ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Case No. 114,301

JAMES TODD BEASON and
DARA BEASON,

Plaintiffs-Appellants,

v.

I.E. MILLER SERVICES, INC.,

Defendant-Appellee.

Honorable Patricia Parrish, Trial Judge
District Court of Oklahoma County, Oklahoma
District Court Case No. CJ-2012-4758

APPELLANTS' BRIEF IN CHIEF

Appeal from Jury Verdict in Personal Injury Action

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INTRODUCTION

When the boom from a crane toppled and hit 34-year-old Todd Beason, it changed his life and that of his wife forever. After a full and fair trial, a jury found the defendant liable and concluded that $15 million constituted fair compensation to the two of them. The judge, sitting through the same presentation of evidence, found nothing improper in the jury's verdict, but nonetheless reduced the verdict by more than one-third pursuant to 23 O.S. § 61.2(B)'s $350,000 cap on noneconomic damages for each claimant.

To accomplish this reduction, the statute requires the judge to propound special interrogatories to the jury in order to partition the general verdict that article 7, section 15 of the Oklahoma Constitution protects from legislative interference. Then, the judge reduced the jury's verdict, despite its explicit and "inviolate" constitutional role as the judge of damages. Moreover, the statute arrogates judicial authority to the legislature, eliminating judicial authority to determine when juror interrogatories are warranted and mandating a remittitur inconsistent with what the record supports and without the option of a new jury trial, not because the jury outstripped its legitimate authority, but because the legislature has invaded the judicial realm to impose a one-size-fits-all result. The statute is a special law imposing preferences and creating inequality, while impairing a plaintiff's access to justice. Fortunately, the Oklahoma Constitution stands as a bulwark against the imposition of such a legislative thumb on the scales of justice. The cap is unconstitutional.

SUMMARY OF THE RECORD

On March 16, 2012, 34-year-old Plaintiff-Appellant James Todd Beason suffered serious and permanent injuries, pain, and disfigurement when the boom of a crane operated by an employee of Defendant-Appellee I.E. Miller Services, Inc. collapsed and struck Beason

due to the negligence of that I.E. Miller employee. (ROA 2, Petition p. 2). On the day of Beason's injury, Appellee's employee was attempting to move an 82,000-pound mud pump without the help of another crane or truck. (Tr. Vol. II, 79:9-25, 80:1-25, 81:1-25; 83:3-6; 142:16-23). The employee's crane became "side-loaded" under the heavy weight, and the crane boom fell over onto Beason. (Tr. Vol. II, 189:7-25; 206:11-25; 208:20-23; 209:3-16).

Beason suffered an extremely painful brachial-plexus injury, which involved tearing the nerves connecting the spinal cord to his shoulder, arm, and hand. (Tr. Vol. II, 92:4-12; 98:10-25; 100:10-23; 101:8-21; 105:6-21; 106:11-21; 107:1-5; 110:1-5, 14-18; 111:18-25; 112:8-22). As a result, Beason underwent an unsuccessful attempt to transplant nerves to his arm and, eventually had to endure two amputations of parts of his arm. (Tr. Vol. II, 92:4-12; 98:10-25; 100:10-23; 101:8-21; 105:6-21; 106:11-21; 107:1-5; 110:1-5, 14-18; 111:18-25; 112:8-22). In addition to the physical pain caused by this negligence, Beason also suffered from post-traumatic stress and has been unable to return to work, where he had been a foreman for Ensign Energy, a drilling company. (Tr. Vol. III, 348:6-14). Beason's wife, Dara, suffered loss of the companionship and loss of consortium. (ROA 2, Petition p. 2).

More than two weeks before the trial started, Appellants filed a trial brief on the constitutionality of 23 O.S. § 61.2 (2011). Appellants argued that the statutory cap should not limit Appellants' damages because the statute violates the constitutional requirement of a general verdict, as well as the constitutional right to equal protection, the right to trial by jury, the right to a remedy, separation of powers, and the prohibition on special legislation. (ROA 528-35, Pls.' Trial Br. Re: Unconstitutionality of Cap on Non-Economic Damages pp. 1-8). Notice of the constitutional challenge was provided to the Attorney General. (ROA 558, Not. to AG Re: Constitutional Challenge to 23 O.S. § 61.2 p. 1).

The case was tried to a jury for seven days. (ROA 801, Journal Entry of J. p. 1). During the trial, the jury heard from the Beasons, fact witnesses, physicians, and experts in the areas of vocational rehabilitation, life-care planning, and economics. (*Id.*). Both comparative negligence and punitive damages were submitted to the jury. (*Id.*). After deliberating less than four hours, nine of the twelve jurors signed blue verdict forms finding against I.E. Miller, in favor of Todd Beason in the amount of $14 million, and in favor of Dara Beason on her consortium claim in the amount of $1 million. (ROA 758-59, Verdict Forms pp. 1-2; Tr. Vol. VII, 853:10-20; 854:1-12). The jury found no fault on the part of Todd Beason. (Tr. Vol. VII, 853:4-6, 854:1-2).

On those initial verdict forms, the jury did not find that I.E. Miller acted in reckless disregard for the rights of others. (ROA 758-59, Verdict Forms pp. 1-2; Tr. Vol. VII, 853:10-20; 854:1-12). Pursuant to 23 O.S. § 61.2(B)-(F), and over Appellants' objection (Tr. Vol. VII, 855:16-25, 856:1-6), the trial court submitted a supplemental, special verdict form for Todd Beason, which required the jury to specify how much of Mr. Beason's damages were attributable to economic damages versus noneconomic damage. (ROA 760, Verdict Forms p. 3). Plaintiffs argued that the jury should not be given the supplemental verdict form and that, if given, it should inform them of the consequences of their answers. (Tr. Vol. VII, 855:14-25; 856:1-25; 857:1-20). Under 23 O.S. § 61.2, the trial court did not tell the jury of the effect of designating some of the compensatory damages as noneconomic. (Tr. Vol. VII, 857:16-18).

All twelve jurors signed the "supplemental verdict form" for Todd Beason, allocating $5 of the $14 million verdict as "noneconomic damages." (ROA 760, Verdict Forms p. 3). The trial court itself determined that all of Mrs. Beason's damages were noneconomic, and

did not send a supplemental verdict form for Mrs. Beason to the jury. (Tr. Vol. VII, 855:9-13). The court then applied 23 O.S. § 61.2(B), reducing the $15 million verdicts to $9.7 million (ROA 801-02, Journal Entry of J. pp. 1-2), entering judgment in this reduced amount, and depriving the Beasons of more than $5 million in compensatory damages. (ROA 802, Journal Entry of J. p. 2).

The Beasons filed a Motion to Modify Judgment to conform it to the evidence and the jury's verdicts arguing that the reduction pursuant to 23 O.S. § 61.2 violated article 2, sections 6, 7, and 19; article 4, section 1; article 5, section 46; and article 7, section 15 of the Oklahoma Constitution. (ROA 806-07, Pls.' Mot. to Modify J. pp. 3-4). Appellants' Motion included affidavits from jurors who were angry and upset that their verdicts were reduced. (ROA 821-26, Pls.' Mot. to Modify J. pp. 18-23). The trial court denied Plaintiffs' motion August 28, 2015 and upheld the statute as constitutional. (ROA 888, Order Re: Pls.' Mot. to Modify J. p. 1). Plaintiffs filed their Petition in Error on September 21, 2015.

STANDARD OF REVIEW

Where facts are not disputed, an appeal presents only a question of law, *Malloy v. Caldwell*, 2011 OK CIV APP 26, ¶ 13, 251 P.3d 183 (citing *Baptist Bldg. Corp. v. Barnes*, 1994 OK CIV APP 71, ¶ 5, 874 P.2d 68), reviewable under a *de novo* standard, where the reviewing Court has plenary, independent, and non-deferential authority to reexamine a trial court's legal rulings. *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, ¶ 13, 932 P.2d 1100, 1103 n.1. If an appeal implicates constitutional rights, the appellate court must exercise its own independent judgment to determine the constitutional question. *Ranola Oil Co. v. Corp. Comm'n of Okla.*, 1988 OK 28, ¶ 7, 752 P.2d 1116, 1118.

ARGUMENT & AUTHORITY

PROPOSITION ONE: 23 O.S. § 61.2 Unconstitutionally Requires the Jury to Make Special Findings of Particular Questions of Fact in Violation of the General Verdict Requirement of Article 7, Section 15 of the Oklahoma Constitution.

The Oklahoma Constitution mandates general verdicts in all jury trials, and prohibits any law that requires a court to direct a jury to make particular findings of fact:

> In all jury trials the jury shall return a general verdict, and *no law* in force nor any law hereafter enacted, *shall require the court to direct the jury to make findings of particular questions of fact*, but the court may, in its discretion, direct such special findings.

Okla. Const. art. 7, § 15 (emphasis added). This prohibition is buttressed by statute. *See* 23 O.S. § 61.1; *see also* 12 O.S. § 588. Courts retain discretion to direct the jury to make special findings or decline to do so under this provision. *Colorado Interstate Gas Co. v. Lorenz*, 1958 OK 228, 330 P.2d 583, 584. The Oklahoma Legislature ran afoul of this constitutional prohibition, and this Court's precedents, when it enacted 23 O.S. § 61.2.

Section 61.2(D) requires the jury to answer interrogatories, specifying:

1. The total compensatory damages recoverable by the plaintiff;
2. That portion of the total compensatory damages representing the plaintiff's economic loss;
3. That portion of the total compensatory damages representing the plaintiff's noneconomic[1] loss; and
4. If alleged, whether the conduct of the defendant was or amounted to:
   a. reckless disregard for the rights of others,
   b. gross negligence,
   c. fraud, or
   d. intentional or malicious conduct.

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[1] "'Noneconomic damages' means nonpecuniary harm that arises from a bodily injury that is the subject of a civil action, including damages for pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, education, disfigurement, mental anguish and any other intangible loss." 23 O.S. § 61.2(B).

Further, 23 O.S. § 61.2(F) prohibits instructing the jury "with respect to the limit on noneconomic damages set forth in subsection B of this section, nor shall counsel for any party nor any witness inform the jury or potential jurors of such limitations." Under these provisions, the court *must* instruct the jury to make particular findings of fact, and the jury may not be informed of the legal effect of their findings of fact. Both provisions make the constitutional violation plain.

A verdict where the jury is limited to making special findings and uninformed of the legal effect of its answers is a special verdict,[2] not a general verdict as mandated by the laws and Constitution. *Smith v. Gizzi*, 1977 OK 91, 564 P.2d 1009, 1013. Under this Court's binding precedent, article 7, section 15 of the Oklahoma Constitution requires that the jury both know about the legal effect of its factual findings and determine the ultimate result. *Id.*

In *Smith*, the jury was instructed on comparative negligence and told that if they found both parties negligent, then they must also determine the degree of negligence of each. The jury instructions informed the jury that if they found the plaintiff's degree of negligence was equal to or greater than the degree of negligence of the defendant, then the plaintiff was not entitled to recover, but that if they found that the degree of negligence of the plaintiff was less than that of the defendant, then the plaintiff was entitled to recover, and her damages should be reduced in proportion her negligence. *Id.* at 1011-12.

The *Smith* defendant argued that the instruction and verdict form were improper because they not only allowed the jury to establish the negligence of the parties, but

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[2] Historically, a special verdict has been a determination of facts by a jury acting solely in an advisory capacity in cases sounding in equity. In such a case, a court could accept or reject the jury's findings because the court was the trier of fact and law. *See Teachers' Conservative Inv. Ass'n v. England*, 1926 OK 27, 243 P. 137. In the present case, because the statute dictated the jury not be informed of the effect of their allocation, the jury was

transformed the trier of fact into a judge, by informing it as to the operation of the statute and the effect of its findings. *Id.* at 1012. While recognizing that "the special verdict is the very cornerstone of the comparative negligence concept," and that other courts had therefore said that the jury should not know the legal effect and result of its answers to the special verdict interrogatories, this Court held that the same result was foreclosed in Oklahoma because of the constitutional status of a general verdict. *Id.* at 1012-13. Under article 7, section 15, special findings are permitted, but "a jury must know the effect of its answers or it is not a general verdict." *Id.* at 1013. *Smith* emphasized that a "jury not only must know the legal effect of its findings, but must determine the ultimate result." *Id.*

Section 61.2 oversteps constitutional authority because the interrogatories it mandates take away the court's discretion, forcing the court to direct the jury to make "findings of particular questions of fact" in plain contravention of article 7, section 15. Moreover, by prohibiting the jury from knowing the outcome of its findings, the statute renders the jury's verdict merely advisory so the court determines the ultimate result.

In *Smith*, it was constitutionally acceptable to have the jury determine both the damages and the percentage of liability and have the court do the math to determine the final award, because the jury was informed that the damages would be reduced based on that percentage. Here, it is unconstitutional to require the jurors to find the total amount recoverable and also require the jury to find by special interrogatory the amounts of economic and noneconomic damages without informing the jury of the effect of their fact findings. Only after they answered the special interrogatories and off the record did the jury learn about the legal effect of their fact findings. ROA 805, Pls.' Mot. to Modify J. p. 2. Jurors were

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essentially relegated to an advisory role in an action at law.

outraged to learn that their answers to the special interrogatories resulted in the Plaintiffs recovering only about two-thirds of the "total amount recoverable." (ROA 821-26, Pls.' Mot. to Modify J. pp. 18-23). The jury's verdicts were not wholly determinative of how Todd Beason and Dara Beason would be compensated, and thus were not "general" verdicts required by the Constitution.

The Oklahoma Committee on Uniform Jury Instructions was cognizant of this constitutional problem when it proposed two alternative uniform jury instructions based on 23 O.S. § 61.2. *See* Charles W. Adams, *Tort Reform & Jury Instructions*, 86 Okla. B.J. 821, 824-27 (2015). The Committee's proposed jury instructions noted the conflict between 23 O.S. § 61.2 and article 7, section 15 in the comments of one alternative instruction, and the second alternative instruction informed the jury of the $350,000 cap. *Id.* at 825-27. This Court did not include either alternative instruction, or any other instruction on 23 O.S. § 61.2, when it adopted amendments to the Oklahoma Uniform Jury Instructions—Civil (Second) in 2014. *In re: Amendments to the Oklahoma Uniform Jury Instructions*, 2014 OK 17. This case presents the Court with the opportunity to declare the statutory mandate of a special verdict in 23 O.S. § 61.2 unconstitutional pursuant to article 7, section 15 and *Smith*.

Because section 61.2 mandates special findings by the jury, and prohibits informing the jury of the effect of its answers, the statute violates the constitutional requirement of a general verdict, and this Court should declare the statute unconstitutional. The jury's original, general verdicts should be reinstated.

PROPOSITION TWO: 23 O.S. § 61.2 Violates the "Inviolate" Right to Trial by Jury Guaranteed by Article 2, Section 19.

The Oklahoma Constitution guarantees that "[t]he right of trial by jury shall be and remain inviolate." Okla. Const. art. 2, § 19. It is a mandate of unique and transcendent

import, not subject to the type of balancing tests applied to other fundamental rights. The right to trial by jury "is the same right to a trial by jury as existed upon the admission of Oklahoma into the Union as a state, and the same right as a trial by jury according to the course of the common law as it existed when the Constitution of the state was adopted, except as modified by the provisions of the Constitution." *Keeter v. State*, 1921 OK 197, 198 P. 866, 869. "It is based on the right as guaranteed under the United States Constitution, and according to common law." *Hamil v. Walker*, 1979 OK 172, 604 P.2d 377, 378. Legislative acts that deprive claimants in this class of cases of their right to trial by jury violate the Oklahoma Constitution, and are void. *Keeter*, 198 P. at 869.

This Court has repeatedly upheld the inviolate right to a jury trial in the strongest terms: "The policy favoring jury trials is of historic and continuing strength—insofar as the constitutional right to jury trial exists, it cannot be annulled, obstructed, impaired, or restricted by legislative or judicial action." *Seymour v. Swart*, 1985 OK 9, ¶ 3, 695 P.2d 509, 511-12. Oklahoma law recognizes that a surrender of the right to jury trial can occur only by voluntary consent or waiver; it cannot be abrogated arbitrarily by a court or by the legislature. *Id.* at 511. "[C]ourts have a duty to enforce strict observance of the constitutional and statutory provisions designed to preserve inviolate the right to and purity of jury trial." *In re H.M.W.*, 2013 OK 44, ¶ 13, 304 P.3d 738, 741 (citing *Fields v. Saunders*, 2012 OK 17, ¶ 13, 278 P.3d 577, 582.

A. Appellants' claims are common law causes of action to which the inviolate jury trial right attaches.

Appellants' claims for personal injuries caused by negligence are traditional common law tort causes of action tried to juries at the time the Oklahoma Constitution was adopted in 1907. Indeed, common law actions for personal injuries were well-established long before the

American Revolution. 1 William Blackstone, *Commentaries on the Laws of England* 120-25, 137 (1765) (facs. ed., Univ. of Chicago 1979); 2 Matthew Hale, *History and Analysis of the Common Law* 114-15 (1713); George E. Woodbine, *The Origins of the Action of Trespass*, 33 Yale L.J. 799, 806-08 (1924) & 34 Yale L.J. 343, 346-352, 353 n.40 (1925). Through trespass actions, the common law protected individuals against negligently caused injuries since at least 1367. C.H.S. Fifoot, *The Common Law* 66-78 (1949); Oliver Wendell Holmes, *The Common Law* 68-95 (Mark D. Howe ed. 1963). These types of tort actions are squarely within the right to a jury trial enshrined in the Oklahoma Constitution.

B. The fundamental constitutional right of trial by jury includes the right to have a jury determine the amount of damages.

As noted above, article 2, section 19 preserved the right to trial by jury as it existed at common law at the time when the Constitution was adopted in 1907. *Keeter*, 198 P. at 869. At the time the Oklahoma Constitution was adopted, few common law practices were better settled than having juries, rather than judges, determine all the "facts" in a case, including the amount of damages due.[3] As the U.S. Supreme Court explained:

> It has long been recognized that "by the law the jury are judges of the damages." *Lord Townshend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994, 994-95 (C.P. 1677). Thus in *Dimick v. Schiedt*, 293 U.S. 474, 55 S. Ct. 296, 79 L.Ed. 603 (1935), the Court stated that "the common law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." *Id.* at 480, 55 S. Ct. at 298. . . . *And*

[3] *See Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001) (internal citations omitted) ("the measure of actual damages suffered . . . presents a question of historical or predictive fact," which constitute "a 'fact' 'tried' by the jury."); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (plaintiff is "entitled . . . to have a jury properly determine the question of liability and the . . . assessment of damages. Both are questions of fact.").

> *there is overwhelming evidence that the consistent practice at common law was for juries to award damages.*[4]

So, "if a party so demands, a jury must determine the actual amount of . . . damages."[5]

Federal and state courts from the founding of the Republic to the present, and jurists and scholars from William Blackstone[6] to Dean Charles McCormick,[7] and have reinforced the central teaching that "'*the jury are*,'" and for more than three centuries have been, "'*judges of the damages.*'"[8] In common law causes of action, the determination of damages rests within the province of a jury.[9] This Court has often reaffirmed the centrality of this aspect of the jury's role.[10]

These principles are especially applicable to claims for noneconomic damages in personal injury actions, because there is not and cannot be any "fixed measure of compensation for the pain and anguish of body and mind . . . or the permanent injury to

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[4] *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353-54 (1998) (emphases added; citations omitted).

[5] *Id.* at 354-55.

[6] *See* 3 W. Blackstone, *Commentaries* 376, 397 (noting that it is the jury's job to "assess the damages . . . sustained by the plaintiff in consequence of the injury upon which the action is brought."). Blackstone's "Commentaries . . . greatly influenced the generation that adopted the Constitution," *Green v. United States*, 355 U.S. 184, 187 (1957), and "are accepted as the most satisfactory exposition of the common law of England." *Schick v. United States*, 195 U.S. 65, 69 (1904). *See, e.g., Helfinstine v. Martin*, 1977 OK 42, 561 P.2d 951, 954; *Nutter v. Stockton*, 1981 OK 30, 626 P.2d 861, 862.

[7] Charles T. McCormick, *Handbook of the Law of Damages* 24 (1935) ("The amount of damages . . . from the beginning of trial by jury, was a 'fact' to be found by the jurors.").

[8] *Feltner*, 523 U.S. at 353 (emphasis added) (quoting *Townshend v. Hughes*, 86 Eng. Rep. 994, 994-95 (C.P. 1677).

[9] *See, e.g., Estrada v. Port City Properties, Inc.*, 2011 OK 30, ¶ 35, 258 P.3d 495 ("The recovery of damages is a jury question. Broad discretion is given to the jury to determine the amount of damages."); *B-Star, Inc. v. Polyone Corp.*, 2005 OK 8, ¶ 20, 114 P.3d 1082, 1087.

[10] *See Complete Auto Transit, Inc. v. Reese*, 1967 OK 73, ¶ 21, 425 P.2d 465, 469 ("The finding of the amount of damages for personal injury and impairment of health are exclusively within the province of the jury.").

health and body."[11] Instead, the amount of such damages, just like the question of liability, is an issue of fact, left to the jury's determination.[12] This Court's decisions, from territorial days until now, have never deviated from these core common law principles incorporated into our Constitution.[13] The Supreme Court of the Territory of Oklahoma explained juries were to consider many categories of damages with no fixed value, such as "pain and anguish of body and mind," "permanent injury to health and body," the value of lost time, and deprivation of earning capacity—which must be left "to the sense of right and justice of the jury." *Chicago, Rock Island & Pac. Ry. Co. v. Stibbs*, 1906 OK 50, ¶¶ 13-16, 87 P. 293, 295-96.

The trial court may not reduce a jury award "unless it appears that the damage award was not supported by the evidence and was so excessive as to appear to have been given under the influence of passion or prejudice." *Estrada*, 2011 OK 30, ¶ 35, 258 P.3d at 508 (citing *B-Star, Inc.*, 2005 OK 8, ¶ 21, 114 P.3d 1082, and *Dodson*, 1985 OK 71, ¶ 6, 708 P.2d 1064).[14] Indeed, this Court has held that "[i]t is self-evident that if a trial court has the unbridled prerogative to substitute its opinion for that of a jury, it would be tantamount to a

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[11] *Illinois Cent. R.R. Co. v. Barron*, 72 U.S. 90, 105 (1866). Instead, assessing the damages due for a tort victim's pain and suffering "involves only a question of fact." *St. Louis, Iron Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648, 661 (1915), *cited with approval in Cooper Industries*, 532 U.S. at 437.

[12] *Complete Auto Transit*, 1967 OK 73, ¶ 21, 425 P.2d at 469; *Dimick*, 293 U.S. at 486.

[13] *See Complete Auto Transit*, 1967 OK 73, ¶¶ 21-22, 425 P.2d at 469; *Sw. Greyhound Lines, Inc. v. Rogers*, 1954 OK 40, 267 P.2d 572, 572 ("Amount of damages recoverable in personal injury cases is a fact question for the jury"); *Carris v. John R. Thomas & Assoc.*, 1995 OK 33, 896 P.2d 522, 529 & n.18 (same); *Dodson v. Henderson Properties, Inc.*, 1985 OK 71, 708 P.2d 1064, 1066; *Harper-Turner Oil Co. v. Bridge*, 1957 OK 124, ¶¶ 14-15, 311 P.2d 947, 952; *Atchison, Topeka & Santa Fe Ry. Co. v. Marks*, 1901 OK 26, 65 P. 996, 1000.

[14] Here, there were no claims or arguments that the jury's award was not supported by the evidence, or that it was influenced by passion or prejudice. The only reason for the reduction of the jury's awards was the statutory cap on noneconomic damages. (ROA 801-02, Journal Entry of J. pp. 1-2).

partial abrogation of the right to trial by jury and the right of appeal." *Cosmo Const. Co. v. Loden*, 1960 OK 127, 352 P.2d 910, 912; *see also Dodson*, 1985 OK 71, ¶¶ 12-14, 708 P.2d at 1068. Section 61.2 attempts to accomplish what even a presiding judge who sat through the same trial cannot: substitute a different determination of compensatory damages from that of a jury—a one size fits all significant injuries standard where the legislature displaces the jury's determination. 23 O.S. § 61.2 provides that, in a civil action arising from a bodily injury "the amount of compensation which a trier of fact may award a plaintiff for noneconomic loss shall not exceed Three Hundred Fifty Thousand Dollars ($350,000.00)," and that "in no event shall a judgment for noneconomic damages exceed [$350,000]" regardless of the jury's determination of damages. The statute thus plainly violates the fundamental constitutional right to trial by jury because it replaces a jury's fairly determined damage assessment with an arbitrary legislatively determined amount utterly divorced from the evidence adduced in the case.

For identical reasons, several state supreme courts have ruled that statutory caps on damages usurp the jury's function and violate the "inviolate" jury trial right recognized in their states' constitutions. After an analysis of the right to trial by jury and the meaning of the word "inviolate" in the 19th century, the Oregon Supreme Court concluded:

> [a]lthough it is true that [the cap] does not prohibit a jury from assessing . . . damages, to the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect. . . . Limiting the effect of a jury's . . . damages verdict eviscerates "Trial by Jury" as it was understood [at common law] and, therefore, does not allow the common-law right of jury trial to remain "inviolate."[15]

[15] *Lakin v. Senco Prod., Inc.*, 987 P.2d 463, 473 (Or. 1999). This "inviolate" right bars legislative "interfer[ence] with the full effect of a jury's assessment of noneconomic damages." *Id.*

The Washington Supreme Court reached the same conclusion, explaining that the notion that the jury's function is merely to *recommend* damages:

> ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages [and] essentially [says] that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. *Such an argument pays lip service to the form of the jury but robs the institution of its function.*[16]

More recently, supreme courts in Georgia and Missouri also held that caps on noneconomic damages violate the "inviolate" jury trial rights enshrined in their state constitutions. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010) (unanimously holding a noneconomic damages cap violated that state's "inviolate" jury-trial right); *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 639-40 (Mo. 2012) (en banc) (same). As the Missouri Supreme Court wrote, "The individual right to trial by jury cannot 'remain inviolate' when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case." 376 S.W.3d at 640.

Oklahoma's "inviolate" right to trial by jury is indistinguishable from the constitutional guarantees in these states. The cap in section 61.2 eviscerates "trial by jury" as it has long been understood in Oklahoma. It replaces the jury's determination with an arbitrary measure of damages, a compulsory, pre-established "one-size-fits-all" formula that courts are commanded to apply in every case, without regard for the evidence and without allowing the option of a new jury trial. Indeed, in the backwards world created by section 61.2, the greater the harm suffered by the plaintiff and the greater the damages a jury awards,

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[16] *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (Wash. 1989) (en banc) (emphasis added).

the more completely the jury's damage assessment is disregarded. The cap thus invades the "inviolate" province of the jury, in derogation of article 2, section 19.

PROPOSITION THREE: 23 O.S. § 61.2 Violates the Fundamental Separation of Powers Guaranteed by Article 4, Section 1.

Article 4, section 1 of the Oklahoma Constitution divides the powers of state government into three separate departments—Legislative, Executive, and Judicial—and prohibits each from exercising powers belonging to the others. In *Ford v. Board of Tax-Roll Corrections*, this Court concluded the "powers properly belonging" to a branch of government were those "essential to the existence, dignity and functions [of the branch]," and include inherent powers. 1967 OK 90, ¶ 21, 431 P.2d 423, 428 (citation omitted). One test for inherent power is whether the subject matter is "so ultimately connected and bound up with [a branch's function] that the right to define and regulate [the subject matter] naturally and logically belongs to the [branch]." *Id.*

Article 7, section 1 creates courts and invests them with judicial power. This Court held that "[t]he power to adjudicate is the power to determine questions of fact or law framed by a controversy and this power is exclusively a judicial power." *Conaghan v. Riverfield Country Day School*, 2007 OK 60, ¶ 20, 163 P.3d 557, 564 (citing *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶ 13, 130 P.3d 213, 220).[17] That has been this Court's

[17] This Court has upheld judicial power against legislative encroachment in many contexts. *See Puckett v. Cook*, 1978 OK 108, 586 P.2d 721 (invalidating anti-consolidation statute as invasion of courts' power to decide which cases should be tried together); *Union School Dist. No. 1 v. Foster Lumber Co.*, 1930 OK 50, ¶¶ 1-6, 286 P. 774, 775 (invalidating statute making single school district liable in pending contract dispute); *Atchison, Topeka & Santa Fe Ry. Co. v. Long*, 1926 OK 963, ¶¶ 3-18, 251 P. 486, 488-89 (treating measure accelerating tax levy cases on court dockets as legislative encroachment on judiciary); *Wilson v. Wood*, 1900 OK 87, 61 P. 1045 (holding that legislature could not make a tax deed conclusive proof of land title); *Burke v. Territory*, 1894 OK 13, ¶ 24, 37 P. 829, 835

understanding for at least 100 years.[18] The Court has long recognized that judicial power encompasses the authority to adjudicate the facts and the law in the cases presented, as well as the authority to exercise judicial discretion.[19] With section 61.2, the legislature has invaded all of these exclusively judicial prerogatives.

As noted above, *supra* Prop. One, article 7, section 15 places the determination to direct the jury to make special findings squarely within the trial court's discretion. *Lorenz*, 1958 OK 228, 330 P.2d at 584. Section 61.2 removes this judicial discretion entirely, mandating that a jury make special findings of fact. 23 O.S. § 61.2(D). The trial court thus has no choice but to direct special findings, in plain violation of article 4, section 1.

With section 61.2, the legislature also arrogated to itself the judicial authority to adjudicate the facts in the cases that come before the courts and requires a judge to enter judgment at odds with the evidence.[20] As detailed above, *supra* Prop. Two, damages in common law cases are questions of fact. This Court has made clear that legislative attempts to predetermine the limits of adjudicative facts impermissibly invade the judiciary's exclusive constitutional prerogative of fact-finding. *Conaghan*, 2007 OK 60, ¶ 22, 163 P.3d at 565 (citing *Yocum*, 2005 OK 27, ¶ 17, 130 P.3d at 222). Section 61.2 purports to legislate a conclusive, irrefutable presumption that the noneconomic damages a plaintiff has suffered can never exceed the legislatively predetermined amount of $350,000, regardless of what the evidence may be—indeed, regardless of what the jury has found the plaintiff's damages to be

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(legislature could not constitutionally limit the courts' "inherent power to punish for contempt").

[18] *In re Courthouse of Okmulgee Cty.*, 1916 OK 952, 161 P. 200.

[19] *Id.*; *Puckett*, 1978 OK 108, ¶ 13, 586 P.2d at 723.

based on that evidence, and even where a judge's review of the verdict finds the award warranted. Section 61.2's cap thus cripples "the free exercise of decision-making powers reserved to the judiciary."[21] Put simply, 23 O.S. § 61.2 is a legislative attempt to determine questions of fact and mandate a legal conclusion, in violation of separation of powers.

Section 61.2 also effectively usurps the courts' inherent power to regulate excessive jury awards through remittitur, a conditional order which requires a plaintiff to choose between a reduced damage award and a new trial.[22] Such remittiturs have been employed in Oklahoma since territorial days.[23] Significantly, however, a court may grant judicial remittiturs only if "the jury has committed some gross and palpable error, or acted under bias, influence, or prejudice, or has totally ignored the rule of law by which damages are awarded."[24] When issues are submitted to a jury, its verdict is conclusive unless the court determines the damage award is excessive. *Muskogee Elec. Traction Co. v. Reed*, 1913 OK 73, 130 P. 157, 158. "In a suit for damages for personal injuries, before a verdict of the jury will be set aside as excessive it must appear that the verdict is so excessive as to strike mankind, at first blush, as being beyond all measure unreasonable and outrageous." *Austin Bridge Co.*

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[20] "There is no principle of law more firmly established than that the judgment must follow and conform to the verdict of the jury or the findings of fact by the court." *Everett v. Akins*, 1899 OK 18, 56 P. 1062, 1064.

[21] *Yocum*, 2005 OK 27, ¶¶ 12-14, 130 P.3d at 220-21 ("[a] legislative command to adjudicate a fact by a predetermined statutory directive would constitute an impermissible invasion" of "judicial independence").

[22] *See Wells v. Max T. Morgan Co.*, 1951 OK 256, 236 P.2d 488, 490.

[23] *See, e.g., Everett*, 1899 OK 18, ¶ 5, 56 P. at 1064. *Cf. Hetzel v. Prince William Cnty.*, 523 U.S. 208, 211 (1998) (remittitur without the option of a new trial violates the Seventh Amendment).

[24] *Currens v. Hampton*, 1997 OK 58, ¶¶ 7-11, 939 P.2d 1138, 1141. If a verdict is not so large as to raise the presumption that it was reached by passion or prejudice, a remittitur is improper. *Sand Springs Ry. Co. v. McGrew*, 1923 OK 648, ¶ 2, 219 P. 111.

v. Christian, 1968 OK 138, 446 P.2d 46, 49. A reduction of damages without consent or a new jury trial cannot be countenanced where the jury-trial right obtains.[25]

The defendant in this case did not request a remittitur or allege that the jury acted improperly. The trial court did not determine the verdict was excessive. Appellate courts defer to a jury's damage assessment when supported by any competent evidence.[26]

Yet, section 61.2 imposes a mandatory remittitur in all meritorious cases in which a plaintiff has demonstrated and the jury has found that the plaintiff is entitled to damages exceeding the legislatively predetermined amount, regardless of the facts adduced at trial, and without requiring consent of the plaintiff or offering the plaintiff the option of a new trial before a new jury. Sister courts in other states have found such legislative remittiturs to be inconsistent with the constitutional separation of powers. *E.g.*, *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 908-09 (Ill. 2010); *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997); *Sofie*, 771 P.2d at 720-21.

In *Best*, for example, the Illinois Supreme Court observed that "the inherent power of the court to order a remittitur or, if the plaintiff does not consent, a new trial, is essential to the judicial management of trials." 689 N.E.2d at 1080 (citation omitted). The Illinois cap on non-economic damages, the court concluded, "functions as a legislative remittitur" and "undercuts the power, and obligation, of the judiciary to reduce excessive verdicts." *Id.* That court further stated:

> [u]nlike the traditional remittitur power of the judiciary, the legislative remittitur . . . disregards the jury's careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their causes of action. The cap on damages is mandatory and operates wholly

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[25] *Hetzel*, 523 U.S. at 211.

[26] *Walker v. St. Louis-San Francisco Ry. Co.*, 1982 OK 25, 646 P.2d 593, 597.

> apart from the specific circumstances of a particular plaintiff's noneconomic injuries. Therefore, [the Illinois cap] unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law.

Id.

Years after the *Best* court issued its constitutional ruling, the Illinois Legislature again enacted a non-economic damage cap. In *Lebron*, the Court reaffirmed that the damage cap requires a court "to override the jury's deliberative process and reduce any noneconomic damages in excess of the statutory cap, irrespective of the particular facts and circumstances, and without the plaintiff's consent." 930 N.E.2d at 908. This "legislative override" impermissibly infringed upon the "fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law," in violation of the separation of powers. *Id.* The Washington Supreme Court has endorsed this reasoning. *See Sofie*, 771 P.2d at 720-21 (cap impermissibly "attempts to mandate legal conclusions").

Precisely the same analysis—and conclusion—are appropriate under article 4, section 1. *See Puckett*, 1978 OK 108, ¶ 15, 586 P.2d at 723. A statute, like 23 O.S. § 61.2, that "seek[s] to supplant exercise of sound judicial discretion" violates separation of powers. *Id.*

PROPOSITION FOUR: 23 O.S. § 61.2 Is an Unconstitutional "Special Law."

Article 5, section 46 of the Oklahoma Constitution provides, in relevant part:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing . . . *[r]egulating the practice* or jurisdiction of, *or changing the rules of evidence in judicial proceedings or inquiry before the courts.*

(emphasis added). A special law is invalid because it "creates preference and establishes inequality." *Wall v. Marouk*, 2013 OK 36, ¶ 5, 302 P.3d 775. Over the last twenty years, this Court has staunchly enforced the constitutional prohibition of special laws against legislative

attempts to "reform" the tort laws of this state.[27] Section 61.2 plainly violates our Constitution's proscription against special legislation in multiple ways.

Undeniably, "'Art. 5, § 46 mandates in absolute terms *statewide procedural uniformity* for an entire class of similarly situated persons or things.'"[28] These mandates are "absolute and unequivocal."[29] The standard for determining if a statute violates article 5, section 46 is straightforward:

> the only issue to be resolved is whether a statute upon a subject enumerated in the constitutional provision targets for different treatment less than an entire class of similarly situated persons or things. The test is whether the provision fits into the structured regime of established procedure as part of a symmetrical whole. If an enactment injects asymmetry, the § 46 interdiction of special law has been offended.

Zeier, 2006 OK 98, ¶ 13, 152 P.3d at 867. *See also Reynolds*, 1988 OK 88, ¶ 14, 760 P.2d at 822; *Montgomery*, 2014 OK 118, ¶ 7, 341 P.3d at 662.

Section 61.2 is special legislation compounded several times over: it creates both a special "rule of evidence" and a special "regulat[ion] of practice" which apply to a subset of tort claimants: just (1) personal injury plaintiffs; (2) not killed by the defendant's acts or omissions; and (3) who are awarded more than $350,000 in noneconomic damages for their

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[27] *Reynolds v. Porter*, 1988 OK 88, 760 P.2d 816 (statute limiting the applicability of the statute of limitations' "discovery rule" to cases not involving medical malpractice violated article 5, sections 46 & 59); *Zeier v. Zimmer, Inc.*, 2006 OK 98, 152 P.3d 861 (affidavit of merit requirement for malpractice claims ran afoul of article 5, section 46); *Woods v. Unity Health Ctr., Inc.*, 2008 OK 97, 196 P.3d 529 (statute creating a 180-day service requirement for malpractice claims violated article 5, section 46); *Wall*, 2013 OK 36, 302 P.3d 775 (invalidating a statute requiring an affidavit of merit before an action for professional negligence could proceed); *Montgomery v. Potter*, 2014 OK 118, 341 P.3d 660 (invalidating statute denying damages for pain and suffering to uninsured motorists).

[28] *Glasco v. Dep't of Corrections*, 2008 OK 65, ¶ 26, 188 P.3d 177, 186 (quoting *Macy v. Bd. of Cnty. Comm'rs of Okla.*, 1999 OK 53, ¶¶ 14-15, 986 P.2d 1130, 1138-39) (emphasis added).

injuries. Thus, while section 61.2 ostensibly applies to "all plaintiffs with bodily injury," it treats plaintiffs within that general class differently depending upon how severely the plaintiff is injured. If a plaintiff suffers severe, life-changing injuries, he does not get to recover the full extent of his damages *unless* he is *so* severely injured that he dies as a result of the defendant's actions. 23 O.S. § 61.2(G). Plaintiffs with relatively minor damages for pain and suffering, disfigurement, or loss of consortium get to recover their full measure of damages, as do the survivors in a wrongful death action. Only plaintiffs like Appellants—living, prevailing plaintiffs with millions of dollars of damages for their disfigurement, loss of limbs, and loss of companionship—are singled out for an arbitrary reduction of their damages.

Likewise, the statute treats a subset of tortfeasors differently depending entirely upon how badly they injure their victims. If a defendant causes a less severe injury or gravely injures someone, the defendant has to pay the full amount of the plaintiff's damages. But section 61.2 lets some defendants off the hook for the full extent of the harm they cause—those defendants, like Appellee, who cause extraordinary damage to a person.

To these subsets of plaintiffs and defendants created by section 61.2, different rules of evidence and different rules of practice apply. Section 61.2's arbitrary $350,000 cap on noneconomic damages can be lifted "if the judge and jury finds, *by clear and convincing evidence*, that the defendant's acts or failures to act were: 1. In reckless disregard for the rights of others; 2. Grossly negligent; 3. Fraudulent; or 4. Intentional or with malice." 23 O.S. § 61.2(C) (emphasis added). Additionally, and as noted above, *supra* Prop. One, the statute *mandates* special findings of fact in civil actions arising from claimed bodily injury, if the verdict is for the plaintiff, and prohibits the court and the parties from informing the jurors or

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[29] *Zeier*, 2006 OK 98, ¶ 18, 152 P.3d at 868; *see also Reynolds*, 1988 OK 88, ¶¶ 1-2,

potential jurors about the effect of their special findings. 23 O.S. § 61.2(B) & (F). These rules do not apply where the plaintiff was less severely injured or where death results.

Section 61.2(C) requires severely injured plaintiffs who have suffered more than $350,000 in noneconomic damages to produce "*clear and convincing evidence*" that "the conduct of the defendant was or amounted to: a. reckless disregard for the rights of others, b. gross negligence, c. fraud, or d. intentional or malicious conduct," in order to recover their full compensatory damages. 23 O.S. § 61.2(C)-(D) (emphasis added). In so doing, section 61.2 changes the common law "preponderance of the evidence" or "weight of the evidence" standard used in all other personal injury cases for a plaintiff to prove liability and recover her full measure of compensatory damages.[30] Under section 61.2, a plaintiff with less severe injuries and the survivors in a wrongful death action only have to meet the "preponderance of the evidence" standard to recover their full measure of damages, but a severely injured plaintiff must make a greater showing. Section 61.2(C)'s alteration of this centuries-old standard of evidence for personal injury cases only for a subset of cases defies article 5, section 46's explicit proscription of non-uniform laws that "chang[e] the rules of *evidence* in judicial proceedings" and defies this Court's repeated admonitions that article 5, section 46's prohibitions are "absolute and unequivocal." *Reynolds*, 1988 OK 88, ¶ 22, 760 P.2d at 824.

Section 61.2 also violates article 5, sections 46's prohibition on the creation of "special law[s] . . . [r]egulating the practice" of the courts in two ways. First, it replaces the jury with a judge as the trier of fact, altering the venerable common law practice used in all

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13-16, 19-23, 760 P.2d at 818, 822, 824.

[30] *Comer v. Preferred Risk Mut. Ins. Co.*, 1999 OK 86, ¶ 10, 991 P.2d 1006, 1010. This standard has been used in Oklahoma since before it became a state. *Town of Norman v. Teel*, 1902 OK 65, ¶ 15, 69 P. 791, 794; *St. Louis & San Francisco R.R. Co. v. Sharrock*, 98 S.W. 158 (Indian Terr. 1906).

civil actions, including all personal injury cases.[31] No matter what a jury may award, section 61.2(B) mandates that a plaintiff cannot receive more than $350,000 in noneconomic damages unless both "the *judge* and jury *finds*, by clear and convincing evidence, that the defendant's acts or failures" fit into one of four categories of liability greater than negligence in a personal injury case. 23 O.S. § 61.2(C). Like section 61.2(C)'s new evidence standard, its new "regulat[ion]" of practice flouts centuries of common law practice. Few common law practices are better settled than that of having juries, not judges, determine all the "facts" in a case, unless the parties waive a jury trial. *See supra* Prop. Two.

Section 61.2(C) ignores this Court's decisions and flouts these venerable common law principles. Indeed, section 61.2(C) turns the equation upside down: it insists that the determination of *some* facts in *some* civil actions (ones which involve severe bodily injuries resulting in noneconomic damages above $350,000) must now be found by the judge, as well. Anytime a jury decides that a plaintiff deserves more than $350,000 for pain, suffering, disfigurement, loss of companionship, or loss of consortium, *inter alia*, section 61.2(B) & (C) operate to require a judicial finding of fact before judgment may be entered on a jury's verdict. Even if a jury finds that the defendant's conduct amounted to reckless disregard for the rights of others, gross negligence, fraud, or intentional or malicious conduct, the *court* can disregard or override that determination if, in the court's exclusive judgment, the evidence of the defendant's gross negligence or reckless disregard for the rights of others was insufficiently "clear and convincing." This new "regulat[ion]" of judicial practice and procedure, applicable only to the subset of cases affected by section 61.2, cannot be squared with article 5, section 46.

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[31] It thus also violates the right to a jury trial. *See supra* Prop. Two.

Second, section 61.2 imposes a different judicial practice only in personal injury cases in which the plaintiff prevails. Section 61.2(D) mandates special findings of particular facts only in those personal injury cases in which the plaintiff prevails. 23 O.S. § 61.2(D). As noted above, *supra* Prop. One, in all other cases, the determination of whether to direct the jury to make special findings of fact is within the discretion of the trial court. Section 61.2 regulates judicial practice in a particular subset of cases, in direct contravention of article 5, section 46.

Section 61.2 is under-inclusive, like many of the statutes this Court has invalidated on special legislation grounds.[32] It carves out "a subset of negligence plaintiffs for different procedural and evidentiary treatment based on the type of action they pursue," as only personal injury plaintiffs are "burdened with the necessity" of proving a defendant's tortious conduct to both a jury and a judge by clear and convincing evidence, and only in those cases are the ordinary rules of evidence and practice displaced.[33] This is exactly "the vice that . . . this Court [has] long guarded against—the granting of preference to some and the denial of equality to a class."[34]

This Court has already ruled that limiting noneconomic damages for a particular group of tort victims is unconstitutional. The statute denying damages for pain and suffering to uninsured motorists[35] was unanimously found unconstitutional in *Montgomery v. Potter*:

> Like the claimants in *Zeier*, it is clear that § 7-116 "sets aside a subset of negligence plaintiffs for different" treatment based on the status of a plaintiff's automobile insurance coverage. . . .

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[32] *Reynolds*, 1988 OK 88, 760 P.2d at 823-24; *Zeier*, 2006 OK 98, ¶ 18, 152 P.3d at 868; *Montgomery*, 2014 OK 118, ¶ 8, 341 P.3d at 662.

[33] *Zeier*, 2006 OK 98, ¶ 17, 152 P.3d at 868 (citations omitted).

[34] *Id.*

[35] 47 O.S. § 7-116.

> Section 7-116 creates an impermissible special class by restricting damages in civil negligence actions for victims who also happen to be uninsured drivers while the general class of automobile accident victims is not prevented from the recovery of damages for pain and suffering. Because 47 O.S. 2011, § 7-116 impacts less than an entire class of similarly situated claimants it is under-inclusive and, therefore, we find it to be an unconstitutional special law prohibited by art. 5, § 46 of the Oklahoma Constitution.

2014 OK 118, ¶ 8, 341 P.3d at 662. The statute at issue in *Montgomery* targeted injured plaintiffs who were not in compliance with the Compulsory Insurance Law. Section 61.2 targets injured plaintiffs with significant noneconomic damages. This Court's analysis in *Montgomery* should lead the Court to the same conclusion in this case. In sum, inasmuch as section 61.2 creates both a new, asymmetrical "regulation" for the courts to follow in a small sub-subset of personal injury cases and a new, non-uniform "rule of evidence" for the courts to apply in such cases, this Court should strike it down as a violation of article 5, section 46's "absolute and unequivocal prohibition" on special laws.

PROPOSITION FIVE: 23 O.S. § 61.2 Creates Unconstitutional Barriers to the Fundamental Right of Equal Access to the Courts Guaranteed by Article 2, Section 6.

Article 2, section 6 warrants that "[t]he courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." This is not an empty formality that can be avoided or ignored but a mandate for full, effective, and equal access to the courts. Indeed, this Court "has long . . . recognized that equal access to the courts, and modes of procedure therein, constitute basic and fundamental rights."[36] *Zeier* stressed that "[t]he clear language of Art. 2, § 6 requires that

[36] *Thayer v. Phillips Petroleum Co.*, 1980 OK 95, ¶ 14, 613 P.2d 1041, 1044. The unequal treatment of those who suffer injuries so significant that their properly adjudicated

the courts must be open to all on the same terms without prejudice . . . [so] all individuals, without partiality, could pursue an effective remedy designed to protect their basic and fundamental rights."[37] For these reasons, this Court has warned that it "strictly scrutinize[s]" any "classifications which might restrain" this fundamental right.[38]

The *Zeier* court found that the one-time cost of procuring a single certificate of merit, which could add no more than "$500 to $5,000" to the cost of initiating a lawsuit,[39] had the potential of imposing too great a barrier on malpractice plaintiffs' access to the courts and struck down the certificate requirement. The Court recently struck down a new certificate of merit requirement in *Wall*, noting that "[t]he idea that money cannot be used as a bar to deny justice long predates the Oklahoma Constitution, and is one of the fundamental values of our legal system." 2013 OK 36, ¶ 24, 302 P.3d at 786. Section 61.2 imposes barriers more ongoing and far more expensive and burdensome than obtaining a single certificate of merit.

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damages surmount the cap and thus receive only a portion of their rightful compensation, as compared to plaintiffs with lesser injuries, also implicates equal protection under article 2, section 7, which provides "No person shall be deprived of life, liberty, or property, without due process of law" and constitutes the functional equivalent of equal protection. *Gladstone v. Bartlesville Indep. School Dist. No. 30*, 2003 OK 30, ¶ 6 n.15, 66 P.3d 442, 446 n.15. Because article 2, section 6 constitutes a fundamental right, strict scrutiny applies. *See Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶ 55, 148 P.3d 842, 856. Under strict scrutiny, the defender of the statute "'bears the burden of establishing, not only that . . . a compelling interest . . . justifies the law, but that the distinctions drawn by the law are necessary to further its purpose.'" *Terry v. Gassett*, 1987 OK 60, ¶ 8, 740 P.2d 141, 144 (quoting *Thayer*, 1980 OK 95, ¶ 13, 613 P.2d at 1044).

[37] *Zeier*, 2006 OK 98, ¶ 25, 152 P.3d at 872 (footnote omitted).

[38] *Thayer*, 1980 OK 95, ¶ 15, 613 P.2d at 1045. *See Zeier*, 2006 OK 98, ¶ 25, 152 P.3d at 872. *See also Key v. Minnetonka Lumber Co.*, 1925 OK 582, ¶ 6, 241 P. 143, 145; *Woody v. State ex rel. Dep't of Corrections*, 1992 OK 45, ¶ 9, 833 P.2d 257, 260; *Moses v. Hoebel*, 1982 OK 26, ¶ 12, 646 P.2d 601, 605.

[39] *Zeier*, 2006 OK 98, ¶ 26, 152 P.3d at 873. *Zeier* also cautioned that a $349 jury fee "bordered" on being too great a burden on access to the courts. *Id.* at ¶ 27, 152 P.3d at 873.

A. Section 61.2 violates article 2, section 6 by imposing a new "clear and convincing evidence" standard that increases the costs, and thus chills the filing, of meritorious lawsuits.

Section 61.2's "clear and convincing evidence" standard—which applies to all aspects and phases of a plaintiff's case (though not a defendant's), and not just once and at the pre-filing stage—is as at least as costly and burdensome as obtaining a certificate of merit. It should suffer the same fate in this Court. Section 61.2 does not merely add a procedural wrinkle for plaintiffs to navigate; rather, it adds to the cost of obtaining a noneconomic damages award greater than the $350,000 cap, even though the additional compensation due is sufficiently proven, and thereby chills the filing of meritorious personal injury suits seeking such damages. Undeniably, "[t]he amount and quality of evidence required to sustain a result based on a preponderance of evidence is . . . less than that required to meet a clear and convincing standard."[40] Significantly, "the very purpose of erecting a higher pleading burden in the first place is to either discourage filing lawsuits or to prematurely terminate them."[41] Thus, courts and scholars agree that statutes imposing higher standards of evidence chill plaintiffs from filing suit and prompt courts to dismiss them peremptorily.[42] Imposing a higher and more costly evidentiary burden on a subset of tort victims cannot be squared with the fundamental right of equal access guaranteed by article 2, section 6.

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[40] *State ex rel. Z.D. v. Utah*, 147 P.3d 401, 407 (Utah 2006).

[41] Christopher M. Fairman, *Heightened Pleading*, 81 Tex. L. Rev. 551, 619-20 (2002).

[42] *See Miller v. Albright*, 523 U.S. 420, 436 (1998) ("clear and convincing evidence" standard "deter[s]" civil lawsuits); *Lincoln Nat'l Life Ins. Co. v. Donaldson, Lufkin & Jenrette Securities Corp.*, 9 F. Supp. 2d 994, 1005 (N.D. Ind. 1998) ("inhibit[s]" lawsuits); M. Rosenberg, *The Adversary System* (May 1984), *in Perspectives on Civil Justice and ADR* 117, 148 (T. Kojima ed. 1990); Christopher J. Hardy, *The PSLRA's Heightened Pleading Standard*, 35 U.S.F. L. Rev. 565, 565 (2001); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 Harv. C.R.-C.L. L. Rev. 341, 371-73 (1990).

Likewise, simply imposing a $350,000 cap on noneconomic damages in personal injury cases in which there is no evidence of anything greater than negligence on the part of the defendant creates a burden on the right of access to courts of severely injured persons who have little or no economic damages for any of a number of reasons including that they are very young or very old, they have a low-wage job or are unemployed, are disabled already, or are homemakers. After analyzing Oklahoma law and case filings, Professor Hatamyar concluded that "[b]y reducing plaintiffs' potential recovery, and by enacting barriers to the filing and prosecution of tort claims, tort reforms make many potential cases uneconomical for plaintiffs' attorneys."[43] It is clear that caps on damages and increased evidentiary burdens discourage lawyers from taking meritorious cases where economic damages are low, and thus, undermine the ability of a significant number of injured persons to seek redress in the courts.[44]

In the final analysis, section 61.2 imposes a "double whammy" on personal injury plaintiffs' ability to seek and obtain justice for their claims, producing effects similar to but greater than the ones this Court found so troublesome in *Zeier* and *Wall*.[45] Section 61.2's clear and convincing evidence standard significantly adds to the up-front cost of filing and proving a personal injury claim, while also reducing the plaintiff's likelihood of success. At

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[43] Patricia Hatamyar, *The Effect of "Tort Reform" on Tort Case Filings*, 43 Val. U. L. Rev. 559, 592 (2009).

[44] *See* Stephen Daniels & Joanne Martins, *The Juice Simply Isn't Worth the Squeeze in Those Cases Anymore:" Damage Caps, 'Hidden Victims,' and the Declining Interest in Medical Malpractice Cases* (Am. Bar Found. Res. Paper Series 2009), *available at* http://ssrn.com/abstract=1357092; *cf.* Kathryn Zeiler, *Medical Malpractice Liability Crisis or Patient Compensation Crisis?*, 59 DePaul L. Rev. 675 (2010) (discussing the possible harmful impact of noneconomic damages caps).

[45] *See Zeier*, 2006 OK 98, at ¶ 21, 152 P.3d at 869 (footnotes omitted) ("additional certification costs . . . produced a substantial and disproportionate reduction in the number of

the same time, section 61.2's cap substantially reduces the chance that a plaintiff will be able to find an attorney able and willing to prosecute his or her case. As such, section 61.2 violates the fundamental right of access to the courts guaranteed by article 2, section 6.

PROPOSITION SIX: The Unconstitutional Provisions in 23 O.S. § 61.2 Are Not Severable.

Appellants maintain that the entirety of 23 O.S. § 61.2 is unconstitutional and void. However, should this Court determine that only certain provisions of 23 O.S. § 61.2 are unconstitutional, it must determine whether the unconstitutional portions are severable. *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶ 18, 163 P.3d 512, 523. Oklahoma law mandates:

> unless there is a provision in the act that the act or any portion thereof or the application of the act shall not be severable . . . the remaining provisions or applications of the act shall remain valid, unless the court finds:
>
> a. the valid provisions or application of the act are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or
>
> b. the remaining valid provisions or applications of the act, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

75 O.S. § 11a. Even if only portions of section 61.2 are held invalid, the remaining portions are not severable under either standard. The remaining portions, standing alone, would be incomplete and incapable of being executed in accordance with legislative intent. The Court could not presume that the Legislature would have enacted the remaining portions without the invalid provisions.

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claims filed by low-income plaintiffs. . . . prevent[ing] meritorious medical malpractice actions from being filed."); *Wall*, 2013 OK 36, at ¶ 23-25, 302 P.3d at 786-87.

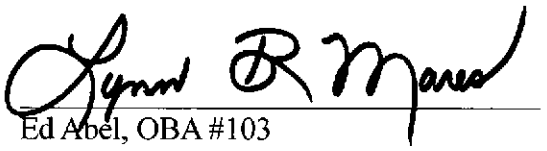
As in *Douglas*, "[i]t would be both dangerous and difficult for this Court to engage in the exercise of severance in this case." *Douglas v. Cox Ret. Properties, Inc.*, 2013 OK 37, ¶ 11, 302 P.3d 789, 793-94. Were the Court to pick and choose which provisions of the statute were essential to and inseparable from the motivating force behind the statute, it would essentially become the legislator, determining substantive policy. It is not at all clear that the statute would have been enacted without the provisions that violate the general verdict requirement of the Oklahoma Constitution, that displace the roles of the judge and jury, or that mandate a higher showing of culpability for a plaintiff to recover his or her full compensatory damages. Were the Court to sever all the invalid portions of section 61.2, it could not presume the Legislature would have enacted the remaining provisions of the bill without the voided sections.

CONCLUSION

Plaintiffs/Appellants Todd and Dara Beason ask the Court to hold that 23 O.S. § 61.2 is unconstitutional and void, remand the case to the trial court with directions to reinstate the amounts of the jury's original, general verdicts, and enter judgment for the Beasons based on the $15 million in damages determined by the jury.

Date: April 25, 2016

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this 25th day of April, 2016, a true copy of the above was sent via United Parcel Service 2nd Day Delivery to the following counsel of record:

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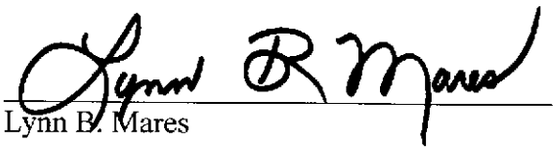

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