NO. M2015-02349-SC-R23-CV

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TAMARIN LINDENBERG, ET AL.

Plaintiffs

v.

JACKSON NATIONAL
LIFE INSURANCE COMPANY

Defendant

BRIEF OF THE BEACON CENTER OF TENNESSEE AND CONCERNED LEGISLATORS AS PROPOSED *AMICI CURIAE*

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STATEMENT CONCERNING ORAL ARGUMENT

Amicus does not request oral argument. The constitutional issues raised are pure issues of law and fully outlined in the pleadings. *Amicus* believes its points are sufficiently raised in its brief. Arguments on questions of certification are disfavored, *see* Tenn. Sup. Ct. R. 23, but should this Court desire it, the defendant and the Office of the Tennessee Attorney General are fully capable of presenting. While certainly available should this Court request, *Amicus* thinks that it would not substantially illuminate the discussion for it to participate in oral argument.

EXPLANATION OF THE TERMS

In this brief, the following intelligible abbreviations will be used to refer to the record. *See* Tenn. R. App. P. 27(g) (2016). All lower court proceedings were in Case No. 13-cv-02657-JPM-cgc (W.D. Tenn.). In the interest of brevity, this citation shall not be repeated when referring to the record. The record itself is publicly available on the Pacer.gov system for United States federal courts. Reference to this record shall be by the document number record entry, denoted as (R.) followed by the appropriate number, a brief description of the entry, and, when helpful, the PageID number stamped upon the page by the federal court's electronic filing system. Trial transcripts shall be abbreviated to (T.) followed by a brief description identifying the quoted party, and the PageID number.

JURISDICTIONAL STATEMENT

Pursuant to Tenn. R. App. P. 27(b) and 31(b) *Amicus* deems the jurisdictional statements of the parties sufficient.

STATEMENT OF INTEREST

The Beacon Center of Tennessee is a non-profit, nonpartisan, and independent Section 501(c)(3) organization dedicated to providing expert empirical research and timely free market solutions to public policy issues in Tennessee. The Beacon Center's mission is to empower Tennesseans to reclaim control of their lives, so that they can freely pursue their version of the American Dream. The Beacon Center's policy arm was involved in the passage of the Tennessee Civil Justice Act of 2011. The Beacon Center's Legal Foundation is dedicated to the promotion of the Tennessee Constitution, administered as written and consistent with its original intended meaning as determined through a rigorous and scholarly method.

Also in agreement with this brief are proposed *Amici*, who are all members of the Tennessee General Assembly who were part of the broad coalition that enacted the Tennessee Civil Justice Act of 2011.[1] The proposed *Amici* include leadership from both the House and Senate, and the sponsors of the Civil Justice Act of 2011. Proposed *Amici* have an unquestionable interest in protecting and defending constitutionally designated legislative

[1] The Beacon Center has contemporaneously filed a motion seeking leave to add the additional *Amici* to the brief. The joining of the additional *Amici* is thus made conditionally, subject to this Court's granting of leave. *See* Tenn. App. P. 31(a) (brief may be conditionally filed with the motion for leave to file an *amicus* brief).

law making functions assigned to them in the Tennessee Constitution. Moreover, they have a special duty to protect the Tennessee Constitution's Declaration of Rights from unwarranted and ahistorical interpretations. Furthermore, as elected representatives, proposed *Amici* have a substantial interest in the promotion of Tennessee's economy and providing a stable, predictable environment for litigants in Tennessee's courts.

The proposed *Amici* are identified as follows:

- **The Honorable Ron Ramsey**
  Lieutenant Governor & Speaker of the Senate
  Senate District 4

- **The Honorable Beth Harwell**
  Speaker of the House of Representatives
  House District 56

- **The Honorable Mark Norris**
  Senate Majority Leader
  Senate District 32
  Prime Sponsor of the Civil Justice Act of 2011

- **The Honorable Gerald McCormick**
  House Majority Leader
  House District 26
  Prime Sponsor of the Civil Justice Act of 2011

- **The Honorable Bill Ketron**
  Senate Majority Caucus Chairman
  Senate District 13

- **The Honorable Glen Casada**
  House Majority Caucus Chairman
  House District 63

- **The Honorable Jack Johnson**
  Senate Commerce Committee Chairman
  Senate District 23
  Co-Prime Sponsor of the Civil Justice Act of 2011

- **The Honorable Brian Kelsey**
  Senate Judiciary Committee Chairman
  Senate District 31
  Co-Prime Sponsor of the Civil Justice Act of 2011

- **The Honorable Pat Marsh**
  House Business & Utilities Committee Chairman
  House District 62
  Co-Prime Sponsor of the Civil Justice Act of 2011

The proposed *Amici* reviewed the content of this brief and are in agreement with its viewpoints. The parties individually consented to the filing of this brief to personal representatives of the Beacon Center of Tennessee.

STATEMENT OF THE ISSUES

In 2011, the Tennessee legislature substantively changed the law to provide parameters within which juries award punitive damages in the form of a maximum damages cap.

1) Does this cap violate the right to trial by jury when punitive damages were unrecognized in Tennessee and only barely emerging in the Nation at the time that right was recognized?

2) If not, could a cap still constitute a violation of separation of powers?

STATEMENT OF THE CASE AND FACTS

This case is about whether the Tennessee legislature may place reasonable limits on the amount of punitive damages that juries may award without giving offense to the Tennessee Constitution's guarantee of right to trial by jury, or the separation of powers.

On July 19, 2013, the plaintiffs filed a civil complaint in the Shelby County Circuit Court, seeking damages and fees for breach of contract and bad faith. (R. 2: Notice of Correction, Attachment 1, Exhibit Redacted Complaint, PageID 46). The defendant removed the case to federal court on August 23, 2013. The United States District Court for the Western District of Tennessee, the Honorable Jon P. McCalla, presided ("the trial court"). (R. 2: Notice of Correction).

A jury found for the plaintiffs following a trial. (R. 151: Jury Verdict, PageID 2015-18). The trial court then asked the jury to make a finding as to the amount of punitive damages. (R. 160: T, Trial Court Instructions, PageID 2229-230). The jury awarded the plaintiffs punitive damages totaling $3,000,000. (R. 152: Special Jury Verdict).

The punitive damages amount exceeded the maximum amount allowable under Tennessee law. Specifically, Tenn. Code Ann. § 29-39-104(a)(5) states that punitive damages may not exceed an amount equal to two times the amount of compensatory damages awarded, or $500,000, whichever is greater. The defendant moved for a judgment as a matter of law

arguing, *inter alia*, that the punitive damages award was limited by Tennessee's statutory cap (R. 158: Brief in Support of Motion for Judgment as a Matter of Law, PageID 2118, 2121).

This punitive damage award prompted a constitutional question regarding the constitutionality of the statutory cap. The plaintiffs contended that the cap was unconstitutional and moved for certification of the question to the Tennessee Supreme Court. (R. 167: Motion for Certification of Questions). On November 24, 2015, the trial court certified the following two questions of state law to this Court via Tenn. S. Ct. R. 23:

1. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 violate a plaintiff's right to trial by jury, as guaranteed in Article I, section 6 of the Tennessee Constitution?
2. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 represent an impermissible encroachment by the legislature on the powers vested exclusively in the judiciary, thereby violating the separation of powers provisions in the Tennessee Constitution?

(R. 188: Order Certifying Questions of State Law, PageID 4270). The trial court denied a flurry of requests that it reconsider, entering a final order on February 1, 2016. (R. 198: Order Denying Motions).

On February 8, 2016, this Court ordered briefing from the parties.

SUMMARY OF THE ARGUMENT

Tennessee's right to a trial by jury does not prohibit substantive legislative change to available tort remedies such as punitive damages. Even embracing the logic that the right prohibits interfering with a jury remedy available in 1796, a cap on punitive damages would still be constitutional. The plaintiffs fail to show that punitive damages were recognized in Tennessee at the time of statehood. They appear much later in Tennessee and were just emerging in American law at the time. And they have always been an evolving doctrine, never thought beyond the reach of the legislature.

A cap on punitive damages is simply a change in the law that does not implicate the jury right. Legislatures are imbued with the authority to alter the common law, including remedies. Just as they make substantive changes to entitlements without offending due process and set criminal sentencing ranges, legislatures have a vital role to play in setting the parameters in which juries operate when they award punitive damages.

The North Carolina Supreme Court's ruling that a cap on punitive damages is constitutional has special resonance because this Court accords that precedent special weight, for very valid historical reasons.

Finally, a cap does not violate separation of powers. For the reasons set forth above, legislatures are authorized to set the substantive parameters for juries.

ARGUMENT

I. THERE IS NO HISTORICAL OR CONSTITUTIONAL BASIS TO DENY THE LEGISLATURE THE ABILITY TO SET SUBSTANTIVE LIMITS ON REMEDIES SUCH AS PUNITIVE DAMAGES. THE RIGHT TO TRIAL BY JURY DOES NOT GUARANTEE A RIGHT TO RECOVER UNLIMITED AWARDS OF PUNITIVE DAMAGES.

A. Introduction and overview.

The Tennessee Declaration of Rights has long protected the right to trial by jury. Article I, section 6 provides: "That the right to trial by jury shall remain inviolate. ..." This Court has long held this right guarantees a trial by jury "as it existed and was in force and use according to the course of the common law under the laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution of 1796." *Patten v. State*, 426 S.W.2d 503, 506 (Tenn. 1968).

The plaintiffs read this with excessive formalism, taking it to mean that the right accords constitutional status to trial practice as it existed under the common law at the time of the ratification of the Tennessee Constitution.[2] (Plaintiffs' brief, p. 13). Thus, they reason that if a cap did not exist in 1796, it may not exist now. The plaintiffs simply misconstrue the nature of the right, for the reasons explained by the defendant and the Attorney General.

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[2]The plaintiffs frame the question by arguing that "[b]ecause a limitation on punitive damages did not exist at the time of the creation of the Tennessee Constitution," it infringes on the right to trial by jury. (Plaintiffs' brief, p. 13). That is, the cap is improper not because of what it took away, but because it did not previously exist, making it appear to argue the legislature may not innovate whatsoever.

Suffice it to say, this right was not meant to freeze in amber trial practice as it existed in 1796 when Tennessee was a rough frontier state with what no one would consider to be a robust and well developed legal practice.[3][4] Tennessee was, after all, a depopulated territory at the time with only two judicial districts and an inferior court in each of the seven counties presided over by justices of the peace.[5] It hardly had a legal practice to speak of, let alone one so developed that the founders would have considered any further innovation to be beyond the pale. The right was meant to protect the jury's ancient role as trier of fact, not to obstruct the development of the law as explained in great detail in the principal briefs.

Nevertheless, even accepting the premise that the right was meant to embed trial practice circa 1796 as a constitutional right, the plaintiffs fail to show that punitive damages were a fundamental jury right in Tennessee at the time, or *even that they existed at all.* The most that can be said about punitive damages is that they did not appear in the annals of Tennessee law

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[3] At the time of Tennessee's constitutional convention, Tennessee barely had the 60,000 free inhabitants required by the Northwest Ordinance to petition for statehood. William Robertson Garrett, Albert Virgil Goodpasture, *History of Tennessee: Its People and Its Institutions from the Earliest Times to the Year 1903*, p. 124 (rev. ed. 1903). Viewed on Google Books: https://books.google.com/books?id=HlUVAAAAYAAJ&printsec=frontcover&dq=History+of+tennessee:+it's+history&hl=en&sa=X&ved=0ahUKEwjA8IHgoevLAhXBWh4KHUUEDAMQ6AEIHzAA#v=onepage&q=History%20of%20tennessee%3A%20it's%20history&f=false (Last viewed on April 4, 2016).

[4] By 1800, the state still only had approximately a population 105,602, with a majority of its 13,893 black residents enslaved. Stanley J. Folmsbee, Robert E. Corlew, Enoch L. Mitchell, *Tennessee: A Short History*, p. 114 (1969).

[5] Garrett, p. 107.

for nearly another fifty years and were an emergent concept in American law at the time of statehood.

Furthermore, the meaning of punitive damages has changed. They once meant something very different than they do now. Rarely used, available only for some causes of action, and not for cases like breach of contract, unlimited punitive damages would certainly not be available to juries as a historical matter.

A cap on punitive damages is nothing more than a substantive change in the law. Far from being impermissible, legislation on this front is right in the legislature's wheelhouse. Legislatures already set substantive boundaries for juries. The legislature alters the scope of entitlement programs. The legislature sets criminal sentencing ranges. So may it cap punitive damages. There is even a particularized need for legislative involvement in this context given the Supreme Court's admonition that excessive punitive damages may violate substantive due process guarantees.

North Carolina, from where our constitutional right to trial by jury derives, has considered this very issue and rejected the plaintiffs' argument. Following North Carolina's precedent as this Court has done so many times before is the natural conclusion of precedent this Court has already laid in place.

B. Plaintiffs fail to show that punitive damages were a part of Tennessee practice in 1796.

Plaintiffs make two unconvincing arguments. First, they argue that the question of damages is historically one for the jury (plaintiffs' brief, pp. 13-14) and, second, punitive damages have "deep roots in Tennessee common law." (Plaintiffs' brief, p. 14). Both points prove that punitive damages are old but stop far short of demonstrating that they stretch back to 1796. The former argument also fails to address the *type* of damages available at the time, or that they were unlimited, or that a cap would not have been considered a matter of substantive law well within legislative purview.

The second argument raises the question: how deep are the roots? To be in existence "at the time of the adoption of the Tennessee Constitution" punitive damages would have to date to 1796. *Patten,* 426 S.W.2d at 506. Plaintiffs cite to the 1840 case of *Wilkins v. Gilmore*, 21 Tenn. 140, 141 (Tenn. 1840). (Plaintiffs' brief, at 14). Roots that reach 1840 may be deep but have not penetrated to the strata of statehood. That plaintiffs can do no better than present case law from 1840 goes a long way in disproving their own argument that punitive damages were established in 1796.

The supporting authority of *Silkwood v. Kerr-McGee*, 464 U.S. 238, 255 (1984) fares no better. Plaintiffs cite it for the proposition that punitive damages have long been a part of state law. (Plaintiffs' brief, p. 14). *Silkwood* was a U.S. Supreme Court case. It did not specifically address Tennessee. And much like the claim that punitive damages have "deep roots," this one

relies on uncritical acceptance of a vague observation. Punitive damages may have long been a part of state law, and still have not existed in Tennessee in 1796.

This does not appear to be the case. In *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900 (Tenn. 1992), this Court analyzed the history of punitive damages in Tennessee. This Court *began* in 1840, long after constitutional ratification.

> As early as 1840, this Court stated: "in an action of trespass the jury are not restrained, in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect to the malicious conduct of the defendant, and the degree of insult with which the trespass has been attended."

Id. (quoting *Wilkins v. Gilmore*, 21 Tenn. 140, 141 (1840)). The 1840 date accords with the plaintiffs who cite to the very same case in describing punitive damages as having "deep roots," (plaintiffs' brief, p. 14), indicating that there is little disagreement that punitive damages did not exist in Tennessee prior. The necessary implication then is that punitive damages were unrecognized in Tennessee in 1796.

This Court then noted in *Hodges* that "shortly thereafter" it began to recognize the more modern notion that punitive damages "should operate to punish the defendant and deter others from like offenses," suggesting that even after 1840 the current notion of punitive damages were hardly a time-honored institution. *See Hodges*, 833 S.W.2d at 900 (quoting *Polk, Wilson & Co. v. Fancher*, 38 Tenn. 336, 341 (1858)). In fact, this Court characterized

the function of punishment and deterrence as "[t]he contemporary purpose," again in tacit recognition of their fluidity.[6] *See id.*

Later still, the doctrine of punitive damages continued to evolve. This Court next detailed the instances in which punitive damages were an appropriate remedy. *Id.* In a holding that undercuts the idea that punitive damages are protected as part of the "inviolate" right to trial by jury, this Court recognized the evolution of punitive damages, concluding that "whatever [the common law causes of action for them] may have once meant, by contemporary standards it is both vague ('social obligations') and overbroad ('gross negligence')." *Id.* at 901. This Court saw no problem in disrupting the common law of punitive damages, recognizing that "the time has come to reexamine, and modify, the manner in which punitive damages are awarded in Tennessee." *Id.* This perfectly logical result emerges from the well-recognized principle that punitive damages are an evolving, common law doctrine subject to change, even abolition.

This shows that in Tennessee, punitive damages were not available in 1796, and even when they emerged they were, as they are now, a somewhat floating concept. They simply were not deeply rooted at the time of statehood. They begin to appear in Tennessee in the middle of the 19th century in embryonic form, and were subject to modification in 1992 when *Hodges* was decided.

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[6] The changing meaning of the punitive damages doctrine is addressed more fully below.

Even if the right to trial by jury protects everything in existence in Tennessee common law at the time of statehood (and obstructs against any future innovation), it would still not matter because punitive damages were anything but an established practice in 1796. This Court thus acted legitimately when it altered them in *Hodges*. It did not infringe on a jury right. The jury right did not enshrine the common law of punitive damages as an inviolate right. So too the legislature may make alterations to them to adapt to the changing times.

C. Punitive damages were not well established in America at the time of statehood either.

The national historical record portrays a similar picture, even though it is only useful inasmuch as it tends to demonstrate what was accepted practice in Tennessee at the time. In an exhaustive history of punitive damages under Anglo-American law in his concurrence in *Pac. Mut. Life Ins. Co. v. Haslip*, Justice Scalia observed: "As recently as the mid-19th century, treatise writers sparred *over whether they even existed*." 499 U.S. 1, 25 (1991) (Scalia, J., concurring) (emphasis added). Justice Scalia concluded that punitive damages, whatever their origin, were "undoubtedly an established part of the American common law of torts" by the time the Fourteenth Amendment was ratified in 1868. *Id.* at 26. Implicit from this statement and his sources, all of which reflect ongoing debate about the dubious origins of punitive damages throughout the mid-19th century, is the inescapable conclusion that punitive damages would not have been regular practice in

Tennessee courts or anywhere else in 1796, even if Tennessee was of the highest legal sophistication for the time and reflected national practice.

While the majority opinion in *Haslip* included late 18th century sources, this in no way undercuts the argument. *Id.* at p. 15. According to the majority, "the first reported American cases" of punitive damages were in 1784 and 1791. *Id.* If the very first reported American cases were emerging relatively contemporaneously with Tennessee's founding, then it defies belief to think that this cutting edge concept would have become established in Tennessee's frontier courts by 1796. If this Court's historical analysis in *Hodges* is to be taken as authoritative, it would be another fifty years before they began to appear in Tennessee. *See Hodges*, 833 S.W.2d at 900. Punitive damages would certainly not have been considered an "inviolate" trial right in Tennessee in 1796.

D. The meaning of punitive damages has changed over time. Their current meaning is different from their historic meaning.

1. *Punitive damages were and are a changing doctrine.*

The contention that punitive damages must retain their alleged historic status fails to appreciate that punitive damages have had an amorphous and shifting meaning over time. While they have undoubtedly long been around in some form, what precisely punitive damages were, and were for has metamorphosed. *See Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n. 11 (2001) ("In any event, punitive damages have

evolved somewhat."); *Hodges*, 833 S.W.2d at 900 (noting the change in purpose). As exhaustively shown by *amici* Tennesseans for Economic Growth, *et al.*, for most of the country's legal history, punitive damages awards were rare, and went to serve different interests.

The broader concerns of society at large were not a concern. "When the Supreme Court, in the 19th century, upheld punitive damages based on their historical pedigree, it understood them to punish 'the wrong done to the plaintiff'—that is, to be imposed 'for the redress of private wrongs.'" Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: the Past, Present, and Future of Punitive Damages*, 118 Yale L.J. 392, 420 (Dec. 2008). Clearly this is no longer so as juries award punitive damages to address concerns that do not even involve the actual parties, like deterrence of others. *See Hodges*, 833 S.W.2d at 900 (calling this the "contemporary purpose"). One court has altogether disavowed punitive damages as currently constituted for want of a nexus to any historical analogue at tort. *See, e.g., Fay v. Parker*, 53 N.H. 342, 382, 397 (1973) (calling them a "false doctrine"--"The idea is wrong. It is a monstrous heresy."). Punitive damages are now a different creature.

The current purposes assigned to punitive damages (deterrence and sending a message to third parties) are relative newcomers to the law. The jury award in this case was in response to these sorts of appeals. Plaintiffs argued to award punitive damages thusly:

- "you are in a unique position … to determine …what message you send to a company that has clearly forgotten the purpose of what it's doing."
- "that's exclusively in your purview as to what you think would deter a company like Jackson National Life Insurance Company from doing this to another family."
- "You have plenty of proof in the record that talks about the resources of this company such that you can derive what number would punish them sufficiently so that no one else has to endure what Tamarin Lindenberg and her family did. ..." (R. 160: T. of plaintiffs' closing, PageID 2221-22).
- "You all are in such a good position to send a loud and clear message from this community that changes need to be made at Jackson National Life Insurance Company. …" (*Id.* at 2227).

The trial court likewise told the jury that punitive damages had a purpose that did not even have anything to do with this defendant: "The purpose of an award for punitive damages is to punish a wrongdoer and to deter misconduct by the defendant *or others*." (*Id.* at PageID 2076) (emphasis added).

Punitive damages were, in this case, about interests unfamiliar to the purposes of punitive damages historically. *See* Colby, 118 Yale L.J. at p. 421. ("History, therefore, provides no basis" for contemporary function of punitive damages). So while demanding their historic due, plaintiffs fail to appreciate

what that entails. The plaintiffs asked for and got something that would not have been considered punitive damages in the first place.

Times have changed. "As a living and breathing thing, the law changes when necessary to serve the needs of the people." *Depuis v. Hand*, 814 S.W.2d 340, 345-46 (Tenn. 1991). Legislatures are entitled to respond. The plaintiffs have benefited from developments. They certainly have no reason to grouse on constitutional or historical grounds about a legislative response to a changing doctrine.

2. *Punitive damages now embrace new causes of action like breach of contract.*

Unsurprisingly, broadening the doctrine meant that punitive damages began to be awarded at an unprecedented rate, as shown by *amici* Tennesseans for Economic Growth, *et al.* This is a phenomenon unique to the United States, even among other English common law countries. The U.S. Supreme Court has observed that even with legislative limits, "punitive damages overall are higher and more frequent in the United States than they are anywhere else." *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495 (2008). Even today, punitive damages are only available in England for a narrow range of cases. *Id.* at 496. Positive or not, these changes are distinctly modern. A modern legislative corrective like a statutory is hardly unthinkable.

Loosed from their historic mooring, punitive damages have drifted into unfamiliar waters, crashing into causes of action in which punitive damages

were not previously thought available. This includes bad faith breach of contract, the cause of action in this very case. (Plaintiffs' brief, p. 5) ("This case arises from Jackson National's breach of contract and bad faith failure to pay the life insurance policy benefits. ..."). Justice O'Connor explains:

> Much of this is attributable to changes in the law. For 200 years, recovery for breach of contract has been limited to compensatory damages. In recent years, however, a growing number of States have permitted recovery of punitive damages where a contract is breached or repudiated in bad faith. *See, e.g., Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 686 P. 2d 1158 (1984). Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards. *See* RAND iv.

Haslip, 499 U.S at 62 (O'Connor, J., dissenting). The very awarding of punitive damages whatsoever for breach of contract cases is itself of modern vintage.

Whatever their historical antecedents under English common law, it is evident that punitive damages no longer resemble punitive damages under English common law. The meaning of the term is simply different. It is misguided to attribute historic sentiment to damage awards such as the one in this case.

To conclude, tinkering with terminology does not fundamentally alter the question. Punitive damages cannot be described as a "sacrosanct" (plaintiffs' brief, p. 19) and venerable tabernacle that would be sullied by legislative limits when plaintiff-friendly innovations were long ago smuggled behind the veil. Merely dubbing something "punitive damages" cannot

elevate developments that were not historically considered to be an aspect of the punitive damages doctrine to constitutionally protected status:

> The Court has, for instance, upheld the constitutionality of obscenity laws in large part on the basis of their long tradition of historical acceptance. But of course a state could not pass a law redefining "obscenity" to include any speech critical of the Governor and then rely on the cases upholding obscenity bans on historical grounds as an absolute justification for the new law. Even if we accept the basic claim that history justifies exempting obscenity from the rules that would otherwise govern the regulation of speech under the First Amendment, an "obscenity" ban that goes well beyond what was historically encompassed by that term - to an entirely different kind of speech - would have no claim to a valid defense grounded in history simply because it co-opts an old historical label.
>
> The same is true of punitive damages. As I have previously written, the fact that the historical institution of punitive damages has been around for centuries ... does not ... mean that any remedy that a modern court chooses to call "punitive damages" is automatically constitutional. If the courts completely change the fundamental nature of the institution of punitive damages, slapping the old label on them will not avoid all questions of constitutional infirmity.

Colby, 118 Yale L.J. at 419. The shifting sands of syntax can provide no foundation for an argument that purports to rest on the bedrock of historic fact.

So long as the legislature has not limited the availability of juries to litigants, or intruded into the role of the jury as a finder of fact, the legislature has not infringed on the right to trial by jury.

E. A cap on punitive damages is a substantive change in the law, well within legislative purview. This Court has approved of legislative changes to the common law.

A cap on damages is nothing more than a substantive change in the law. A cap "merely establish[es] the parameters within which a jury's fact-finding deliberations proceed." Randall R. Bovbjerg, Frank A. Sloan, and James F. Blumstein, *Public Policy: Valuing Life and Limb in Tort: Scheduling "Pain and Suffering."* 83 Nw. U.L Rev. 908, 973 (Summer, 1989). *See also Kirkland by & ex rel. Kirkland v. Blaine Cty. Med. Ctr.*, 4 P.3d 1115, 1120 (Idaho 2000) (cap on noneconomic damages does not violate Idaho's right to trial by jury because it does not infringe on ability of jury to decide cases).[7] The core confusion in the present argument rests with the view that a cap interferes with a traditional jury function. But the jury's constitutionally protected role is to make findings of fact, not assess penalties. *See Woods v. State*, 169 S.W. 558, 559 (Tenn. 1914) ("It is not essential that the jury assess the [criminal] punishment, unless the statutes of the State so direct."). To be

[7] The plaintiffs dismiss cases from other states as distinguishable because in Tennessee, "the right to a jury trial has always been sacrosanct." (Plaintiffs' brief, p 19). They do not mention *Kirkland*, which concerned a cap on noneconomic damages. But like Tennessee, Idaho's Constitution guarantees that the right to trial by jury "shall remain inviolate," 4 P.3d at 1117, n. 4, making it defy the hasty distinction. In fact, the *Kirkland* plaintiffs relied on the same line of reasoning as the plaintiffs here. The Idaho right protected "[t]he right to jury trial as it existed in common law and under the territorial statutes when the Idaho Constitution was adopted." *Id.* at 1118. The plaintiffs "correctly" noted that at the time of statehood, a jury's right to award compensatory damages was established. *Id.* It did not matter because the Idaho Court recognized that the legislature has the right to make substantive law, including abolish the common law and therefore, limit the remedies. *Id.* at 1119. Because the jury retained the ability to decide cases and act as the trier of fact, "[t]hat is all to which the jury entitles them." *Id.* at 1120.

sure, this includes finding fault and awarding damage, but within legislative boundaries, duly enacted.

Legislatures are not prohibited from limiting the penalties available. *See id. See Henley v. State*, 41 S.W. 352, 361 (Tenn. 1897) (trial right "did not mean that no law should in the future be passed to regulate such trials and prescribe in such cases, but that the right should not be denied the citizen, with its material and substantial benefit"). *See also Kirkland,* 4 P.3d at 1120 (punitive damages cap does not infringe on jury's right to decide cases). According to this Court, "it was never for a moment supposed," *Henley*, 41 S.W. at 361, that the common law would never change. *See also Hodge v. Craig*, 382 S.W.3d 325, 338 (Tenn. 2012) ("beyond reasoned argument" that the legislature may alter common law).

Common law remedies are no exception. "The State has complete control over the remedies of its citizens in the Courts. It may give new and additional remedy for a right already in existence—or may abolish old and substitute new remedies." *Collins v. East T., V. & G. R. Co.*, 56 Tenn. 841, 847 (Tenn. 1872). *See Morris v. Gross*, 572 S.W.2d 902, 905 (Tenn. 1978) (no right to a particular remedy; legislature may change them). The cap is a simple matter of substantive law lying at the very heart of the legislature's function.

The right to jury trial no more protects against substantive changes to remedies than it would against substantive changes to causes of action. As

both the defendant (defendant's brief, p. 17) and the Attorney General ably point out (Attorney General brief, pp. 9, 16), common law causes of action are subject to elimination altogether. In support of this point, *amicus* offers the following examples of the abolishment of common law: interspousal immunity, *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983); alienation, *Depuis v. Hand*, 814 S.W.2d 340, 345 (Tenn. 1991) (listing cases abolishing obsolete common law doctrine); negligent supervision of minor children, *Lavin v. Jordan*, 16 S.W.3d 362, 364 (Tenn. 2000). Were the common law not subject to revision, even, revocation, then any judgments that were rendered on a Sunday would be void. Yet the doctrine of *dies dominicus non est juridicus* was abolished by this Court in 2001. *See State v. King*, 40 S.W.3d 442, 448 (Tenn. 2001) ("There is no ... constitutional provision that prohibits judicial functions on a Sunday.").

Causes of action have been created by the legislature as well. Wrongful death did not exist at common law. *See Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 596 (Tenn. 1999). The defendant observes that statutes of repose are within legislative purview. (Defendant's brief, p. 18). So are statutes of limitations. *See Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) (citations omitted) (calling them "exclusively the creature of the legislative branch"). These are not thought to be impermissible legislative enactments, yet they too limit the availability of a plaintiffs' right to recover at tort, even on common law causes of action and even on damages that,

unlike punitive damages, clearly existed at the time of statehood and were awarded by juries.

It follows that if a common law cause of action can be abolished altogether, then the legislature "necessarily had the power to limit the damages recoverable for the cause of action." *Kirkland,* 4 P.3d at 1119 (if legislature can enact statutes of limitation, then it can pass other limitations on recovery). The establishment of a jury right did not mark the end of history. The fundamental role of a jury to make findings of fact, determine liability, and award damages is unchanged. The legislature is merely setting the substantive parameters in which juries are to operate, an action to which it is entitled.

F. Juries operate within parameters set by the legislature. This is a relationship familiar in the due process and criminal sentencing context.

This path is well trod. Two examples demonstrate how overwrought the constitutional concerns over caps truly are. The area of entitlements and due process provides one precedent, an analogy drawn directly by Bovbjerg, Sloan, and Blumstein. 83 Nw. U.L Rev. at 974. To prevail, a plaintiff must show a deprivation of a protected liberty or property interest. *See Board of Regents v. Roth*, 408 U.S. 564, 569-570 (1972). Property interests themselves are not "created by the Constitution," *id.* at 577, but by the states themselves. Procedural due process does not prohibit a legislative change in the nature or scope of an entitlement. *Atkins v. Parker*, 472 U.S. 115, 128-29 (1985). This is

a matter of substantive law. *See id.* States are free to modify the scope of the protected interest, but once they do, citizens cannot be deprived of that entitlement absent adequate procedural due process. *See Cleveland Bd. of Educ. v. Laudermill,* 470 U.S. 532, 541 (1985). There is no basis for a due process hearing to determine facts when the nature or scope of the entitlement changes by the terms of the legislation. *See Atkins*, 472 U.S. at 130-31. So long as the change is prospective, the legislature is perfectly free to alter, amend, or revoke the interest altogether. It is no different with a cap on damages.

The due process field provides a cogent template for resolving the plaintiffs' constitutional concern. This Court long ago recognized that the State has "complete control over the remedies of its citizens in the Courts," and that so long as the legislature does not alter a vested right it may abolish old remedies. *See Collins*, 56 Tenn. at 847. *See also Morris,* 572 S.W.2d at 905 (same, legislature may not abolish a remedy that would affect substantive rights of pending litigants). Like entitlements, the legislature may alter those remedies prospectively, but not take them away once vested absent due process. With a cap on damages the legislature has substantively altered the scope of remedies, just like an adjustment to an entitlement. While a plaintiff has a right to expect juries to find facts and award damages within those parameters, and certainly the legislature may not affect pending litigation,

that plaintiff has no right to object to a limitation on a remedy passed prior to the commencement of the action.

The interest in legislative involvement weighs particularly heavily when, as with punitive damages, a component of punishment is involved. *See Cooper Indus.*, 532 U.S. at 432 (comparing punitive damages to criminal punishment). Not only has the Supreme Court and this Court shined its favor on legislative change in the due process setting, it has conversely held that jury awards of punitive damages may be so excessive as to violate the Fourteenth Amendment's *substantive* due process protections, *see B.M.W. of N. Am. v. Gore*, 517 U.S. 559 (1996), setting the argument for unrestrained punitive damages based on the Tennessee Constitution on a collision course with the U.S. Constitution. Indeed, in evaluating a challenge to punitive damages, one of the factors the courts are to consider is how severely analogous criminal behavior is punished by the politically accountable branch. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003). A cap on a form of punishment is uniquely within the special sphere of competence and accountability of the legislature. Far from prohibited, the legislature's involvement is quite necessary. The Supreme Court's procedural due process cases show how substantive boundaries set by the legislature do not offend a procedure or fact finding prerogative of the jury.

The second precedent available for this Court is criminal sentencing. At the time of our Nation's founding, the punishment was closely linked to

the crime itself. Under the common law, the punishment was fixed, either by common law or statute. *See Apprendi v. New Jersey*, 530 U.S. 466, 479-480 (2000); *Jones v. United States*, 526 U.S. 227, 244-45 (1999) (noting the norm of fixed sentences in felony cases). It was the jury who made the determination of guilt, effectively sentencing the defendant. The judge simply imposed the sentence. He had virtually no authority to alter it. *Apprendi*, 530 U.S. at 479 ("As Blackstone, among many others, has made clear 'the judgment, though pronounced or awarded by the judges, is not their determination or sentence. ...").

The modern practice is quite different. Now felony penalties are set by the legislature in predetermined ranges. *See* Tenn. Code Ann. §§ 40-35-111, 112 (LexisNexis 2015). Not only must sentences fall within the legislatively determined range, it is the now the judge, not the jury, who (except in capital cases) must select the actual sentence within the legislatively determined range. *See* Tenn. Code Ann. § 40-35-203(a) (LexisNexis 2015). In fact, the revision of the entire Tennessee Criminal Code replaced common law offenses with statutory offenses to better accomplish the legislatively desired goals of punishment. Tenn. Code Ann. § 39-11-102(a), Sent. Comm'n Comments (LexisNexis 2015). This Court has long rejected the idea the legislatures cannot set criminal penalties without running afoul of the right to trial by jury. *See Woods*, 169 S.W. at 559 ("The power to declare what shall be the

appropriate punishment for an ascertained crime belongs solely to the legislature.")

A legislature that can set sentencing ranges may set a punitive damages cap. A cap on damages could fairly be characterized as the civil equivalent to sentencing ranges. As noted above, the Supreme Court has even recognized that punitive damages are akin to criminal sentencing. *See Cooper Indus.*, 532 U.S. at 432. Legislatures are free to set sentencing ranges, or even mandatory minimum sentences, so long as the jury makes the requisite findings of fact that trigger the mandatory minimum. *See Jones*, 526 U.S. at 230. The Supreme Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *United States v. Booker*, 543 U.S. 220, 233 (2005) (citing *Apprendi*, 530 U.S. at 481). If the legislature may impose ranges for *felony crimes* upon juries when the loss of personal liberty is at stake, then it most certainly may impose caps on punitive damages in civil actions such as breach of contract. A cap setting the range of civil penalties for the jury to utilize is harmonious with the time honored relationship between legislatures and juries.

G. The North Carolina Supreme Court's favorable treatment of the constitutionality of punitive damages should be given special precedential weight.

The defendant takes special care to single out the North Carolina Supreme Court's rejection of the same constitutional argument against punitive damages caps in *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 10 (N.C.

2004). (Defendant's brief, pp. 14-16). The defendant has good reason. Tennessee's constitutional origins are inextricably interwoven with North Carolina's. While the defendant capably demonstrates the precedential weight this Court has attributed to North Carolina's jurisprudence, its importance is magnified by a fuller examination of the relationship between the two states as set forth below.

Tennessee and North Carolina have long been intertwined. In May of 1772, four years before the Declaration of Independence, a group of settlers, disgusted with decades of royalist corruption and official abuse, fled from neighboring colonies, primarily North Carolina.[8] They settled along the Watauga River near present day Elizabethton, Tennessee, and, unsure as to whether they were within the bounds of any organized government, executed a document known as the Watauga Compact.[9] The Compact set forth the terms of a rudimentary government, thus whelping the first incarnation of self-governance in Tennessee.[10]

The Watauga Compact has been described somewhat debatably as "the first written constitution (1772) to be prepared on American soil and adopted by native Americans, who sought to remove themselves from the rule of

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[8] Stanley J. Folmsbee, Robert E. Corlew, Enoch L. Mitchell, *Tennessee: A Short History*, pp. 52-54 (1969).

[9] *Id.* at 52-53, 56-57.

[10] Garrett, p. 55.

British Colonial Governors."[11] *Cooper v. Rutherford County*, 531 S.W.2d 783, 786-87 (Tenn. 1975) (Henry, dissenting). Fearing for their fragile state following the outbreak of the American Revolution, the Wataugans later submitted their settlement for annexation by North Carolina.[12] These early Tennesseans subsequently participated in the drafting of the North Carolina Constitution in 1776, with four (4) of them actually signing it, including such luminaries from Tennessee history as John Sevier.[13]

This point bears further emphasis. The North Carolina Constitution has special importance not just because Tennessee's Constitution in many ways derives from North Carolina's, but also because Tennessee's founders helped draft the North Carolina Constitution. Tennessee has influenced North Carolina in kind. The resultant two state constitutions could fairly be described as an act of cross-pollination from bees of the same hive.

Tennessee was physically divided from North Carolina as a separate territory on February 25, 1790, as a condition set by Congress before North

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[11] To credit the Watauga Compact as the "first American Constitution" is a common historical observation, one echoed throughout the literature and by, among others, Theodore Roosevelt in his seminal work, *The Winning of the West*. More recent histories criticize "the assertion that the Wataugans exercised full rights of statehood by emphasizing the temporary nature of their agreement." Lewis L. Laska, *The Tennessee State Constitution*, p. 2 (1990). This debate is unlikely to ever be resolved satisfactorily. The actual Watauga Compact has been lost to posterity and its exact contents referenced only obliquely in the historical record. Folmsbee, pp. 56-57.

[12] *Id.* at p. 61. Laska, p. 2.

[13] Folmsbee, p. 61. Laska, p. 2.

Carolina could join the Union.[14] Following the American Revolution, no less an historical figure than President George Washington signed an act creating a territorial government for the southwestern lands of what was formally North Carolina but was soon to become Tennessee.[15] Tennessee was later to submit in its official bid for statehood a proposed constitution that began with recognition of this history, declaring their intention to act consistently with the U.S. Constitution and "the act of Cessation of the State of North Carolina" in 1796. Tenn. Const. pmbl. (1796).

Tennessee's constitutional history is likewise tightly related to North Carolina.[16] In drafting the proposed constitution, the draftsmen included a Declaration of Rights which "has remained virtually unchanged for the past two centuries," *Martin v. Beer Bd.*, 908 S.W.2d 941, 949 (Tenn. Ct. App. 1995) (citing *Waugh v. Slate*, 564 S.W.2d 654, 657 (Tenn. 1978)). Tennessee's Declaration of Rights was drafted in three days, suggesting that little thought accompanied the process other than to incorporate provisions found in other state constitutions. *See Martin,* 908 S.W.2d at 948, n. 12. The Declaration of Rights was the longest section of the proposed constitution and was almost entirely taken from North Carolina's.[17] This is the same

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[14] Garrett, p. 103.

[15] *Id.*

[16] *Id.* at 124. Laska, at p. 2.

[17] *Id.* at p.5.

constitution that, as shown previously, Tennesseans like John Sevier themselves aided in crafting. So not without cause this Court was referring to North Carolina as "our parent State" as early as 1833. *Garner v. State,* 13 Tenn. 159, 171 (1833).

For good reason then this Court has long placed great precedential weight on North Carolina's decisions. Never is this more correct than when interpreting Tennessee's constitutional right to trial by jury. *See Garner*, 13 Tenn. at 176 ("The trial by jury is the same that was handed down to us from the State of North Carolina by her act of cessation in the year 1789. ..."). Employing very similar language as Tennessee's, North Carolina's original constitution from 1776, and continuing until today, reads: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and violable." *Rhyne*, 594 S.E.2d at 10.

The two states provide the same protections, despite the minor difference in verbiage. In Tennessee, the right has "been interpreted to be a trial by jury as it existed and was in force and use according to the course of the common law under the laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution of 1796." *Patten v. State*, 426 S.W.2d 503, 506 (Tenn. 1968). Relying on *Patten*, this Court wrote, "Tennessee, however, differs from all other states in focusing upon the common law of North Carolina to interpret the jury trial guarantee under the

State Constitution." *Helms v. Tennessee Dep't of Safety*, 987 S.W.2d 545, 549 (Tenn. 1999). When a Tennessee constitutional provision is largely modeled on another state's, this Court accords special weight to that state's jurisprudence on the subject. *See State v. Marshall*, 859 S.W.2d 289, 292 (Tenn. 1993). When it comes to Tennessee's constitutional right to trial by jury guaranteed by article 1, section 6, this Court even very recently reaffirmed the significance of North Carolina's jurisprudence. *See Young v. City of LaFollette*, No. E2013-00441-SC-R11-CV, 2015 Tenn. LEXIS 695 (Tenn. Aug. 26, 2015).

As the defendant observes (defendant's brief, p. 15), North Carolina has resolved this issue, considering the very same claims presented by the plaintiffs. *See Rhyne,* 594 S.E.2d 1. North Carolina capped punitive damages with a provision remarkably similar to Tenn. Code Ann. § 29-39-104(a)(5). Whereas Tenn. Code Ann. § 29-39-104(a)(5) caps an award of punitive damages at the greater of either twice times the amount of compensatory damages or $500,000, North Carolina capped them at the greater of either thrice the amount of damages or $250,000. *Rhyne*, 594 S.E.2d at 6. The North Carolina Supreme Court held that, irrespective of the "established place" punitive damages have in North Carolina common law, "it is well settled that North Carolina common law may be modified or repealed by the General Assembly, except [for] any parts of the common law which are incorporated in our Constitution." *Id.* at p. 8 (citations and quotations omitted). Punitive

damages are not about compensating the plaintiff, so they are not property. *Id.* at pp. 9, 12. Furthermore, the greater right to limit or abolish common law doctrine includes the lesser right to limit recovery on those actions. *Id.* at 9.

This Court should endorse this logic on the grounds of shared constitutional history, but also on its strength. This Court has already erected the architecture undergirding the *Rhyne* decision. As in North Carolina, punitive damages in Tennessee are not about compensating the victim. *See Huckeby v. Spangler*, 563 S.W.2d 555, 558-59 (Tenn. 1978) ("In this state, the theory of punitive damages is not to compensate an injured plaintiff. ..."). Rather, "[t]hey refer to the nature of the defendant's conduct rather than to the injury thereby inflicted." *Breault v. Friedli*, 610 S.W.2d 134, 136 (Tenn. Ct. App. 1980) (citing *Inland Container Corp. v. March*, 529 S.W.2d 43 (Tenn. 1975)). Thus, this Court has long recognized that "punitive damages are not recoverable as a matter of right, but rest within the sound discretion of the trier of fact." *Huckeby*, 563 S.W.2d at 558 (citing cases). Also as in North Carolina, this Court has repeatedly supported the ability of the legislature to alter the common law and even abolish it. *See Lavin*, 16 S.W.3d at 268. If it can be abolished and altered as a matter of substantive law, it necessarily follows that the amount of recover can be limited. This Court should extend its existing rulings to the next step and, as in *Rhyne*, find that the right to a jury trial in Tennessee would not include punitive damages.

It is respectfully submitted that this Court should continue its longstanding practice of ruling in accordance with North Carolina constitutional law. This Court has been consistent in analyzing the right to trial by jury by focusing upon North Carolina's rulings. *See Helms*, 987 S.W.2d at 549. It is not suggested that this Court is bound by the *Rhyne* decision; naturally, this Court always maintains its "authority as 'the court of last resort' in interpreting the Constitution of Tennessee." *Marshall*, 859 S.W.2d at 295. And such autonomy should remain. But reaching a different result from North Carolina regarding the right to trial by jury would represent a sharp departure from this Court's past practice. Finding that punitive damages are not a protected jury trial right is fully in keeping with this Court's longstanding recognition of the close constitutional relationship with North Carolina, and prior precedent regarding punitive damages.

II. A CAP DOES NOT VIOLATE SEPARATION OF POWERS. IT IS WELL WITHIN THE ROLE OF THE LEGISLATURE TO SET THE PARAMETERS FOR A JURY REMEDY.

Resolution of the first question largely resolves this one. Even accepting the dubious premise that juries are part of the judicial branch (Attorney General brief, p. 26), a cap on punitive damages is not an objectionable encroachment on the judiciary. This Court has reiterated that the legislature has "plenary power" to alter the common law and "definitively set boundaries on rights, obligations or procedures," unless there is a constitutional limit in play, *Hodge*, 382 S.W.3d at 338, an admonition that makes no sense if this was a freestanding right. If a cap is nothing more than a substantive change in the law that juries are obliged to operate within, then the legislature has acted within its proper boundaries.

CONCLUSION

This Court should accept the questions certified by the trial court. This Court should rule that Tenn. Code Ann. § 29-39-104 does not violate the Tennessee Constitution, or violate separation of powers.

Dated: April 14, 2016

Respectfully submitted,

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ADDENDUM

TRIAL BY JURY

Sec. 6. Trial by jury – Qualifications of jurors.

"That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."

Tenn. Const. Art. I, § 6 (LexisNexis 2015).

DAMAGES CAP

29-39-104. Punitive Damages.

(a) In a civil action in which punitive damages are sought:

....

(5) Punitive or exemplary damages shall not exceed an amount equal to the greater of:

(A) Two (2) times the total amount of compensatory damages awarded; or

(B) Five hundred thousand dollars ($500,000).

Tenn. Code Ann. § 29-39-104 (LexisNexis 2015).

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, by the following means:

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On this date, April 14, 2016.

BRADEN H. BOUCEK

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TAMARIN LINDENBERG,

Plaintiff/Petitioner,

v.

No. M2015-02349-SC-R23-CV

JACKSON NATIONAL LIFE INSURANCE COMPANY

Trial Court No. 13-cv-02657-JPM-cgc (W.D. Tenn.)

Defendant/Respondent,

and

STATE OF TENNESSEE,

Intervenor-Respondent.

BRIEF OF *AMICI CURIAE* TENNESSEANS FOR ECONOMIC GROWTH, TENNESSEE CHAMBER OF COMMERCE & INDUSTRY, TENNESSEE BUSINESS ROUNDTABLE, TENNESSEE HOSPITAL ASSOCIATION, TENNESSEE MEDICAL ASSOCIATION, STATE VOLUNTEER MUTUAL INSURANCE COMPANY, ASSOCIATED BUILDERS AND CONTRACTORS – GREATER TENNESSEE CHAPTER, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN MEDICAL ASSOCIATION, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN COATINGS ASSOCIATION, BEAMAN AUTOMOTIVE GROUP, THE BUN COMPANIES, COMPASS PARTNERS LLC, COMMUNITY HEALTH SYSTEMS, INC., HCA, INC., LEE COMPANY, AND SMITH SECKMAN REID IN SUPPORT OF THE CONSTITUTIONALITY OF TENNESSEE'S STATUTORY LIMIT ON PUNITIVE DAMAGES

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INTEREST OF *AMICI CURIAE*

Amici include organizations representing businesses, healthcare providers, and insurers, along with several prominent Tennessee-based employers, which are concerned with the predictability and fairness of the civil justice system. *Amici* have an interest in ensuring that the civil litigation environment in Tennessee is balanced, reflects sound policy, and respects due process. Limiting punitive damages to the greater of two times the compensatory damages awarded or $500,000, as provided by Tenn. Code Ann. § 29-39-104(a)(5), furthers these goals. This law, enacted in 2011, prevents unpredictable liability, excessive awards, and punishment disproportionate to conduct at issue. Without a statutory limit on punitive damages, those that do business and provide healthcare in Tennessee are at risk of significant and unwarranted liability exposure. Maintaining the statutory limit is important to the solid reputation of Tennessee's civil justice system and the state's continued economic growth. Full statements of interest of the organizations and businesses joining this brief are included as an appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Tennessee joined many of its sister states in 2011 when it placed statutory limits on punitive damage awards. These laws establish sound public policy on liability issues by moderating drastic, inappropriate expansion in the availability, size, and unpredictability of punitive damage awards over the past half century. Courts of last resort in nearly all of these states have upheld these enactments as fully within their legislatures' authority, including in North Carolina whose constitution provided the basis for the Tennessee Constitution. *See Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004). These courts have found, just as this Court has in respecting legislation regarding related liability issues, that it is the proper role of legislatures to establish available penalties in civil actions.

Punitive damages are, by definition, penalties awarded in addition to compensatory damages. *See Goff v. Elmo Greer & Sons Const. Co.*, 297 S.W.3d 175, 187 (Tenn. 2009) (finding compensatory and punitive damages serve "vastly different" purposes). This Court accordingly has reserved punitive damages for the narrow set of cases in which a defendant wrongfully injures someone through malicious, intentional, fraudulent, or reckless conduct. *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); Tenn. Code Ann. § 29-39-104(a)(3). While the plaintiff keeps the award as a windfall, the Court has recognized that the societal purpose of punitive damages is to punish "the wrongdoer and to deter the wrongdoer and others from committing similar wrongs." *Hodges*, 833 S.W.2d at 900; *see also* Restatement (Second) of Torts § 908 (1979) (same).

The General Assembly's 2011 reforms complement the measures this Court has taken to reduce the injustice of excessive punitive damages. In addition to the standards discussed above, this Court has applied a heightened burden of proof before allowing punitive damages; it requires a plaintiff to show that a defendant's conduct warrants an award of punitive damages through "clear and convincing evidence." *Hodges*, 833 S.W.2d at 901. As part of the 2011 reforms, the General Assembly codified these standards and this burden of proof; it also required the punitive damage phase of the case to be bifurcated from the assessments of liability and damages, much like the sentencing phase of a criminal act, and set forth factors for the trier-of-fact to consider. Tenn. Code Ann. § 29-39-104(a)(1). Finally, it placed monetary limits on awards to guard against excessive punishment, establishing that punitive damages generally cannot exceed the

greater of twice the amount of compensatory damages or $500,000. *See* Tenn. Code Ann. § 29-39-104(a)(5).[1]

The General Assembly has the constitutional authority to make public policy judgments as to which types of conduct warrant punishment and to set the range of permissible penalties.[2] As this brief explains, the General Assembly's decision to adopt reasonable limits on punitive damages furthers the valid legislative interest in facilitating a fair civil justice system and a strong economy. It also gives credence to the right to a jury trial and the separation of powers doctrine. This Court has traditionally respected the General Assembly's policymaking role in shaping the State's civil justice system. *See, e.g., Mills v. Wong*, 155 S.W.3d 916, 922 (Tenn. 2005) (recognizing the legislature's authority "to place reasonable limitations on rights of action in tort which it also has the power to create or to abolish"). It should do so here as well and hold that the statutory limits on punitive damages are a constitutional means of fostering predictable, proportional, and fair penal liability.

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[1] There are public policy exceptions for when the statutory limits do not apply, such as when a defendant acted with "specific intent to inflict serious physical injury. *See* Tenn. Code Ann. § 29-39-104(a)(7). These exceptions are not implicated in this case.

[2] Whether punitive damages are available here is still being contested based on the General Assembly's enactment of Tenn. Code Ann. § 56-7-105(a), which establishes monetary penalties where insurance benefits are not timely paid in good faith. The U.S. Court of Appeals for the Sixth Circuit has ruled that this statute "precludes punitive damages . . . because it provides the exclusive extracontractual remedy for an insurer's bad faith refusal to pay on a policy." *Heil Co. v. Evanston Ins. Co.*, 690 F.3d 722, 728 (6th Cir. 2012). *Amici* urge the Court to avoid any statement in its ruling in this case that could be misinterpreted as either implicit or explicit acceptance of the availability of punitive damages in insurance bad faith cases.

ARGUMENT

I. STATUTORY LIMITS ON PUNITIVE DAMAGES ARE NEEDED TO MODERATE THE DRASTIC AND INAPPROPRIATE EXPANSION IN THE AVAILABILITY, SIZE, AND UNPREDICTABILITY OF PUNITIVE AWARDS

For several decades, legislatures and courts have been placing limits on punitive damages because the availability and size of these awards have expanded significantly, making them unpredictable and unjustifiable. These legislative and judicial reforms work together to create a fairer, more predictable system for determining the appropriate targets and amounts of these civil penalties.

A. The Initial and Dramatic Rise in Punitive Damages

The origin of punitive damages dates to English common law, where they were strictly limited to a narrow category of torts involving conscious and intentional harm in which the defendant's conduct was an "affront to the honor of the victims." D. Dorsey Ellis., Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 14-15 (1982); *see also* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived its Origin*, 37 Vand. L. Rev. 1117, 1121-22 (1984) (observing that early punitive damage awards provided compensation in addition to that which was recoverable at the time). When punitive damages first appeared in Tennessee, they served similarly narrow purposes, subjecting a defendant who acted maliciously and with a "degree of insult" to damages beyond pecuniary loss. *See Wilkins v. Gilmore*, 21 Tenn. 140, 141 (1840). Soon thereafter, this Court firmly established that the purpose of punitive damages is to punish the defendant and deter others from similar conduct. *See Polk, Wilson & Co. v. Fancher*, 38 Tenn. 336, 341 (1858).

For much of English and American jurisprudence, punitive damages awards "merited scant attention," because they "were rarely assessed and likely to be small in amount." Ellis, 56 S. Cal. L. Rev. at 2. Over time, however, the scope of conduct for which punitive damages were

awarded was broadened, both nationally and in Tennessee. Punitive damage awards were no longer reserved for intentional, malicious, or willful misconduct, but could be imposed for reckless actions and even gross negligence. *See Inland Container Corp. v. March*, 529 S.W.2d 43, 45 (Tenn. 1975) (permitting punitive damages for "gross negligence" or acts done "so recklessly as to imply disregard of social obligations"). The standards fell so low that punitive damages were "awarded in cases in which liability of any sort would have been almost out of the question" a decade or two earlier. Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133, 133 (1982).

Due to the vagueness of the standards for punitive damages, awards became highly unpredictable. *See, e.g.,* Lara W. Short, *New Challenges to Punitive Damages in Tennessee*, 26 Tenn. B.J. 16 (Apr. 1990) (examining Tennessee punitive damage awards between 1972 and 1982). There was "no logical pattern" for why some cases resulted in punitive damages lower than compensatory damages while others had the opposite result. *Id.* They also became increasingly commonplace, particularly with the advent of strict product liability and mass tort litigation in the 1970s and 1980s. Further, the size of punitive awards "increased dramatically." George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 142 (1986) (recognizing "unprecedented numbers of punitive awards in product liability and other mass tort situations"). By the late 1980s, practitioners observed that "hardly a month [went] by without a multi-million dollar punitive damage verdict . . ." Malcolm Wheeler, *A Proposal for Furthering Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 Ala. L. Rev. 919, 919 (1989).

B. Closer Judicial Review is Helpful, But Insufficient

In 1991, the U.S. Supreme Court recognized that punitive damages had "run wild." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *cf. TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor J., dissenting) ("[T]he frequency and size of such awards have been skyrocketing" and "it appears that the upward trajectory continues unabated."). Over the next twenty years, a series of U.S. Supreme Court cases placed constitutional safeguards on the process for awarding and quantifying punitive damages. These controls include procedural requirements for meaningful judicial review, substantive restrictions on the proportional amount of the awards, and limitations on a trial court's ability to consider activity outside its jurisdiction as the basis for punitive awards.[3]

This Court took comparable measures because of the unpredictable nature of punitive damage awards in this State. In 1992, the Court found that Tennessee's standard for punitive damages was too "vague" and "overbroad," particularly with respect to permitting awards for "gross negligence." *Hodges*, 833 S.W.2d at 900-901. The Court instructed that punitive damages are to be reserved for the "most egregious of wrongs" and restricted their availability to cases in which there is clear and convincing evidence of intentional, fraudulent, malicious, or

[3] *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (finding "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee"); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2002) (requiring *de novo* review); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 560, 575-83 (1995) (adopting guideposts for when a punitive damage award is excessive); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (requiring adequate judicial review of punitive damage awards); *TXO Prod. Corp.*, 509 U.S. at 456 (recognize substantive limitations on the size of punitive damage awards); *Haslip*, 499 U.S. at 31 (finding the Due Process Clause requires "significantly definite and meaningful constraint on the discretion [of the jury] to award punitive damages"); *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008) (finding, as a matter of federal maritime law, outlier punitive damage awards are best constrained by general 1:1 ratio between punitive and compensatory damages, representing a ratio just above the median).

reckless conduct. *Id.* at 901. As discussed above, the Legislature codified the *Hodges'* standard and burden of proof in the Civil Justice Act of 2011, which helped create a more predictable and rational punitive damage legal environment. *See* Tenn. Code Ann. § 29-39-104(a)(1).

While extraordinary and unjustified punitive awards can be reduced on appeal, the General Assembly made a valid judgment that clearer limits on punitive damages were necessary for reining in excessive punitive damage awards. This judgment is well-founded. The U.S. Supreme Court has suggested that, in cases where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). However, the Court has not adopted a bright-line ratio and, in all events, the federal constitutional limits on punitive damage awards set only the outermost limit, beyond which such awards are inconsistent with even the most basic conceptions of due process. Thus, there is no broad-based judicial measure for assuring sensible limits, only limits that meet the bare minimum required by due process. Indeed, many federal and state courts have not reversed punitive damage awards that have even exceeded the guidelines provided by the U.S. Supreme Court. *See* Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 Hastings L.J. 1257, 1301-02 (2015); *see also* W. Kip Viscusi, *The Blockbuster Punitive Damage Awards*, 53 Emory L.J. 1405, 1406 (2004) (explaining the difficulty of translating "moral outrage at wrongful conduct into a dollar penalty amount").

Further, the appellate process can be expensive and time consuming, and requires one to litigate cases all the way through both trial and appeal. It also does not relieve the undue pressure that the threat of outsized punitive awards place on settlement values, particularly when

the defendant is perceived to be a "deep pocket." The Bureau of Justice Statistics has found that in cases where an individual is suing a company, for example, punitive damages are awarded one out of every three times they are requested. *See* Thomas Cohen & Kyle Harbacek, Punitive Damages Award in State Courts, 2005, at 4 (U.S. Dep't of Justice Statistics 2011). These dynamics present "a weighty factor in settlement negotiations and inevitably result[] in a larger settlement agreement than would ordinarily be obtained." *See Dunn v. HOVIC*, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting), *modified in part*, 13 F.3d 58 (3d Cir. 1993). Overall, "the availability of unlimited punitive damages affects the 95% to 98% of cases that settle." George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 La. L. Rev. 825, 830 (1996).

Thus, while the U.S. Supreme Court and this Court have appropriately strengthened judicial scrutiny of punitive damage awards, judicial rulings alone cannot fully address the injustices of excessive, unpredictable and disproportionate punitive damage awards.

II. TENNESSEE'S STATUTORY LIMITS ON PUNITIVE DAMAGES PROMOTE PUBLIC CONFIDENCE IN THE CIVIL JUSTICE SYSTEM AND ADVANCE SOUND ECONOMIC POLICY

Many state legislatures have enacted commonsense statutory limits on punitive damages, often to complement court rulings, in order to guard against the recent trend of unjustifiable punitive damage awards and improperly inflated settlement values.[4] Several states, including

[4] *See* Ala. Code § 6-11-21; Alaska Stat. § 9.17.020; Colo. Rev. Stat. § 13-21-102(1)(a); Conn. Gen. Stat. § 52-240b (product liability); Fla. Stat. Ann. § 768.73; Ga. Code Ann. § 51-12-5.1(f); Idaho Code Ann. § 6-1604; Ind. Code Ann. § 34-51-3-4; Kan. Stat. Ann. § 60-3702; Me. Rev. Stat. tit. 28-A § 2-804(b) (wrongful death); Miss. Code Ann. § 11-1-65(3)(a); Mont. Code Ann. 27-1-220(3); Nev. Rev. Stat. § 42.005; N.J. Stat. Ann. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32.03.2-11(4); Ohio Rev. Code § 2315.21; Okla. Stat. tit. 23, § 9.1; 40 Pa. Cons. Stat. Ann. § 1303.505 (healthcare providers); S.C. Code Ann. § 15-32-530; Tenn. Code Ann. § 29-39-104; Tex. Civ. Prac. & Rem. Code § 41.008; Va. Code Ann. § 8.01-38.1; W. Va. Code § 55-7-27; Wis. Stat. § 895.043(6). In addition, Louisiana, Massachusetts, Michigan,

Colorado, Florida, Kansas, Oklahoma, Nevada, North Dakota, Texas, and Virginia have had statutory limits on punitive damages since the 1980s. *See* Am. Tort Reform Ass'n, Punitive Damages Reform, *at* http://atra.org/issues/punitive-damages-reform (compiling state legislation). Tennessee is among the states – including South Carolina (2011), Wisconsin (2012), and West Virginia (2015) – which recently adopted statutory limits because of ongoing concerns with excessive, unpredictable and disproportionate punitive damages awards. *See* S.C. Code Ann. § 15-32-530; W. Va. Code § 55-7-27; Wis. Stat. § 895.043(6).

The Tennessee General Assembly made a considered policy decision to limit punitive damages in civil actions to two times compensatory damages or $500,000, whichever is greater. It also created public policy exceptions for when these limits do not apply, for example, when the defendant acted with specific intent to harm the plaintiff.[5] *See* Tenn. Code Ann. § 29-39-104(a). These reasonable limits promote sound public policies and an environment that is fair to all litigants, while still providing appropriate incentives to act within societal norms. Experience has shown that statutory limits on punitive damages also can result in a more timely recovery of compensatory damages; predictability fosters settlement, and proportional punitive damage awards will not be subject to lengthy appeals.[6]

Nebraska, New Hampshire, and Washington do not permit punitive damage awards or allow them only when expressly authorized for a specific action by statute.

[5] Tennessee's limit on punitive damages does not apply if the defendant had a specific intent to inflict serious physical injury; the defendant intentionally falsified, destroyed or concealed records containing material evidence; the defendant was under the influence of alcohol, drugs or any other intoxicant or stimulant, resulting in the defendant's judgment being substantially impaired, and causing the injuries or death; or the defendant's act or omission resulted in the defendant being convicted of a felony, and that act or omission caused the damages or injuries. Tenn. Code Ann. § 29-39-104(a)(7).

[6] In personal injury cases, particularly those involving mass torts, the statutory limit on punitive damages also helps preserve assets for deserving claimants who may otherwise see their compensatory recoveries limited if defendants' resources are depleted by earlier-filing plaintiffs who obtain "windfall" awards. This has happened, for example, in the asbestos context. *See*

The concepts of proportionality and a monetary ceiling are also consistent with the factors that courts have traditionally considered in upholding civil punishments: they reduce the opportunity for arbitrary and excessive punishment, and assure "fair notice" of the severity of a punishment. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 560, 574 (1995). Indeed, Tennessee's punitive damage statute follows a similar approach to other Tennessee laws that provide penalties for comparable wrongdoing. *See, e.g.*, Tenn. Code Ann. § 47-18-109(a)(3) (authorizing court to award up to three times the actual damages sustained for willing or knowing violations of Tennessee Consumer Protection Act). As former Justice Lewis Powell has expressed, it is important for government to "bring the law of punitive damages into conformity with our notions of just punishment." Lewis Powell, *The "Bizarre" Results of Punitive Damages*, Wall St. J., Mar. 8, 1995, at A21 (stating decision-makers should not have "virtually unlimited discretion to impose punishment").

In addition to this sound legal basis, Tennessee's limits on punitive damages place the State wholly within the mainstream of American jurisprudence, as other states' laws have similarly tied punitive damages to compensatory awards and set comparable maximums. *See, e.g.*, Colo. Rev. Stat. § 13-21-102(1)(a) (cannot exceed compensatory damages); Conn. Gen. Stat. Ann. § 52-240b (two times compensatory damages in product actions); Ga. Code Ann. § 51-12-5.1(f) ($250,000 limit unless defendant acted with specific intent to harm); Idaho Code Ann. §6-1604 (three times compensatory damages or $250,000); N.C. Gen. Stat. § 1D-25 (three times compensatory damages or $250,000 with no exceptions); N.D. Cent. Code § 32.03.2-11(4) (two times compensatory damages or $250,000); Okla. Stat. Ann. tit. 23, § 9.1 (two times

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Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 Rutgers J. L. & Pub. Pol'y 50, 51 (2011).

compensatory damages or $500,000); Va. Code Ann. § 8.01-38.1 ($350,000 limit); Wis. Stat. § 895.043(6) (two times compensatory damages or $200,000).

The General Assembly appreciated that Tennessee businesses and residents must compete economically with these states, including neighboring Alabama, Georgia, Mississippi, North Carolina, and Virginia, which have imposed reasonable statutory boundaries on punitive damage awards.[7] Manufacturing companies, physicians and other economic actors are sensitive to a state's legal environment when deciding where to locate. "The high stakes and high variability of punitive damages are of substantial concern to companies, as punitive damages may pose a catastrophic threat of corporate insolvency," particularly for smaller businesses and individuals. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 285 (1998).

Likewise, other countries, with whom Tennessee and its sister states also compete for jobs, either generally limit the availability of punitive damage awards or do not recognize them at all. *See* Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. Times, Mar. 26, 2008 (reporting that "[m]ost of the rest of the world views the idea of punitive damages with alarm" and finds that punishment should be meted out only through the criminal justice system); John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transnat'l L. 391, 421 (2004) (finding that the most widespread use of punitive damages is in the United States). If Tennessee's legal climate is viewed as having excessive, unpredictable and disproportionate liability exposure, then job-creators, physicians, and others will have an incentive to go where they will receive fairer treatment. Therefore, statutory limits on punitive damages "promote public confidence in and bring more certainty to our system of civil redress, shielding [the State]

[7] *See* Ala. Code § 6-11-21; Ga. Code Ann. § 51-12-5.1(f); Miss. Code Ann. § 11-1-65(3)(a); N.C. Gen. Stat. § 1D-25; Va. Code Ann. § 8.01-38.1.

from problems encountered in other states, and encouraging business to bring much needed employment and other economic resources to this state." *Rhyne*, 594 S.E.2d at 17.

Opponents of statutory limits generally contend that the threat of unlimited punitive damages is necessary to deter misconduct and protect the public from irresponsible behavior. *Amici* are aware of no empirical studies supporting this view. Further, excessive punitive damages do not serve this purpose. Outlier punitive damages awards are wholly unpredictable, which is a reason they violate due process. *See Gore,* 571 U.S. at 574 (explaining that each of the Court's three "guideposts" for assessing punitive damages ultimately "indicates that [the defendant] did not receive adequate notice of the magnitude of the sanction that [the State] might impose"). They have no deterrent effect beyond that of reasonably foreseeable punitive damages awards. *See Campbell*, 538 U.S. at 417 ("To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.").

Accordingly, reasonable limits on punitive damages have received support from influential legal public policy groups. *See* Am. Law Inst., 2 Enterprise Responsibility for Personal Injury—Reporters' Study 258-59 (1991) (endorsing concept of ratio coupled with alternative monetary ceiling); Am. College of Trial Lawyers, Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice 15 (1989), *at* https://www.actl.com/library/report-punitive-damages-committee-special-problems-administration-justice (proposing limits of two times compensatory damages or $250,000). Both sound legal and economic public policies support Tennessee's reasonable limits on punitive damages.

III. COURTS HAVE OVERWHELMINGLY FOUND THAT STATUTORY LIMITS ON PUNITIVE DAMAGES ARE CONSTITUTIONAL

With respect to the questions certified here, both state and federal courts "consistently have upheld the constitutionality" of statutory limits on punitive damages, finding them fully

consistent with the right to jury trial and the separation of powers doctrines under state constitutions and the U.S. Constitution. Janet V. Hallahan, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle Over Statutory Limits on Punitive Damages*, 26 Loy. U. Chi. L.J. 405, 407 (1995). Tennessee jurisprudence is consistent with these mainstream principles of constitutional law. *See Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (recognizing the Court's "strong presumption that acts passed by the legislature are constitutional").

A. Tennessee's Statutory Limit on Punitive Damages is Fully Consistent With the Jury's Fact-finding Role

Punitive damage limits, including those imposed by Tenn. Code Ann. § 29-39-104, do not violate the right to a trial by jury because they do not infringe upon the jury's fundamental fact-finding role. Under Section 29-39-104, the jury continues to decide disputed material facts regarding liability and determine the appropriateness of a penalty within the legally available remedies. Once the jury decides these issues, the constitutional mandate is met.[8]

The provision in the Tennessee Constitution guaranteeing the right to a jury trial is comparable to the Seventh Amendment of the U.S. Constitution. *Compare* Tenn. Const. Art. 1, § 6 (stating "the right to trial by jury shall remain inviolate") *with* U.S. Const. Amendment VII (stating "the right of trial by jury shall be preserved"). This Court has called the Seventh Amendment "an analogous provision" and held that the Tennessee Constitution "should be given the same interpretation" as courts have given the Seventh Amendment. *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 89 (Tenn. 1992). The U.S. Supreme Court has explained that the constitutional guarantee under the Seventh Amendment is "designed to preserve the basic

[8] It is questionable whether the right to jury trial provided by the Tennessee Constitution even applies to punitive damage awards, as punitive damages today bear little resemblance to the punitive damages that existed when the Tennessee Constitution was adopted in 1796. *See Young v. City of LaFollette*, 479 S.W.3d 785, 793-94 (Tenn. 2015). Also, the constitutional right to trial by jury does not apply to the plaintiff's bad faith claim, a statutory action created long after 1796. *See id.* (citing *Helms v. Tenn. Dep't of Safety,* 987 S.W.2d 545, 547 (Tenn.1999)).

institution of jury trial in only its most fundamental elements," namely for the jury to be the trier-of-fact. *Galloway v. United States*, 319 U.S. 372, 392 (1943); *see also Tull v. United States*, 481 U.S. 412, 425-27 (1987) (holding right to jury trial does not include assessment of civil penalties). It has never stood for the proposition that the legislature, or the courts, for that matter, cannot establish the legal remedies available to the jury.

Nearly every federal and state court considering the constitutionality of statutory punitive damage limits in conjunction with the right to trial by jury has found that placing bounds on such punishment is, in fact, constitutional. *See, e.g., Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (applying Virginia law); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002); *Smith v. Printup*, 866 P.2d 985, 994 (Kan. 1993); *Rhyne*, 594 S.E.2d at 12-14; *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758 (Tex. Ct. App.-Hous. 1998); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999).

For example, Virginia's Supreme Court reasoned that "[o]nce the jury has ascertained the facts and assessed damages . . . the constitutional mandate is satisfied [and thereafter] it is the duty of the court to apply the law to the facts. *Pulliam*, 509 S.E.2d at 312 (internal citation omitted). Similarly, the Supreme Court of Alaska held that "[t]he decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury." *Evans*, 56 P.3d at 1051 (upholding limits on punitive and noneconomic damages); *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807 (Alaska 2005) (affirming *Evans* that punitive damages cap is a policy choice and does not violate the right to a jury trial).

The Ohio Supreme Court observed that a statute limiting damages should be treated the same as laws enhancing damages, including statutes that treble jury awards. *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 476 (Ohio 2007). "We have never held that the legislative choice to

increase a jury award as a matter of law infringes upon the right to a trial by jury; the corresponding *decrease* as a matter of law cannot logically violate that right." *Id.* (emphasis in original). Additionally, the U.S. Court of Appeals for the Fourth Circuit found that because the legislature can "completely abolish a cause of action without violating the right to trial by jury . . . it may limit damages recoverable for a cause of action." *Boyd*, 877 F.2d at 1196. Once courts and legislatures establish the legal framework, the jury must stay within that framework and cannot order civil penalties where no such penalties are available at law.

These rulings echo constitutional pronouncements this Court has made about the right to jury trial in this State. This Court has similarly recognized that the "primary aspect" of the right to jury trial is for an unbiased, impartial jury to determine "all contested factual issues." *Ricketts v. Carter*, 918 S.W.2d 419, 421 (Tenn. 1996). It has held that the General Assembly has "sovereign power prospectively to limit and even to abrogate common law rights of action." *Mills,* 155 S.W.3d at 922 (citing *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83-84, 88 n.32 (1978)). It similarly does not allow juries to impose awards, including punitive damages, that are not available or where the legislature has provided alternative punishment. *See Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 912 (Tenn. 1999) (finding punitive damages are not available under the Tennessee Consumer Protection Act because the General Assembly authorized treble damages for willful or knowing violations). These holdings reflect the fundamental reality that the scope of available remedies, including punitive damages, is a legal question for the General Assembly and courts, not a contested factual issue for the jury.

The absence of relevant case law to the contrary in other states is striking. The Supreme Court of Alabama, which struck down a punitive damage limit in *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), has since clarified that the state constitution does not restrict its

legislature "from removing from the jury the unbridled right to punish." *Ex Parte Apicella*, 809 So. 2d 865, 874 (Ala. 2001). The Arkansas Supreme Court invalidated a punitive damage limit, but only pursuant to a unique provision of the Arkansas Constitution barring limits on recovery outside the employment context. *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011). Finally, among state high courts, only the Missouri Supreme Court has invalidated a broad-based statute limiting punitive damages based on an interpretation of the state's right to jury trial. *See Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014). The Missouri ruling is an outlier that is contrary to the decisions in the overwhelming majority of courts to rule on this issue, and is inconsistent with Tennessee jurisprudence. In fact, it has harmed the reputation of the state's civil justice system.[9]

The Court should uphold the constitutionality of Tenn. Code Ann. § 29-39-104. It is consistent with the mainstream of rulings on the right to a jury trial and Tennessee jurisprudence.

B. Identifying Conduct Subject to Punishment, and Setting a Maximum Penalty, is a Public Policy Decision Within the Legislative Realm

The punitive damage limitations imposed by Tenn. Code Ann. § 29-39-104 represent a permissible exercise of legislature authority and do not encroach on powers vested exclusively in the judiciary. Punitive damages are awarded based on public policy, reflecting a judgment that a certain type of conduct warrants punishment. *Rhyne*, 594 S.E.2d at 9-10. As this Court and others have ruled, legislatures have clear authority to establish the range of penalties for wrongful conduct. *See id.; State v. Hinsley*, 627 S.W.2d 351, 355 (Tenn. 1982) (recognizing, in

[9] *See* Carter Stoddard, *Survey: Missouri Among Worst States for Legal Fairness, Missourian*, Sept. 11, 2015, *at* http://www.columbiamissourian.com/news/state_news/survey-missouri-among-worst-states-for-legal-fairness/article_7d52876a-572d-11e5-9087-43bbfaab0ca4.html (reporting that attorneys and executives of major employers cited this ruling as the reason for lowering their ranking of the fairness of Missouri's liability system in 2015).

criminal law, the General Assembly's authority to "distinguish among the ills of society" and determine an appropriate punishment "without violating constitutional limitations").

Most states have held that statutory limits on damages "cannot violate the separation of powers." *Evans*, 56 P.3d at 1055-56; *see also Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004); *Arbino*, 880 N.E.2d at 490; *Judd v. Drezga*, 103 P.3d 135, 145 (Utah 2004); *Pulliam*, 509 S.E.2d at 319; *Estate of Verba v. Ghaphery*, 552 S.E.2d 406, 411 (W. Va. 2001). Statutory limits are a constitutional alteration to damages that are applied to all cases as a matter of public policy. *See Garhart*, 95 P.3d at 581; *Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 77 (Neb. 2003).

As the Idaho Supreme Court ruled, "[b]ecause it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine." *Kirkland v. Blaine County Med Ctr.*, 4 P.3d 1115, 1122 (Idaho 2000) (upholding statutory limit on noneconomic damages); *see also Rhyne*, 594 S.E.2d at 9 (recognizing validity of similar legislative actions). "Indeed, were a court to ignore the legislatively-determined remedy . . . the court would invade the province of the legislature." *Gourley*, 663 N.W.2d at 77 (internal quotation omitted).[10]

This Court has similarly respected the General Assembly's role in modifying common law rights, remedies and punishments. *See, e.g., Lynch v. City of Jellico*, 205 S.W.3d 384 (Tenn.

[10] *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907, 908-13 (2001) (documenting state legislatures' delegation of the development of common law to the judiciary, judicial expansion of the availability of punitive damages, and legislative response through adopting reforms).

2006) (upholding Workers' Compensation Reform Act of 2004 under the Tennessee and U.S. Constitutions); *Mills*, 155 S.W.3d at 916 (upholding three-year medical malpractice statute of repose) (citing *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978) (same)); *Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994) (upholding contingent fee cap for medical malpractice actions); *Jones v. Five Star Eng'g, Inc.*, 717 S.W.2d 882 (Tenn. 1986) (upholding ten-year product liability statute of repose); *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522 (Tenn. 1981) (upholding four-year statute of repose for improvements to real property). In *Lavin v. Jordon*, the Court upheld the constitutionality of a statute that "capped" *compensatory* damages in cases where parents are subject to liability for acts of a child, recognizing that the wisdom of the statutory limit is a question for the legislature. 16 S.W.3d 362, 369-70 (Tenn. 2000).

The Court should reject Plaintiff's effort to reverse course and apply an expansive and unsupported reading of the Tennessee Constitution. Section 29-39-104 is exactly the type of legislation the U.S. Supreme Court had in mind as a complement to its constitutional bounds on punitive damages. *See Cooper Indus.*, 532 U.S. at 433 ("As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damage awards); *Gore*, 517 U.S. at 568 ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."). This view has been expressed even by jurists who oppose vigorous scrutiny of punitive damages under federal due process. *See Campbell*, 538 U.S. at 431, 438 (Ginsburg, J., dissenting) ("damages-capping legislation may be altogether fitting and proper," and "setting a single digit ratio and 1-to-1 benchmarks could hardly be questioned"); *Haslip*, 499 U.S. at 39 (Scalia, J., concurring) ("State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so.").

Here, the General Assembly made a policy decision to limit punitive damage awards in ways that properly balance judicial and economic considerations. The statute (1) is in line with punishments typical at common law; (2) is similar to other penalties for comparable wrongdoing; (3) is similar to statutes in other states; (4) provides proper safeguards; (5) fosters settlement; and (6) is supported in its constitutionality by nearly all courts to consider the issue.

CONCLUSION

For these reasons, *Amici* respectfully urge the Court to find Tenn. Code Ann. § 29-39-104(a)(5) does not violate the right to jury trial or the State's separation of powers doctrine.

Respectfully submitted,

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Dated: April 15, 2016

APPENDIX: STATEMENTS OF INTEREST

Tennesseans for Economic Growth ("TEG") is a nonprofit public benefit corporation organized under section 501(c)(4) of the Internal Revenue Code for the promotion of public welfare, including the job growth and economic development in Tennessee. TEG coordinated a coalition of small, medium and large businesses operating in Tennessee, trade associations, and individuals in galvanizing support for the Civil Justice Act of 2011, which included the statutory limit on punitive damages at issue in this litigation.

The Tennessee Chamber of Commerce & Industry is the state chamber of commerce and is the Tennessee Manufacturers' Association, representing all facets of business and industry across the State. Formed in 1912, it is one of Tennessee's oldest and most respected business trade and public advocacy organizations dedicated to ensuring a positive business and regulatory climate.

The Tennessee Business Roundtable, LLC ("TBR") is a forum of strategic thinkers and business leaders who develop and seek to implement public policy that enhances a vibrant economic climate to optimize the quality of life and wellbeing for all Tennesseans. TBR develops policy through research and analysis, collaborates with state government and other business organizations, and provides leadership by bringing key business organization together to speak with one voice.

The Tennessee Hospital Association ("THA") promotes and represents the interests of hospitals and health systems in Tennessee. THA was established in 1938 as a not-for-profit membership association, to serve as an advocate for hospitals, health systems and other healthcare organizations and the patients they serve.

The Tennessee Medical Association ("TMA") is organized as a 501(c)(6) non-profit tax-exempt professional association. With over 8500 members, TMA is the largest professional association of physicians, residents and medical students in the state of Tennessee. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all Tennessee physicians, residents and medical students are represented in the TMA's policy making process. TMA members practice in every medical specialty area and every geographic area in Tennessee. The TMA was founded in 1830 to promote the science and art of medicine and the betterment of public health, and these constitute its mission. It represents the interests of its members before Tennessee courts, its General Assembly, and its executive branch. To that end, the TMA periodically files *amicus curiae* briefs in cases that raise legal issues of interest to the practice of medicine and delivery of health care in Tennessee.

State Volunteer Mutual Insurance Company ("SVMIC") was formed by a group of Tennessee physicians in 1975 in response to a medical liability insurance crisis. It was one of the first organizations in the nation created by physicians to insure their own medical liability risk. SVMIC insures over 19,000 physicians and advanced practice providers in Tennessee, Arkansas, Virginia, Kentucky, Alabama, Mississippi, and Georgia. SVMIC supports laws that have improved the medical liability environment in Tennessee and made Tennessee an environment for quality healthcare and a favorable place to practice medicine.

The Associated Builders and Contractors ("ABC") is nonprofit construction industry trade association. Members of the Greater Tennessee Chapter of ABC are dedicated to providing high-quality, low-cost, safe, on-time construction. These contractors employ thousands of workers in Tennessee who build commercial buildings, industrial plants, municipal and public works projects, roads and highways, homes, and provide a wide array of construction services.

ABC supports laws that stimulate economic growth and provide a fair and predictable liability environment for its members.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive agencies. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and all fifty states. The manufacturing industry employs over 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The American Medical Association ("AMA") is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of

medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including in Tennessee. The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America' s small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 325,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing approximately 325 major property and casualty insurance companies based in Tennessee and most other states. AIA members collectively underwrite more than $127 billion in direct property and casualty premiums nationwide, including more than $2.1 billion in this State, and range in size from small

companies to the largest insurers with global operations. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums nationwide. AIA also files amicus curiae briefs in significant cases before federal and state courts, including this Court, on issues of importance to the insurance industry and marketplace.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing nearly 1,000 property and casualty insurance companies, representing the broadest cross-section of any national trade association. PCI promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis.

The American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors.

Beaman Automotive Group ("Beaman") includes several automotive dealerships operating in Nashville, Murfreesboro, and Dickson, Tennessee. Beaman has an interest in promoting economic growth and maintaining a fair and predictable legal system in Tennessee.

The Bun Companies are a leading manufacturer and innovator in the wholesale baking, frozen dough and storage industries. Its family of businesses includes Tennessee Bun Company (bakeries in Nashville and Dickson, Tennessee) and Cold Storage of Nashville. The Bun Companies have an interest in job growth, economic development, and a stable legal system.

Compass Partners LLC is a Nashville-based full-service provider of construction management services. It has facilitated projects across a broad range of professional industries including Nashville icons LP Field, Schermerhorn Symphony Center, Music City Center, the Country Music Hall of Fame, and Vanderbilt University's Blair School of Music. Compass Partners supports laws that facilitate job creation in the construction industry.

Community Health Systems, Inc. (together with its affiliates herein referred to as "CHS") is located in Franklin, Tennessee. CHS affiliates own or lease 198 hospitals in 29 states that in total employ over 134,000 people, including approximately 3,928 physicians. In Tennessee, CHS's 19 affiliated hospitals employ over 16,000 people.

HCA Inc. (together with its affiliates, "HCA"), also known as Hospital Corporation of America, is the nation's largest non-governmental healthcare provider. In Tennessee, Nashville-based HCA operates thirteen hospitals and four surgery centers, employing over 21,000 people. Nationally, HCA owns and operates 165 hospitals and 115 ambulatory surgery centers in 20 states and employs approximately 204,000 people. Approximately four to five percent of all inpatient care delivered in the country today is provided by HCA facilities. HCA supports laws that foster a fair and predictable legal system and affordable healthcare.

Lee Company is the largest mechanical service provider in Tennessee, serving businesses and families for three generations. It employs 1,000 experienced heating and air conditioning repair technicians, electricians, plumbers, professional engineers, certified construction and facilities managers, and field personnel. Lee Company was among Tennessee businesses that took a leadership role in advocating for the state's 2011 civil justice reforms, including reasonable statutory bounds on punitive damage awards.

Smith Seckman Reid, Inc. ("SSR") is an employee-owned corporation, headquartered in Nashville, Tennessee. SSR focuses on providing engineering, commissioning, and technology services across the United States and around the world. For example, SSR served as the prime engineering consultant for updating the infrastructure of the Tennessee State Capitol building, a project completed in 2012. SSR supported Tennessee's Civil Justice Act of 2011, which has helped Tennessee attract and retain jobs by offering businesses a more predictable and fair liability system.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief of *Amici Curiae* was served upon the following counsel of record via U.S. Mail, postage prepaid:

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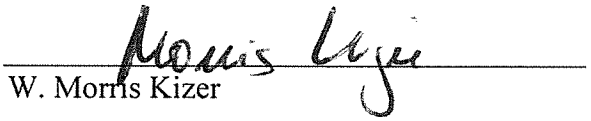
on this the 15th day of April, 2016.



W. Morris Kizer

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TAMARIN LINDENBERG,	)	
	)	
Petitioner-Plaintiff,	)	**Tennessee Supreme Court**
	)	**No. M2015-02349-SC-R23-CV**
v.	)	
	)	
JACKSON NATIONAL LIFE INSURANCE COMPANY,	)	**United States District Court**
	)	**Western District of Tennessee**
	)	**No. 2:13-cv-02657-JPM-cgc**
Respondent-Defendant,	)	
	)	
STATE OF TENNESSEE,	)	
	)	
Respondent-Intervenor.	)	

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF OF *AMICUS CURIAE* NATIONAL HEALTHCARE CORPORATION

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INTEREST OF *AMICUS CURIAE*

Since 1971, National HealthCare Corporation ("NHC") has provided high-quality healthcare services to patients in Tennessee and beyond. NHC's principal business is the operation of skilled nursing facilities with associated assisted living and independent living facilities. NHC provides sub-acute and post-acute skilled nursing care, intermediate nursing care, rehabilitative care, senior living services, home health care services and other related activities. Over the past 45 years, NHC has grown to own, lease or manage 74 skilled nursing facilities with a total of 9,403 licensed beds; 20 assisted living facilities with 935 units; five independent living facilities with 475 retirement apartments; and 36 homecare programs that provided almost 500,000 homecare patient visits in 2015.

Although its operations now stretch across a number of other states, NHC continues to be a significant provider of healthcare services in Tennessee. From its headquarters in Murfreesboro, NHC owns, leases or manages 33 skilled nursing facilities, nine assisted living facilities, four independent living facilities and 18 homecare programs in Tennessee. And, two new Tennessee skilled nursing facilities are currently scheduled to open in 2016. NHC is also a major source of jobs in the state. It provides almost 8,000 jobs in Tennessee with a 2015 payroll of approximately $194 million.

As a Tennessee-based company that is both a major source of jobs and healthcare services in this state, NHC maintains a significant interest in the subject matter of this case. The healthcare industry has experienced alarming increases in both the number of personal injury/wrongful death claims and the size of awards based upon alleged negligence by skilled nursing facilities and their employees in providing care to residents. At the same time, professional liability insurance has become prohibitively expensive or unavailable, leading NHC

to establish a wholly-owned licensed liability insurance company for the purpose of managing losses related to these risks. NHC, accordingly, is highly knowledgeable about the statutory scheme at issue in this case, and NHC will be directly impacted by this Court's decision.

INTRODUCTION & SUMMARY OF ARGUMENT

In this case, this Court is asked to decide whether the punitive damages cap in civil cases imposed by Tenn. Code Ann. § 29-39-104 violates the right to a jury trial under Article I, Section 6 of the Tennessee Constitution and the Constitution's separation of powers provisions. The punitive damages cap is one part of the Tennessee Civil Justice Act (the "Act"), which was signed into law in June 2011 and governs all claims accruing on or after October 1, 2011. Tenn. Code Ann. §§ 29-39-101 to 104. In relevant part, the Act caps punitive damages to an amount equal to the greater of two times the total amount of compensatory damages awarded or $500,000. Tenn. Code Ann. § 29-39-104(a)(5). With certain exceptions, including instances of intentional misconduct, the law applies in all cases in which a party seeks punitive damages in an amount that exceeds the cap.

The Act was a key component of the Administration's 2011 jobs initiative and was intended to improve Tennessee's economy and help Tennessee's citizens by "'attract[ing] and retain[ing] jobs by offering businesses more predictability and a way to quantify risk.'" *See* News Release, *Haslam Signs Tennessee Civil Justice Act to Improve Business Climate*, June 16, 2011, *available at* http://www.tn.gov/news/31023. The punitive damages cap reduces uncertainty in tort litigation by placing an upper limit on punitive damages and by ensuring that the amount of punitive damages bears a reasonable relationship to the amount of compensatory

damages. The Act received bipartisan support and passed with large majorities in both the House and the Senate. *Id.*; *see* Tennessee Bill History, 2011 Reg. Sess. H.B. 2008.[1]

With the Civil Justice Act, the legislature modified the Tennessee law of remedies. Before the Act, defendants could be held liable for unlimited punitive damages, subject only to judicial review for compliance with the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution. *See Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 554 (Tenn. 2008). The Act altered this category of damages by placing a statutory limit on the amount of punitive damages that can be recovered.

Petitioner asks this Court to find that the punitive damages cap violates the right to a jury trial under Article I, Section 6 of the Tennessee Constitution. Respondents, Jackson National Life Insurance Company and the State of Tennessee, have ably described the unique nature of punitive damages and why the statutory cap on this category of damages in particular is constitutionally sound. Beyond the fact that punitive damages are directed at punishing wrongdoers and not at compensating plaintiffs, the law should be upheld for a simple reason – it does not invade the right of litigants to have a jury decide the facts under applicable law in individual disputes, including the amount of punitive damages. Rather, it establishes a general, uniform law of damages to be applied as a matter of law by judges.

Tennessee law is clear that the General Assembly has the power to abolish or modify common law rights and remedies. By enacting a cap on punitive damages, the General Assembly did exactly that – it modified the law governing damages. The Act allows full recovery of economic damages, whether those damages are $4,000 or $40 million. But, it places an upper limit on punitive damages – a category of damages that is inherently unpredictable, unavoidably subjective and uniquely susceptible to juror emotions and bias.

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1 *Available at*: http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB2008&ga=107

Petitioner also asks this Court to find that the law violates the separation of powers provisions of the Tennessee Constitution. But, Petitioner's conclusory argument rests on the same flawed foundation as its jury-right argument. Because the punitive damages cap does no more than uniformly and prospectively modify the substantive law of remedies, it does not violate the separation of powers provisions.

ARGUMENT & AUTHORITY

I. Standard of Review and Presumption of Constitutionality.

Issues of statutory and constitutional interpretation are questions of law, which the Supreme Court reviews *de novo*. *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014). When considering the constitutionality of a statute, the courts must give wide discretion to the General Assembly, must presume the law is constitutional and must resolve every doubt in favor of its constitutionality. *See Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). The party attacking the constitutionality of a statute bears a heavy burden in establishing some constitutional infirmity. *Id.* at 459-60.

II. The Damages Cap Does Not Violate the Right to a Jury Trial.

The right to trial by jury granted to litigants by Article I, Section 6 of the Tennessee Constitution is no more than the right "as it existed at common law and was in force and use under the laws and Constitution of North Carolina at the time of the formation and adoption of our Constitution in 1796." *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 88 (Tenn. 1992). Article I, Section 6 provides litigants – plaintiffs and defendants alike – with the right to have a jury resolve issues of fact and to apply the facts to the law under the supervision of the judge. *See, e.g., Whirley v. Whiteman*, 38 Tenn. 610, 616 (Tenn. 1858), *abrogated on other grounds by McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). "The rights of parties must be decided according to the established law of the land, as declared by the Legislature, or expounded by the

courts . . . ." *Whirley*, 38 Tenn. at 617. Thus, the jury trial right is no more than the right of litigants to have a jury resolve factual disputes under the law. The jury function is necessarily constrained by the statutory or common law applicable to a particular controversy. *See id.*; *Ferguson v. Moore*, 39 S.W. 341, 342 (Tenn. 1897) ("In a civil case the jury are in no sense the judges of the law, but they take it as given by the court.").

A. The General Assembly Can Modify or Abolish Common Law Rights and Remedies.

There is no right to assert any particular common law cause of action, remedy or defense under the Tennessee Constitution, and the General Assembly has the power to enlarge, modify or entirely abolish common law rights, remedies and defenses. *See Hodge v. Craig*, 382 S.W.3d 325, 338 (Tenn. 2012) ("It is likewise beyond reasoned argument that the General Assembly, subject only to constitutional limitations, has plenary power to alter the common law.").[2] "[T]he Tennessee General Assembly has the sovereign power prospectively to limit and even to abrogate common law rights of action in tort . . . ." *Mills v. Wong,* 155 S.W.3d 916, 922 (Tenn. 2005). And, "'[t]he state has complete control over the remedies which it offers to suitors in its courts . . . ." *Alamo Dev. Corp. v. Thomas*, 212 S.W.2d 606, 610 (Tenn. 1948) (quoting *Cavender v. Hewitt*, 239 S.W. 767, 770 (Tenn. 1922)); *see Scott v. Nashville Bridge Co.*, 223 S.W. 844, 848 (Tenn. 1920).

In the past, the General Assembly has entirely abolished common law causes of action, and this Court has consistently affirmed its power to do so. *See* Tenn. Code Ann. § 36-3-701 (abolishing tort of alienation of affections); Tenn. Code Ann. § 39-13-508 (abolishing torts of

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2 In *Hodge*, this Court explained "when the General Assembly has acted to occupy an area of the law formerly governed by the common law, the statute must prevail over the common law in the case of conflict. In areas of the law where the General Assembly has enacted statutes that clearly and definitively set boundaries on rights, obligations, or procedures, we have recognized that 'it should be left to the legislature to change those boundaries, if any are to be changed, and to define new ones.'" *Hodge*, 382 S.W.3d at 338 (citations omitted).

seduction and criminal conversation); *Hanover v. Ruch*, 809 S.W.2d 893, 895-96 (Tenn. 1991) (discussing legislative abolition of torts of seduction and criminal conversation).

The General Assembly has enacted statutes of repose that extinguish the right of a plaintiff to pursue an action, and these statutes have withstood constitutional attack. *See, e.g., Harrison v. Schrader*, 569 S.W.2d 822, 827-28 (Tenn. 1978) (upholding three-year statute of repose in medical malpractice actions); *Mills*, 155 S.W.3d at 925 (same). The legislature has also modified common law rights, and those modifications necessarily foreclosed or changed the rights of parties to bring or defend actions in jury trials. *See, e.g.,* Tenn. Code Ann. § 36-3-504 (abolishing common law doctrine of coverture in the Married Woman's Emancipation Act); *Foster v. Ingle*, 246 S.W. 530, 531 (Tenn. 1923) (plaintiff could not recover damages from husband based on tort committed by wife because of statutory abolition of coverture); Tenn. Code Ann. § 39-11-203 (abolishing common law criminal defenses); *c.f. McIntyre*, 833 S.W.2d at 56 (modifying common law through adoption of comparative fault and noting "[w]e recognize that this action could be taken by our General Assembly").

Given the General Assembly's power to abolish common law actions and defenses, it is axiomatic that it has the power to take the less drastic measure of ***modifying*** common law remedies. *See Bowen v. Hannah,* 71 S.W.2d 672, 676 (Tenn. 1934). As this Court explained over a century ago, "the greater includes the lesser in law, as in mathematics." *Williams v. City of Nashville*, 15 S.W. 364, 365 (Tenn. 1891).[3]

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3 The legislature's abolition of the common law tort of seduction provides a clear example of this principle. At common law, a defendant could be held liable for "persuading a female, by flattery or deception to surrender her chastity." *Thompson v. Clendening*, 38 Tenn. 287, 289 (Tenn. 1858). "Punitive damages [were] generally awarded in actions of seduction." *Caccamisi v. Thurmond*, 282 S.W.2d 633, 646 (Tenn. Ct. App. 1954). When the legislature abolished the right to bring a cause of action based on this common law tort, it completely foreclosed the right to receive an award of punitive damages.

Further, this Court has explicitly recognized the General Assembly's power to modify common law remedies. *See Alamo Dev. Corp.*, 212 S.W.2d at 610; *Nichols v. Benco Plastics, Inc.*, 469 S.W.2d 135, 137 (Tenn. 1971). The legislature has exercised this authority in numerous statutes. Treble-damages statutes automatically increase the amount of damages assessed against a defendant beyond the amount determined by the jury. *See, e.g.*, Tenn. Code Ann. § 47-50-109 (treble damages for inducing breach of contract); Tenn. Code Ann. § 49-6-4006 (treble damages for assaults occurring on school property). And, the General Assembly has capped the amount of damages that can be recovered against parents for the conduct of their children. *See Lavin v. Jordon*, 16 S.W.3d 362, 364-65, 370 (Tenn. 2000).

In sum, the General Assembly's modification of the common law by instituting a cap on punitive damages was soundly within its authority. The right to a jury trial does not guarantee that common law rights and remedies will remain forever unchanged. *See Nance v. O. K. Houck Piano Co.*, 155 S.W. 1172, 1174 (Tenn. 1913) ("The suggestion . . . that the common law as it existed at the time of the adoption of our Constitution was transfixed by that event into a rigid and inflexible system of laws, which could not be changed by the Legislature, is one that is not entitled to serious consideration."). To hold otherwise would endanger countless long-settled modifications of the common law and strip the legislature (and, indeed, the courts) of the ability to modify the common law to reflect ever-evolving social and economic norms and conditions.

B. The Cap Does Not Infringe the Jury's Fact-Finding Function.

The General Assembly purposefully structured the Act to avoid encroaching upon the jury's fact-finding function. If a jury finds that a plaintiff has proven by clear and convincing evidence that the defendant against whom punitive damages are sought acted maliciously, intentionally, fraudulently or recklessly, then the court must conduct a hearing in which the jury determines the amount of punitive damages. *See* Tenn. Code Ann. § 29-39-104(a)(1)-(3). The

law strictly prohibits the court and the parties from disclosing the existence of the cap to the jury. *See* Tenn. Code Ann. § 29-39-104(a)(6). The jury determines the amount of punitive damages under legal instructions provided by the judge. *See* Tenn. Code Ann. § 29-39-104(a)(4). The judge then reviews that award to ensure that it is consistent with federal and state due process protections. *See* Tenn. Code Ann. § 29-39-104(b). If the jury's award of punitive damages exceeds the applicable cap, the judge applies the cap to limit the award to the statutory amount as a matter of law. *See* Tenn. Code Ann. § 29-39-104(a)(6). In other words, the cap is applied only after the jury has ***completed*** its duty.

The application of the cap after a jury returns its verdict is fully consistent with Tennessee law. The jury "'are to decide upon the effect of the evidence, and thus to assist the court to pronounce a right judgment; but they have nothing to do with the judgment or sentence which follows the verdict.'" *Hopkins v. Nashville, C. & St. L. Ry.*, 34 S.W. 1029, 1031 (Tenn. 1896) (quoting William Forsyth, *History of Trial by Jury* (1852)). While the judge ensures that the jury applies the applicable law through the giving of jury instructions, the judge also ensures the law was correctly applied after the jury has rendered its verdict. *See Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004) (affirming trial court's modification of jury's assignment of fault because jury's verdict was based on error of law); *Leverette v. Tenn. Farmers Mut. Ins. Co.*, 2013 WL 817230 at *30 (Tenn. Ct. App. Mar. 4, 2013) ("[T]he trial court is not relegated to an entirely ministerial role after a jury renders its verdict, for it interprets the law that the verdict must comply with.").

Consistent with this duty, when entering a final judgment, Tennessee judges must reduce a jury's damage award if it exceeds the amount sought in the plaintiff's *ad damnum*. *See Gaylor v. Miller*, 59 S.W.2d 502, 504 (Tenn. 1933) ("A judgment or decree in excess of the amount

pleaded is void to the extent of the excess."); *Goff v. Elmo Greer & Sons Constr. Co.*, 297 S.W.3d 175, 186-87 (Tenn. 2009) (noting that trial court reduced $2 million punitive damages award to $1 million to conform to the amount sought by plaintiffs in their complaint); *Miltier v. Bank of Am.*, 2011 WL 1166746 at *2-6 (Tenn. Ct. App. Mar. 30, 2011) (upholding trial judge's reduction of jury award to amount specified in *ad damnum* and rejecting plaintiff's argument that because the nature of a pain and suffering award is such that only the jury can determine the amount, he should be required to receive the amount determined by the jury).

The application of a cap on punitive damages, therefore, is fully consistent with the roles of the judge and the jury. The cap is applied by the judge as a matter of law only after the jury's responsibility has been satisfied.[4] This Court, accordingly, should hold that the cap on punitive damages does not infringe the jury trial right.[5]

III. The Damages Cap Does Not Violate the Separation of Powers Provisions of the Tennessee Constitution.

Petitioner makes a perfunctory argument that the punitive damages cap violates the separation of powers provisions because, in essence, the cap affects the legal remedy available to litigants. But, as discussed above, the cap is simply a prospective, uniform modification of the

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4 Courts around the country also have concluded that damages caps do not violate the right to a jury trial. *See Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 258-64 (5th Cir. 2013); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1050-51 (Alaska 2002); *Kirkland v. Blaine County Med. Center*, 4 P.3d 1115, 1118-20 (Idaho 2000); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 602 (Ind. 1980); *Peters v. Saft*, 597 A.2d 50, 53-54 (Me. 1991); *Murphy v. Edmonds*, 601 A.2d 102, 116-18 (Md. 1992); *Franklin v. Mazda Motor Corp.*, 704 F.Supp. 1325, 1330-35 (D. Md. 1989); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 736-37 (Mich. Ct. App. 2002); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 74-75 (Neb. 2003); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 430-32 (Ohio 2007); *Judd v. Drezga*, 103 P.3d 135, 144-45 (Utah 2004); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 528-29 (Va. 1989).

5 Petitioner, in passing, claims the punitive damages cap violates the Tennessee Constitution's due process protections. But, as explained by the State of Tennessee, this argument relies wholly on the flawed premises that the cap infringes the right to a jury trial and should be subjected to strict scrutiny.

substantive law of remedies. It is precisely the kind of law that is within the power of the legislative branch, as consistently defined by this Court.

The Tennessee Constitution vests legislative authority in the General Assembly. *See Motlow v. State*, 145 S.W. 177, 182 (Tenn. 1912) ("[T]he Legislature has all the power that the people themselves have—that is, complete legislative power"). The General Assembly has the constitutional prerogative to weigh and balance competing public and private interests to establish or modify the policy of the state by creating new laws or modifying or abolishing old ones. *See Mills*, 155 S.W.3d at 923; *Hoffman v. Hosp. Affiliates, Inc.*, 652 S.W.2d 341, 343 (Tenn. 1983). The legislature is assigned the power to enact prospective laws of general applicability, and the judiciary is assigned the power to resolve individualized disputes between particular litigants under the statutory and common law. *See Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 312 (Tenn. 2014); *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975) ("'[T]he legislative power is the authority to make, order, and repeal, . . . and the judicial [role is] to interpret and apply, laws.'") (citation omitted); *In re Cumberland Power Co.*, 249 S.W. 818, 819 (Tenn. 1923). A statute that abolishes or modifies a common law right or remedy prospectively does not unconstitutionally infringe the judicial sphere. *See Hanover*, 809 S.W.2d at 895-96 (noting legislature could abolish common law torts prospectively without violating separation of powers provisions).

In enacting the punitive damages cap, the legislature has properly exercised this well-defined Constitutional power – the cap is a prospective law of general applicability to be applied by the courts. Petitioner attempts to distract from this simple fact by asserting that the cap limits the evaluation and determination of facts. But, as discussed in Section II.B., above, the law was carefully designed to avoid impacting the evaluation and determination of facts. Because the

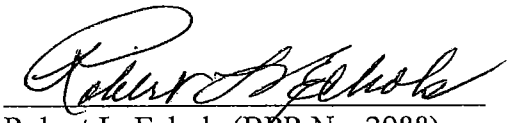
cap's existence cannot be disclosed to the jury, it does nothing to limit the determination of facts before the jury's decision is made. Rather, the cap is uniformly applied as a matter of law in all such cases after the jury's determination has been made. The cap does not disturb the jury's factual findings. It simply limits the remedy ultimately received by the prevailing plaintiff as a matter of law.

CONCLUSION

For the reasons stated herein, NHC respectfully urges the Court to find that the cap on punitive damages in Tenn. Code Ann. § 29-39-104 does not violate the right to a jury trial under Article I, Section 6 or the separation of powers provisions of the Tennessee Constitution.

DATED this 15th day of April, 2016.

Respectfully submitted,



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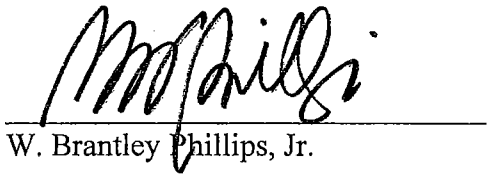

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