



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

MARIA DEL CARMEN)
ORDINOLA VELAZQUEZ,)
Appellant-Respondent,)
v.) WD83485 (consolidated with
JENNIFER REEVES, M.D., et al,) WD83490, WD83722 and
Respondent-Appellants.) WD83781)
FILED: February 16, 2021

**Appeal from the Circuit Court of Jackson County
The Honorable John M. Torrence, Judge**

**Before Division One: Alok Ahuja, P.J., and Thomas H. Newton
and Thomas N. Chapman, JJ.**

In this medical malpractice case, a jury in the Circuit Court of Jackson County awarded Maria del Carmen Ordinola Velazquez¹ \$30,000 in economic damages and \$1,000,000 in non-economic damages. Pursuant to § 538.210,² the circuit court reduced Ordinola’s non-economic damages award from \$1,000,000 to \$748,828, and entered judgment accordingly. Ordinola appeals the reduction of the damages award, contending that the damages limitations contained in § 538.210

¹ Appellant’s last name is spelled inconsistently in the record, sometimes as “Velasquez,” and sometimes as “Velazquez.” The parties’ briefing spells Appellant’s last name “Velazquez,” and refers to her by her paternal surname of “Ordinola.” We follow the usage in the parties’ briefing.

² Statutory citations refer to the 2016 edition of the Revised Statutes of Missouri. Section 538.210 was amended in 2017 and again in 2020. See H.B. 452, 99th Gen. Assembly, 1st Reg. Session (2017); S.B. 591, 100th Gen. Assembly, 2d Regular Session (2020). Although certain subsections of § 538.210 were renumbered, the 2017 and 2020 amendments did not substantively alter any of the provisions which are at issue in this appeal.

are unconstitutional. The defendants also appeal, alleging errors at trial, and in the manner in which the circuit court applied § 538.210.

Ordinola has filed a motion to transfer this case to the Missouri Supreme Court. We conclude that her appeal raises a real and substantial challenge to the constitutionality of § 538.210, and thereby invokes the Supreme Court's exclusive appellate jurisdiction under Article V, § 3 of the Missouri Constitution. We accordingly grant Ordinola's motion to transfer, and order that the case be transferred to the Supreme Court pursuant to Article V, § 11 of the Missouri Constitution.

Factual Background

On August 24, 2017, Ordinola filed a medical malpractice action against multiple physicians and against University Physician Associates, which employed several of the individual defendants. In her petition, Ordinola alleged that the physicians had acted negligently in multiple respects in connection with the delivery of her child, and her post-partum care, at Truman Medical Center in Kansas City in September 2015. Ordinola alleged that as a result of the physicians' negligence, she was required to undergo multiple surgeries, and experienced a variety of serious and permanent injuries, including cardiac arrest, massive internal bleeding, a complete hysterectomy, a laceration to the bladder, permanent leakage of urine through the vagina, and pain during urination and sexual relations.

Ordinola's petition anticipated the potential application of the damages limitations contained in § 538.210 to her case. The petition alleged that the damages caps in § 538.210 were unconstitutional on a variety of grounds. Among other things, Ordinola's petition alleged that application of § 538.210 would deny her the right to a trial by jury guaranteed in Article I, § 22(a) of the Missouri

Constitution, as interpreted by the Missouri Supreme Court in *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. 2012).

The case was tried to a jury in October 2019. At the conclusion of trial, the jury returned a verdict allocating 100% of the fault among the defendants (except defendant Dr. Susan Mou, whom the jury found to bear no fault). The jury awarded Ordinola damages totaling \$1,030,000: \$30,000 in past economic damages; \$300,000 in past non-economic damages; and \$700,000 in future non-economic damages.

The defendants filed motions for remittitur, asking the circuit court to reduce the total non-economic damage award to \$400,000 – the cap specified in § 538.210.2(1) for cases involving non-catastrophic personal injuries. Ordinola filed suggestions in opposition to the defendants’ remittitur motions, renewing her assertion that the statutory damages cap is unconstitutional. In the alternative, Ordinola asked the circuit court to apply the higher cap found in § 538.210.2(2) for cases involving “catastrophic personal injury,” which would limit her award of non-economic damages to \$700,000 rather than \$400,000.

On January 6, 2020, the circuit court entered its judgment. The court refused to find § 538.210 unconstitutional. The court agreed with Ordinola, however, that the case involved “catastrophic personal injury” subject to the higher cap found in § 538.210.2(2). The court accordingly reduced the non-economic damages awarded by the jury from \$1,000,000 to \$748,828 (the amount of the relevant cap at the time of the jury verdict, after application of the cost-of-living escalator in § 538.210.8).

All parties (except Dr. Mou) appeal from the circuit court’s judgment.

On June 4, 2020, Ordinola filed a motion to transfer the appeal to the Missouri Supreme Court, contending that her constitutional challenge to § 538.210 invoked the Supreme Court’s exclusive appellate jurisdiction. The motion was

taken with the case. Although the defendants did not file any written response to Ordinola’s motion to transfer, at oral argument they acknowledged that Ordinola’s constitutional challenge to § 538.210 invokes the Missouri Supreme Court’s exclusive appellate jurisdiction.

Discussion

Under Article V, § 3 of the Missouri Constitution, the Missouri Supreme Court has “exclusive appellate jurisdiction in all cases involving the validity of a . . . statute . . . of this state.”

On appeal, Ordinola directly challenges the constitutionality of § 538.210, contending that it violates the right to trial by jury guaranteed by Article I, § 22(a) of the Missouri Constitution.³ On its face, her constitutional claim is the sort of claim which falls within the Supreme Court’s exclusive appellate jurisdiction. *See Accident Fund Ins. Co. v. Casey*, 536 S.W.3d 360, 364 (Mo. App. W.D. 2017) (“the [Supreme] Court’s ‘exclusive appellate jurisdiction is invoked when a party asserts that a state statute directly violates the constitution either facially or as applied’”; quoting *McNeal v. McNeal-Sydnor*, 472 S.W.3d 194, 195 (Mo. 2015)).

“The mere assertion that a statute is unconstitutional does not alone deprive this Court of jurisdiction,” however. *Accident Fund*, 536 S.W.3d at 365 (quoting *Sharp v. Curators of Univ. of Mo.*, 138 S.W.3d 735, 737 (Mo. App. E.D. 2003)). Instead, “[j]urisdiction of cases involving the validity of a state statute vests exclusively in the Supreme Court only if the claim has been properly preserved and the allegation is real and substantial and not merely colorable.” *Id.* (citing *Sharp*, 138 S.W.3d at 783); *see also, e.g., Donaldson v. Mo. State Bd. of Registration for Healing Arts*, No. WD83217, 2020 WL 3697769, at *2 (Mo. App. W.D. July 7, 2020).

³ Although her petition alleged that § 538.210 was unconstitutional on multiple grounds, Ordinola has alleged on appeal only that the statute violates her constitutional right to a jury trial.

We first consider whether Ordinola properly preserved her constitutional argument in the circuit court. “[I]f the constitutional challenge has not been properly preserved for appellate review, the claim is not ‘real and substantial,’ and jurisdiction remains with [the appellate] court.” *Ritter v. Ashcroft*, 561 S.W.3d 74, 84 (Mo. App. W.D. 2018) (quoting *Joshi v. St. Luke's Episcopal Presbyterian Hosp.*, 142 S.W.3d 862, 866 (Mo. App. E.D. 2004)). “To properly preserve a constitutional issue for appellate review, the issue must be raised at the earliest opportunity and preserved at each step of the judicial process.” *Sharp*, 138 S.W.3d at 738 (citations omitted). “[T]he issue must not only have been presented to the trial court, but the trial court must have ruled thereon.” *Id.* (quoting *Estate of McCluney*, 871 S.W.2d 657, 659 (Mo. App. W.D. 1994)). The point raised on appeal must also be based upon the same theory advanced at the circuit court. *Id.*

Ordinola properly raised and preserved the constitutional issue in the circuit court. She challenged the constitutionality of § 538.210 in her original petition (before she had even been awarded damages, and therefore before the applicability and validity of § 538.210 was even in issue). After the jury returned its verdict and the defendants filed motions for remittitur asking the circuit court to apply § 538.210, Ordinola renewed her constitutional challenges, including her claim that the statute violates the right to trial by jury guaranteed by Article I, § 22(a) of the Missouri Constitution, as interpreted in *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 641 (Mo. 2012). Even disregarding the allegations in Ordinola’s petition, she timely raised her constitutional argument by asserting it in response to the defendant’s remittitur motion. *See Dodson v. Ferrara*, 491 S.W.3d 542, 553 (Mo. 2016) (wrongful-death plaintiffs properly preserved their challenge to the constitutionality of § 538.210 when they raised their constitutional arguments in response to the defendants’ post-verdict motions for application of the statutory caps). In addition, the circuit court’s judgment ruled on the constitutional issue on

the merits. The court expressly denied Ordinola’s claim that § 538.210 violates the Missouri Constitution, and applied the statute to reduce her jury-assessed non-economic damages. On appeal, Ordinola raises the same constitutional challenge to § 538.210 which she timely asserted in the circuit court.

We next consider whether Ordinola’s constitutional argument is real and substantial.

In determining whether a constitutional claim is real and substantial, we make a preliminary inquiry as to whether it presents a contested matter of right that involves fair doubt and reasonable room for disagreement. If the initial inquiry discloses the claim is so legally or factually insubstantial as to be plainly without merit, the claim may be deemed merely colorable. [¶] In the context of the “not merely colorable” test, the word “colorable” means feigned, fictitious or counterfeit, rather than plausible.

Donaldson, 2020 WL 3697769, at *3 (citations and internal quotation marks omitted).

In *Watts*, the Missouri Supreme Court addressed the constitutionality of an earlier version of § 538.210, which also capped non-economic damages in medical malpractice cases. The Court held that common-law medical negligence actions “fall[] into th[e] category” of civil actions which have been tried by juries since the first Missouri Constitution was adopted in 1820, and thus, that the right to a jury trial found in Article I, § 22(a) of the Missouri Constitution attached to such actions. *Watts*, 376 S.W.3d at 638. The Court also held that the earlier version of § 538.210 “directly curtails the jury's determination of damages and, as a result, necessarily infringes on the right to trial by jury when applied to a cause of action to which the right to jury trial attaches at common law.” *Id.* at 640. The Court accordingly held that the earlier version of § 538.210 was unconstitutional. *Watts* overruled the Court’s earlier decision in *Adams by and through Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 907 (Mo. 1992), which had held that the limitation on

non-economic damages in § 538.210 did *not* violate the Constitution’s guarantee of a trial by jury. *Watts*, 376 S.W.3d at 645-46.

Ordinola argues that the invalidity of the current version of § 538.210 is established by *Watts*, and by the Supreme Court’s subsequent decision in *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014), which followed *Watts* and found a cap on punitive damages to be unconstitutional as applied to common-law fraud actions. If the result in this case were clearly dictated by the Supreme Court’s prior decisions in *Watts* and *Lewellen*, we would arguably have jurisdiction to decide Ordinola’s constitutional argument. “If the United States Supreme Court or Missouri Supreme Court has addressed a constitutional challenge, the claim is merely colorable and the intermediate appellate court has jurisdiction.” *D.E.G. v. Juvenile Officer of Jackson Cnty.*, 601 S.W.3d 212, 215 n.2 (Mo. 2020) (quoting *State v. Henry*, 568 S.W.3d 464, 479 (Mo. App. E.D. 2019)).

The constitutionality of the current version of § 538.210 is not necessarily controlled by *Watts* and *Lewellen*, however. *Watts* involved a *common-law* claim for negligence by health-care practitioners, while *Lewellen* involved a *common-law* fraud claim. The current version of § 538.210 purports to repeal the common-law cause of action for medical malpractice involved in *Watts*, and replace it with a new cause of action created by the legislature. Section 538.210.1 declares that “[a] statutory cause of action for damages against a health care provider for personal injury or death arising out of the rendering of or failure to render health care services is hereby created, replacing any such common law cause of action.” As part of the same 2015 legislation which amended § 538.210, the General Assembly also amended § 1.010, which generally provides that “[t]he common law of England . . . [is] the rule of action and decision in this state.” § 1.010.1. The 2015 legislation adds a new subsection to § 1.010, in which “[t]he general assembly expressly excludes from this section the common law of England as it relates to claims arising

out of the rendering of or failure to render health care services by a health care provider, it being the intent of the general assembly to replace those claims with statutory causes of action.” § 1.010.2.

We recognize that, other than imposing limitations on the damages to which a plaintiff is entitled, the so-called “statutory cause of action” for medical malpractice created by the legislature in 2015 appears to be identical to the common-law cause of action which previously existed. The “new” cause of action appears to be subject to the same substantive standards, and the same procedural framework, as the earlier common-law action. Nevertheless, if the damages caps in the current version of § 538.210 are viewed as limitations on a *statutory* cause of action, rather than on a *common-law* claim, that could have important implications for Ordinola’s constitutional argument.

The Missouri Supreme Court has held that damages limitations may permissibly be applied to certain *statutory* claims, even though those same limitations would be unconstitutional as applied to *common-law* causes of action. In *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. 2012), the Missouri Supreme Court held that the damages limitations contained in an earlier version of § 538.210 were constitutional as applied to a statutory wrongful-death claim. In *Dodson v. Ferrara*, 491 S.W.3d 542 (Mo. 2016), wrongful-death plaintiffs argued that a later version of § 538.210 was unconstitutional; in making this argument, the plaintiffs argued that the analysis in *Watts*, rather than the analysis in *Sanders*, controlled their case.

The Missouri Supreme Court in *Dodson* explained that the *Watts* analysis was inapplicable to a cause of action created by statute, and that the legislature had greater power to limit recoverable damages when dealing with a statutory, rather than a common-law, cause of action. The plurality opinion in *Dodson* explained:

Watts involved a common law claim for personal injury (non-wrongful death) medical malpractice filed by a mother on behalf of her son. . . .

Watts did not overrule *Sanders*. Instead, *Watts* differentiated common law causes of action as not being subject to legislative limits on the right to trial by jury. By its own terms, *Watts* applies to “cause[s] of action to which the right to jury trial attaches at common law.” [376 S.W.3d] at 640. As the Court noted in *Sanders*, wrongful death actions were not recognized at common law in 1820 in Missouri but, instead, are creatures of statute. Because Plaintiffs' action is for wrongful death, *Sanders* provides the correct analysis of their constitutional challenge.

....

... *Sanders* and *Watts* set forth a different analysis for determining whether the constitutional right to a jury trial is violated by legislative caps on recoveries. In *Sanders*, the Court held:

The legislature has the power to define the remedy available if it creates the cause of action. . . .

[T]he legislature has the authority to choose what remedies will be permitted under a statutorily created cause of action.

The legislature in so doing, at least in regard to a statutorily created cause of action limited “the substance of the claims themselves,” as it has a right to do in setting out the parameters of a statutory cause of action.

Sanders, 364 S.W.3d at 203 [internal citations omitted]. As this Court stated in *Sanders*:

... The General Assembly has the right to create causes of action and to prescribe their remedies. The General Assembly may negate causes of action or their remedies that did not exist prior to 1820. . . .

364 S.W.3d at 205.

In *Watts*, on the other hand, the Court held that such caps “infringe[] on the right to trial by jury when applied to a cause of action to which the right to jury trial attaches at common law.” 376 S.W.3d at 640 [emphasis added by *Dodson*].

Dodson, 491 S.W.3d at 555-56 (other citations and internal quotation marks omitted; footnote omitted).

The concurring opinion in *Dodson* similarly recognized a sharp distinction between the constitutionality of statutory damages caps, depending on whether the

limitations apply to statutory, or instead to common-law, causes of action. *See id.* at 571 (Fischer, J., concurring in result) (“the constitutional jury trial right prohibits the enforcement of statutory caps on amounts recoverable on a common law cause of action but is not offended by such caps on amounts recoverable under a statutory cause of action”); *see also Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 376 (Mo. 2012) (holding that a cap on the damages recoverable in an action brought under the Missouri Merchandising Practices Act was constitutional, because the Legislature “limited ‘the substance of the claims themselves,’ as it has a right to do in setting out the parameters of a statutory cause of action”; citation omitted).

The Missouri Supreme Court has not considered the precise question that Ordinola raises here: whether the legislature may constitutionally limit the damages recoverable on a cause of action which *did* exist at common law, but which has now been “replaced” by a statutory cause of action. The legal effect of the legislature’s rechristening of a common-law cause of action as “statutory” has not previously been decided by the Supreme Court. Because this case does not simply involve a rote application of either the *Watts-Lewellen* line of cases, or instead the *Dodson-Sanders* line of cases, Ordinola’s constitutional claim raises “a contested matter of right that involves fair doubt and reasonable room for disagreement.” *Donaldson*, 2020 WL 3697769, at *3 (citations and internal quotation marks omitted). By seeking transfer, Ordinola has herself recognized that the constitutional issue she raises differs from the question decided in *Watts* or in other existing Supreme Court precedent, and must be addressed on appeal by the Supreme Court. Because Ordinola’s constitutional challenge is not “merely colorable,” it falls within the exclusive appellate jurisdiction of the Missouri Supreme Court.

We recognize that, in their appeals, the defendants raise a series of non-constitutional issues concerning alleged errors at trial, and concerning the circuit court’s application of § 538.210. Because Ordinola’s challenge to the constitutionality of § 538.210 is “real and substantial” and triggers the Supreme Court’s exclusive jurisdiction, however, we cannot decide *any* issue in the case, including the non-constitutional claims asserted by the defendants. “Even if some but not all of the issues presented in this case fall within the exclusive jurisdiction of the Supreme Court, appeals are not bifurcated and the ‘appeal is properly lodged in the court having jurisdiction over all issues in the case.’” *SEBA, LLC v. Dir. of Revenue*, No. WD83083, 2020 WL 3067497, at *4 (Mo. App. W.D. June 9, 2020) (quoting *State ex rel. Union Electric Co. v. Pub. Serv. Comm’n*, 687 S.W.2d 162, 165 (Mo. 1985)); *see also, e.g., In re Estate of Austin*, 389 S.W.3d 168, 170 n.9 (Mo. 2013); *State v. Nathan*, No. ED96851, 2012 WL 5860933, at *3 (Mo. App. E.D. Nov. 20, 2012) (“When the Missouri Supreme Court has exclusive jurisdiction, its jurisdiction extends to all issues in the case.” (citations omitted)); *Snodgrass v. Martin & Bayley, Inc.*, No. ED87304, 2006 WL 1735246, at *3 (Mo. App. E.D. June 27, 2006) (where “this Court lacks jurisdiction, . . . we are without the power to reach any issue in the case”).

Conclusion

Because Ordinola’s challenge to the constitutionality of § 538.210 was properly preserved for appellate review and presents a real and substantial question, this case falls within the exclusive appellate jurisdiction of the Missouri Supreme Court under Article V, § 3 of the Missouri Constitution. We accordingly grant Ordinola’s motion to transfer, and order that the case be transferred to the Missouri Supreme Court for disposition. *See* Mo. Const. Art. V, § 11.


Alok Ahuja, Judge

All concur.