SUPREME COURT OF MISSOURI
en banc

FILED
JUL 22 2021
CLERK, SUPREME COURT

MARIA DEL CARMEN ORDINOLA VELAZQUEZ, Appellant-Respondent, v. UNIVERSITY PHYSICIAN ASSOCIATES, ET AL., Respondents-Appellants.	)	No. SC98977

DISSENTING OPINION

Nine years ago, I expressed apprehension that if the legislature has unfettered power to modify or abolish common law causes of action by statute, and if "this maxim is absolute, then the legislature could abolish common law actions and then reenact them as statutory actions with dramatic limitations on damages." *Sanders v. Ahmed*, 364 S.W.3d 195, 214 (Mo. banc 2012) (Draper, J., dissenting). Today, my apprehension has become a reality with the principal opinion's tolerance of the legislature's form over substance maneuvering to deprive Missouri citizens of their right to trial by jury guaranteed by article I, section 22(a) of the Missouri Constitution. This Court's holding provides the legislature with unconstitutional carte blanche to limit the constitutional right to trial by jury through hostile legislation, when, in fact, "[t]he voters of this state are the only ones

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empowered to change the constitution." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 773 (Mo. banc 2010) (Wolff, J., concurring).

A jury determined Maria del Carmen Ordinola Velazquez (hereinafter, "Ordinola") was injured catastrophically by University Physician Associates and various physicians (hereinafter and collectively, "Physicians"). The jury further determined Ordinola should receive $1 million in noneconomic damages under the particularized facts of her case. The circuit court reduced Ordinola's noneconomic damage award pursuant to the statutory cap in section 538.210.2, RSMo Supp. 2015.[1]

The principal opinion affirms the circuit court's judgment, upholds section 538.210 as constitutional, and condones the legislature's conversion of the common law medical malpractice cause of action into a statutory cause of action merely to impose the same statutory caps this Court previously struck down for infringing on the right to trial by jury protected by the Missouri Constitution. I believe the legislature's abolition of the common law medical malpractice cause of action and replacing it with an identical statutory cause of action to impose identical statutory caps is a blatant end-run around the Missouri Constitution's mandate that the right of trial by jury as heretofore enjoyed shall remain inviolate and this Court's holding in *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. banc 2012), which held these same statutory caps were unconstitutional when applied to common law medical malpractice causes of action. Therefore, I dissent.

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[1] All statutory references are to RSMo Supp 2015.

Article I, section 22(a) of the Missouri Constitution provides each citizen the fundamental guarantee that "the right of trial by jury as heretofore enjoyed shall remain inviolate[.]" "The Court has interpreted this provision to mean that the right to a jury trial is 'beyond the reach of hostile legislation and [is] preserved' as it existed at common law before the state constitution's first adoption in 1820." *Dodson v. Ferrara*, 491 S.W.3d 542, 553 (Mo. banc 2016) (alteration in original) (quoting *State ex rel. St. Louis, Keokuk & Nw. Ry. Co. v. Withrow*, 36 S.W. 43, 48 (Mo. 1896)). The plain meaning of the word "inviolate" is "free from change or blemish, pure or unbroken." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (1993). The phrase "heretofore enjoyed" means "the constitution protects the right as it existed when the constitution was adopted and does not provide a jury trial for proceedings subsequently created." *Dodson*, 491 S.W.3d at 553 (quoting *Hammons v. Ehney*, 924 S.W.2d 843, 848 (Mo. banc 1996)).

In 2012, this Court struck down the previous version of section 538.210—which imposed identical statutory caps on noneconomic damages in common law medical malpractice causes of action—as violating the right to trial by jury. *Watts*, 376 S.W.3d at 636. This Court recognized "civil actions for damages resulting from personal wrongs have been tried by juries since 1820." *Id.* at 638. This Court explained, "Once the right to a trial by jury attaches … the plaintiff has the full benefit of that right free from the reach of hostile legislation." *Id.* at 640.

Precisely as in *Watts*, there is no doubt the version of section 538.210 at issue here constitutes hostile legislation designed to curtail this constitutional right. The concurring opinion in *Klotz* recognized the legislature cannot limit the constitutional right to trial by

jury, no matter what its underlying policy, judgment, or rationale may be. *Klotz*, 311 S.W.3d at 773 (Wolff, J., concurring).[2] "[T]he right to trial by jury ... applies 'regardless of any statutory provision' and is 'beyond the reach of hostile legislation.'" *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 92 (Mo. banc 2003) (quoting *Lee v. Conran*, 111 S.W. 1151, 1153 (Mo. 1908)). In reaching its decision in *Watts*, this Court overruled *Adams By and Through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. banc 1992), which upheld similar statutory caps on noneconomic damages enacted in 1986. *Watts*, 364 S.W.3d at 644-46. This Court found *Adams*' reasoning contained several flaws, one of which is particularly relevant to the statutory caps at issue here. This Court found:

> *Adams* further misconstrues the right to trial by jury because it specifically permits legislative limitation of an individual constitutional right. *Adams* justifies the section 538.210 damage cap because the jury nominally is permitted to find the facts while the judge statutorily is required to make a separate legal determination that applies the damages cap. The unavoidable result of this rationale is that right to trial by jury is directly subject to legislative limitation. This holding is untenable for the simple reason that a statutory limit on the state constitutional right to trial by jury amounts to an impermissible legislative alteration of the Constitution.

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[2] Judge Wolff also questioned the legislature's justification for imposing the noneconomic damages caps, explaining that the legislature "enacted the limits on noneconomic damages in response to what it perceived as a serious problem in the tort and insurance liability system ... [in] that the legislature considered malpractice litigation to be a crisis, but it seems a rather slow-moving crisis, more a trickle than a flood." *Klotz,* 311 S.W.3d at 773 (Wolff, J., concurring). In *Dodson*, I too expressed doubt about the existence of the alleged medical malpractice litigation "crisis:" "A clear, cogent argument exists that this medical malpractice "crisis" was manufactured and continues to be exacerbated today by a special interest group that persistently labels, for shock value, and characterizes some jurisdictions as "judicial hellholes." These characterizations and the underlying "support" for these characterizations have been criticized roundly." *Dodson*, 491 S.W.3d at 572 (Draper, J., dissenting).

Id. at 642.

The principal opinion rubberstamps the legislature's machinations to re-impose unconstitutional statutory caps in medical malpractice actions, merely noting that medical malpractice now is a statutory cause of action. To that end, the principal opinion finds *Sanders* controls. *Sanders* upheld statutory caps on noneconomic damages in wrongful death actions because the legislature has the authority to choose what remedies are permitted under statutorily-created causes of action. *Sanders*, 364 S.W.3d at 203-04. In addition to turning a blind eye to the legislature's unconstitutional limitation of the right to trial by jury, the principal opinion wholly ignores the underpinning of *Sanders*' holding. *Sanders* determined, "Missouri does not recognize a common-law claim for wrongful death. This Court has reaffirmed time and time again that 'a claim for damages for wrongful death is statutory; it has no common-law antecedent.'" *Id.* at 203 (quoting *Diehl,* 95 S.W.3d at 88). This Court characterized wrongful death as "a new statutory cause of action independent of the predicate tort." *Id.* at 204. Hence, this Court held the legislature's enactment to limit noneconomic damages for wrongful death actions did not violate article I, section 22(a).[3] *Id.*

[3] *Dodson* reaffirmed *Sanders*' rationale in upholding statutory caps on noneconomic damages in wrongful death actions by reiterating "the wrongful death action was not recognized at common law in 1820 in Missouri but is, instead, a statutory creation subject to statutory caps and limitations." *Dodson*, 491 S.W.3d at 550. *Dodson* explicitly found *Watts* did not apply to wrongful death statutory caps because "*Watts* involved a claim for personal injury, which was a cause of action recognized at common law and was 'not subject to legislative limits on damages' when the constitution was adopted in 1820." *Id.*

Unlike wrongful death actions in *Sanders,* medical malpractice was a common law cause of action that existed when Missouri's constitution was adopted in 1820. This common law cause of action existed until this Court struck down section 538.210's statutory caps on noneconomic damages in *Watts*. There is no question the statutorily-created medical malpractice cause of action is not "new," and it certainly is not independent of the predicate tort, in that the elements for both the common law and statutory causes of action are identical. Rather than abide by the constitution, the legislature abolished common law medical malpractice simply to re-impose the statutory caps that were struck down in *Watts*.

To justify this hostile legislation, the principal opinion cites the legislature's abolition of a worker's right to file a common law negligence claim against an employer and enactment of the statutory worker's compensation act as an example of the legislature's power to change or abolish common law causes of action. This Court upheld the constitutional validity of the legislature's enactment of the workers' compensation act in *DeMay v. Liberty Foundry Company*, 37 S.W.2d 640 (Mo. 1931), acknowledging, "the legislature has power to change or to abolish existing common-law or statutory remedies." *Id.* at 646. However, analogizing the enactment of the workers' compensation act to the legislature's abolition of the medical malpractice cause of action here is unpersuasive when one carefully examines this Court's reasoning in *DeMay*, which also was rejected in *Watts*.

First, *DeMay* took pains to distinguish the new workers' compensation act from the common law negligence claims against employers when upholding the act. *DeMay* recognized the new workers' compensation act "affords a right and remedy to an employee

for an injury occasioned without wrong, human fault, or negligence ...." *Id.* This Court found this new statutory scheme was "of recent origin, and proceedings looking to awards of compensation, and for the ascertainment and determination of claims for compensation (as distinguished from compensatory damages), were wholly unknown at common law, and, of course, came into existence long since the adoption of our present Constitution in 1875." *Id.* at 648. This Court classified the new statutory scheme commencing as an administrative proceeding as "special and wholly statutory," "in a class by itself," and "more of the nature of an action in equity." *Id.*

The legislature's creation of a new workers' compensation scheme differs significantly from the legislature's abolition of the common law medical malpractice action in the case at bar. In abolishing the common law negligence claim against the employer in favor of the statutory workers' compensation act, the legislature significantly altered every aspect of the common law claim, including the worker's burden to demonstrate the employer's negligence and directing the parties to participate in administrative proceedings. In the instant case, the legislature abolished the common law medical malpractice cause of action and enacted *the exact same cause of action* statutorily merely to avoid having to comply with the Missouri Constitution and *Watts*.

Second, *Watts* found *Adams*' reliance on this very rationale from *DeMay* unpersuasive:

> Instead, [*Adams*] cited to *DeMay* ... to argue that the legislature could abolish a common law cause of action for damages against an employer when it substituted a system of workers' compensation in its stead, and then said that if this were true, then it must be 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 in those causes of action."
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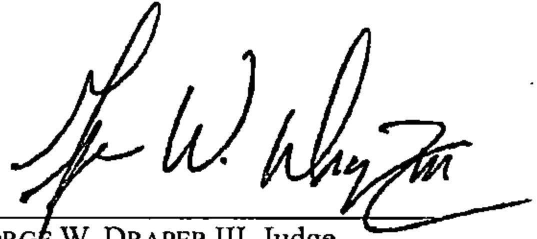
> This statement is *Adams*' total analysis on this issue, and other cases upholding statutory damage caps simply repeat this mantra. They do so without any further analysis and without addressing how this reasoning can stand in the face of their continued recognition that statutes cannot limit constitutional rights. Indeed, if the two were equivalent, then it would be *DeMay* and similar cases that would have to be overruled. But *De May* itself recognized that its analysis, even if it is accepted as valid, applies only '*when the cause of action cognizable at law is abrogated or removed*'—that is, it held only that if there is no cause of action, there is nothing to which the right to jury trial can attach. Nothing in it suggested a legislature can take constitutional protections from a plaintiff seeking relief under existing causes of action. If that could be done, it would make constitutional protections of only theoretical value—they would exist only unless and until limited by the legislature. Such rights would not be rights at all but merely privileges that could be withdrawn.

Watts, 376 S.W.3d at 642-43 (emphasis in original) (internal citations omitted).

By upholding section 538.210, the principal opinion rewards the legislature's form over substance maneuvering rather than protect the constitutional right to trial by jury for all Missouri citizens, and especially for those who have suffered life-altering and catastrophic injuries due to the negligence of medical professionals. By condoning the legislature's flagrant end-run around this vital constitutional protection, "the right to trial by jury [now] is defined not by the text and history of our constitution but instead by the whim of legislative prerogative." *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 382 (Mo. banc 2012) (Teitelman, J., dissenting). It bears repeating that "[o]ur constitution 'deals with substance, not shadows.... If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.'" *Sanders*, 364 S.W.3d at 215 (Draper, J., dissenting) (quoting *Cummings v. Mo.*, 71 U.S. 277, 325, 4 Wall. 277, 18 L. Ed. 356 (1866)). I would find

section 538.210's statutory cap on noneconomic damages unconstitutional, reverse the circuit court's judgment, and remand the cause to award Ordinola the full amount of the jury's verdict against Physicians.



GEORGE W. DRAPER III, Judge