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Case No. -114301

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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STATE OF OKLAHOMA
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JAMES TODD BEASON and DARA BEASON,)
Plaintiffs/Appellants/Cross-Appellees,)
vs.)
I.E. MILLER SERVICES, INC.,)
Defendant/Appellee/ Cross-Appellant.)

) District Court of Oklahoma County,
) Case No. CJ-2012-4758

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AMICUS BRIEF OF OKLAHOMA ASSOCIATION FOR JUSTICE

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

Case No. CJ- 2012-4758

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INTRODUCTION

This Court should reverse the trial court's decision that the statute which purports to cap Plaintiffs' damages at \$350,000¹ is constitutional and hold the statute unconstitutional for five reasons. First, the statute's requirement for the jury to answer interrogatories violates Article 7, §15 of the Oklahoma Constitution forbidding such a requirement in any statute "hereafter enacted." Second, it violates the right to a jury trial specifically granted by Article 2, § 19 of the Oklahoma Constitution. Third, the statute's cap contravenes the fundamental right of equal protection guaranteed by the Constitutions of both the United States and the State of Oklahoma. Fourth, the cap is an impermissible special law that impacts only the most severely injured plaintiffs. And fifth, the cap violates the separation of powers clause set forth in Art. 4, § 1 of the Oklahoma Constitution.

ARGUMENT AND AUTHORITIES

PROPOSITION I: THE STATUTE'S SUBSECTION D REQUIRES THE JURY TO ANSWER INTERROGATORIES IN VIOLATION OF THE OKLAHOMA CONSTITUTION'S ARTICLE 7 §15

Article 7, § 15 of the Oklahoma Constitution provides:

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.²

The statute's subsection D provides:

. . . the jury, . . ., shall return a general verdict accompanied by answers to interrogatories, which shall specify all of the following: [portion of judgment representing economic and non-economic loss]³

¹ 23 O.S. § 61.2, hereafter, "the statute."

² Emphasis supplied.

³ Emphasis supplied, parenthetical added.

The Court can readily see that the statute does precisely what the Constitution specifically forbids, i.e. the statute requires the court to direct the jury to make findings of particular facts. Because this provision of the statute is vital to the operation of the statute, the statute is unconstitutional.

Vaught v. Holland,⁴ does not compel a contrary result. *Vaught* affirmed use of an interrogatory not required by the terms of a statute. The statute applicable there, 23 O.S. § 12 does not require the jury to answer an interrogatory. The assault upon the trial court's decision in *Vaught* was that the trial court used a form of verdict which contained interrogatories. So long as the statute does not require use of the interrogatory, there is no violation of Article 7, § 15. The statute before the Court today does require use of interrogatories. That is the statute's fatal flaw.

*Smith v. Gizzi*⁵ speaks to a related but different issue: whether the verdict form in question is a permissible "general verdict" (required by Article 7, § 15) or a forbidden "special verdict." The instruction in question, given pursuant to the statute in question in *Gizzi*⁶ specifically told the jury the effect of the findings the jury would make. The *Gizzi* Court said: "¶12 A trial court in Oklahoma however, must be cautious in presenting a verdict form to the jury to insure that it is a general verdict. If the verdict is not wholly determinative of the right of recovery the verdict would be special."

Article 7, § 15 forbids both a special verdict and a statutorily required interrogatory, such as that in the present, unconstitutional, statute.

⁴ 1976 OK 119, 554 P.2d 1174.

⁵ 1977 OK 91, 564 P.2d 1009.

⁶ 23 O.S. 1976 Supp. § 11.

PROPOSITION II: THE NONECONOMIC DAMAGES CAP VIOLATES THE RIGHT TO A JURY TRIAL AND ACCESS TO THE COURTS

Trial by Jury

The Oklahoma Constitution unequivocally provides that “[t]he right of trial by jury shall be and remain inviolate....” Art. 2, § 19. This constitutional right “except as modified in the Constitution itself, means the right as it existed in the territory at the time of the adoption of the Constitution.” *Steinway v. Griffith Consolidated Theatres, Inc.*⁷ See also *Maryland National Insurance Co. v. District Court of Oklahoma County*,⁸ (holding that the right to jury trial “was not predicated upon the statutes existing in the territories at that time, but the right as guaranteed under the federal Constitution and according to the course of common law”); *Vogel v. Corporation Commission*,⁹ (stating that “[t]his constitutional safeguard granted no new right....”). There is no question that, at common law, a tortfeasor who inflicted harm upon another person could be held liable in damages for that injury. *Nealis v. Baird*.¹⁰

The constitutionally guaranteed right to a jury trial extends to the determination of damages, as this Court has held. In *Massey v. Farmers Insurance Group*,¹¹ this Court addressed the preclusive effect of a statutorily mandated appraisal provision then contained in standard fire insurance policies. The court held that such a mandatory provision would not be binding on the party who did not demand the appraisal, “because such binding nature of the appraisal award would violate the non-demanding party’s constitutional right to trial by

⁷ 1954 OK 156, ¶ 4, 273 P.2d 872, 878.

⁸ 1969 OK 73, ¶ 7, 455 P.2d 690, 692.

⁹ 1942 OK 14, ¶ 12, 121 P.2d 586, 589.

¹⁰ 1999 OK 98, ¶ 19, 996 P.2d 438, 446.

¹¹ 1992 OK 80, 837 P.2d 880.

jury.”¹² In so holding, the court emphasized that the non-demanding party is specifically entitled to have the jury determine the amount of damages to which he is entitled:

Farmers argues that the appraisal process does not violate the right to trial by jury because the award is subject to judicial review for fraud, bad faith and manifest mistake per this Court’s holdings....However, under these cases, the jury does not determine the amount of loss unless they first find that the appraisal award was subject to fraud, bad faith or mistake. Thus, if the party cannot prove that the award lacks credibility, that party is denied the opportunity to have the jury determine the amount of loss. Under such a scheme, the right of jury trial is still thwarted.

....

Our constitution provides that the right to jury trial shall remain inviolate. This right includes having a jury determine *all* issues of fact, not just those issues that remain after the legislature has narrowed the claims process. In many instances, the amount of the loss will be the only disputed issue. *Massie v. Farmers*¹³

See also *Death of Lofton v. Green*,¹⁴ (holding that it is the function of the jury “to properly evaluate the various elements of alleged damages . . . the extent of plaintiff’s pecuniary and *emotional* loss was a matter exclusively for the jury to determine”) (emphasis added). The emotional loss to which this Court referred is encompassed in the loss that is now impermissibly capped by the statute. As a result, the statute invades the province of the jury as forbidden by the Oklahoma Constitution.

Other courts have addressed similar statutory damage caps and found them to be unconstitutional using this rationale. For example, in *Watts v. Lester E. Cox Medical Centers*,¹⁵ the Missouri Supreme Court addressed a noneconomic damages cap imposing the

¹² *Id.* at ¶ 15.

¹³ 1992 OK at ¶¶ 19, 20 (internal quotations omitted) (emphasis added).

¹⁴ 1995 OK 109, ¶ 11, 905 P.2d 790, 792.

¹⁵ 376 S.W.3d 633 (Mo. 2012).

same \$350,000.00 limitation on such damages. In *Watts*, a medical malpractice action, the jury awarded the plaintiff \$1,450,000 in noneconomic damages as a result of catastrophic brain injury to her son caused by medical negligence during the delivery. The trial court entered judgment reducing plaintiff's damages to the capped amount. On appeal, the plaintiff asserted that the cap on noneconomic damages violated her right to trial by jury under the Missouri Constitution, which contains the same "remain inviolate" language as does the Oklahoma Constitution.

The Missouri court had little difficulty in determining the noneconomic damages cap to be unconstitutional, holding that:

Once the right to a trial by jury attaches, as it does in this case, the plaintiff has the full benefit of that right free from the reach of hostile legislation. Section 538.210 imposes a cap on the jury's award of non-economic damages *that operates wholly independent of the facts of the case*. As such, section 538.210 *directly curtails the jury's determination of damages and, as a result, necessarily infringes on the right to trial by jury* when applied to a cause of action to which the right to jury trial attaches at common law. Because the common law did not provide for legislative limits on the jury's assessment of civil damages, Missouri citizens retain their individual right to trial by jury subject only to judicial remittitur based on the evidence in the case . . . *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*. Section 538.210 necessarily and unavoidably violates the state constitutional right to trial by jury. *Watts v. Lester* ¹⁶.

In so holding, the court rejected the defendant's argument that the jury's constitutional role is not limited by the cap because the jury is free to award whatever damages it deems appropriate before the cap is applied, finding the reduction of the jury's award "clearly

¹⁶ *Id.* at 640 (emphasis added).

nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."¹⁷

The Washington Supreme Court reached the same result in *Sofie v. Fibreboard Corp.*¹⁸ (The cap on noneconomic damages in *Sofie* increased with the age of the plaintiff, thus allowing a younger plaintiff to recover more in noneconomic damages than an elderly one, but otherwise operated just as the cap at issue in this case, and the one deemed unconstitutional in *Watts*.) Just as with Oklahoma and Missouri, the Washington Constitution contains the "remain inviolate" language in describing the right of trial by jury. The court found that language to be dispositive of the constitutionality of the cap:

[T]he plain language of article 1, section 21 provides the most fundamental guidance: "The right of trial by jury shall remain inviolate." *The term "inviolate" connotes deserving of the highest protection.* Webster's Third New International Dictionary 1190 (1976), defines "inviolate" as "*free from change or blemish: pure, unbroken...free from assault or trespass: untouched, intact...*" Applied to the right to trial by jury, *this language indicates that the right must remain the essential component of our legal system that it has always been.* For such a right to remain inviolate, *it must not diminish over time and must be protected from assaults to its essential guarantees.* In Washington, those guarantees include allowing the jury to determine the amount of damages in a civil case.¹⁹

The court acknowledged that the legislature may shape legislation by passing measures that affect jury determinations, such as rules of procedure and evidence, or even abolishing common law rights of action, but may not preempt a jury's finding on a factual issue the jury has decided.²⁰ Importantly, the court stressed that "the jury's role in determining noneconomic damages is perhaps even more essential" than its findings on other factual

¹⁷ *Id.* at 642.

¹⁸ 771 P.2d 711 (Wash. 1989).

¹⁹ *Id.* at 721-722 (emphasis added).

²⁰ *Id.* at 722.

issues. *Sofie*²¹ And as the Missouri court did in *Watts*, the Washington court rejected out of hand the defendant's argument that the cap only affects the judgment after the jury has made its findings of fact, finding that "[s]uch an argument pays lip service to the form of the jury but robs the institution of its function."²²

The Oregon Supreme Court struck down a \$500,000 noneconomic damage cap in *Lakin v. Senco Products, Inc.*,²³ again based on the "remain inviolate" language in the Oregon Constitution. The Oregon court concluded that this language "prohibits the legislature from interfering with the full effect of a jury's assessment of noneconomic damages . . ."²⁴ The Court also reached the same conclusion as the Missouri and Washington Supreme Courts that the jury's fact-finding function does not end with the evaluation of damages and the return of the verdict. "Limiting the effect of a jury's noneconomic damages verdict eviscerates 'Trial by Jury' as it was understood [at the time the Constitution was adopted] and, therefore, does not allow the common-law right of jury trial to remain 'inviolate.'"²⁵ See also *Smith v. Department of Insurance*,²⁶ (finding cap unconstitutional and emphasizing that "[a] plaintiff who receives a jury verdict for, e.g., \$1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at \$450,000"); *Lucas v. United States*²⁷ (citing the above-quoted *Smith* language in support of the court's decision to strike down the damages cap); *Knowles v. United*

²¹ *Id.* at 717.

²² *Id.* at 721.

²³ 987 P.2d 463 (Ore. 1999).

²⁴ *Id.* at 473.

²⁵ *Id.* at 473.

²⁶ 507 So.2d 1080, 1088 (Fla. 1987).

²⁷ 757 S.W.2d 687, 692 (Tex. 1988).

*States*²⁸ (recognizing that the “remain inviolate” language prohibits the imposition of an arbitrary damages cap).

Defendant relied on several cases before the trial court that require comment. In *Etheridge v. Medical Center Hospitals*,²⁹ the Virginia Supreme Court upheld the validity of a \$750,000 cap on damages in a medical malpractice action in the face of constitutional challenges including the jury trial guarantee. The Virginia court adopted the argument the courts cited above rejected, and determined that plaintiff’s right to a jury trial was satisfied because “[a] trial court applies the remedy’s limitation only after the jury has fulfilled its fact-finding function. Thus, [the cap] does not infringe upon the right to a jury trial because the section does not apply until after a jury has completed its assigned function in the judicial process.”³⁰ While OAJ submits this conclusion is simply incorrect as a statement of law regardless of the constitutional language, it is significant that the jury trial provision in Virginia’s Constitution is worded very differently than Oklahoma’s or the other states that have declared such caps unconstitutional. The Virginia Constitution provides, “[t]hat in controversies respecting property, and in suits between man and man, trial by jury is *preferable* to any other, and *ought* to be held sacred.”³¹ This is clearly not the same as the language of the Oklahoma Constitution which *mandates* that the right to trial by jury “*shall be* and *remain* inviolate.” Indeed, the Virginia Constitution grants the Virginia legislature a flexibility that does not exist in Oklahoma’s Constitution. *Ethridge* is thus distinguishable from the present action and the opposite result should be reached. *Franklin v. Mazda Motor*

²⁸ 544 N.W.2d 183, 187-188 (S.D. 1996).

²⁹ 376 S.E.2d 525 (Va. 1989).

³⁰ *Id.* at 529.

³¹ *Id.* at 528.

*Corp.*³² and *Kirkland v. Blaine County Medical Center*,³³ also referenced by Defendant in support of its position, rely heavily on *Ethridge* in upholding a damage cap, and should be rejected by this Court as unpersuasive.

As a result of the explicit language in the Oklahoma Constitution directing that the right to a jury trial “shall be and remain inviolate,” this Court should join those courts which find that caps on noneconomic damages unconstitutionally deprive a jury of its right to determine damages. Oklahoma’s constitutional provision allows for no other result.

Access to the Courts

In a related vein, the Oklahoma Constitution also provides that its citizens shall have unfettered access to the courts:

The 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.³⁴

This Court has expressed that while “the legislature may facilitate speedy resolution of differences, legislation cannot be used to deny the constitutional guarantee of court access – a fundamental right.” *Zeier v. Zimmer, Inc.*³⁵ This is precisely what the noneconomic damages cap does, as other courts have held when construing similar statutes.

Florida’s “access to the courts” statute contains the same general language used by the Oklahoma Constitution, providing that the court shall be open to every person and that “justice shall be administered without sale, denial or delay.”³⁶ In *Smith*,³⁷ the appellants

³² 704 F.Supp. 1325 (D. Md. 1989).

³³ 4 P.3d 1115 (Idaho 2000).

³⁴ Oklahoma Constitution, Art. 2, § 6.

³⁵ 2006 OK 98, ¶ 25, 152 P.3d 861, 872.

³⁶ Florida Constitution, Art. I, § 21.

argued that the \$450,000 cap on noneconomic damages enacted as a part of tort reform unconstitutionally denied access to the courts in violation of the Florida Constitution. The court agreed, holding that:

Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become part of the common law of the State...***the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown. Smith v. Dept. of Ins.***³⁸

The Florida court found that standard was not met with regard to the cap on noneconomic damages, as the legislature failed to provide a reasonable alternative to protect the rights of the people to redress because the benefits of the \$450,000 noneconomic damages cap run in only one direction – in favor of the tortfeasor and the insurance company.³⁹ The Court also emphasized that the plaintiff did not receive the constitutional benefit of a jury trial, and was thus denied the corresponding right of access to the courts.⁴⁰ See also *Lucas*⁴¹ (emphasizing the “access to the court is granted for the purpose of redressing injuries” in Texas, which redress is precluded by the imposition of an arbitrary cap on damages); *Knowles*⁴² (citing *Smith* and *Lucas* in reaching the same result under the open courts provision of the South Dakota Constitution).

³⁷ 507 So.2d 1080 (Fla. 1987).

³⁸ *Id.* at 1088 (emphasis added).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 757 S.W.2d at 692.

⁴² 544 N.W.2d at 188.

In support of its argument that an opposite result should be reached in this case, Defendant relies on the Oklahoma Supreme Court decision in *St. Paul Fire & Marine Insurance Co. v. Getty Oil Co.*,⁴³ which involved Oklahoma's statute of repose on construction defects. The statute involved there, 12 O.S. § 109, bars tort claims against builders and architects for injuries occurring more than ten years after completion of construction. The Supreme Court began its analysis with the precept that "it is within the power of the Legislature to modify or abolish an old right under common law *as long as no vested right is disturbed.*"⁴⁴ The court held that the statute of repose was constitutional on that basis, as tort liability for construction defects was essentially unknown at common law, and a builder had no liability to persons absent privity of contract:

Even as late as 1924, this Court cited the general rule that an independent contractor is not liable to third persons for an injury caused by work done by the contractor where the contractee had accepted the work prior to injury. Not until 1961 did we completely apply to design and construction cases the modern rule that no privity of contract is essential to support liability for negligence in respect of acts or instrumentalities which are imminently dangerous.⁴⁵

The same cannot be said about a cause of action for personal injury, which has always been a part of the common law of Oklahoma and may not now be abrogated or reduced by the Legislature. *Nealis*.⁴⁶ Because that right has long vested, the Legislature may not deny a remedy, and the corresponding access to the courts, by imposing a cap. *St. Paul*.⁴⁷ The cap on noneconomic damages thus violates Oklahoma's constitutional provision guaranteeing equal access to the courts of this State, and should be declared unconstitutional on this basis.

⁴³ 1989 OK 139, 782 P.2d 915.

⁴⁴ *Id.* at ¶ 14 (emphasis added).

⁴⁵ *Id.* at ¶ 19 (internal quotations and citation omitted).

⁴⁶ 1999 OK 98, ¶ 19.

⁴⁷ 1989 OK 139, ¶ 23.

The Missouri Supreme Court followed the same rationale as did Oklahoma in a new case issued nine days ago, as this brief is being filed. *Dodson v. Ferrara*⁴⁸ applied the Missouri \$350,000 non-economic damage cap which it had rejected in *Watts*.⁴⁹ Its rationale is that *Dodson* was a wrongful death case and wrongful death actions were unknown to the common law of Missouri when the Missouri Constitution was adopted. Of course, the case before the Court today involves a common law cause of action as to which the constitutional provisions apply.

PROPOSITION III: THE NONECONOMIC DAMAGES CAP VIOLATES EQUAL PROTECTION

This Court has held:

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution mandates no state “deny to any person within its jurisdiction the equal protection of the laws.” The Oklahoma Constitution does not contain an equal protection provision like the federal Equal Protection Clause; however, this Court has identified a functional equivalent in our due process section. Although not an absolute guarantee of equality of operation or application of state legislation, the Equal Protection Clause’s purpose is to safeguard against arbitrary discrimination.

Butler v. Jones ex rel. State ex rel. Oklahoma Department of Corrections.⁵⁰ See also *Horn v. State*⁵¹ (holding that “Oklahoma’s Due Process and Equal Protection provisions are the same as those found in the Federal Constitution”); *Nelson v. Nelson*⁵² (stating that “[t]he United States Constitution and the Oklahoma Constitution each contain built-in anti-discrimination

⁴⁸ 2016 WL 1620102, __ S.W. 3d __, (Mo. Sup. Ct. *en banc* 2016).

⁴⁹ *Supra*. Note 15

⁵⁰ 2013 OK 105, ¶ 11, 321 P.3d 161, 166.

⁵¹ 2009 OK CR 7, ¶ 14, 204 P.3d 777, 781.

⁵² 1998 OK 10, ¶ 12, 954 P.2d 1219, 1224.

components which afford protection against unreasonable or unreasoned classifications which serve no important governmental interests”).

While equal protection does not require exact equality of classification, “[i]t does require that the classification rest on *bona fide*, not feigned differences . . . and that the different treatments are not arbitrary.” *Nelson v. Nelson*⁵³ This standard is clearly violated in the case of Oklahoma’s noneconomic damages cap, as the cap denies a full monetary recovery, as determined by the jury, to the state’s most severely injured citizens. In contrast, plaintiffs who are less seriously injured – and whose damages fall within the \$350,000 cap amount – are compensated in full. This sort of arbitrary treatment cannot pass muster under equal protection.

Just as with the right to trial by jury, numerous states have deemed damage caps unconstitutional as violative of equal protection. In *Ferdon v. Wisconsin Patients Compensation Fund*,⁵⁴ the Wisconsin Supreme Court addressed the equal protection issue in the context of a cap on noneconomic damages in medical malpractice actions. Plaintiff Ferdon had been awarded \$700,000 in noneconomic damages for a birth injury that left him paralyzed. After the verdict, the trial court granted the defendant’s motion to have that amount reduced to \$350,000 in accordance with the statutory cap. On appeal, Ferdon challenged constitutionality of the cap on multiple grounds, including violation of his right to equal protection, trial by jury and separation of powers. The Wisconsin Supreme Court found the equal protection issue to be paramount, and declined to consider the remaining arguments.

⁵³ *Id.*

⁵⁴ 701 N.W.2d 440 (Wis. 2005).

Significantly, the court found the damages cap unconstitutional despite its use of the less rigorous rational basis level of scrutiny, and its acknowledgement that such scrutiny results in a “heavy burden in overcoming the presumption of constitutionality” for the challenger. *Ferdon*⁵⁵ The court said:

[J]udicial deference to the legislature and the presumption of constitutionality of statutes do not require a court to acquiesce in the constitutionality of every statute. A court need not, and should not, blindly accept the claims of the legislature. For judicial review under rational basis to have any meaning, there must be a meaningful level of scrutiny, a thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and its purpose . . . The rational basis test is not a toothless one.⁵⁶

In *Ferdon*, the Wisconsin Supreme Court found that the cap on noneconomic damages did not meet this standard, saying:

If the legislature’s objective was to ensure that Wisconsin people injured as a result of medical malpractice are compensated fairly, no rational basis exists for treating the most seriously injured patients of medical malpractice less favorably than those less seriously injured.

While we adhere to the concept of judicial restraint that cautions against substituting judicial opinion for the will of the legislature, we do not abdicate judicial responsibility. To hold that a rational basis exists for the \$350,000 statutory cap on noneconomic damages in medical malpractice cases would amount to applying a judicial rubber stamp to an unconstitutional statute.⁵⁷

In so holding, the Wisconsin court cited evidence indicating that the damage cap had little, if any, effect on medical malpractice costs, which was the express purpose of the legislation.

⁵⁵ *Id.* at 457.

⁵⁶ *Id.* at 460 (internal quotations omitted).

⁵⁷ *Id.* at 466, 491.

For example, the court cited studies by the U.S. General Accounting Office which concluded that there is no definitive correlation between caps on noneconomic damages and lower medical malpractice premium rates. *Ferdon*⁵⁸ Such studies supported the court's conclusion that there was no rational basis for the cap.

The Florida Supreme Court has also found a noneconomic damage cap violative of the right to equal protection guaranteed by the Florida Constitution. *Estate of McCall v. United States*.⁵⁹ The statute there provided that, in a case alleging medical negligence, noneconomic damages would be capped at \$500,000 per practitioner.⁶⁰ The Court found the statute unconstitutional using the rational basis analysis, and determined that the "statutory cap on wrongful death economic damages does not bear a rational relationship to the stated purpose that the cap is purported to address, the alleged medical malpractice insurance crisis in Florida."⁶¹

The court emphasized that the legislature's justification for such a statute is not to be taken at face value:

The general rule is that findings of fact made by the legislature are presumptively correct. However, it is well-recognized that the findings of fact made by the legislature must actually be findings of *fact*. They are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and *they are always subject to judicial inquiry*.

Our consideration of the factors and circumstances involved demonstrates that the conclusions reached by the Florida Legislature as to the existence of a medical malpractice crisis are not fully supported by the available data. Instead, the alleged interest of health care being unavailable is completely

⁵⁸ *Id.* at 472.

⁵⁹ 134 So.3d 894 (Fla. 2014).

⁶⁰ *Id.* at 900.

⁶¹ *Id.* at 971.

undermined by authoritative government reports. Those government reports have indicated that the number of physicians in both metropolitan and non-metropolitan areas have increased. *Estate of McCall*⁶²

The court went on to determine that:

Even if these conclusions by the Legislature are assumed to be true, and Florida was facing a dangerous risk of physician shortage due to malpractice premiums, we conclude that section 766.118 still violates Florida's Equal Protection Clause because the available evidence fails to establish a rational relationship between a cap on noneconomic damages and alleviation of the purported crisis...Reports have failed to establish a direct correlation between damages caps and reduced malpractice premiums.⁶³

Similarly, this Court should probe the conclusions of the Oklahoma Legislature on this issue just as did the Florida court. In doing so, this Court will likely reach the same conclusion – the statutory cap on noneconomic damages does not accomplish the desired result and thus does not survive an equal protection analysis; to the contrary, the damage cap impermissibly deprives the most severely injured plaintiffs of the compensation they deserve.

Significantly, the cap at issue in *Estate of McCall* also contained language applying the cap regardless of the number of claimants or defendants (§ 61.2 limits the injured plaintiff's recovery to \$350,000 no matter the number of defendants). In that case, the decedent was survived by her parents and her son. Because of the cap, each received only half of what he or she would have recovered without the application of the cap. The court found the cap violated equal protection "because it imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants."⁶⁴ The same is true with regard to the noneconomic damages cap at issue in this case, and the same

⁶² *Id.* at 906 (emphasis in original).

⁶³ *Id.* at 909.

⁶⁴ *Id.* at 971.

result should be reached. See also *Wright v. Central Du Page Hospital Association*⁶⁵ (accepting plaintiff's argument that limiting a medical malpractice victim's recovery to \$500,000 is arbitrary and discriminates against the most seriously injured victims).

Defendant argued before the trial court that because this Court upheld the constitutionality of Oklahoma's cap on punitive damages, 23 O.S. § 9.1, the Court must necessarily do so in this case. However, Defendant's argument disregards the distinction between noneconomic damages, which are awarded to compensate the plaintiff for his or her harm, and punitive damages, which are intended to further "a state's legitimate interests in punishment and deterrence." *Gilbert v. Security Finance Corp. of Oklahoma, Inc.*⁶⁶ See also *LeFlore v. Reflections of Tulsa, Inc.*⁶⁷ (holding that "[t]he established principles regarding the award of punitive damages is that they are allowed as punishment for the benefit of society as a restraint upon the transgressor and a warning and example serving as a deterrent to such conduct in the defendant and others similarly situated"). As such, a cap on punitive damages does not work to the detriment of the severely injured plaintiff in the way that a cap on noneconomic damages does, and is a more appropriate subject for legislative action.

Moreover, every equal protection analysis must be limited to the statute at issue, and not controlled by a decision on a cap imposed in a different context. As the Wisconsin Supreme Court expressed in rejecting a similar argument:

To determine the constitutionality of a statute, the classification in the statute must be analyzed along with the objectives of the statute. The analysis of each statute under equal protection will be different if circumstances so warrant, because the facts and rationales motivating and supporting the enactment of the statutes will most likely be different.

⁶⁵ 347 N.E.2d 736, 743 (Ill. 1976).

⁶⁶ 2006 OK 58, ¶30, 152 P.3d 165, 177.

⁶⁷ 1985 OK 72, ¶ 40, 708 P.2d 1068, 1077.

Ferdon.⁶⁸ As a result, the fact that the punitive damages statute contains a cap that has been upheld by this Court does not impact the analysis with regard to the cap on noneconomic damages at issue in this case, and Defendant's argument to the contrary should be rejected.

PROPOSITION IV: THE NONECONOMIC DAMAGES CAP IS AN UNCONSTITUTIONAL SPECIAL LAW

The Oklahoma Constitution provides that:

The Legislature shall not except as otherwise provided in this Constitution, pass any local or special law authorizing:

Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts...⁶⁹

This Court explained the nature of a special law in *Wall v. Marouk*:⁷⁰

A special law confers some right or imposes some duty on some but not all of the class of those who stand upon the same footing and same relation to the subject of the law . . . *The shortcoming of a special law* is that it does not embrace all the classes that it should naturally embrace, and that *it creates preference and establishes inequality*. It applies to persons, things, and places possessed of certain qualities or situations and excludes from its effect other not dissimilar persons, things, or places.⁷¹

"If an enactment injects asymmetry, the § 46 interdiction of special law has been offended."

*Woods v. Unity Health Center, Inc.*⁷² As a result, this Court has expressed that, when a statute is challenged as a special law, the Court's constitutional review is confined to only the

⁶⁸ 701 N.W.2d at 490.

⁶⁹ Oklahoma Constitution, Art. 5, § 46.

⁷⁰ 2013 OK 36, 302 P.3d 775.

⁷¹ *Id.* at ¶ 5 (emphasis added).

⁷² 2008 OK 97, ¶ 4, 196 P.3d 529, 531.

question of whether the statute is a general or special law. “If the statute is special, § 46 absolutely and unequivocally prohibits its passage by the legislature.” *Zeier*.⁷³

In this case, there can be no serious question but that the cap on noneconomic damages is a prohibited special law. The cap applies only to a select group of injured plaintiffs – those with the most severe injuries and most in need of compensation. Plaintiff Todd Beason, for example, was only 34 years old when his left arm was amputated as a result of his injuries. His life, and that of his wife, has been permanently altered by his devastating injury. Mr. Beason clearly was entitled to noneconomic damages far in excess of \$350,000 in compensation for the lifetime impact of his injuries, as the jury found. In contrast, had he been less severely injured, a noneconomic damages award of \$350,000 may have been sufficient. Moreover, the *Beason* jury found Defendant’s conduct not so egregious as to rise to the level of recklessness or intentional and with malice. Had it found otherwise, Mr. Beason would have been entitled to the full amount of his noneconomic damages as awarded by the jury (in addition to any punitive damages the jury may have awarded). Surely, Mr. Beason was entitled to the full amount of his damages regardless of the degree of culpability of the Defendant. This distinction has no basis – and makes no sense – in the context of noneconomic damages for bodily injury.

This is precisely the sort of inequality Oklahoma’s constitutional prohibition against special laws is designed to prevent, as this Court has determined with regard to other laws that inappropriately singled out a group of persons for application. See *Zeier*⁷⁴ (striking as unconstitutional the requirement that a medical negligence plaintiff obtain an affidavit of merit prior to suit as it impermissibly “divides tort victims alleging negligence into two

⁷³ 2006 OK 98, ¶ 11.

⁷⁴ 2006 OK 98, ¶ 14.

classes – those who pursue a cause of action in negligence generally and those who name medical professionals as defendants”); *Woods*⁷⁵ (holding that a statute requiring a medical negligence case to be dismissed without either notice to the plaintiff or an opportunity to be heard, while other plaintiffs are afforded both before dismissal, amounted to an unconstitutional special law); *Wall*⁷⁶ (rejecting the Legislature’s effort to cure the statute ruled unconstitutional in *Zeier* by requiring the affidavit of merit in all actions of professional negligence and finding the statutes to be functionally identical); *Montgomery v. Potter*⁷⁷ (finding a statute preventing uninsured motorists from recovering noneconomic damages to offend the constitutional prohibition against special laws).

Other courts have also ruled a damages cap unconstitutional on this basis. See *Wright*⁷⁸ (holding Illinois’ limitation on recovery in medical malpractice actions was an unconstitutional special law, and saying that “we have consistently held that to the extent that recovery is permitted or denied on an arbitrary basis a special privilege is granted in violation of the Illinois Constitution”); *Best v. Taylor Machine Works*⁷⁹ (relying in part on *Wright* to find that a cap on noneconomic damages is a special law that “actually undermines the stated goal of providing consistency and rationality to the civil justice system”). The same result should be reached in this case, as Oklahoma’s cap on noneconomic damages is similarly arbitrary and specially impacts only the most injured plaintiffs in clear violation of Oklahoma law.

PROPOSITION V: THE NONECONOMIC DAMAGES CAP VIOLATES SEPARATION OF POWERS

⁷⁵ 2008 OK 97.

⁷⁶ 2013 OK 36.

⁷⁷ 2014 OK 118, 341 P.3d 660.

⁷⁸ 347 N.E.2d 736, 743.

⁷⁹ 689 N.E.2d 1057, 1077 (1997).

The Oklahoma Constitution contains a separation of powers provision which provides that:

The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive and Judicial; and except as provided in this Constitution, the Legislative, Executive and Judicial departments of government shall be separate and distinct, and neither shall exercise powers properly belonging to either of the others.⁸⁰

The cap on noneconomic damages imposed by 23 O.S. § 61.2(B) violates the above constitutional provision by allowing the Legislature to interfere with the judicial evaluation and imposition of remittitur, and to do so without the judicial safeguards imposed by Oklahoma law. Oklahoma law sets a high bar for a trial court's determination to apply judicial remittitur and limit the damages awarded by a jury. The Oklahoma Supreme Court described that standard in *Clark v. Bearden*:⁸¹

A clear showing of prejudice is required before we will allow a trial court to set aside a jury verdict, or set it aside ourselves, for excessiveness or inadequacy of damages.

.....

A trial judge may not sit as a thirteenth juror. It matters not that the trial court or this court might or might not have reached a different conclusion as to the amount of damages suffered by means of the injuries received. A court may not substitute its judgment for that of the jury in the exercise of its function as a fact finding body.⁸²

See also *Strubhart v. Perry Memorial Hospital Trust Authority*⁸³ (recognizing that "[t]he general rule is that the issue of damages in a personal injury action is left to the jury after

⁸⁰ Oklahoma Constitution, Art. 4, § 1.

⁸¹ 1995 OK 71, 903 P.2d 309.

⁸² *Id.* at ¶¶ 11, 13.

⁸³ 1995 OK 10, ¶ 18, 903 P.2d 263.

hearing all the evidence”); *Aldridge v. Patterson*⁸⁴ (stating that “[i]f allowed the unbridled substitution of his own opinion for that of the jury, [a trial court] could in effect partially abrogate both our jury system and right of appeal by repeatedly setting aside successive verdicts and granting new trials until a verdict was returned that conformed to his own personal idea of an adequate recovery”). The judicial standard for remittitur is not applicable to the Oklahoma Legislature, and that body has imposed a damages cap that is applicable to severely injured plaintiffs across the board regardless of the evidence presented and the jury’s verdict. The only exception is if the jury finds the defendant to be a bad actor using much the same criteria as for an award of punitive damages, including acting with reckless disregard or intentionally and with malice.⁸⁵ However, the plaintiff is no less severely injured because the defendant was merely negligent, as in the case at bar, and is entitled to a full recovery – including both economic and noneconomic damages - as determined by the jury, just as he would be if the jury had found the defendant’s conduct in reckless disregard of the plaintiff’s rights, grossly negligent, fraudulent, or committed intentionally and with malice.

Just as with the other constitutional arguments, courts in other states have found separation of powers to be unconstitutionally infringed by a damages cap. In *Best*,⁸⁶ the court found a \$500,000 damages cap enacted as part of a tort reform act to be violative of several provisions of the Illinois Constitution, among them the separation of powers. Finding that the damages cap essentially functioned as an impermissible “legislative remittitur” without the corresponding safeguards, the court held:

Unlike the traditional remittitur power of the judiciary, the legislative remittitur of section 2-1115.1 *disregards the jury’s*

⁸⁴ 1954 OK 264, ¶ 3, 276 P.2d 202, 204.

⁸⁵ See 23 O.S. § 9.1.

⁸⁶ 689 N.E.2d 1057.

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 apart from the specific circumstances of a particular plaintiff's noneconomic injuries. Therefore, *section 2-1115.1 unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive* within the meaning of the law.⁸⁷

In reaching its conclusion, the court quoted with approval from the Supreme Court of Washington's *Sofie* decision. While *Sofie* struck down the damages cap as a violation of a plaintiff's right to trial by jury, the court also addressed the plaintiff's argument that the cap violated the constitutional separation of powers mandate as a legislative usurpation of remittitur. The Washington court stated that,

... any determination calling for a legal conclusion is constitutionally within the province of the judiciary, not the Legislature. Any legislative attempt to mandate legal conclusions would violate the separation of powers. The judge's use of remittitur is, in effect, the result of a legal conclusion that the jury's finding of damages is unsupported by the evidence. The Legislature cannot make such case-by-case determinations.

Sofie.⁸⁸ See also *Lakin*⁸⁹ (rejecting defendant's argument that the legislature has the authority to grant a remittitur like a trial judge by imposing a cap on noneconomic damages and emphasizing the arbitrary nature of the statutory cap, stating that "[t]he reduction is mandated even though the jury is correctly instructed, its findings are supported by the evidence as a matter of law, and no legal error is present in the record").

This Court should reach the same result in this case, as a refusal to do so would allow the Legislature, as a matter of *law*, to usurp the judicial responsibility to determine any

⁸⁷ *Id.* at 1080 (emphasis added).

⁸⁸ 771 P.2d at 721.

⁸⁹ 987 P.2d at 472.

excessiveness or other impropriety with regard to the jury's award of damages. Again, each action will necessarily involve different and unique facts and evidence, which will have been presented to and evaluated by both the judge and the jury. The Legislature has wrested from the jury this role with regard to noneconomic damages, resulting in a scenario where all injured persons – no matter the extent of their injuries or the evidence presented in support of their damages – is limited in their recovery *ab initio*. The Legislature is not empowered to do so under the separation of powers provision in the Oklahoma Constitution, and the noneconomic damages cap should be declared unconstitutional on this basis as well.

CONCLUSION

When evaluating the constitutionality of 23 O.S. 61.2(B), this Court should be mindful of the fact the noneconomic damages cap affects only the plaintiffs who have suffered the very most devastating and life-altering injuries, preventing them from being fully compensated for those injuries as determined by a jury. This is an impermissible result under the Oklahoma Constitution and should be remedied by this Court. OAJ supports Plaintiffs James Todd Beason and Dara Beason in urging the Court to declare the noneconomic damages cap unconstitutional.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this 25th day of April, 2016, a true and correct copy of the above and foregoing was mailed to the following counsel of record:

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