.

297. *Id.* at 648-52 (Russell, J., dissenting).

298. *Id.* at 648.

299. *Id.* at 649-50.

300. *Id.* at 649.

301. *Id.* at 650-51; see *supra* notes 203-06 and accompanying text.

302. *Watts*, 376 S.W.3d at 651.

303. *Id.*

304. *Id.* at 651-53.

tional rights. Second, this Part will address the many problems with non-economic caps including inconclusive evidence about the effects of caps on insurance premiums and why caps do not improve the availability or quality of physician care.

A. *The Importance of Judges' Constitutional Interpretation*

Whether placing a cap on the amount of non-economic damages a plaintiff can recover violates his or her right to a jury trial is a controversial issue that has been addressed by several states. A number of these states have the exact same wording in their respective state constitutions, yet different outcomes have been reached. States are split on this issue because in the end, many judgments depend on how judges interpreted the constitutional language and how they view the jury's role.³⁰⁵ In Missouri, the majority of the supreme court interpreted the "remain inviolate" language to mean that a jury must determine damage amounts to complete their "constitutional task" as was done in 1820.³⁰⁶ Other judges, including the three dissenters in *Watts*, have interpreted these terms differently: they reason if the cap is applied after the jury has determined damages, the "constitutional task" of providing a jury trial has already been fulfilled.³⁰⁷ They claimed any statutory changes made to the damage award later are a matter of law, not fact, and do not harm the right to trial by jury.³⁰⁸

Whether an individual believes a jury has performed its constitutional duty before or after a damage award is handed down to the plaintiff, the result can have serious consequences. This small, yet crucial difference in reasoning emphasizes the importance of judges in our legal system and the power they have in interpreting constitutional rights. The judiciary's ability to interpret meaning behind words has become widely accepted as a "permanent and indispensable feature of our constitutional system."³⁰⁹ There are two main views about how to interpret constitutional wording: one side argues a constitution should be read the way it was originally understood when it was first drafted.³¹⁰ Other judges take the "living document" approach, or the view that a constitution should "grow and evolve over time[.]"³¹¹

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

305. See *supra* Part III.E.

306. See *Watts*, 376 S.W.3d at 638-40.

307. *Id.* at 649-50.

308. See *id.* at 649.

309. PAMELA S. KARLAN, GOODWIN LIU & CHRISTOPHER H. SCHROEDER, AM. CONST. SOC'Y, KEEPING FAITH WITH THE CONSTITUTION 23 (2009), http://www.acslaw.org/pdf/ACS_KeepFaith_FNL.pdf (quoting *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)) (internal quotation marks omitted).

310. *Id.* at 24-25.

311. *Id.* at 25.

Ideally, judges practice judicial independence and do not rely on outside influences; they look only to the source of the language, here the respective state constitution. However, this is not always the case. Missouri has a history of cases where judges allowed statutory law to override constitutional rights.³¹² Rather than interpret the laws of their jurisdiction, judges have deferred to the legislature's decision on public policy, allowing constitutional rights to be altered and, at times, altogether done away with.³¹³ Even though these "flawed" case decisions have since been overturned, this reasoning may still be prevalent in some courts across the United States today. Judges are subjected to many influences throughout their daily lives that realistically cannot be avoided.³¹⁴ However, judicial independence is compromised when these outside influences result in judges losing their ability to adjudicate for the parties.³¹⁵

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

B. The Impact of Caps on the Health Care System

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

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

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

314. Peter H. Russell, *Toward a General Theory of Judicial Independence*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 12* (Peter H. Russell & David M. O'Brien eds., 2001).

315. *Id.*

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

317. Williams, *supra* note 14, at 495 (quoting Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 CONN. L. REV. 667, 694 (2006)).

place the burden on patients who have been hurt. When a cap is in place, it sends a message to Missouri citizens that they do not deserve compensation to the full extent of their injuries and that victims must bear the burden to help preserve the health care system.

When caps are not in place, doctors are more likely to take extra precautions to deter error, rather than face high malpractice liability.³¹⁸ A medical error is “the failure of a planned action to be completed as intended . . . or the use of a wrong plan to achieve an aim[.]”³¹⁹ Studies have shown that as many as 98,000 deaths a year are caused from medical negligence or mistake.³²⁰ This number is astounding, especially when considering 98,000 is two times as many as the number of Americans who die in automobile accidents each year.³²¹

While “[t]he potential of an unlimited or ‘uncapped’ . . . award deters misconduct from health care providers,” a damage cap does little to police misconduct or remove inadequate doctors from practice.³²² Unlike other forms of insurance, doctors’ malpractice insurance premiums are not based on past performance or payout.³²³ Because insurance companies do not take a doctor’s skill into account and do not raise premiums for high payouts,³²⁴ there may be less impact on a doctor’s safety precaution when damages remain capped. Additionally, state disciplinary boards do little to discipline doctors for misconduct.³²⁵ According to one study, of the more than 35,000 doctors who received a medical payout between 1990 and 2002, only 7.6% were disciplined by their state board.³²⁶ The same study showed state boards only disciplined 13.3% of doctors with five or more medical malpractice payouts.³²⁷

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

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

320. *Id.* at 1.

321. *Id.* at 1, 26.

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

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

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

325. Harris, *supra* note 5, at 178.

326. JACKSON WILLIAMS, PUB. CITIZEN CONG. WATCH, *MEDICAL MISDIAGNOSIS: CHALLENGING THE MALPRACTICE CLAIMS OF THE DOCTORS’ LOBBY* 21 (2003), <http://www.citizen.org/documents/BRIEFING%20BOOK--MISDIAGNOSIS.pdf>.

327. *Id.*

There is also conflicting evidence on whether caps affect medical malpractice insurance premiums, as both sides of the cap debate strongly disputes the other's findings.³²⁸ With a cap in place, insurance companies pay out less in claims each year; in theory this should result in lower premiums for doctors who are required to have medical malpractice insurance and for consumers who buy health insurance.³²⁹ Yet data shows an inconsistent correlation between damage caps and lowered premiums.³³⁰

The United States has recently seen a trend in lowered malpractice premium rates across most states, leading experts to believe that caps cannot be the only reason for the decreased rates.³³¹ Medical malpractice insurance rates vary state by state,³³² but also vary widely within states.³³³ "In Detroit, Michigan, a medical malpractice . . . carrier quotes \$34,922 for a general internist, but . . . on the other side of the state, in Kalamazoo, [the same coverage] would be \$14,143, or 60% less."³³⁴ This suggests that even within a state with the same non-economic cap, malpractice premiums can widely vary based on city or region. Although differing laws play some role in why premiums vary by state, other factors such as judges, plaintiffs' lawyers, the willingness to bring a claim, and the rate at which juries award damages also affect premium rates.³³⁵

Proponents of non-economic damage limits also argue that caps prevent high numbers of frivolous claims from reaching a court.³³⁶ The problem with preventing litigation through caps is that it also discourages claims with merit

328. Harris, *supra* note 5, at 180-81.

329. See AM. ASS'N FOR JUSTICE, FIVE MYTHS ABOUT MEDICAL NEGLIGENCE 9 (2003), http://www.justice.org/clips/five_myths_about_medical_negligence.pdf.

330. Bryan A. Liang & LiLan Ren, *Medical Liability Insurance and Damage Caps: Getting Beyond Band Aids to Substantive Systems Treatment to Improve Quality and Safety in Healthcare*, 30 AM J.L. & MED. 501, 505-06 (2004) ("[I]n 1975 California had the highest premiums in the nation" but as a result of the Medical Injury Compensation Reform Act, physicians in California pay premiums in the lowest one-third); Kathryn Zeiler, *Medical Malpractice Liability Crisis or Patient Compensation Crisis?*, 59 DEPAUL L. REV. 675, 681 (2010) ("Contrary to the assertions of tort reform proponents, closed claims data suggest little connection between the liability system and premium fluctuations.").

331. Robert Lowes, *Rising Malpractice Insurance Premiums? Yes and No*, MEDSCAPE MED. NEWS (Oct. 5, 2011), <http://www.medscape.com/viewarticle/751009>.

332. *Id.* ("[I]n 2010, the highest quote for a \$1 million/\$3 million policy for a general internist is . . . in Miami-Dade County, Florida, where First Professionals Insurance charges \$47,431 The lowest quote is \$3,375 throughout Minnesota[.]").

333. *Id.*

334. *Id.*

335. *Id.*

336. See AM. ASS'N FOR JUSTICE, *supra* note 329, at 2.

from being filed and reaching a court.³³⁷ Data suggests that most patients who experience negligent care do not file malpractice claims.³³⁸ One study found that only about one in eight patients who experience negligent injuries file a claim.³³⁹ “[T]he problem is not too many claims,” but not enough claims.³⁴⁰

Further, a cap’s overall impact on the health care system is minimal because malpractice costs are such a small part of total health care spending.³⁴¹ A study by the Congressional Budget Office in 2004 found that “even a reduction of 25 percent to 30 percent in malpractice costs would lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small.”³⁴² Medical malpractice litigation costs in the United States each year amount to only two percent of total health care spending.³⁴³

Supporters of caps also argue that limits on non-economic damages keep doctors practicing within the state.³⁴⁴ However, there is little evidence that shows correlation between the implementation of caps and where or how

337. MICHELLE M. MELLO, MEDICAL MALPRACTICE: IMPACT OF THE CRISIS AND EFFECT OF STATE TORT REFORMS 15, http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2006/rwjf11941/subassets/rwjf11941_1 (instead of discouraging frivolous litigation, damage caps “burden the most severely injured patients”).

338. Williams, *supra* note 14, at 485.

339. HENRY COHEN, CONG. RESEARCH SERV., RL31692, MEDICAL MALPRACTICE LIABILITY REFORM: LEGAL ISSUES AND FIFTY-STATE SURVEY OF CAPS ON PUNITIVE DAMAGES AND NONECONOMIC DAMAGES 1 (2005), <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL3169202082005.pdf>. The study was continued by Harvard School of Public Health researchers, who additionally examined over 1,400 closed medical negligence claims and found that ninety-seven percent of claims were meritorious and eighty percent involved death or serious injury. Studdert et al., *supra* note 4, at 2025-26.

340. COHEN, *supra* note 339, at 1.

341. CONG. BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE 1 (2004), <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/49xx/doc4968/01-08-medicalmalpractice.pdf>.

342. *Id.* at 6.

343. *Id.*

344. FRED J. HELLINGER & WILLIAM E. ENCINOSA, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE IMPACT OF STATE LAWS LIMITING MALPRACTICE AWARDS ON THE GEOGRAPHIC DISTRIBUTION OF PHYSICIANS 2 (2003), <http://www.ahrq.gov/research/tortcaps/tortcaps.pdf> (arguing that “[s]upporters of legislation to cap damages in malpractice cases maintain that it reduces malpractice premiums and helps insure an adequate supply of physicians”).

doctors choose to practice.³⁴⁵ Many physicians claim frivolous malpractice suits pressured them in their practice to order unnecessary tests or defer patients out of fear of being sued.³⁴⁶ However, physician surveys reveal these concerns are unrelated to a doctor's respective state malpractice protection, including caps on non-economic damages.³⁴⁷ What is more alarming is that "physicians do not consider medical errors a 'problem'" when compared to other health care issues such as frivolous claims and malpractice insurance rates.³⁴⁸ Until physicians start recognizing the real problems within the health care system – the egregious amount of negligent medical errors – the health care system will remain in crisis.

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

VI. CONCLUSION

After the *Watts* decision, there are currently no caps on non-economic damages in Missouri.³⁴⁹ Because some feel the ruling in *Watts* will lead to a rise in the number of lawsuits and an increase in medical malpractice premiums, some individuals are calling for the General Assembly to restore the non-economic damages cap as a "high priority" issue in 2013.³⁵⁰ In January 2013, two bills were introduced to recreate a statutory cause of action against health care providers in malpractices cases.³⁵¹ The legislature is also consid-

345. See U.S. GEN. ACCOUNTING OFFICE, NO. GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 16-24 (2003), <http://www.gao.gov/new.items/d03836.pdf>.

346. Emily R. Carrier et al., *Physicians' Fears of Malpractice Are Not Assuaged by Tort Reforms*, 29 HEALTH AFFAIRS 1585, 1587 (2010), available at <http://content.healthaffairs.org/content/29/9/1585.full.pdf+html>.

347. *Id.* at 1590.

348. Williams, *supra* note 14, at 487 ("[O]ne-third of surveyed physicians named medical malpractice lawsuits and medical malpractice insurance as the two biggest problems in healthcare, but only [five percent] listed medical errors resulting in patient injuries as the biggest problem in healthcare."); see also Robert J. Blendon et al., *Views of Practicing Physicians and the Public on Medical Errors*, 347 NEW ENG. J. MED. 1933, 1935 (2002), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMs022151>.

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

350. Gallegos, *supra* note 16.

351. Representative Eric Burlison introduced House Bill 112. See H.B. 112, 97th Gen. Assemb., Reg. Sess. (Mo. 2013), available at <http://www.house.mo.gov>

ering a constitutional amendment to limit lawsuits against medical professionals.³⁵² However, Missouri voters would need to approve such an amendment.³⁵³ If Missouri overturns the *Watts* decision and reinstates a cap system, many changes should be made to the non-economic cap policy that was in place from 2005 to 2012, including a cap that is adjusted for inflation. However, because of Missouri's strong constitutional "remain inviolate" language, Missouri will likely have to explore other options besides caps in the future when making decisions about tort reform litigation.

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

/billsummary.aspx?bill=HB112&year=2013&code=R. Senator Dan Brown introduced Senate Bill 105. See S.B. 105, 97th Gen. Assemb., Reg. Sess. (Mo. 2013), available at http://www.senate.mo.gov/13info/BTS_Web/Bill.aspx?SessionType=R&BillID=17100416.

352. Senator Brad Lager introduced Senate Joint Resolution No. 1 to repeal Missouri's right to jury trial and adopt a new section relating to non-economic damage awards. See S.J.R. 1, 97th Gen. Assemb., Reg. Sess. (Mo. 2013), available at <http://legiscan.com/MO/text/SJR1/id/671326>.

353. Chris Blank, *Missouri Lawmakers to Pursue Medical Liability Limits*, KAN. CITY STAR, Jan. 5, 2013, <http://www.kansascity.com/2013/01/05/3995913/missouri-lawmakers-to-pursue-medical.html>.

354. See *Watts*, 376 S.W.3d at 635-36.

355. *Id.* at 637-46.