

## **LIFE AFTER LEARMONTH**

Presenter - Roy A. Smith, Jr.

### **Introduction**

On February 27, 2013 the United States Court of Appeals for the Fifth Circuit rendered its opinion in the case styled *Lisa Learmonth v. Sears Roebuck and Company*, Case No. 09-60651. The only issue on appeal was the application of the statutory cap on non-economic damages which had been applied by the United States District Court of the Southern District of Mississippi reducing the portion of the award for non-economic damages to \$1 million. This is the cap on non-economic damages pursuant to Miss. Code Ann. § 11-1-60(2)(b). The issue has not yet been ruled on by the Mississippi Supreme Court and the Fifth Circuit ruling is not binding in state courts. However, it is a well written and well reasoned opinion analyzing the various issues which the Mississippi Supreme Court will likely address at some point.

Since *Learmonth*, United States District Judge Carlton Reeves has entered an order dated June 13, 2013, in *Clemons v. United States of American and State of Mississippi*, Cause No. 4:10-CV-209-CWR-FKB. The *Clemons* case dealt with subsection 2(a) of Miss. Code Ann. § 11-1-60, the non-economic damages cap in medical negligence cases. Judge Reeves did not appear to actually be in favor of the cap. However, his well reasoned order citing the case law and, of course, the *Learmonth* decision led to his conclusion that the plaintiff's

constitutional challenges to the cap should be denied. We will now look at the history, the arguments made for and against the constitutionality of the non-economic damage caps of the *Learmonth* and *Clemons* decisions and life after *Learmonth*.

## **I. Background**

In 2004, the Mississippi legislature enacted Miss. Code Ann. § 11-1-60, Supp. 2012. Section 11-1-60(2)(b) places a cap of \$1 million on non-economic damages. The legislature passed the tort reform legislation in an effort to address the increasingly large verdicts. Prior to 1995, there were no verdicts greater than \$9 million in Mississippi courts.<sup>1</sup> Between 1995 and 2001, twenty-four verdicts in Mississippi exceeded \$9 million, and at least seven of those awards were for \$100 million or more.<sup>2</sup> In *O'Keefe v. Loewen Group, Inc.*, a Hinds County jury awarded a verdict of \$500 million arising from a \$4 million contract dispute.<sup>3</sup> These verdicts were representative of the legal climate that drove the legislature to take action and pass legislation placing caps on non-economic damages. Nonetheless, the constitutionality of the statutory caps have been challenged.

---

<sup>1</sup>Mark A. Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 Miss. C. L. Rev. 393, 400

<sup>2</sup>*Id.*

<sup>3</sup>*Id.* at 401

## II. Challenges to Constitutionality

### A. The Mississippi Supreme Court and the constitutionality of the caps

The statutory caps have been challenged with arguments that the limitation on recoverable damages violates the Mississippi Constitution. The Mississippi Supreme Court has yet to rule on the constitutionality of the caps even though cases addressing the issue have been considered by the Court. In *Double Quick, Inc. v. Lymas*<sup>4</sup>, the court addressed the application of the caps. Mr. Lymas challenged the caps on constitutional grounds. Subsequently, the Attorney General filed a brief and argued that the statute was constitutional. Several amici curiae briefs were filed and it appeared the court would finally address the issue. However, the court never addressed it because the case was reversed and rendered for a failure to prove proximate cause.

The court was also presented with the constitutional issue in *Intown Lessee Assocs. v. Howard*<sup>5</sup>. In *Intown Lessee*, two plaintiffs were awarded \$2 million general jury verdicts. The verdict form did not require the damages award to be separated by economic and non-economic. Thus, the court ruled that the parties waived the application of the statute because they did not object to the jury instruction or the verdict form during trial. The court added that it would not “engage in speculation or conjecture and it would be nothing more than

---

<sup>4</sup>*Double Quick, Inc. v. Lymas*, 50 So.3d 292 (Miss. 2010)

<sup>5</sup> *Intown Lessee Assocs. v. Howard*, 67 So.3d 711 (Miss. 2011)

supposition for us to try to guess what amount the jury awarded in economic damages and what amount it awarded in non-economic damages.”<sup>6</sup>

### **1. *Sears, Roebuck & Co. v. Learmonth***

The Mississippi Supreme Court has been able to decide cases without addressing the constitutional issue. *Sears v. Learmonth* was no different. *Learmonth* was filed in federal court under diversity jurisdiction. The jury found Sears liable for Learmonth’s injuries and awarded \$4 million in compensatory damages. Learmonth challenged the constitutionality of the noneconomic caps and argued that it violated Mississippi’s right to a jury and separation of powers provisions in the constitution. The Fifth Circuit certified the constitutional question to the Mississippi Supreme Court.

The constitutional question was never answered by the Mississippi Supreme Court in *Learmonth*. On August 23, 2012, using similar reasoning from *Intown Leese*, the court did not address the issue because the jury issued a general verdict without separating economic and non-economic damages. Even though the parties in *Learmonth* stipulated to the amounts, the court considered it speculative.<sup>7</sup> Following the decision of the Mississippi Supreme Court, the Fifth Circuit asked the parties to re-brief the constitutional issues and permitted *amici* to do the same.<sup>8</sup> The 5th Circuit concluded in *Learmonth* that the 11-1-60(2)(b) did

---

<sup>6</sup>*Intown* at 724

<sup>7</sup>95 So.3d 633, 639 (Miss. 2012)

<sup>8</sup>*Learmonth v. Sears, Roebuck & Co.*, No. 09-60651 (5th Cir. 2013)

not violate the Mississippi Constitutional provisions of (1) jury trial guarantee and (2) separation of powers.

### **III. Arguments Made for Unconstitutionality**

Generally, Mississippi Courts allow the Mississippi constitutional provisions to prevail when there is a possible conflict with a statute.<sup>9</sup> Still, the Mississippi Supreme Court has stated, “statutes are clothed with a heavy presumption of validity, and the burden is on the party challenging the constitutionality of the statute to carry his case beyond a reasonable doubt.”<sup>10</sup> Further, a statute will be ruled against “only where the legislation under review be found in palpable conflict with some plain provision of the . . . constitution.”<sup>11</sup> The Mississippi Constitution is to be construed in light of the common law.<sup>12</sup>

#### **A. Jury Trial Guarantee**

Miss. Const. art. III § 31 states, “The right of trial by jury shall remain inviolate. . .” Learmonth argued to the Fifth Circuit that § 11-1-60(2)(b) violates the Mississippi Constitution’s right to a jury by imposing caps on non-economic damages. Learmonth contended that the caps violate two rights encompassed by the right to a jury: (1) the right to have a jury alone find the proper compensatory damages amount, and (2) the right to have

---

<sup>9</sup>*Bd. of Trs. of State Insts. of Higher Learning v. Ray*, 809 So.2d 627, 636 (Miss. 2002)

<sup>10</sup> *James v. State*, 731 So.2d 1135, 1136 (Miss. 1999).

<sup>11</sup> *Hood v. State*, 17 So.3d 548, 551 (Miss. 2009).

<sup>12</sup>*See Robinson v. State*, 108 So. 903, 904 (Miss. 1926).

that factual finding converted, undisturbed, into a legally binding judgment of equal value.<sup>13</sup> Applying Mississippi law, the court distinguished between a “verdict” or “award” (a purely fact find with respect to compensatory damages) and a “judgment” (an act whereby the law that applies to the facts at bar is given effect).<sup>14</sup> In the commentary to Mississippi Rule of Civil Procedure 54, the Advisory committee states, “The terms ‘decision’ and ‘judgment’ are not synonymous under these rules. The decision consists of the courts’s findings of fact and conclusions of law; the rendition of a judgment is the pronouncement of that decision and the act that gives legal effect.” Therefore, the court determined that the application of the statute is to impose a legal limitation on a judgment. Under the statute, judges are not to inform the jury of the caps to ensure that the jury’s decision is uninfluenced. The jury retains it’s fact finding role and the judge’s role is to apply the law to the factual findings. The judge reducing the award to the available legal remedy under the statute is consistent with the Mississippi Constitution and jury guarantee.

Further, the court noted that the Mississippi Supreme Court has historically recognized the legislature’s authority to alter legal remedies.<sup>15</sup> The Mississippi Supreme Court has upheld worker’s compensation limitations and contributory negligence being replaced with

---

<sup>13</sup>*Learmonth II* at 11.

<sup>14</sup>*Id.* at 12, *See Learmonth*, 95 So.3d at 639

<sup>15</sup>*Id.* at 14.

comparative negligence.<sup>16</sup> Therefore, the court determined that Learmonth's argument that the jury's award should be legally binding without regard to the statutory caps is not supported by common law.

## **B. Separation of Powers**

Learmonth also argued to the Fifth Circuit that the caps violate the Mississippi Constitution's Separation of Powers Clauses in Miss. Const. art. I §§ 1, 2. Learmonth contended that the statute: (1) conflicts with remittitur (a judicial procedure), and (2) is facially invalid as a legislatively promulgated procedural rule.<sup>17</sup>

A remittitur is a purely judicial process "by which a court reduces or proposes to reduce damages awarded in a jury verdict."<sup>18</sup> It is used in circumstances where "the evidence does not support the jury's general damages award."<sup>19</sup> However, a statutory damages cap sets a uniform limit to particular categories of damages without regard to the presence of or lack of evidentiary support. The court determined that a remittitur applies when there is a question regarding the jury's factual findings and does not appear anywhere in the statute. The caps do not alter the ability of the court to suggest a remittitur nor does it serve as a

---

<sup>16</sup> See *Walters v. Blackledge*, 71 So 2d 433, 444-445 (Miss. 1954), *Natchez & Southern Railroad Co. v. Crawford*, 55 So. 596, 599-600

<sup>17</sup>*Id.* at 20

<sup>18</sup>Black's Law Dictionary 1290 (7th ed. 199).

<sup>19</sup>*Hetzel v. Prince Williams County*, 523 U.S. 208, 211 (1998)

legislative remittitur. As the court noted, the caps are a statutory limit on a legal remedy and nothing more. The judge could still issue a remittitur despite the caps.

Learmonth argued that the caps were facially invalid because only the judiciary has the power to create procedural rules, that the legislature cannot interfere with compensatory damages, and that the legislature has reached beyond its legislative powers. The court determined that the statute does not create a rule, but provides the application of substantive law. The Mississippi Supreme Court has defined procedure as “the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the rights, and which by means of the proceedings, the court is to administer; the machinery, as distinguished from its product.”<sup>20</sup> The statute is an application of substantive law and is not a procedural rule.

Judge King wrote in the *Learmonth* opinion, “To accept that the constitutional separation of powers prohibits the legislature from limiting a legal remedy would be to prohibit the legislature from enacting practically any change to substantive law.” Learmonth argued that if the legislature can limit the damages to \$1 million, it could place the cap at \$1. The court noted that the Mississippi Constitution’s due process or remedies clauses would impose restraints on the legislature’s authority to cap compensatory damages, and that this particular argument was outside the separation of powers analysis.

---

<sup>20</sup>*Jones v. City of Ridgeland*, 48 So.3d 530, 537 (Miss. 2010)(en banc)

### **C. Access to courts**

Article 3, § 24 of the Mississippi Constitution provides that the Courts of Mississippi “shall be open” and that every person “shall have remedy by due course of law.” Some have argued that the caps violate the right of access to the court and remedies clauses because it prohibits a litigant from fully recovering without offering an alternative remedy. The Mississippi Supreme Court has stated that the open courts provision “does not create an unlimited right of access to courts.”<sup>21</sup> Also, the provision has not been interpreted as “guaranteeing limitless or absolute recovery for an injury.”<sup>22</sup> The statute only limits the amount of a litigant’s remedy; it does not deny it, nor does it hinder access to the courts or the right to a remedy.

### **D. Takings Clause**

Some argue that the caps deprive plaintiffs of property interest without compensation. The “takings” clause derives from Article 3, § 17 of the Mississippi Constitution and the Fifth Amendment of the United States Constitution. The provision provides that private property shall not be taken except upon due compensation. The Mississippi Supreme Court addressed the “takings” argument in *Wells v/ Panola County Board of Education*, and stated

---

<sup>21</sup> *Wells v. Panola County Bd. of Educ.*, 645 So. 2d 883, 890 (Miss. 1994) (quoting *Turrentine v. Brookhaven, Miss. School Dist.*, 794 F.Supp.620, 626 (S.D. Miss. 1992))

<sup>22</sup> *Id.* at 892

it was “creative, but not persuasive.”<sup>23</sup> In *Wells*, it was argued that the limit on recovery for school bus injuries violated the takings provisions. However, the court noted that the “takings” jurisprudence typically concerned real property owners and that since the court had “never construed the takings clause to apply to a cause of action or right to sue,” *Wells*’ argument was without merit.<sup>24</sup> Therefore, under *Wells*, the takings argument fails because it does not concern real property.

### **E. Equal Protection Clause**

It has been argued that Miss. Ann. Code. 11-1-60 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by creating two classes of tort victims, those who recover fully and those who do not. The preliminary concern with this argument is that Mississippi does not have an equal protection clause in its constitution. Further, the statute does not limit the plaintiff’s ability to recover all of her economic damages. When considering an equal protection issue, the Mississippi Supreme Court has recognized that “laws will not be invalidated under the due process or equal protection clauses unless they are manifestly arbitrary or unreasonable for the classifications”.<sup>25</sup>

---

<sup>23</sup>*Id.* at 895

<sup>24</sup>*Id.* at 895

<sup>25</sup>*Miss. Bd. of Nursing v. Belk*, 481 So.2d 826, 830 (Miss. 1985)

“The Equal Protection clause commands that no person shall be denied equal protection of the law by any state.”<sup>26</sup> Further, “the equal protection guarantee applies to all government actions which classify individuals for different benefits or burdens under the law.”<sup>27</sup> In *Clemons v. U.S.*, the plaintiff challenged the constitutionality of the Mississippi statute on caps for medical malpractice.<sup>28</sup> Clemons argued that strict scrutiny should apply because she was not afforded a jury trial. However, the claim was brought under the Federal Tort Claims Act, which does not provide for jury trials.<sup>29</sup> Strict scrutiny applies when there is interference with a fundamental right of a suspect class.<sup>30</sup> However, the Mississippi Supreme Court has ruled that parties injured by government tortfeasors, or by any tortfeasors, are not a suspect class.<sup>31</sup>

The Honorable Judge Carlton Reeves wrote the opinion in *Clemons* and ruled that rational basis review applied, and legislation will not be overturned unless it is unrelated to the achievement of legitimate legislative purposes.<sup>32</sup> Judge Reeves concluded that the

---

<sup>26</sup>*Ford Motor Co. V. Tex. Dep’t of Transp.*, 264 F.3d 493, 510 (5th Cir. 2001)

<sup>27</sup>*Id.*

<sup>28</sup>*Clemons v. U.S.*, Cause No. 4:10-CV-209-CWR-FKB (S. D. Miss. 2013)

<sup>29</sup>*Id.* at 12, *See* 28 U.S.C. § 2402

<sup>30</sup>*Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F. 3d 185, 211 (5th Cir. 2012)

<sup>31</sup>*Wells*, 645 So.2d at 896

<sup>32</sup>*Clemons*, at 12 (quoting *NRA*, 700 F.3d at 212)

Mississippi Supreme Court would likely hold that an effort to reduce medical malpractice insurance premiums is a legitimate legislative purpose and that the limitation on noneconomic damages to \$500,000 was rationally related to achieving that goal.<sup>33</sup> Considering the overwhelming evidence of its effect on business, predictability, and consistency, as well as and the extensive million-dollar verdicts in Mississippi, Judge Reeves found the Mississippi Supreme Court would likely rule that the cap on all civil actions at \$1 million furthers a legitimate purpose as well.<sup>34</sup>

#### **F. Waiver**

The statutory cap on noneconomic damages applies as a matter of law and does not require that any facts be proven at trial. However, in *Clemons v. U.S.*, the plaintiff argued that the defense did not raise the statutory cap as an affirmative defense. In the Fifth Circuit, a state law limiting the recovery of non-economic damages in a medical negligence case is considered to be an affirmative defense under Federal Rule of Civil Procedure 8(c).<sup>35</sup> Further, because a party waives an affirmative defense if it fails to plead it in its first responsive pleading, the argument is that the statutory cap has been waived if not pleaded. Therefore, in *Clemons*, the plaintiff argued that because the defendant failed to invoke § 11-1-60 in its answer when it knew it was facing a \$5 million demand, it should result in a waiver of the

---

<sup>33</sup>*Id.* at 15

<sup>34</sup>*Id.* at 1

<sup>35</sup>*Id.* at 4., *See Simon v. United States*, 891 F.2d 1154, 1156-157 (5<sup>th</sup> Cir. 1990)

statute's benefits.<sup>36</sup> In Judge Reeves' opinion, he cited *Lucas v. State*, in which the defendant raised the cap issue at trial and the Fifth Circuit agreed that it was sufficient and did not prejudice the plaintiff.<sup>37</sup> The statutory cap was included in the pretrial order and because of that Judge Reeves stated it was preserved.<sup>38</sup>

### **G. Special Legislation**

The statutory caps limit the award of non-economic damages for medical malpractice and any other civil actions. Some argue that the extra benefit to health care providers violates the Mississippi constitution's prohibition on "special legislation" because they are favored over other defendants, and litigants are limited to half of what other civil actions can receive for noneconomic damages. Sections 87 and 90 of the Mississippi Constitution provide the basis for the special legislation argument. The provisions are meant to ensure laws will not be passed that only benefit particular persons. The Mississippi Supreme Court, when considering Section 87, has repeatedly held that it only applies where there has been a local or private law enacted for the benefit of private individuals or corporations.<sup>39</sup> However, the medical malpractice law applies generally to all medical health care providers-an entire industry-and not a particular hospital or doctor. "A law is classified as general when

---

<sup>36</sup>*Id.* at 6

<sup>37</sup>*Id.* at 8

<sup>38</sup>*Id.*

<sup>39</sup>*Brandon v. City of Hattiesburg*, 493 So.2d 324, 326 (Miss. 1986).

it operates uniformly on all members of a class of persons, places or things requiring legislation particular to that class.” Therefore, the law would have to be more narrow to be unconstitutional. For example, in *Oxford v. Asset Partners*, the court struck down part of a law that excluded the City of Oxford and only that city from the general laws of Mississippi.<sup>40</sup>

#### **IV. After Learmonth**

The 5th Circuit ruling in *Learmonth* upholding the Mississippi statute placing caps on non-economic damages is not binding in state courts. It is, however, persuasive. Still, until the Mississippi Supreme Court affirmatively rules on the statute, the question remains open. United States District Court Judge Carlton Reeves stated in *Clemons v. U.S.* that the Mississippi Supreme Court would likely conclude that the statute is constitutional.<sup>41</sup>

State court judges in Mississippi are beginning to make rulings on the constitutionality of the statute because the judges are without clear word from the Mississippi Supreme Court. Two Mississippi state circuit court judges have declared the statutory caps unconstitutional. In *Carter v. Interstate Realty Management* and *Tanner v. Eagle Oil*, the juries rendered verdicts in excess of the caps. The judges ruled that the \$7.5 million verdict in *Carter* and the \$27 million verdict in *Tanner* could not be reduced because it violated the Mississippi Constitution. The court in *Carter* ruled that the statutory caps violated provisions of the

---

<sup>40</sup>*Id.* at 10., *See Oxford Asset Partners v. City of Oxford*, 970 So.2d 116, 119

<sup>41</sup>*Clemons*, at 1

constitution, including the right to a jury trial, remedy, and separation of powers clauses. The *Tanner* court chose not to reduce the verdict based on separation of powers and due process clause violations. It is important to note that both verdicts were special and not general, which provided the reasoning for the Mississippi Supreme Court to previously not rule on the issue. Both verdicts have been appealed, and the Mississippi Supreme Court may have to address the constitutionality arguments. Judge Eddie Bowen in Jasper County noted in *Tanner* that because the Mississippi Supreme Court declined to answer the question, he issued the order without guidance or precedent.<sup>42</sup> With more pressure and cases involving the issue, the Mississippi Supreme Court may be forced to rule on it soon. With the well reasoned opinions in *Learmonth* and *Clemons*, the Mississippi Supreme Court has clear guidance and persuasive precedent, supported by the law, to uphold the constitutionality of the caps on non-economic damages.

*Learmonth* did not address all arguments which could have been made. *Clemons* touches on some of them. David Maron wrote an article for the Mississippi College Law review, Volume 32, Issue 1, 2013 titled “Statutory Damages Caps: Analysis of the Scope of the Right to Jury Trial and the Constitutionality of Mississippi Statutory Caps on Noneconomic Damages.” I recommend a detailed reading of Mr. Maron’s article. He addresses what I have addressed herein, but also describes other arguments which can be

---

<sup>42</sup>*Tanner v. Eagle Oil & Gas Co.*, Civ. Action No. 111-0013 (Jasper Cnty. Cir. Ct. Oct. 23, 2012)

made. These arguments include a fundamental right to full recovery, due process, open courts and the remedy clause. Mr. Maron provides the basis for the other grounds. In each instance he concludes that these other arguments are considerations but ultimately should not be sufficient basis for the Mississippi Supreme Court to find 11-1-60(2)(b) unconstitutional. I believe that the statute in all likelihood will be upheld.

\*\*\*This paper was prepared by Roy A. Smith, Jr. of Daniel Coker Horton & Bell, P.A. Special thanks to law clerk, Marcus Williams, for his hard work researching the issues and arguments, and assistance in writing this paper.