

## FATAL MEDICAL NEGLIGENCE AND MISSOURI'S PERVERSE INCENTIVE

### I. INTRODUCTION

Due to recent developments in medical injury law in Missouri, the amount of damages a negligent healthcare provider<sup>1</sup> is liable for in tort may depend on the fate of the injured patient. This state of affairs owes its existence, in part, to the Supreme Court of Missouri's decision in *Sanders v. Ahmed*,<sup>2</sup> in which the Court held that statutory limitations on non-economic damages in medical malpractice wrongful death claims are neither in violation of the State's right to trial by jury, nor separation of powers provisions.<sup>3</sup> The Missouri Constitution only shields from such legislative interference jury awards stemming from common law causes of action.<sup>4</sup> The State of Missouri maintains that wrongful death was absent at common law,<sup>5</sup> therefore, the loved ones of victims of fatal medical negligence<sup>6</sup> may

---

1. This Note refers to "healthcare providers" and "physicians" interchangeably, although in reality the former denotes a more expansive list of professionals than simply physicians. See MO. REV. STAT. § 538.205(4) (2012) (those defined as healthcare providers include physicians, hospitals, HMOs, dentists, registered and licensed nurses, chiropractors, and "any other person or entity that provides health care services under the authority of a license or certificate . . .").

2. 364 S.W.3d 195 (Mo. banc 2012). The other case responsible for this state of affairs is *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. banc 2012). See *infra* text accompanying note 19. Together, these two cases create the imbalance in Missouri medical malpractice law.

3. *Sanders*, 364 S.W.3d at 205.

4. See *id.* at 204. Medical malpractice has a storied history as an old common law right of action. *Watts*, 376 S.W.3d at 638; Robert I. Field, *The Malpractice Crisis Turns 175: What Lessons Does History Hold for Reform?*, 4 DREXEL L. REV. 7, 10 (2011). However, wrongful death, no matter the predicate tort, has been branded by most jurisdictions as a creature of statute that is not afforded many of the privileges enjoyed by common law actions. See, e.g., *Nelms v. Bright*, 299 S.W.2d 483, 487 (Mo. banc 1957) (declaring "it is only by virtue of the wrongful death statutes that any claim or cause of action accrues to the persons named [in the wrongful death act]"); *Tait v. Wahl*, 987 P.2d 127, 130 (Wash. Ct. App. 1999) (holding that "causes of action for wrongful death are strictly a matter of legislative grace"); *Liff v. Schildkrout*, 404 N.E.2d 1288, 1290 (N.Y. 1980) (maintaining that "the common law of this State . . . does not recognize suits to recover damages for the wrongful death of an individual."). There are, however, some past and recent apostates. See *Cross v. Guthery*, 2 Root 90, 90 (Conn. Super. Ct. 1794); *Kake v. Horton*, 2 Haw. 209, 212 (1860); *Hallett v. Town of Wrentham*, 499 N.E.2d 1189, 1192 (Mass. 1986).

5. *Sanders*, 364 S.W.3d at 203.

be left uncompensated simply because of the Missouri courts' readings of history.

Ronald Sanders experienced this reality after filing suit in the circuit court of Jackson County, Missouri, for the wrongful death of his wife, Paulette Sanders.<sup>7</sup> Mrs. Sanders was treated at the Medical Center of Independence in Independence, Missouri, on May 21, 2003, due to "complaints of numbness in her legs and difficulty walking."<sup>8</sup> After neurologist Iftekhar Ahmed substituted Depakote, an anti-epileptic drug, in place of her usual anticonvulsant medications, Dilantin and phenobarbital, Mrs. Sanders became lethargic and, less than a week following her admittance to the hospital, experienced a focal seizure.<sup>9</sup> Following the seizure, Dr. Ahmed took her off the Depakote.<sup>10</sup> Upon weakening physically and mentally, she was subsequently sent to a long-term care facility where she died in August of 2005.<sup>11</sup> Mr. Sanders brought suit that same August, adding to his initial complaint a claim for wrongful death on May 28, 2008.<sup>12</sup>

Five years after filing suit against Dr. Iftekhar Ahmed and Iftekhar Ahmed, P.A., Mr. Sanders received a verdict in his favor based on the jury's finding that the Depakote prescribed by Dr. Ahmed caused his wife's brain

---

6. For the sake of simplicity, this Note refers to plaintiffs in medical wrongful death suits as the loved ones of victims of medical negligence. More specifically, Missouri Revised Statutes Section 537.080.1 states that damages in a wrongful death action may be sought:

- (1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;
- (2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;
- (3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem. Such plaintiff ad litem shall be appointed by the court having jurisdiction over the action for damages provided in this section upon application of some person entitled to share in the proceeds of such action. Such plaintiff ad litem shall be some suitable person competent to prosecute such action and whose appointment is requested on behalf of those persons entitled to share in the proceeds of such action. Such court may, in its discretion, require that such plaintiff ad litem give bond for the faithful performance of his duties.

MO. REV. STAT. § 537.080.1(1)–(3) (2012).

7. *Sanders*, 364 S.W.3d at 201.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. See *Sanders*, 364 S.W.3d at 201.

damage and death.<sup>13</sup> The jury awarded Mr. Sanders and his family \$9.2 million in non-economic damages.<sup>14</sup> However, pursuant to Missouri Revised Statutes Section 538.210,<sup>15</sup> the State's statutory cap on non-economic medical malpractice damages, the trial court decreased the non-economic damages award to \$1,265,207.64 (\$632,603.82 per defendant).<sup>16</sup> On appeal, the Supreme Court of Missouri upheld the trial court's reduction of damages.<sup>17</sup>

Soon after the *Sanders* decision, the Court in *Watts v. Lester E. Cox Medical Centers* declared that limitations on non-economic damages for common law (i.e., non-wrongful death)<sup>18</sup> medical malpractice causes of action violated the Missouri Constitution's trial by jury provision.<sup>19</sup> *Sanders*, however, still bars plaintiffs from recovering the full amount owed to them for injuries received from the death of a loved one due to a healthcare provider's negligence.

Medical malpractice damages law in Missouri belies fairness: death is now cheaper than life. Part II of this Note provides a brief history of medical malpractice tort reform and the evolution of damage caps in Missouri.<sup>20</sup> Part III explains the *Sanders* decision with an eye toward elucidating the current state of medical wrongful death non-economic damage limitations in Missouri.<sup>21</sup> Following the *Sanders* discussion, Part IV posits that courts should apply the mode of analysis used by the Missouri Supreme Court in the 2003 decision of *State ex rel. Diehl v. O'Malley*<sup>22</sup> when determining the scope of Missouri's jury trial guarantee.<sup>23</sup> Such an approach would afford

---

13. *Id.* at 201-02.

14. This amount was the sum of past and future non-economic damages. *Id.* at 202. In combination with economic damages, Mr. Sanders was originally awarded \$10,120,745.88. *Id.*

15. MO. REV. STAT. § 538.210 (2012), *invalidated* in part by *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 641 (Mo. banc 2012).

16. *Sanders*, 364 S.W.3d at 202. Mr. Sanders's suit accrued before section 538.210's 2005 amendments became effective. *Id.* at 200 n.1. Therefore, his award was adjusted for inflation and was not limited to one cap per case. See *id.* at 202 n.3. The 2005 amendments are discussed in Part II.C, *infra*.

17. *Id.* at 206.

18. Throughout this Note "personal injury," "common law," and "non-fatal" are used interchangeably to refer to medical malpractice claims brought by injured plaintiffs. Wrongful death claims brought by the loved ones of victims of fatal medical negligence are termed "medical wrongful death," "wrongful death medical malpractice," "fatal medical malpractice," or other similar variations.

19. *Watts*, 376 S.W.3d at 642.

20. See *infra* Part II.

21. See *infra* Part III.

22. 95 S.W.3d 82 (Mo. banc 2003).

23. See *infra* Part IV.

medical malpractice wrongful death claimants constitutional protection from statutorily imposed damage caps.<sup>24</sup> Part V discusses the perverse incentive that *Sanders*, coupled with the later *Watts* decision, created for Missouri healthcare providers — that it is cheaper to kill than to injure.<sup>25</sup> Lastly, Part VI submits that the General Assembly must eliminate section 538.210's limitations on medical wrongful death non-economic damage awards if a suit brought under Missouri's constitution is unsuccessful.<sup>26</sup>

24. *Id.*

25. See *infra* Part V. While section 538.210.1 imposes a cap on medical wrongful death claims, non-medical malpractice wrongful death claims are not subject to a monetary limit. See MO. REV. STAT. § 537.090 (2012).

26. See *infra* Part VI. The General Assembly is not likely to heed this Note's proposals. In March of 2013, the Missouri House of Representatives approved House Bill 112 (H.B. 112). The legislation aimed to re-instate the \$350,000 non-economic damages cap partially struck down by the Court in *Watts*. See H.B. 112, 97th Gen. Assemb., 1st Reg. Sess. § 538.210.2 (Mo. 2013). The legislation was not a mere exercise in futility. The *Watts* Court struck down section 538.210's cap as to personal injury medical malpractice actions based on the theory that caps on damages in common law actions violate Missouri's right to trial by jury guarantee. Missouri Revised Statutes Section 1.010, Missouri's reception statute, states that "[t]he common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First . . . are the rule of action and decision in this state . . ." MO. REV. STAT. § 1.010 (2012). However, a statute may override the common law as long as it does so clearly. See *State ex rel. Brown v. Ill Invs., Inc.*, 80 S.W.3d 855, 859 (Mo. Ct. App. 2002). Wishing to preempt any judicial meddling based on common law principles, H.B. 112's draftsmen sought to amend section 1.010 by adding the following sentence to the end of the statute:

The general assembly expressly excludes from this section the common law of England as it relates to claims arising out of the rendering or failure to render health care services by a health care provider, with it being the intent of the general assembly to replace such claims with statutory causes of action.

Mo. H.B. 112, § 1.010. H.B. 112's amended section 538.210.1 would complement the new section 1.010, stating:

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 services is hereby created, replacing any such common law cause of action. The elements of such cause of action are that the health care provider failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by similarly situated health care providers and that such failure proximately caused injury or death.

*Id.* § 538.210.1. The Missouri Senate failed to approve H.B. 112 before the adjournment of the legislative session. See Virginia Young & Elizabeth Crisp, *Highlights from the 2013 Missouri Legislative Session*, STL TODAY (May 18, 2013), [http://www.stltoday.com/news/local/govt-and-politics/political-fix/highlights-from-the-missouri-legislative-session/article\\_9d213073-d8c3-5fe5-b440-43ac41940948.html](http://www.stltoday.com/news/local/govt-and-politics/political-fix/highlights-from-the-missouri-legislative-session/article_9d213073-d8c3-5fe5-b440-43ac41940948.html). Therefore, the perverse incentive in Missouri medical malpractice law is still extant; however, its cure has not (as of yet) occurred at the expense of *all* fatal medical negligence victims' families.

## II. MEDICAL MALPRACTICE REFORM IN MISSOURI

The history of medical malpractice tort reform in Missouri consists of three chapters. The first chapter concerns the enactment of Senate Bill 663 (S.B. 663),<sup>27</sup> Chapter 538's first manifestation, which became effective in 1986.<sup>28</sup> S.B. 663 was created to combat the rising costs of insurance premiums, as well as the proliferation of medical malpractice litigation.<sup>29</sup> The second chapter began in 2005 when the General Assembly enacted House Bill 393 (H.B. 393),<sup>30</sup> Chapter 538's second and most recent version.<sup>31</sup> *Sanders* was decided near the end of this chapter. Finally, the current epoch centers on the Missouri Supreme Court's near-evisceration of section 538.210 in *Watts*, decided the same year as *Sanders*.<sup>32</sup> Before examining these three chapters, however, Part II.A details a general summary of the remedies available to medical malpractice plaintiffs.

### A. Damages Overview

Malpractice damage awards consist of economic, non-economic, and punitive damages.<sup>33</sup> These remedies are available to both personal injury and wrongful death claimants. Economic damages are based on relatively calculable monetary losses, including damages for lost wages.<sup>34</sup> Punitive damages are penalties designed to deter further tortious conduct.<sup>35</sup> Non-

---

27. S.B. 663, 82d Gen. Assemb., 2d Reg. Sess. (Mo. 1986).

28. Kevin McManus, Comment, *Finding a Cure for High Medical Malpractice Premiums: The Limits of Missouri's Damage Cap and the Need for Regulation*, 49 ST. LOUIS U. L.J. 895, 900 (2005). Chapter 538 contains Missouri's medical malpractice provisions. See Paul J. Passanante & Dawn Mefford, *The Effect of Tort Reform on Medical Malpractice*, 61 J. MO. B. 236, 236 (2005).

29. McManus, *supra* note 28, at 900.

30. H.B. 393, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005).

31. Passanante & Mefford, *supra* note 28, at 236.

32. See *supra* text accompanying note 19.

33. Carly N. Kelly & Michelle Mello, *Are Medical Malpractice Damage Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 516 (2005); Passanante & Mefford, *supra* note 28, at 241.

34. Kelly & Mello, *supra* note 33, at 516. See MO. REV. STAT. § 538.205(1) (2012) (defining economic damages as "damages arising from pecuniary harm including, without limitation, medical damages, and those damages arising from lost wages and lost earning capacity . . .").

35. Kelly & Mello, *supra* note 33, at 516. See MO. REV. STAT. § 538.205(10) (defining punitive damages as "damages intended to punish or deter willful, wanton or malicious misconduct, including exemplary damages and damages for aggravating circumstances . . .").

economic damages, which include damages for “pain and suffering” and other hard-to-calculate injuries, are the subject of section 538.210.<sup>36</sup>

Non-economic damages — those nebulous and non-mathematically precise remedies — are viewed as a significant contributing factor to the high damage awards in many medical malpractice suits.<sup>37</sup> Their limitation, the theory goes, leads to increased savings by insurance companies, including those companies to reduce insurance premiums.<sup>38</sup> Reduced premiums, in turn, allow healthcare providers to lower prices, which leads to cheaper and more accessible healthcare.<sup>39</sup> Legislative caps on non-economic damages have been the most visible realization of the tort reform movement since the enactment of California’s Medical Injury Compensation Act in 1975.<sup>40</sup>

#### B. S.B. 663 (1986)

Born out of compromise and a desire to combat seemingly repetitive insurance “crises,”<sup>41</sup> S.B. 663 was crafted by representatives from the insurance, healthcare, and legal fields and became effective in 1986.<sup>42</sup> The legislature’s response to the proliferation of medical malpractice litigation and the rise of liability insurance premiums, embodied by section 538.210,<sup>43</sup> was to limit the amount of recoverable non-economic damages in medical malpractice claims.<sup>44</sup> Specifically, section 538.210 instituted a

---

36. Kelly & Mello, *supra* note 33, at 516. See MO. REV. STAT. § 538.205(7) (defining non-economic damages as “damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages . . .”).

37. See Kelly & Mello, *supra* note 33, at 517.

38. McManus, *supra* note 28, at 896-97.

39. *Id.* (quoting *Adams v. Childrens Mercy Hosp.*, 832 S.W.2d 898, 904 (Mo. banc 1992)).

40. See Leonard Nelson, et al., *Medical Liability and Health Care Reform*, 21 HEALTH MATRIX 443, 456 (2011); CAL. CIV. CODE § 3333.2(b) (1975) (capping the amount of non-economic damages recoverable in medical malpractice actions at \$250,000); Kelly & Mello, *supra* note 33, at 517.

41. See *Klotz v. St. Anthony’s Med. Ctr.*, 311 S.W.3d 752, 773 (Mo. banc 2010) (per curiam) (Wolff, J., concurring) (stating that “it seems a rather slow-moving crisis, more a trickle than a flood,” and speculating that the reduction in malpractice claims since 2005 is the result of “detering claims on behalf of the elderly, the disabled and those (mostly women) who do not work outside the home”).

42. McManus, *supra* note 28, at 900.

43. *Id.* at 900-01.

44. Bruce Keplinger, *Multiple Damage Caps for Claims Against Health Care Providers*, 60 J. MO. B. 116, 116 (2004).

\$350,000 cap on non-economic damages subject to annual adjustment for inflation, which was applicable to each defendant in a claim.<sup>45</sup>

The statute faced a constitutional challenge in 1992 in *Adams v. Children's Mercy Hospital*.<sup>46</sup> In *Adams*, the Court rejected challenges to section 538.210 on state equal protection, open courts, due process, and trial by jury grounds.<sup>47</sup> The Court held that the cap was "a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians," and that "the plaintiffs received all the process due them under law."<sup>48</sup> As for the trial by jury challenge, the Court (erroneously)<sup>49</sup> held that the legislature was able to eliminate or otherwise alter common law causes of action, and therefore limit plaintiffs' duly awarded jury verdicts.<sup>50</sup>

### C. H.B. 393 (2005)

Efforts to reform Missouri's medical tort system did not end in 1986. H.B. 393, which became operative in 2005,<sup>51</sup> amended section 538.210 by eliminating the inflationary adjustment provision in the statute.<sup>52</sup> It further reduced plaintiffs' abilities to recover by holding *all* defendants in a medical malpractice claim subject to one cap.<sup>53</sup> Accordingly, the amount of non-economic damages a plaintiff in a medical negligence suit could recover was set at no more than \$350,000.<sup>54</sup> As amended, subsection 1 of the statute stated: "In any action against a health care provider for damages for personal injury or death arising out of the rendering or failure to render health care services, no plaintiff shall recover more than [\$350,000] for noneconomic damages irrespective of the number of defendants."<sup>55</sup>

In 2010, the Court in *Klotz v. St. Anthony's Medical Center*<sup>56</sup> determined that, pursuant to the Missouri Constitution's prohibition of retrospective

---

45. Passanante & Mefford, *supra* note 28, at 242.

46. 832 S.W.2d 898, 898 (Mo. banc 1992).

47. *Id.* at 905-08.

48. *Id.* at 904, 907.

49. *Watts*, 376 S.W.3d at 645-46 (stating that "Adams' erroneous interpretation of article I, section 22(a) of Missouri's constitution negated the guarantee of that section that the right of Missouri citizens to jury trial as heretofore enjoyed shall remain inviolate.") .

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

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

52. Passanante & Mefford, *supra* note 28, at 242.

53. *Id.*

54. *Id.*

55. MO. REV. STAT. § 538.210.1 (2012).

56. 311 S.W.3d 752 (Mo. banc 2010).

laws,<sup>57</sup> H.B. 393 did not apply to claims instituted before August 28, 2005, H.B. 393's effective date.<sup>58</sup> In *Klotz*, James and Mary Klotz added Dr. Michael Shapiro and Metro Health Group (MHG) as defendants in their malpractice suit against St. Anthony's Medical Center over two years after they filed their initial 2004 complaint.<sup>59</sup> The trial court decreased the Klotz's non-economic damages award as to Dr. Shapiro and MHG, pursuant to H.B. 393's amendments.<sup>60</sup> However, the Supreme Court held that, because Mr. and Mrs. Klotz initially filed their action before August 28, 2005, the amendments were not applicable.<sup>61</sup>

In his concurring opinion in *Klotz*, Judge Michael Wolff criticized the *Adams* decision.<sup>62</sup> Lamenting that case's holding, he decried the use of caps in limiting a jury's verdict, writing:

In enacting the new version of section 538.210, the General Assembly, unfortunately, may well have been guided by the Court's decision in *Adams* . . . . The best that can be said for *Adams* is that it arose from the flawed view, then prevalent, that the right to trial by jury could be modified or abolished legislatively in particular cases. The limit on juries under section 538.210 did not exist at common law or in statutes when the people of Missouri adopted their constitution in 1820 guaranteeing the right to trial by jury as heretofore enjoyed shall remain inviolate.<sup>63</sup>

Judge Wolff believed that "*Adams's* fundamental error is in concluding that statutory law can trump the constitutional right to jury trial."<sup>64</sup> He anticipated the Court's inevitable confrontation with *Adams*,<sup>65</sup> and implored the Court "to restore the right to trial by jury to its traditional and vital place in our constitutional system."<sup>66</sup>

#### D. *Post-Sanders: Watts v. Lester E. Cox Medical Centers (2012)*

Following the *Sanders* decision, the Court was again asked to rule on the constitutionality of section 538.210. In *Watts*, plaintiff Deborah Watts won a jury verdict based on the finding that her newborn son's devastating

---

57. MO. CONST. art. I, § 13. Article I, section 13 provides, "[t]hat no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." *Id.*

58. *Klotz*, 311 S.W.3d at 760.

59. *Id.* at 758.

60. *Id.* at 758-59.

61. *Id.* at 760.

62. *Id.* at 771-74 (Wolff, J., concurring).

63. *Klotz*, 311 S.W.3d at 773-74.

64. *Id.* at 774.

65. *Id.* at 773.

66. *Id.* at 774.

brain injuries were the result of her physicians' negligence.<sup>67</sup> The trial court reduced her \$1.45 million award in non-economic damages to \$350,000, but the Court, sitting en banc, reversed, holding that statutory caps on non-economic damages in common law causes of action violate Missourians' right to trial by jury.<sup>68</sup> The Court, in overturning the *Adams* decision, declared: "Once the right to a trial by jury attaches, as it does in this case, the plaintiff has the full benefit of that right free from the reach of hostile legislation."<sup>69</sup>

Subsection 1 of the statute still reads as quoted above in Part II.C; however, it presently only applies to "action[s] against a health care provider for damages for . . . death . . . ."<sup>70</sup>

### III. SANDERS V. AHMED

Healthcare providers pitch battle against death and illness every day. Physicians, nurses, and other professionals who competently undertake services in the aid of a patient who dies are not to be held civilly liable for such awful turns of events.<sup>71</sup> However, patients rely on healthcare providers because of their special skills.<sup>72</sup> Those professionals who cause a patient's death because of their unreasonable failure to competently apply such skills should be held accountable to the decedent's family, and the family should be able to recover the full amount for their pain and suffering, loss of consortium, and other non-pecuniary injuries stemming from their loved one's death.<sup>73</sup>

Missouri courts hold that wrongful death is statutorily created (i.e., it did not exist at common law before codification of Missouri's 1820

---

67. *Watts*, 376 S.W.3d at 635.

68. *Id.* at 635, 645-46.

69. *Id.* at 640.

70. MO. REV. STAT. § 538.210.1 (emphasis added).

71. See *Ewing v. Goode*, 78 F. 442, 443 (C.C.S.D. Ohio 1897) ("[I]f a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art . . .").

72. See, e.g., Susan Dorr Gould & Mack Lipkin, Jr., *The Doctor-Patient Relationship: Challenges, Opportunities, and Strategies*, 14 J. GEN. INTERNAL MED. (SUPPLEMENT) S26, S27 (1999) (writing that vulnerable patients "experience a heightened reliance on the physician's competence, skills, and good will"); Franklin D. Cleckley & Govind Hariharan, *A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford to Live with Inefficient Doctors?*, 94 W. VA. L. REV. 11, 64 (1991) (claiming "[i]t is no great secret that the vast majority of the American public view doctors as god-like").

73. See Jeff Watters, Comment, *Better to Kill Than to Maim: The Current State of Medical Malpractice Wrongful Death Cases in Texas*, 60 BAYLOR L. REV. 749, 770 (2008) (imploping the Texas legislature to "pass a bill to remove the perverse incentive in the law, and give the families of the victims who die due to medical malpractice the justice they deserve").

Constitution).<sup>74</sup> Accordingly, the General Assembly may alter or eliminate the right to bring a wrongful death cause of action.<sup>75</sup> The *Sanders* Court was presented with an opportunity to declare limits on non-economic damages for death at the hands of a negligent healthcare provider as unconstitutional. Instead, the Court upheld such damage caps as part and parcel of the legislature's authority, notwithstanding the rights afforded the citizens of Missouri pursuant to their constitution's jury trial and separation of powers provisions.<sup>76</sup> Subpart A details the *Sanders* majority opinion and Subpart B details the dissent.<sup>77</sup>

#### A. *The Majority*

Judge William J. Price, Jr., writing for the *Sanders* majority, rejected Mr. Sanders's arguments, holding that section 538.210 neither violated Missouri's right to trial by jury, nor separation of powers provisions.<sup>78</sup> The Court deferred to precedent when it declared that wrongful death claims have no common law antecedent and so may be altered by the legislature.<sup>79</sup> The following sections detail the Court's jury trial and separation of powers analyses.<sup>80</sup>

##### 1. Right to Trial by Jury

Article I, section 22(a) of the Missouri Constitution declares: "[T]he right of a trial by jury as heretofore enjoyed shall remain inviolate . . ."<sup>81</sup> Courts divide this provision into two elements: (1) the right to a jury trial "as heretofore enjoyed" in 1820 when Missouri's original constitution was drafted; and (2) the right's "inviolable" nature in the face of proposed limitations.<sup>82</sup> If a cause of action enjoyed the right to a jury determination in 1820, or is analogous to such an action, the right, including the factual determinations made by the jury, is free from encroachment by the legislature.<sup>83</sup> The Court in *Sanders* saw no reason to proceed to the

---

74. See *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993).

75. See *Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609, 616 (Mo. 1965), *overruled on other grounds* by *Bennett v. Owens-Corning Fiberglass Corp.*, 896 S.W.2d 464 (Mo. banc 1995).

76. See *infra* Part III.A and B.

77. See *id.*

78. *Sanders*, 364 S.W.3d at 205.

79. *Id.* at 203.

80. See *infra* Part III.A.1 and 2.

81. MO. CONST. art. I, § 22(a).

82. *Klotz*, 311 S.W.3d at 774-75 (Wolff, J., concurring).

83. *Id.* at 777-78. Missouri's historical test mirrors that which is used by the federal courts in applying the Seventh Amendment to the U.S. Constitution's trial by jury guarantee in civil cases. *Id.* at 776. The Seventh Amendment provides that "the right of trial by jury shall be

"inviolable" analysis, for it determined (or more reiterated) that wrongful death claims, no matter if they originate from a healthcare provider's negligent actions, have "no common-law antecedent" and therefore are not protected from legislative interference.<sup>84</sup>

Mr. Sanders contended that his wrongful death claim should have been recognized, and thus analyzed, as a common law action because it "ar[ose] out of the underlying tort of medical negligence" and so was in reality a common law action.<sup>85</sup> Medical malpractice is rooted in English and American common law.<sup>86</sup> If wrongful death claims so predicated were analyzed with relation to, or as no different from, the ancient action of

---

preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. As is the case in Missouri, federal courts generally determine whether a jury trial attaches to a civil action by distinguishing between suits that were brought in courts of law and courts of equity, or modern analogues of those actions. *Curtis v. Loether*, 415 U.S. 189, 192 (1974); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999). At common law, jury trials were available in legal actions, but not in actions at equity. *Curtis*, 415 U.S. at 194; *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003). Therefore, pursuant to the Seventh Amendment, claims that were in existence as of 1791 when that amendment was enacted and which were legal, as opposed to equitable, actions are triable by a jury. See STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 559 (7th ed. 2008). While complexities in the development of Anglo-American law make construction of a bright-line rule defining "legal" and "equitable" actions difficult, suits that sought only money damages were generally considered actions at law, while those seeking an injunction or some other non-monetary remedy were generally deemed equitable in nature. See *Diehl*, 95 S.W.3d at 86.

The U.S. Supreme Court in *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 415 U.S. 558 (1996), was divided over correct application of the Seventh Amendment test in actions not in existence prior to 1791. See 415 U.S. at 561-74 (Marshall, J.), 574-81 (Brennan, J., concurring), 581-84 (Stevens, J., concurring), 584-95 (Kennedy, J., dissenting). In *Tull v. U.S.*, 481 U.S. 412 (1987), the Court announced the application of the test in such circumstances thusly: "First, we compare the statutory action to 18<sup>th</sup>-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 417-18 (internal citations omitted). In *Chauffeurs*, Justice Brennan disagreed with the plurality's application of the historical test, which he believed "needlessly convolutes our Seventh Amendment jurisprudence." *Chauffeurs*, 415 U.S. at 575 (Brennan, J., concurring). He supported eliminating the first step of the analysis and relying solely on the action's remedy, *id.* at 574, 577, writing that "there remains little purpose to our rattling through dusty attics of ancient writs. The time has come to borrow William of Occam's razor and sever this portion of the analysis." *Id.* at 575. The *Diehl* Court similarly advocated an analysis focused primarily on the action's remedy. See *Diehl*, 95 S.W.3d at 86.

84. *Sanders*, 364 S.W.3d at 203 (quoting *Diehl*, 95 S.W.3d at 88) (internal quotation marks omitted).

85. *Id.* at 204.

86. See *Watts*, 376 S.W.3d at 638.

"mala praxis,"<sup>87</sup> the right to a jury trial, with all of its incidents, would be available to plaintiffs bringing forth such claims. The Court, however, was neither convinced by this argument, nor willing to critically re-examine its precedents.<sup>88</sup> Judge Price wrote:

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." In its present form, the action for wrongful death is provided by section 537.080.1, RSMo 2000. The legislature has the power to define the remedy available if it creates the cause of action.<sup>89</sup>

The Court, citing the *Adams* decision, declared that the legislature's ability to "create and abolish causes of action" carries with it a concomitant power to "limit recovery in those causes of action."<sup>90</sup>

## 2. Separation of Powers

Mr. Sanders also argued that section 538.210 violated the State's separation of powers provision.<sup>91</sup> Missouri's separation of powers clause is contained within article II, section 1 of the Missouri Constitution.<sup>92</sup> The protection has "its origin in the jealousy of the framers of our state and federal governments and the great solicitude to keep [the three branches of government] separate in order to preserve the liberty of the people."<sup>93</sup> The branches being co-equal, none may encroach upon the traditional powers reserved to another.

Some contend that statutory limitations on damages create a "legislative remittitur."<sup>94</sup> The judicial power of remittitur allows the court to decrease excessive jury claims or, in the event of the plaintiff's rejection of such a lowered amount, order a new trial.<sup>95</sup> The Illinois Supreme Court, for example, held that caps on non-economic damages were unconstitutional because legislative limits on such remedies interfere with the courts' powers to use their own discretion to limit jury verdicts.<sup>96</sup> Mr. Sanders did not assert

---

87. See *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 221-22 (Ga. 2010) (referring to medical malpractice as "mala praxis" and labeling it one of Blackstone's "private wrongs").

88. See *Sanders*, 364 S.W.3d at 203.

89. *Id.* (footnote and citation omitted) (quoting *Diehl*, 95 S.W.3d at 88).

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

91. *Sanders*, 364 S.W.3d at 204.

92. MO. CONST. art. II, § 1.

93. *Rhodes v. Bell*, 130 S.W. 465, 467 (Mo. 1910).

94. See *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1078-81 (Ill. 1997).

95. BLACK'S LAW DICTIONARY 1409 (9th ed. 2009).

96. *Best*, 689 N.E.2d at 1078-81.

that section 538.210 created a legislative remittitur.<sup>97</sup> Instead, he contended that the statute obstructs “the judiciary’s performance of its constitutionally-assigned power to render judgments in conformity with the jury’s verdict,” as well as “the constitutional power and duty of the courts to enforce judgments upon the verdict because it prevents the collection of part of the damages the jury found to be fair, reasonable and appropriate.”<sup>98</sup>

The Court was not disposed to overturn its precedents. It declared that “section 538.210 interferes neither with the jury’s ability to render a verdict nor with the judge’s task of entering judgment; rather, it informs those duties.”<sup>99</sup> Judge Price determined that finding for Mr. Sanders “would be to tell the legislature it could not legislate; it could neither create nor negate causes of action, and in doing so could not prescribe the measure of damages for the same.”<sup>100</sup>

### B. *The Dissent*

Judge George W. Draper, III, writing for the dissent, saw no constitutional difficulties in upholding Mr. Sanders’s jury verdict, writing that section 538.210 “represents an impermissible burden on the inviolate right to a trial by jury . . . and the separation of powers . . . .”<sup>101</sup>

In his examination of the constitutionality of damages limitations, Judge Draper employed the more direct mode of analysis used by the Court in the *Diehl* decision, discussed in Part IV, *infra*. Invoking the *Diehl* test, he stated: “If the action is a civil action for damages, then the right to a jury trial attaches and must ‘remain inviolate.’”<sup>102</sup> He further wrote:

Section 538.210 nullifies the jury’s finding of fact regarding the amount of damage actually suffered by the plaintiff by requiring the court to reduce a non-economic damages award determined by a jury that exceeds the statutorily imposed limit. This undermines one of the jury’s most basic functions and the plaintiff’s right to a trial by jury.<sup>103</sup>

Medical wrongful death claims are triable by a jury (unless the right is waived)<sup>104</sup> and, because limitations on the right to a jury trial violates the

---

97. Appellant’s Second Brief at 45, *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012) (No. SC 91492).

98. *Id.*

99. *Sanders*, 364 S.W.3d at 205.

100. *Id.*

101. *Id.* at 215 (Draper, J., dissenting).

102. *Id.* at 214-15 (quoting *Diehl*, 95 S.W.3d at 84).

103. *Id.* at 215.

104. See MO. REV. STAT. § 510.190.1 (2012).

“inviolable” nature of the right, limitations on the amount of damages a jury may award a plaintiff in such claims violate the Missouri Constitution.<sup>105</sup>

Judge Draper also argued that section 538.210 violates Missouri’s separation of powers provision because it places limitations on the judiciary’s ability to limit jury verdicts through the power of remittitur.<sup>106</sup>

*Sanders* stands for the proposition that the right to bring a wrongful death action predicated on medical malpractice is subject to the whims of the Missouri General Assembly, such that the legislature is not constitutionally constrained from limiting those actions’ available remedies, as well from legislating such actions out of existence.<sup>107</sup> Missouri juries are limited in their right to assess damages as they may judge fair and adequate — a right consistent with their traditional role as finders of fact — and so are limited in their ability to fully compensate the survivors of victims of fatal medical negligence.<sup>108</sup> Therefore, absent constitutional amendment, legislative action, or express overruling by the Supreme Court of Missouri, the emotional pain and distress caused by the death of a loved one is worth no more than \$350,000 if the tortfeasor is a healthcare provider.

#### IV. STATE EX REL. DIEHL V. O’MALLEY: THE UNLIKELY CASE TO SUPPORT A CASE FOR A PROHIBITION ON CAPS IN MEDICAL WRONGFUL DEATH SUITS

Section 538.210’s remaining cap on fatal medical malpractice claims violates principles of fairness, and its existence in the absence of corresponding caps on personal injury medical malpractice claims belies common sense. Importantly, such caps are not consistent with the mode of analysis laid out in the Missouri Supreme Court case of *State ex rel. Diehl v. O’Malley*. Decided in 2003, *Diehl* does not involve physician negligence; if relied on strictly because of its facts the case would be irrelevant to medical malpractice litigation.<sup>109</sup> However, the *Diehl* Court’s application of article I, section 22(a) provides a simple and straightforward test that can be applied

105. *Sanders*, 364 S.W.3d at 215 (Draper, J., dissenting).

106. See *id.* Missouri courts recognize both remittitur and additur. See MO. REV. STAT. § 537.068 (2012). An “additur” order allows a court to increase a plaintiff’s damages. *Tucci v. Moore*, 875 S.W.2d 115, 116 (Mo. banc 1994).

107. The general wrongful death act, contained in section 537.080 *et seq.*, is subject to the possible imposition of legislative alterations, or even abrogation. See *Sanders*, 364 S.W.3d at 204 n.8. Judge Price noted by way of example that the wrongful death act contained a \$5,000 damage cap when originally enacted in 1855. *Id.* No such cap currently exists. See MO. REV. STAT. § 537.090 (1979).

108. *Klotz v. St. Anthony’s Med. Ctr.*, 311 S.W.3d 752, 777 (Mo. banc 2010) (per curiam) (Wolff, J., concurring) (“This concept of the jury as the fact finder is rooted in Missouri’s history as is the idea that its verdict should not be disturbed.”) (internal citations omitted).

109. In fact, its language has been cited in support of the *denial* of a common law right to wrongful death. See *supra* note 89 and accompanying text.

to medical wrongful death actions in such a way as to end the disparity in the law in favor of the loved ones of fatal medical malpractice victims.<sup>110</sup>

A. *Diehl and Civil Actions for Damages*

The litigation in *Diehl* concerned Kathleen Diehl's suit against her employer pursuant to the Missouri Human Rights Act (MHRA).<sup>111</sup> The MHRA bars discrimination by an employer based on "race, color, religion, national origin, sex, ancestry, age or disability . . ."<sup>112</sup> Ms. Diehl brought suit in circuit court after receiving a "right to sue" letter from the Missouri Commission on Human Rights.<sup>113</sup> On appeal from the trial court's rejection of her motion for a jury,<sup>114</sup> the Supreme Court, Judge Wolff presiding, asked whether article I, section 22(a) applies to MHRA damage actions.<sup>115</sup> A unanimous Court, with Judge Price not participating, held that it did.<sup>116</sup>

Judge Wolff began his opinion by laying forth the historical test courts use to determine article I, section 22(a)'s reach,<sup>117</sup> explaining that "the provision is intended to guarantee a right, not to restrict a right."<sup>118</sup> After examining the jury trial provisions contained within the territorial laws of Louisiana Territory and Missouri, which included a provision affording litigants jury trials in "all civil cases of the value of one hundred dollars,"<sup>119</sup> Judge Wolff declared, "the simple analysis is whether the action is a 'civil action' for damages. If so, the jury trial is to 'remain inviolate.'"<sup>120</sup>

Two Missouri cases in particular guided the Court in reaching the conclusion that statutory actions not in existence as of 1820 still appreciate article I, section 22(a)'s full protection:<sup>121</sup> *Briggs v. St. Louis & S.F. Ry. Co.*<sup>122</sup> and *Bates v. Comstock Realty*.<sup>123</sup> In *Briggs*, the Court held that the right to a jury attaches "in all cases in which an issue of fact, in an action for the recovery of money only, is involved, whether the right or liability is one at

110. See *infra* Part IV.B.

111. *Diehl*, 95 S.W.3d at 84; see MO. REV. STAT. § 213.055 (2012).

112. MO. REV. STAT. § 213.055.1(1).

113. *Diehl*, 95 S.W.3d at 84.

114. *Id.*

115. *Id.*

116. *Id.* at 92.

117. See *supra* text accompanying notes 81-83.

118. *Diehl*, 95 S.W.3d at 84.

119. *Id.* at 85 (quoting MO. TERR. LAWS 58, § 13). Judge Wolff noted that the right to trial by jury existed before the territory of Missouri adopted the common law in 1816. *Id.*

120. *Id.*

121. *Id.* at 86.

122. 20 S.W. 32 (Mo. 1892).

123. 267 S.W. 641 (Mo. 1924).

common law or is one created by statute.”<sup>124</sup> *Bates* held that proceedings involving a special tax bill unknown to common law courts were amenable to jury trials because they were “of like nature” (i.e., analogous) to actions able to be tried by juries at common law.<sup>125</sup> Therefore, based on past statutory and case law precedent, *Diehl* concluded that the test for determining whether a case is afforded article I, section 22(a)’s guarantees involves asking the simple question: is the claim a civil action for damages?<sup>126</sup> If it is, and if it is sufficiently analogous to a common law action, then it is afforded the right to trial by jury’s full protections.<sup>127</sup>

The MHRA’s provision of a remedy for workplace discrimination was not a right colorable under Missouri’s common law.<sup>128</sup> However, in applying the rule gleaned from its precedents, the Court held that the claim was sufficiently analogous to common law actions for trespass, for which pre-1820 Missouri courts granted damage remedies.<sup>129</sup> Actions for trespass “included actions for a variety of wrongs to the person” which are “now commonly referred to categorically as torts . . . .”<sup>130</sup> Therefore, Ms. Diehl’s claim was constitutionally protected by article I, section 22(a), and the Court accordingly overruled the trial court’s denial of her motion for a jury.<sup>131</sup>

#### B. Application of the Diehl Test to Medical Wrongful Death Suits

A physician’s negligent actions caused Mrs. Sanders’s injuries and subsequent death. Mr. Sanders argued that his wrongful death suit was deserving of the full incidents of the constitutional right to a trial by jury because it was predicated on “the underlying tort of medical negligence and, therefore, existed at common law.”<sup>132</sup> Because suits seeking damages for death at the hands of a negligent healthcare provider are “civil actions for damages,” and both fatal and non-fatal medical malpractice claims are predicated on a healthcare provider’s negligence,<sup>133</sup> Mr. Sanders’s medical

124. *Briggs*, 20 S.W. at 33 (discussed and quoted in *Diehl*, 95 S.W.3d at 86).

125. *Bates*, 267 S.W. at 644; *Diehl*, 95 S.W.3d at 86.

126. *Diehl*, 95 S.W.3d at 85; cf. *Sanders v. Ahmed*, 364 S.W.3d 195, 214-15 (Mo. banc 2012) (Draper, J., dissenting).

127. *Diehl*, 95 S.W.3d at 86 (“The fact that an action is brought pursuant to statute, whether in existence at the time of the 1820 Constitution or enacted later, does not exclude the prospect of a right to jury. The question is, according to *Bates*: is the claim ‘analogous to’ actions brought at the time of the state’s original 1820 Constitution?”).

128. See *id.* at 87-88.

129. *Id.* at 87.

130. *Id.*

131. *Id.* at 92.

132. *Sanders*, 364 S.W.3d 195, 215.

133. Compare *Montgomery v. South Cnty. Radiologists, Inc.*, 168 S.W.3d 685, 691 (Mo. Ct. App. 2005) (listing the elements of personal injury medical malpractice), with *Watson v.*

wrongful death claim was, and indeed all medical wrongful death claims are, deserving of the full incidents of article I, section 22(a)'s guarantees under *Diehl's* "civil action for damages" test. Mr. Sanders's claim at least deserved more than the perfunctory examination it received from the Court. Inconsistencies in judicial application of the rule that wrongful death has no common law antecedents further buttress this argument.<sup>134</sup>

As it is incontrovertible that an action for wrongful death seeking monetary relief is a civil action for damages, fatal medical negligence meets the first prong of the *Diehl* test. That the "analogous" prong is met is best exemplified by the identical showings plaintiffs in fatal and non-fatal medical negligence suits must make in order to hold a healthcare provider liable. Missouri courts have established that plaintiffs in medical malpractice actions must prove the following elements to establish a prima facie case:

- (1) an act or omission of the defendant failed to meet the requisite standard of medical care; (2) the act or omission was performed negligently; and (3) the act or omission caused the plaintiff's injuries.<sup>135</sup>

In wrongful death medical malpractice actions plaintiffs must establish the aforementioned elements, as well as prove that the physician's negligent act or omission was the cause of the decedent's death.<sup>136</sup> The actions are therefore identical save for the resulting injury; in both scenarios a healthcare provider behaves unreasonably and in so behaving harms the patient. If the *Diehl* Court was able to find that a statutorily-created cause of action authorizing a remedy for discrimination based, in part, on race and sex was analogous to forms of action from 19th-century Missouri<sup>137</sup> — a state admitted to the Union as a slave state<sup>138</sup> and which upheld such a right in human chattel until enactment of the Thirteenth Amendment<sup>139</sup> — then medical wrongful death, which is caused by the same type of physician negligence that the common law deemed unreasonable, should similarly be found to be sufficiently analogous to a common law action.

The rule that wrongful death was absent at common law descends from Lord Ellenborough's 1808 pronouncement in the English case of *Baker v. Bolton* that "[i]n a [c]ivil court, the death of a human being could not be

---

Tenet Healthsystem SL, Inc., 304 S.W.3d 236, 240 (Mo. Ct. App. 2009) (listing the elements of wrongful death medical malpractice).

134. See *infra* text accompanying notes 140-46.

135. *Mueller v. Bauer*, 54 S.W.3d 652, 656 (Mo. Ct. App. 2001).

136. *Super v. White*, 18 S.W.3d 511, 516 (Mo. Ct. App. 2000).

137. See *supra* text accompanying note 127.

138. See Joseph Fred Benson, *Ages of the Law: A Brief Legal History of Missouri, Part I – 1803 to 1860*, 68 J. MO. B. 24, 27 (2012).

139. U.S. CONST. amend. XIII, § 1.

complained of as an injury.”<sup>140</sup> While American jurisdictions predominantly accepted the *Baker* rule,<sup>141</sup> many cases are inapposite,<sup>142</sup> such as the Missouri case of *James v. Christy*,<sup>143</sup> decided in 1853 (two years before the enactment of Missouri’s wrongful death statute),<sup>144</sup> in which the Supreme Court of Missouri recognized a father’s right to recover damages for the loss of society or comforts of his deceased fifteen-year-old son.<sup>145</sup> Other examples include the Connecticut medical wrongful death case of *Cross v. Guthery*, decided in 1794, in which a husband was able to recover for loss of “the service, company and consortship” of his wife, and the 1972 Massachusetts Supreme Judicial Court decision of *Gaudette v. Webb*, which

140. *Baker v. Bolton*, (1808) 70 Eng. Rep. 1033 (cited in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 383 (1970)).

141. See, e.g., *Carey v. Berkshire R.R. Co.*, 55 Mass. (1 Cush.) 475, 480 (1848), overruled by *Gaudette v. Webb*, 284 N.E.2d 222, 229 (Mass. 1972). *Carey* was the first American case to adopt the *Baker* rule. Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1067 (1965).

142. The United States Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), made the most compelling plea for judicial recognition of a common law right to bring a wrongful death action. While specifically deciding whether there was a common law right of action at wrongful death in general maritime jurisprudence, the Court declared quite emphatically that the unanimous enactment of wrongful death statutes by the states “has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception.” *Id.* at 393. Along with *Cross v. Guthery*, 2 Root 90 (Conn. 1794), the *Moragne* Court cited *Sullivan v. Union Pac. R.R. Co.*, 23 Fed.Cas. 368 (C.C. Neb. 1874), and *Shields v. Yonge*, 15 Ga. 349 (1854), as examples of early American courts that refused to adopt *Baker v. Bolton*’s holding denying a common law right to recovery for wrongful death. *Moragne*, 398 U.S. at 384. The *Moragne* Court believed that “[t]he most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age.” *Id.* at 386. *Plummer v. Webb*, 19 F. Cas. 894 (D. Me. 1825), and *Ford v. Monroe*, 20 Wend. 210 (N.Y. Sup. Ct. 1838), are further examples of early American courts that disregarded *Baker*. Malone, *supra* note 141, at 1066-67.

143. 18 Mo. 162 (1853).

144. *State ex rel. Kansas City Stock Yards Co. of Maine v. Clark*, 536 S.W.2d 142, 150 (Mo. banc 1976) (Bardgett, J., dissenting).

145. *James*, 18 Mo. at 164. Over one hundred years later, Judge Bardgett of the Supreme Court of Missouri wrote of *James*:

*James v. Christy*, although not called a wrongful death action, was an action by which the father could recover what is now compensatory wrongful death damages. Additionally, it might be noted that the damages to the father in *James v. Christy* included loss of society and comfort and there was no limitation on the amount . . . . What is also rather striking about the opinion in [*James*], is that it simply states the situation as it existed in and prior to 1853. In other words, here were judges of this court who had practiced law in Missouri and by their experience knew what was going on at that time simply reciting that this type of suit was then being entertained in courts of this state. I can hardly believe that the judges of this court would have acknowledged the existence of such a cause of action unless it did actually exist.

*Clark*, 536 S.W.2d at 151 (emphasis added).

declared that “the law in this Commonwealth has . . . evolved to the point where it may now be held that the right to recovery for wrongful death is of common law origin . . . .”<sup>146</sup> So, while Missouri and most modern courts may view wrongful death — no matter the predicate tort — as a statutorily-created cause of action, there is precedent supporting the proposition that the connection between personal injury and wrongful death actions is not so tenuous.

Perusing old and voluminous cases for definitive assurance that wrongful death was indeed a part of American common law is unnecessary if Missouri courts apply the flexible test formulated in *Diehl*.<sup>147</sup> A wrongful death claim for damages at the hands of a physician is a civil action for damages. Further, wrongful death medical malpractice suits are predicated on the same type of actions as are personal injury medical malpractice suits — a healthcare provider’s negligence.<sup>148</sup> So, under the *Diehl* test, a medical wrongful death complainant is entitled to the same inviolate right to a trial by jury, along with the full award determined by the jury, as are non-fatal medical malpractice plaintiffs.<sup>149</sup> Application of this test in *Sanders* would have resulted in the elimination of section 538.210’s medical wrongful death non-economic damages cap.<sup>150</sup>

---

146. *Cross*, 2 Root at 90-91 (declaring that “the defendant, who then was, and for many years had been a practicing physician, and professed to be well skilled in surgery . . . performed [the] operation in the most unskillful, ignorant and cruel manner, contrary to the well-known rules and principles of practice in such cases . . . and . . . after said operation the plaintiff’s wife languished for about three hours and then died of the wound given by the hand of the defendant”); *Gaudette*, 284 N.E.2d at 229.

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

148. See *supra* text accompanying note 133.

149. Read broadly, this test would mean that no wrongful death claims for damages could be legislatively limited. While this Note issues no opinion as to such an application of *Diehl*, a narrow application of the “analogous” prong could actually *limit* the amount of wrongful death claims to which article I, section 22(a) attaches. This Note merely argues that, due to medical wrongful death’s similarities to personal injury medical malpractice, medical wrongful death claims should be free from the same limitations of which medical personal injury claims are free.

150. Application of the *Diehl* test is not the only viable argument in support of abolishing section 538.210’s remaining cap. While Missouri’s original constitution was established in 1820, two other constitutions were adopted before the recent 1945 Constitution was enacted. See Alexander Muntges, *Forget Batson*, 68 J. MO. B. 218, 219 (2012); Joseph J. Simeone, *The Legal History of the State of Missouri*, 43 ST. LOUIS U. L.J. 1395, 1402 (1995); Aaron E. Schwartz, Comment, *Dusting Off the Blaine Amendment: Two Challenges to Missouri’s Anti-Establishment Tradition*, 73 MO. L. REV. 129, 167 (2008). Missouri has recognized a cause of action for wrongful death since the first wrongful death act was enacted in 1855, if not earlier. See *supra* text accompanying notes 141-45 (discussing the case of *James v. Christy*, 18 Mo. 162 (1853)). If 1945, the date the current Missouri Constitution was enacted, was used to

#### V. SANDERS, WATTS, AND MISSOURI HEALTHCARE PROVIDERS' PERVERSE INCENTIVE

In Missouri it matters a great deal whether a physician's negligence causes a patient's injury, or death. *Sanders*, together with the subsequent decision in *Watts v. Lester E. Cox Medical Centers*,<sup>151</sup> has created a reality in which negligent healthcare providers owe potentially less in tort if their actions cause death instead of personal injury.<sup>152</sup> The *Sanders-Watts* imbalance has therefore created for Missouri physicians and other healthcare providers a perverse incentive, based on simple economics, to kill rather than injure.<sup>153</sup> Missouri is currently at a crossroads. It must end the disparity in its medical damages law based on its own notions of fairness and equity. Hopefully, this disparity will be resolved for the benefit of the families of victims of fatal medical malpractice.

##### A. *Perverse Incentive*

This Note is not daring to assert that before each operation or treatment decision Missouri physicians determine the probability that their actions will result in the patient's death and so alter their course of treatment accordingly in order to minimize potential liability. Such a calculation is unrealistic in that it assumes that physicians can correctly predict the amount of non-economic damages (not to mention economic and punitive damages) that a jury will award in the event of negligent injury.<sup>154</sup> Importantly, such an assertion does a disservice to the men and women who dedicate their professional careers to the provision of care for the sick and dying.

The healthcare industry's clientele, as exemplified by the very purpose of the industry, do not enlist the services of a physician when they are healthy. While section 538.210's limitations are unfair to families of victims of fatal medical negligence, it is equally true that we must not deter good medical care by punishing healthcare providers for deaths and injuries that were near certain to occur with or without their services.<sup>155</sup> Proponents of medical tort reform argue that excessive medical malpractice damages induce

---

frame the right to jury trial analysis instead of 1820, statutory limitations on wrongful death damages would be precluded as interfering with a pre-constitution right of action.

151. 376 S.W.3d 633, 648 (Mo. banc 2012).

152. See *supra* Part I.

153. See *infra* Part V.A.

154. See generally Dru Stevenson, *The Function of Uncertainty within Jury Systems*, 19 GEO. MASON L. REV. 513, 513 (2012) (discussing the uncertainty of juries); but see Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 380 (2011).

155. See *Herskovits v. Group Health Coop. of Puget Sound*, 664 P.2d 474, 488-89 (Wash. banc 1983) (Brachtenbach, J., dissenting) ("[The medical] profession affords [the physician] only an inexact and often experimental science by which to discharge his duty. Moreover, the tendency to place blame on a physician who fails to find a cure is great.").

physicians to practice defensive medicine (resulting in the employment of procedures that, depending on the circumstances, may be dangerous),<sup>156</sup> or even move to more physician-friendly jurisdictions<sup>157</sup> (which in turn may cause physician shortages).<sup>158</sup> The elimination of all remaining medical damage caps in Missouri is not good policy if such a result would cause physicians to leave Missouri or apply expensive or dangerous procedures for fear of unfair and excessive civil penalties.

However, the perverse incentive that Missouri physicians have to kill rather than injure is very real and very serious. If the Missouri legislature enacted a statute that capped the amount of non-economic damages that a negligent automobile driver could be held liable for in damages at, say, \$500,000, while leaving non-fatal automobile injury actions without a cap, then a driver who negligently struck a pedestrian would have the economic incentive to back up in order to limit his or her liability in tort.<sup>159</sup> The existence of such a possibility would reflect poorly on our society's values, and would do little to promote the deterrent aspirations of tort law.<sup>160</sup> So too

---

156. Jill Fairchild, *The Defensive Medicine Debate: Driven by Special Interests*, 19 ANNALS HEALTH L. ADVANCE DIRECTIVE 297, 299-300 (2010), <http://www.luc.edu/media/lucedu/law/centers/healthlaw/pdfs/advancedirective/pdfs/issue4/fairchild.pdf>. Defensive medicine refers to "care provided solely (or mostly) to reduce the probability of litigation." Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1606 (2002).

157. See Allen Kachalia et al., *Physician Responses to the Malpractice Crisis: From Defense to Offense*, 33 J.L. MED. & ETHICS 416, 416 (2005) (writing that traditional physician responses to fears of unfair medical malpractice litigation include relocation).

158. John W. Hill et al., *Law and the Healthcare Crisis: The Impact of Medical Malpractice and Payment Systems on Physician Compensation and Workload as Antecedents of Physician Shortages – Analysis, Implications, and Reform Solutions*, 2010 U. ILL. J. L. TECH. & POL'Y 91, 95-6 (2010) (writing that many physicians argue that "because malpractice costs are so affecting the profitability of physician practices, physicians are being driven from practicing in some jurisdictions, thereby contributing to a problem of physician shortages in some locales and specialties.").

159. Dean Prosser famously wrote that before enactment of the wrongful death statutes, it was more economically prudent "to kill a man than to scratch him." VICTOR E. SCHWARTZ, ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS, CASES AND MATERIALS 586 (Thomson Reuters, 12th ed. 2010). Just as would a cap on automobile wrongful death actions, Sanders's refusal to afford article I, section 22(a)'s protections to fatal medical negligence suits allowed further developments – the *Watts* case – to resurrect such a barbaric state of affairs in Missouri.

160. Many commentators believe that "[e]ach case in a common law system creates the potential for normative articulation and deterrent impact." Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 183 (2012). Professors Franklin Cleckley and Govind Hariharan argued that medical malpractice caps undercut the deterrent effect of civil litigation, writing: "Not only do damage caps tell the medical profession that we do not mind if inefficient doctors continue to practice, the caps also tell victims of malpractice that their suffering is inconsequential compared to the happiness of inefficient doctors." Cleckley & Govind, *supra* note 72, at 64. See also *id.* at 18 (writing that "we cannot sacrifice human lives

does section 538.210's remaining cap cast a shadow over Missouri's civil justice system and culture, for no matter the physician's intentions, there is the very real possibility that a patient's death may result in less liability than if that patient were to survive the negligent application of healthcare services. The villain in this tale is not the Missouri healthcare provider, but the legal reality that death is cheaper than life under Missouri medical malpractice law.

#### B. *Potential Paths: Alabama and Texas's Solutions*

*Sanders*, *Watts*, and *Diehl* cannot all be correct. Either medical wrongful death is not worthy of the full incidents of the right to trial by jury and *Diehl's* application beyond its facts is a misapplication of that decision, or the *Sanders* majority's failure to apply *Diehl* to medical wrongful death claims was incorrect as not in line with viable precedent. Either the courts or the legislature must rectify the imbalance. Throughout the preceding years, states have variously upheld and abrogated damage caps.<sup>161</sup> Developments in Alabama and Texas demonstrate the potential paths Missouri may take.

In *Moore v. Mobile Infirmary Association*, the Alabama Supreme Court held that section 6-5-544(b) of Alabama's Medical Liability Act, which capped "the amount of recovery for noneconomic losses . . . either to the injured plaintiff, the plaintiff's spouse, or other lawful dependents or any of them together" at \$400,000,<sup>162</sup> violated the state constitution's jury trial and equal protection provisions.<sup>163</sup> The case did not address the \$1,000,000 cap on wrongful death medical negligence claims codified in section 6-5-

---

so that a handful of incompetent doctors can afford to buy expensive cars; surely human beings are worth more than the trinkets they manufacture.").

161. See, e.g., *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991), *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010) (striking down non-economic caps); *MacDonald v. City Hosp., Inc.*, 715 S.E. 2d 405 (W. Va. 2011), and *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012) (upholding caps).

162. ALA. CODE. § 6-5-544(b), held unconstitutional by *Moore*, 592 So.2d at 171.

163. *Moore*, 592 So.2d at 171. The Alabama Court stated: "[I]n cases involving damages incapable of precise measurement, a party has a constitutionally protected right to receive the amount of damages fixed by a jury unless the verdict is so flawed by bias, passion, prejudice, corruption, or improper motive as to lose its constitutional protection." *Id.* at 162. While the *Moore* Court also held that section 6-5-544(b) violated the Alabama Constitution's guarantee of equal protection, *id.* at 170-71, the Supreme Court of Alabama has since held that the state's constitution contains no equal protection guarantee. *Ex parte Melof*, 735 So. 2d 1172, 1181 (Ala. 1999); Marc James Ayers, *Interpreting the Alabama Constitution*, 71 ALA. LAW. 286, 289 (2010). However, in 2003 the Supreme Court of Alabama refused to revisit its decision in *Moore* even though that decision was based, in part, on an interpretation of a non-existent right. *Mobile Infirmary Med. Ctr. v. Hogden*, 884 So.2d. 801, 813-14 (Ala. 2003).

547 of the Act,<sup>164</sup> which indicates that Alabama physicians operated under conditions similar to those currently existing in Missouri under the *Sanders-Watts* imbalance. However, the Alabama Court cured any such imbalance four years later when it held that the cap on medical wrongful death damages was similarly violative of the state's jury trial and equal protection provisions.<sup>165</sup>

If section 538.210 is not completely severed from Chapter 538, however, Missouri may go the way of Texas. Texas physicians face the possible prospect of paying more in damages for injuring a patient than for causing one's death.<sup>166</sup> Section 74.301 of the Texas Civil Practice and Remedies Code<sup>167</sup> provides a \$250,000 cap on non-economic damages in all medical malpractice claims,<sup>168</sup> and section 74.303<sup>169</sup> provides a \$500,000 cap on all damages in medical wrongful death claims.<sup>170</sup> The Texas Supreme Court in *Rose v. Doctors Hospital*,<sup>171</sup> held that limitations on damage caps in wrongful death actions do not violate the Texas Constitution.<sup>172</sup> Therefore, Texas plaintiffs bringing forth a suit for wrongful death against a healthcare professional must suffer the application of sections 74.301 and 74.303's caps.<sup>173</sup> So, just as is currently the law in Missouri, "under Texas law it is cheaper to kill than to maim."<sup>174</sup>

## VI. POSSIBLE SOLUTIONS

Applying the flexible test articulated in *Diehl*,<sup>175</sup> the *Sanders* Court could have found that a claim for wrongful death predicated on a healthcare professional's negligence is as deserving of the full benefits of Missouri's right to trial by jury as are claims for personal injury caused by medical malpractice. If the *Sanders* Court would have embraced such a rule then not

164. ALA. CODE § 6-5-547, held unconstitutional by *Smith v. Schulte*, 671 So.2d 1334, 1344 (Ala. 1995) (per curiam), abrogated on other grounds by *Ex parte Apicella*, 809 So. 2d 865 (Ala. 2001).

165. *Smith*, 671 So. 2d at 1344. In 2007, the Alabama Court refused to overrule the *Smith* decision's invalidation of section 6-5-547's caps. *Mobile Infirmary Ass'n v. Tyler*, 981 So. 2d 1077, 1105 (Ala. 2007).

166. See *Watters*, supra note 73, at 749-50.

167. TEX. CIV. PRAC. & REM. § 73.301 (2003).

168. *Watters*, supra note 73, at 756-57.

169. TEX. CIV. PRAC. & REM. § 74.303 (2003).

170. *Watters*, supra note 73, at 758.

171. 801 S.W.2d 841, 841 (Tex. 1990).

172. *Id.* at 848.

173. *Watters*, supra note 73, at 760.

174. Christine Lockhart, *The Safest Care is to Deny Care: Implications of Corporate Health Insurance, Inc. v. Texas Department of Insurance on HMO Liability in Texas*, 41 S. TEX. L. REV. 621, 636 (2000).

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

only would Mr. Sanders and his family have kept their full jury award, but the *Watts* Court's prohibition of caps on non-economic damages in the latter class of cases would not have created the perverse incentive that Missouri physicians operate under currently.<sup>176</sup> If the courts or the legislature fail to solve the imbalance in favor of plaintiffs like Mr. Sanders, the future will likely result in either a continuation of the status quo, or a cure of the imbalance by way of either legislation or a constitutional amendment that serves to overturn *Watts*.<sup>177</sup> A constitutional attack through the courts is the most likely means by which section 538.210's remaining limitation would be invalidated, given the legislature's proclivity for tort reform.

#### A. Possible Constitutional Challenges

It may be some time before a case is litigated before Missouri's Supreme Court that will provide it with an opportunity to overrule *Sanders*. The Court previously held that section 538.210 did not violate the State's equal protection, open courts, trial by jury, or due process provisions in the *Adams* decision.<sup>178</sup> However, the Court's rejection of *Adams*'s jury trial holding in *Watts* may have opened the door for further constitutional contests to section 538.210.<sup>179</sup> The following are suggestions for possible-constitutional challenges to section 538.210's remaining cap, excluding litigation based on the right to trial by jury, which has been discussed above.<sup>180</sup>

##### 1. Equal Protection

Missouri's equal protection clause is located in article I, section 2 of the Missouri Constitution.<sup>181</sup> That clause declares that "all persons are created equal and are entitled to equal rights and opportunity under the law . . ."<sup>182</sup> Missouri courts apply the following test to determine whether the equal protection clause has been violated:

The first step is a determination of whether the classification operates to the disadvantage of a suspect class or impinges on a fundamental right. If so, the classification is subject to strict scrutiny and will only be upheld if it is

---

176. See *supra* Part V.A.

177. See, e.g., H.B. 112, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

178. *Adams*, 832 S.W.2d at 905-07.

179. *Watts*, 376 S.W.3d at 646.

180. This is not meant to be an exhaustive compilation of constitutional challenges to section 538.210, but merely an example of some of the more probable challenges. For a pre-*Watts* discussion on the matter see Passanante & Mefford, *supra* note 51.

181. MO. CONST. art. I, § 2.

182. *Id.*

necessary to a compelling state interest. If not, the classification is upheld if it is rationally related to a legitimate state interest.<sup>183</sup>

A suspect classification is one that embodies “invidious discrimination,” such as classifications based on race.<sup>184</sup> Fundamental rights encompass such liberties as freedom of speech and the right to vote.<sup>185</sup> Medical malpractice victims are unlikely to be regarded as members of a suspect class,<sup>186</sup> and the Missouri Supreme Court may be unwilling to hold that section 538.210’s remaining cap invades a fundamental right if it does not also find that the statute is otherwise unconstitutional.<sup>187</sup> Therefore, an equal protection analysis will likely be conducted under rational basis review.

While the *Adams* decision declared that section 538.210 did not violate plaintiffs’ equal protection rights,<sup>188</sup> litigants may argue that the legal reality created by *Sanders* and *Watts* treats plaintiffs suing for the death of a loved one irrationally different from those suing for non-fatal injuries, without any foundation based on a legitimate state interest.<sup>189</sup> The Missouri Supreme Court may agree with its ruling in *Adams*, which upheld section 538.210 under rational basis review because it “represents an effort by the legislature to reduce rising medical malpractice premiums and in turn prevent physicians and others from discontinuing ‘high risk’ practices and procedures.”<sup>190</sup> It is not apparent, however, exactly what legitimate state interest is being served by fostering Missourians’ risk of falling prey to the effects of a perverse incentive in medical negligence law.

---

183. *In re Care & Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007) (internal citations omitted).

184. *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991) (stating that suspect classes are “those based upon race, national origin or illegitimacy, which because of historical reasons, ‘command extraordinary protection from the majoritarian political process.’”) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976)).

185. *Id.* (stating that fundamental rights “include the rights to free speech, to vote, freedom of interstate travel, the right to personal privacy and other basic liberties”).

186. The *Adams* Court in fact “reject[ed] the notion that victims of medical malpractice are a suspect class.” *Adams v. Childrens Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo. banc 1992).

187. See *id.* (rejecting the plaintiffs’ contention that their fundamental rights had been invaded, even assuming that the constitutional rights to open courts, trial by jury, and certain remedies were fundamental rights, because such rights were not held to have been violated by section 538.210).

188. *Id.* at 905.

189. See *Mo. Prosecuting Att’ys & Circuit Att’ys Ret. Sys. v. Pemiscot Cnty.*, 256 S.W.3d 98, 102 (Mo. banc 2008) (“The rational basis test requires only that the challenged law bear some relationship to a legitimate state interest.”).

190. *Adams*, 832 S.W.2d at 904.

## 2. Separation of Powers

Judge Draper, in his *Sanders* dissent, opined that as well as violating Missouri's right to trial by jury, section 538.210 violates Missouri's separation of powers provision, codified in article II, section 1 of the Missouri Constitution.<sup>191</sup> That provision states:

The powers of government shall be divided into three distinct departments — the legislative, executive and judicial — each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.<sup>192</sup>

A litigant could argue that section 538.210 acts as an unconstitutional legislative remittitur, as was held by Judge Draper in his *Sanders* dissent.<sup>193</sup>

## 3. Due Process

Missouri's due process clause, located in article I, section 10 of the Missouri Constitution, provides that "no person shall be deprived of life, liberty or property without due process of law."<sup>194</sup> Missouri courts evaluate whether a procedural due process violation has occurred by assessing (1) whether an individual was deprived of a liberty or property interest and, if such a deprivation occurred, (2) whether the deprivation was accompanied by "constitutionally sufficient" procedures.<sup>195</sup>

Successfully convincing a tribunal that section 538.210's remaining cap on medical wrongful death damages violates due process may require novel argumentation, as a due process claim was quite curtly struck down in *Adams*.<sup>196</sup> However, a court may prove sympathetic to the argument that section 538.210 lacks constitutional sufficiency because its application deprives the litigant of his or her right to a hearing before a jury of his or her peers — consistent with all of that right's incidents — in a civil action sounding in tort, and because there is a high risk that an assessment of damages at no more than \$350,000 will not fully compensate a litigant.<sup>197</sup>

---

191. *Sanders v. Ahmed*, 364 S.W.3d 195, 215 (Mo. banc 2012) (Draper, J., dissenting).

192. MO. CONST. art. II, § 1.

193. *Sanders*, 364 S.W.3d at 215 (Draper, J., dissenting).

194. MO. CONST. art. I, § 10.

195. *City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252, 257 (Mo. Ct. App. 2011).

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

197. In determining what process is due, the court should balance the following factors: (1) the affected private interest; (2) the risk of an erroneous deprivation through use of the current procedures, and the "probable value" of additional procedures; and (3) the government's

#### 4. Other Challenges

Other challenges could possibly be made under Missouri's open courts,<sup>198</sup> special laws,<sup>199</sup> or other constitutional provisions if no arguments based on Missouri's right to trial by jury, equal protection, separation of powers, or due process provisions prove successful.

#### B. Constitutional Amendment

Opponents of section 538.210 could propose a constitutional amendment prohibiting limitations on non-economic damages in medical malpractice actions.<sup>200</sup> Some state constitutions prohibit limitations on recoverable damages in some form.<sup>201</sup> However, it is more likely that any constitutional amendment affecting damage caps would, given Missouri's largely conservative bent,<sup>202</sup> provide the General Assembly with the constitutional right to limit non-economic damages in medical malpractice cases, as was the case with the amendment that resulted in Texas' article III, section 66(b).<sup>203</sup>

#### C. The General Assembly: Our Only Hope?

There is little chance that the legislature will soon eliminate the remnants of section 538.210 and so further halt medical tort reform's advances in Missouri. However, the Missouri Supreme Court's inability or refusal to acknowledge that wrongful death predicated on the negligent actions of a healthcare professional is a civil action for damages deserving of the full incidents of a jury trial — including an undisturbed award of non-economic damages — or that the *Sanders* decision is unconstitutional on other

---

interest. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *City of Kansas City v. Jordan*, 174 S.W.3d 25, 42 (Mo. Ct. App. 2005).

198. MO. CONST. art. I, § 14.

199. MO. CONST. art. III, § 40.

200. See MO. CONST. art. XII, § 2(a).

201. AM. MED. ASS'N, CAPS ON DAMAGES (2011), <http://www.ama-assn.org/resources/doc/arc/capsdamages.pdf>.

202. See Jack Wagman, *Is Missouri a Red State Now?*, STL TODAY (Nov. 6, 2010), [http://www.stltoday.com/news/local/govt-and-politics/is-missouri-a-red-state-now/article\\_44d3e1dd-b922-580c-9264-9b0616c8f63a.html](http://www.stltoday.com/news/local/govt-and-politics/is-missouri-a-red-state-now/article_44d3e1dd-b922-580c-9264-9b0616c8f63a.html).

203. See Watters, *supra* note 73, at 767. Article III, section 66(b) states:

[T]he legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, by a provider of medical or health care. . . . This subsection applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law. . . . The claim or cause of action includes a medical or health care liability claim as defined by the legislature.

TEX. CONST. art. III, § 66(b).

grounds will leave the task of curing section 538.210's remaining inequities to the men and women of the state legislature. Given the legislature's recent attempts to replace any common law right to bring a medical malpractice action with a purely statutory remedy, the General Assembly's efforts to cure the imbalance will not likely result in the elimination of caps.<sup>204</sup>

## VII. CONCLUSION

Mr. Sanders was deprived of his wife and of full compensation for his injuries, injuries caused by a physician who was found by a Missouri jury to have behaved negligently. Mr. Sanders did not receive his duly awarded jury verdict, however, because of the difference between life and death. The *Sanders* Court had the opportunity to find section 538.210 unconstitutional, but its refusal to do so allowed future events to create for Missouri a reprehensible condition in which death is cheaper than life. The courts, or the legislature, can relieve healthcare providers and plaintiffs of the abhorrence of the law's perverse incentive; either body may legally abrogate section 538.210, they need only have the will to right a legal wrong. Hopefully action is taken before the law's imbalance causes more plaintiffs like Mr. Sanders to leave the courthouse with less than their constitutionally entitled compensation. Hopefully, death will cease to be cheaper than life in Missouri.

DANIEL J. SHEFFNER\*

---

204. See H.B. 112, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

\* B.S., Truman State University; J.D., Saint Louis University School of Law (anticipated 2014). The author is thankful to the Honorable Michael Wolff, Dean and Professor of Law, for his inspiration and constant support during the writing process. The author is also thankful for the provision of much needed advice and wisdom from Dean Steven Steinglass. Lastly, this Note would not have been possible if it were not for the members of the *Saint Louis University Journal of Health Law & Policy*, my family, and Srishti Miglani.