

Non-Economic Damage Caps Remain Constitutional in Wrongful Death Actions

AUTHOR: SANDBERG PHOENIX

On April 19, 2016, the Missouri Supreme Court issued its opinion in *James Dodson, et al. v. Robert Ferrara, M.D., et al.* The Court upheld Missouri's 2005 "tort reform" non-economic damage cap as constitutional as applied in wrongful death cases.

Basic Facts and Litigation History: On February 8, 2011, Shannon Dodson presented to the Mercy Hospital St. Louis complaining of shortness of breath. Ms. Dodson was diagnosed with bronchitis and after a stress echocardiogram indicated there might be some abnormalities with her heart, a heart catheterization was recommended. Dr. Robert Ferrara performed the heart catheterization. During the procedure, Ms. Dodson suffered a left main coronary artery dissection. Dr. Ferrara called for assistance, but did not attempt to open the artery for approximately 30 minutes after the dissection. Attempts to place a stent in the artery were unsuccessful and, more than 45 minutes after the dissection was first noticed, Ms. Dodson was transferred to the operating room for emergency surgery. The surgery was unsuccessful and Ms. Dodson died as a result of the dissection.

The jury awarded \$10,831,155 to Ms. Dodson's spouse and three children, consisting of \$9,000,000 in non-economic damages and \$1,831,155 in past and future economic damages. The Court entered judgment reducing the non-economic damages to the statutory non-economic damage cap of \$350,000.

Arguments: The plaintiffs argued the non-economic damage cap does not apply in wrongful death cases because *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012) (affirming the pre-2005 damage caps in wrongful death actions), no longer applies in light of the decision in *Watts v. Lester E. Cox Med. Ctr.*, 376 S.W.3d 633 (Mo. banc 2012) (overturning the 2005 damage caps as applied to medical malpractice personal injury claims). The plaintiffs argued the 2005 tort reform statute is fundamentally different from the pre-2005 statute ruled on in *Sanders* and also that section 538.210.1 is not severable and, therefore, there was no statute for the court to apply in light of the *Watts* decision. The plaintiffs also argued the cap is unconstitutional on several grounds, including equal protection, violation of the right to trial by jury, and separation of powers. Finally, the plaintiffs appealed the trial court's granting of a directed verdict on the issue of aggravating circumstances damages at the close of the defendants' evidence.

The defendants' primarily relied on the precedent established by the Court's ruling in *Sanders*. The defendants also argued the trial court failed to grant a directed verdict to on the plaintiff's aggravating circumstances claim at the close of plaintiffs' evidence, the trial court failed to grant their motion for a new trial based on the questioning of two defense witnesses, and gave an improper jury instruction regarding the jury's consideration of insurance coverage. Finally, the defendants argued the trial court erred in overruling their motion for directed verdict, for judgment notwithstanding the verdict, and for a new trial on plaintiffs' claim for future economic damages because plaintiffs failed to prove the damages to a reasonable degree of certainty.

Court Ruling: The Court's opinion, authored by Judge Russell, reaffirms that §538.210, RSMo, capping non-economic damages, does not violate the Missouri Constitution as applied to wrongful death claims because wrongful death actions are statutorily created and not grounded in the common law as it existed in 1820. The Court rejected the plaintiffs' argument that the 2005 amendments to §538.210 changed the analysis from *Sanders*. The Court also rejected the argument that *Watts* applied as opposed to *Sanders*. The Court noted *Watts* differentiated common law causes of action in determining whether the right to trial by jury is implicated and further rejected the plaintiffs' argument that a wrongful death claim existed at common law. Additionally, the Court found §538.210 was severable and that *Watts* did not invalidate the entire statute. Further, the Court found the noneconomic damages cap does not deny wrongful death plaintiffs the equal protection of the law by limiting their recovery while personal injury plaintiffs have unlimited recovery. Finally, the Court reaffirmed that the noneconomic damages cap as applied to the statutory wrongful death cause of action does not infringe on the judiciary's power and, thus, does not violate separation of powers.

The Court also ruled that the plaintiffs failed to make a submissible case that the defendants acted with complete indifference to or conscious disregard for the safety of Ms. Dodson and, therefore, the trial court properly directed a verdict at the close of the defendants' case as to aggravating circumstances. However, the Court also found the trial court did not err in declining to direct a verdict on this issue at the close of plaintiffs' case as reasonable minds could differ at that point as to whether plaintiffs' had established the required elements. The Court also found no error in refusing to grant a new trial based on the questioning of two defense witnesses. The Court also found the trial court acted properly in issuing a jury instruction instructing the jury not to consider insurance coverage during deliberations. Finally, the Court found the evidence at trial provided a sufficiently certain foundation for the jury to estimate future economic damages suffered by plaintiffs.

Dissenting Opinions: Judge Draper authored a dissent from the Court's opinion. Judge Draper opined that the noneconomic damage caps are not rationally related to a perceived malpractice insurance crisis. Judge Draper expressed doubt that there ever was a malpractice insurance crisis and opined that the damage caps were passed as a result of special interest group influence on the voting public and state legislators. Judge Draper left open the possibility that the damage caps could be challenged under a rational basis test.

Judge Teitelman also dissented from the Court's opinion. Judge Teitelman opined that the right to trial by jury includes statutory wrongful death actions. He argued the fundamental constitutional right to a jury trial is not limited to the precise contours of the common law circa 1820. Instead, Judge Teitelman argued the right attaches to a modern statutory cause of action when it is a civil action for damages that is analogous to or a modern variant of the type triable by juries when the Missouri Constitution was adopted. Judge Teitelman opined that a wrongful death claim is analogous to common law causes of action because it seeks redress for wrongs to a person and that similar claims were maintained at common law. Judge Teitelman went on to argue that because a statutory wrongful death claim invokes the right to a jury trial, the damage caps violated plaintiffs' right to a trial by jury. Finally, Judge Teitelman opined that *Sanders* was decided wrongly.

By John Moore and Alex Bean