

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TAMARIN LINDENBERG,

Petitioner,

v.

No. M2015-02349-SC-R23-CV

JACKSON NATIONAL LIFE INSURANCE
COMPANY,

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

Respondent,

and

STATE OF TENNESSEE,

Intervenor-Respondent.

PETITIONER'S OPENING BRIEF ON CERTIFICATION FROM
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE

Oral Argument Requested

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	2
II. JURISDICTION	3
III. STATEMENT OF THE ISSUES.....	4
IV. STATEMENT OF THE CASE	5
V. STATEMENT OF FACTS	7
A. MS. LINDENBERG’S LEGITIMATE CLAIM FOR LIFE INSURANCE BENEFITS	7
B. JACKSON NATIONAL’S EGREGIOUS CONDUCT	8
VI. STANDARD OF REVIEW	12
VII. ARGUMENT	13
A. TENNESSEE’S PUNITIVE DAMAGES CAP VIOLATES MS. LINDENBERG’S FUNDAMENTAL RIGHT TO A TRIAL BY JURY.....	13
B. THE CAP ALSO VIOLATES THE SEPARATION-OF-POWERS PRINCIPLES CONTAINED IN THE TENNESSEE CONSTITUTION	16
C. CASES FROM OTHER STATES UPHOLDING PUNITIVE DAMAGES CAPS ARE DISTINGUISHABLE	17
D. DOCTRINES PERMITTING CASE-BY-CASE REDUCTIONS OF JURY AWARDS ARE DISTINGUISHABLE.....	21
VIII. CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Dougherty v. Shown</i> , 48 Tenn. 302, 306 (Tenn. 1870)	20
<i>Arbino v. Johnson & Johnson</i> , 880 N.E.2d 420, 441 (Ohio 2007).....	16, 21
<i>Arkansas Valley Land & Cattle Co. v. Mann</i> , 130 U.S. 69, 74 (1889).....	22
<i>Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt</i> , 691 S.E.2d 218, 224 (Ga. 2010).....	15
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559, 583-84 (1996)	14
<i>Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.</i> , 532 U.S. 424, 443 (2001).....	21
<i>Corywell v. Colbaugh</i> , 1791 WL 380, at *1 (N.J. 1791)	20
<i>Day v. Woodworth</i> , 54 U.S. 363, 371 (1851).....	20
<i>Dimick v. Schiedt</i> , 293 U.S. 474, 487 (1935).....	22
<i>Edwards v. Travelers Ins.</i> , 563 F.2d 105, 119 (6 th Cir. 1977)	14
<i>Evans ex rel. Kutch v. State</i> , 56 P.3d 1046 (Alaska 2002).....	18, 19
<i>Exxon Shipping Co. v. Baker</i> , 554 U.S. 471, 514-15	20
<i>Foster v. Amcon Int'l</i> , 621 S.W.2d 142, 147 (Tenn. 1981).....	15

<i>Gasperini v. Ctr. for Humanities, Inc.</i> , 518 U.S. 415, 459 (1996).....	20
<i>Genay v. Norris</i> , 1784 WL 26, at *7 (S.C. 1784).....	20
<i>Grace v. Curley</i> , 3 Tenn. App. 1 (Tenn. Ct. App. 1926).....	14
<i>Lakin v. Senco Prods., Inc.</i> , 987 P.2d 463, 472-73 (Or. 1999).....	15
<i>Lewellen v. Franklin</i> , 441 S.W.3d 136, 143 (Mo. 2014).....	15, 16
<i>McDonald v. City of Chicago</i> , 561 U.S. 742, 765 n.13 (2010).....	21
<i>Meals ex. rel. Meals v. Ford Motor Co.</i> , 417 S.W.3d 414, 420 n.8 (Tenn. 2013).....	15
<i>Moore v. Love</i> , 107 S.W.2d 982, 983 (Tenn. 1936).....	17
<i>Peters v. Saft</i> , 597 A.2d 50, 53-54 (Me. 1991).....	19
<i>Planned Parenthood of Middle Tennessee v. Sundquist</i> , 38 S.W.3d 1, 15 (Tenn. 2000).....	12, 15
<i>Pulliam v. Coastal Emergency Servs. of Richmond, Inc.</i> , 509 S.E.2d 307, 314 (Va. 1999).....	18
<i>Rye v. Women's Care Ctr. of Memphis, MPLLC</i> , 2015 WL 6457768, at *45 (Tenn. Oct. 26, 2015).....	17
<i>Seals v. H & F, Inc.</i> , 301 S.W.3d 237, 241 (Tenn. 2010).....	12
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238, 255 (1984).....	14
<i>State v. Doe</i> , 987 N.E.2d 1066, 1071 (Ind. 2013).....	19

<i>State v. Mallard</i> , 40 S.W.3d 473, 483 (Tenn. 2001).....	13, 17
<i>State ex rel. Ohio Acad. of Trial Lawyers v. Sheward</i> , 715 N.E.2d 1062, 1091 (Ohio 1999).....	16
<i>State Farm Mut. Auto Ins. Co. v. Campbell</i> , 538 U.S. 408, 425-26 (2003)	20
<i>Tenn. Coach & R.R. Co. v. Roddy</i> , 5 S.W. 286, 289 (Tenn. 1887).....	14
<i>Thompson v. French</i> , 18 Tenn. 452, 459 (1837).....	13, 19
<i>Trigally v. City of Memphis</i> , 46 Tenn. 382, 385 (1869).....	13
<i>Wackenhut Applied Techs. Ctr., Inc. v. Sygnatron Protection Sys., Inc.</i> , 979 F.2d 980, 985 (4 th Cir. 1992)	18
<i>Webb v. Canada</i> , 2007 WL 1519536, at *2 (Tenn. Ct. App. May 25, 2007).....	22
<i>Wilkins v. Gilmore</i> , 21 Tenn. 140, 141 (Tenn. 1840)	14, 19
<i>Willard v. State</i> , 130 S.W.2d 99, 100 (Tenn. 1939).....	20

State Statutes and Rules

Article I, Section 6 of the Tennessee Constitution	4
Article VI, Section 1 of the Tennessee Constitution.....	16
Tennessee Code § 29-39-104.....	2, 3, 4, 6, 12, 13, 18, 23
Tennessee Code § 56-7-105.....	5
Tennessee Supreme Court Rule 23	3, 12

Article I, Section 16 of the Alaska Constitution19
Article I, Section 22(a) of the Missouri Constitution16
Article I, Section 11 of the Virginia Constitution.....18

Other Authorities

*Amelia J. Troy, Comment, Statutory Punitive Damages Caps and the Profit Motive: An
Economic Perspective,*
40 Emory L.J. 303, 304 (1991).....23

I. INTRODUCTION

A jury awarded Petitioner Tamarin Lindenberg (“Petitioner” or “Ms. Lindenberg”) a punitive damages award in the amount of \$3,000,000 based on Respondent Jackson National Life Insurance Company’s (“Jackson National”) egregious conduct in failing to pay Ms. Lindenberg life insurance benefits to which she was entitled. The United States District Court for the Western District of Tennessee (the “District Court”) has upheld the jury’s punitive damages award. The District Court, at Petitioner’s request, has certified two questions to this Court to determine whether the statutory cap on punitive damages set forth in Tennessee Code Section 29-39-104 violates the Tennessee Constitution. Application of this cap would destroy the jury’s verdict and violate Ms. Lindenberg’s fundamental right to a trial by jury, a right guaranteed by the Tennessee Constitution. Moreover, the statutory cap represents an unconstitutional encroachment by the Tennessee Legislature upon the functions of the judiciary. Accordingly, this Court should accept the District Court’s certified questions and hold that Section 29-39-104’s punitive damages cap is unconstitutional.

II. JURISDICTION

The Court may exercise jurisdiction over the certified questions pursuant to Rule 23 of the Rules of the Tennessee Supreme Court. On November 24, 2015, the District Court certified two questions of law to this Court regarding the constitutionality of the punitive damages caps under Tennessee Code Section 29-39-104. On December 16, 2015, the State of Tennessee filed with the District Court a Motion to Alter or Amend the Order Denying Defendant's Motion for Judgment as a Matter of Law and Granting Plaintiff's Motion for Certification of Questions to the Tennessee Supreme Court (the "Motion to Alter or Amend"). Accordingly, on December 21, 2015, this Court granted the parties' Joint Motion to Suspend Briefing Scheduling pending the District Court's resolution of the State's Motion to Alter or Amend.

On February 2, 2016, the District Court denied the State's Motion to Alter or Amend. The two questions of law certified by the District Court are now properly before this Court.

III. STATEMENT OF THE ISSUES

The two questions of law certified by the District Court are as follows:

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

IV. STATEMENT OF THE CASE

This case arises from Jackson National's breach of contract and bad faith failure to pay the life insurance policy benefits of Thomas Lindenberg to Ms. Lindenberg, the primary designated beneficiary on the policy at issue. After she made a written demand for the policy benefits in compliance with Tennessee Code Section 56-7-105 and Jackson National continued to refuse to pay the benefits to her, Ms. Lindenberg filed suit in Shelby County Circuit Court on July 13, 2013. Jackson National removed the case to the District Court on August 23, 2013.

The District Court held a jury trial in this matter from December 15, 2014 to December 22, 2014. (November 24, 2015 Order Denying Def.'s Mot. for J. as Matter of Law ("Nov. 24th Order") at 4.)¹ After hearing the evidence and the arguments of the parties, the jury returned a verdict with the following findings:

1. The preponderance of the evidence demonstrated that Jackson National breached the terms of its contract with Ms. Lindenberg, and Ms. Lindenberg was entitled to actual damages in the amount of \$350,000.00.
2. The preponderance of the evidence demonstrated that Jackson National's refusal to pay Ms. Lindenberg the life insurance benefits was not in good faith, and Ms. Lindenberg was entitled to bad faith damages in the amount of \$87,500.00.
3. Clear and convincing evidence demonstrated that Jackson National acted either intentionally, recklessly, maliciously, or fraudulently in refusing to pay, and Ms. Lindenberg was entitled to punitive damages.

(*Id.* at 4-5.)

¹ The District Court's November 24th Order is included in the Appendix.

Following the jury's verdict, the District Court allowed the parties to present evidence and argument regarding the measure of punitive damages. The jury returned a punitive damages award in favor of Ms. Lindenberg in the amount of \$3,000,000.00. (*Id.* at 5.)

Jackson National moved for judgment as a matter of law on the grounds that Ms. Lindenberg did not offer sufficient proof at trial to sustain her punitive damages claim. (*Id.*)² Ms. Lindenberg responded to Jackson National's motion and filed a motion to certify questions to this Court regarding the constitutionality of the punitive damages cap set forth in Tennessee Code Section 29-39-104. (*Id.*) Following Ms. Lindenberg's certification motion, the State was granted leave to intervene in this matter to defend the constitutionality of the statute. (*Id.* at 5-6.)

On November 24, 2015, the District Court denied Jackson National's motion for judgment as a matter of law and held that Ms. Lindenberg presented sufficient proof at trial to support her punitive damages award. (*Id.* at 29-30.) The District Court also granted Ms. Lindenberg's certification motion, concluding that the issue was ripe for determination given that the punitive damages award exceeded the statutory cap and that no Tennessee appellate court had ruled on the statute's constitutionality. (*Id.*)

² Jackson National also moved for judgment as a matter of law on Ms. Lindenberg's bad faith claim, which the District Court denied.

V. STATEMENT OF FACTS

The questions certified by the District Court present pure questions of law for this Court to answer. This brief statement of facts, however, is intended to provide some context regarding the parties' dispute and the egregious conduct by Jackson National that caused the jury to award Ms. Lindenberg punitive damages.

A. Ms. Lindenberg's Claim for Life Insurance Benefits.

Mr. Lindenberg passed away on January 22, 2013. (Nov. 24th Order at 7.) At the time of his death, Mr. Lindenberg had a life insurance policy for \$350,000.00 with Jackson National. The policy designated Ms. Lindenberg as the primary beneficiary and entitled her to receive 100% of the policy benefits upon Mr. Lindenberg's death. (*Id.* at 6.)

Mr. Lindenberg procured this life insurance policy in 2002 while he was married to Ms. Lindenberg. (*Id.*) Mr. and Ms. Lindenberg divorced in 2006. (*Id.*) Under the parties' marital dissolution agreement ("MDA"), Ms. Lindenberg was to continue to pay the premiums on the policy, which she did until Mr. Lindenberg's death. (*Id.* at 6-7.) At no point following the parties' divorce did Mr. Lindenberg modify Ms. Lindenberg's status on the policy as the primary designated beneficiary. The Lindenegs remained close after their divorce and for a number of years prior to his death Ms. Lindenberg financially supported his household as well as hers. Just prior to his death Mr. Lindenberg was not well and resided with Ms. Lindenberg and their two children.

Ms. Lindenberg submitted her claim for the life insurance benefits on February 6, 2013, along with the required paperwork. (*Id.* at 7.) She requested an expedited review of her claim because Mr. Lindenberg's death came at a time that she was rebuilding her career following surviving cancer. She had recently lost her job and her family was in a precarious financial

condition. (*Id.*) At trial, the jury heard audio recordings of Ms. Lindenberg's telephone conversations with Jackson National's claims department, in which Ms. Lindenberg checked on the status of her claim and emphasized the importance of receiving the benefits promptly. In addition, Ms. Lindenberg's attorney sent a letter to Jackson National explaining Ms. Lindenberg's dire financial circumstances and requesting an expedited review, and that letter was introduced into evidence at trial. (*Id.*)

Jackson National, in response, sent Ms. Lindenberg a letter drafted by its customer service representative, Jennifer Trumpie, a non-lawyer. (*Id.* at 14.) In the letter, Jackson National demanded that Ms. Lindenberg obtain waivers from other parties that it wrongly asserted might hold legal claims to the benefits, including Mr. Lindenberg's adult child from a prior marriage. (*Id.*) In addition, the letter required Ms. Lindenberg to obtain court-appointed guardians for her minor children to execute waivers on their behalf. (*Id.* at 7.) Alternatively, Jackson National stated that it would require Ms. Lindenberg to waive her right to the benefits so that the benefits could be disbursed to all the children. (*Id.*) Even though Jackson National demanded that waivers be executed by Mr. Lindenberg's adult child and/or Ms. Lindenberg, it refused to provide waiver forms even in the face of repeated requests by Ms. Lindenberg. (*Id.* at 18.)

B. Jackson National's Egregious Conduct.

As the jury found, Jackson National's refusal to pay the policy benefits was in bad faith and amounted to an intentional and reckless breach. The policy at issue stated: "The Company will pay the face amount shown in the policy specifications, less any premium due, to the designated beneficiary upon proof of the Insured's death and not later than two months after the receipt of such proof." (*Id.* at 6.)

Although Jackson National asserted at trial that the MDA raised doubts concerning the proper beneficiary under the policy, the District Court rejected this argument and concluded that ample evidence supported the jury's finding that Jackson National's basis for denial had not been made in good faith. (*Id.* at 19.) In explaining why payment had not been made to Ms. Lindenberg within the sixty days required by the policy, in house counsel for Jackson National testified that despite the ordinary, plain meaning of the term "designated beneficiary" in the policy, Jackson National could pay the death benefit to a beneficiary other than the beneficiary designated by the decedent. The District Court concluded "[Jackson National's] conduct was reprehensible so as to subject it to severe punitive damages." (Feb. 1, 2016 Order Denying Mot. to Revise and Denying Mot. to Alter or Am. ("Feb. 1st Order") at 7.)³

The District Court found that the MDA was clear on its face that Ms. Lindenberg did not waive her rights to the policy benefits, despite Ms. Trumpie's uninformed assertions to the contrary. (Nov. 24th Order at 13.) Moreover, Jackson National failed to investigate the claim using ordinary care and diligence so as to comply with the time limit set forth in its own Policy. (*Id.* at 14.) For instance, Jackson National never made any attempt to contact Mr. Lindenberg's adult child, even though Jackson National's own expert testified at trial that it was standard practice in the insurance industry to contact potentially adverse parties. (*Id.*) Indeed, Jackson National's first contact with Mr. Lindenberg's adult child occurred when it served her with a copy of the interpleader complaint seven months after Mr. Lindenberg's death.

Moreover, at trial, Ms. Lindenberg offered opinion testimony from Aubrey Brown, a Tennessee family law attorney, that Jackson National faced no risk of multiple liability under

³ The District Court's Feb. 1st Order is included in the Appendix.

Tennessee law.⁴ (*Id.* at 15-16.) Jackson National did not consider this in dealing with Ms. Lindenberg's claim because it never attempted to hire Tennessee counsel. Instead, Jackson National relied solely on the advice of an in-house attorney, Nate Maas, who was licensed only in Michigan and was regularly away from work during the relevant time period because he was representing himself in a personal bankruptcy case. (*Id.* at 18.)

The jury also heard from Ms. Lindenberg's former attorney, who testified that Ms. Lindenberg offered Jackson National a hold harmless and indemnification agreement to protect it from liability, but that Mr. Maas rejected the agreement. Mr. Maas further failed to send the waivers that Jackson National insisted upon, even after repeated requests by Ms. Lindenberg.

Jackson National also rejected the guardians that Ms. Lindenberg had proposed for her minor children in her effort to cooperate with the demands of Jackson National. It later agreed to the appointment of those same guardians after this lawsuit was filed. (*Id.* at 16-17.) In addition, although Jackson National was well aware of Ms. Lindenberg's dire financial circumstances, it still insisted that Ms. Lindenberg bear the financial burden of an unnecessary, court-appointed guardian process. (*Id.* at 18.) Jackson National's probate expert testified that its demand would have required Ms. Lindenberg to have hired two attorneys, one to file the guardianship petition and another to serve as the guardian. (*Id.*) Both Ms. Trumpie and Mr. Maas admitted that the process they insisted on Ms. Lindenberg complying with was extra-contractual and not set forth in the Policy. (*Id.* at 19.) Ms. Lindenberg's opinion witnesses testified that Jackson National's process was not a viable solution in any event. (*Id.*)

Based on the above evidence presented at trial, the District Court held that Ms. Lindenberg offered sufficient evidence that Jackson National intentionally and recklessly

⁴ Jackson National did not present any testimony to rebut Mr. Brown's opinion. (Nov. 24th Order at 16.)

breached the parties' contract, such that the jury's punitive damages award was warranted. (*Id.* at 25-26.) Moreover, the District Court held the amount of the jury's punitive damages award was not excessive and Jackson National's due process rights would not be violated if the statutory punitive damages cap is found unconstitutional. (Feb. 1st Order at 8.)

VI. STANDARD OF REVIEW

Under Rule 23, the Court may “accept and answer a question of state law certified . . . by the federal court to assist the federal court in deciding a question of state law.” *Seals v. H & F, Inc.*, 301 S.W.3d 237, 241 (Tenn. 2010) (internal quotation omitted). Rule 23 permits only the consideration of questions of law, not questions of fact or controversies as a whole. *Id.* The scope of review for certified questions of law is de novo. *Id.*

Section 29-39-104 interferes with a plaintiff’s right to a trial by jury, a fundamental right that was set forth in the Declaration of Rights with the adoption of the Tennessee Constitution. “It is well settled that where a fundamental right is at issue, in order for a state regulation which interferes with that right to be upheld, the regulation must withstand strict scrutiny.” *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000).

VII. ARGUMENT

The statutory punitive damages cap violates Ms. Lindenberg's right to a trial by jury guaranteed by the Tennessee Constitution. The cap also represents an unconstitutional encroachment by the Tennessee legislature upon the functions of the judiciary. Accordingly, the Court should strike down the punitive damages cap in Section 29-39-104 as unconstitutional.

A. Tennessee's Punitive Damages Cap Violates Ms. Lindberg's Fundamental Right to a Trial by Jury.

Tennessee's statutory cap on punitive damages violates Ms. Lindenberg's right to a trial by jury, which is guaranteed by article 1, section 6 of the Tennessee Constitution. The Tennessee Constitution is unequivocal on this point: "[T]he right of trial by jury shall remain inviolate." Tenn. Const. art. 1, § 6. Trial by jury is accordingly a fundamental right in Tennessee and was included in the Declaration of Rights at the creation of the Tennessee Constitution. Indeed, this Court has stated: "The proper and settled construction of the constitutional provision which declares that the right of trial by jury shall remain inviolate is that the right of trial by jury shall remain inviolate, as it existed at the formation of the Constitution." *Trigally v. City of Memphis*, 46 Tenn. 382, 385 (1869). Because a limitation on punitive damages did not exist at the time of the creation of the Tennessee Constitution, the punitive damages cap in Section 29-39-104 infringes on the fundamental right to a trial by jury. *See State v. Mallard*, 40 S.W.3d 473, 483 (Tenn. 2001) ("[T]he General Assembly has no constitutional power to enact rules that infringe upon the protections of the Declaration of Rights.").

The right to a trial by jury as it existed at the creation of the Tennessee Constitution included the calculation of damages, and, under Tennessee law, that amount is committed to the jury. *See Thompson v. French*, 18 Tenn. 452, 459 (1837) (determining damages is "a question peculiarly within the province of the jury, and the court would not reverse for a mistake as to the

amount unless it were gross and palpable”). “To the jury . . . is committed, by unanimous consent, the exclusive task of examining those facts and circumstances, and valuing the injury, and awarding compensation in the shape of damages.” *Tenn. Coach & R.R. Co. v. Roddy*, 5 S.W. 286, 289 (Tenn. 1887); *see also Grace v. Curley*, 3 Tenn. App. 1 (Tenn. Ct. App. 1926) (“[T]he jury [is] the proper judge[] of damages . . . and this court has no more right to weigh the evidence and to disturb the verdicts of juries on the question of the amount of damages, in such cases, than it has on any other question of fact. . . .”) The decisions of whether to award punitive damages and the proper amount of any punitive damages award are thus unambiguously committed to the jury by the Tennessee Constitution.

A jury’s prerogative to award punitive damages has deep roots in Tennessee common law. *See, e.g., Wilkins v. Gilmore*, 21 Tenn. 140, 141 (Tenn. 1840). “Punitive damages have long been a part of . . . state . . . law.” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). It is further “well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting). Punitive damages serve an essential common law function in Tennessee: “[b]y awarding punitive damages, the Tennessee law blends the interest of society and the aggrieved individual and gives such damages as will punish the defendant in a way that will deter similar transactions.” *Edwards v. Travelers Ins.*, 563 F.2d 105, 119 (6th Cir. 1977).

Consequently, when a statute attempts to alter the fundamental right to a jury’s determination of punitive damages, that statute violates the Tennessee Constitution in at least two ways. First, it undermines the express civil jury guarantee in the Tennessee Constitution. It also violates due process because fundamental rights cannot be altered via statute without first

being strictly scrutinized to determine if a compelling governmental interest might “overcome the fundamental nature of the right.” *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000). Acts of the legislature must be invalidated if the right is a fundamental one and there is no compelling state interest in limiting it. *Id.*

Here, there is no compelling state interest in curtailing a plaintiff’s fundamental right to have a jury determine her damages. Even if there were such an interest (e.g., insulating insurance companies or other corporate defendants from arguably excessive punitive damages awards in rare cases), remittitur is a well-established remedy under Tennessee law. Remittitur addresses the same interest as the statutory caps, but, unlike caps, does not undercut the fundamental right to a jury. “Additurs and remittiturs were designed to correct the excessiveness or inadequacy of a jury’s verdict as an alternative to the granting of a new trial.” *Foster v. Amcon Int’l*, 621 S.W.2d 142, 147 (Tenn. 1981). Remittitur serves to protect the rights of defendants while respecting the province of the jury to assess damages. *See Meals ex. rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 420 n.8 (Tenn. 2013) (“A suggested remittitur should not be so substantial as to destroy the jury’s verdict.”). Tennessee’s statutory cap on punitive damages, however, goes much further than remittitur because, unlike the statutory cap, a plaintiff has the option to elect a new trial if he or she objects to remittitur. *See, e.g., Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 224 (Ga. 2010); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 472–73 (Or. 1999).

State supreme courts outside of Tennessee have invalidated punitive damage caps under nearly identical provisions of their respective state constitutions. Most recently, in *Lewellen v. Franklin*, 441 S.W.3d 136, 143 (Mo. 2014), the Missouri Supreme Court held that a statutory cap on punitive damages violated the plaintiff’s fundamental right to a jury trial under the Missouri

Constitution. The Missouri Constitution, like the Tennessee Constitution, guarantees “[t]hat the right of a trial by jury as heretofore enjoyed shall remain inviolate.” Mo. Const. art. 1, § 22(a). Affirming this right, the *Lewellen* court concluded that any change in the right to a jury’s determination of damages from the time the Missouri Constitution was created is unconstitutional. *Id.* at 143. The court noted that under the common law as it existed at the time the Missouri Constitution was adopted, imposing punitive damages was “a peculiar function of the jury.” *Id.* Accordingly, the court held that a statutory cap on punitive damages “necessarily changes and impairs the right of a trial by jury,” and was therefore invalid. *Id.*

Similarly, the Ohio Supreme Court has found that statutory limits on punitive damages violate a plaintiff’s fundamental right to a jury trial, explaining that:

These amendments create the illusion of compliance by permitting the jury to assess the amount of punitive damages to be awarded, but requiring the court to nullify the jury’s determination and substitute the will of the General Assembly in any case where a jury awards punitive damages in excess of the amounts specified in [the Ohio punitive damages statute]. This is a Constitution we are dealing with. The right to a trial by jury is a fundamental constitutional right which derives from the Magna Carta. . . . [A] statute that allows the jury to determine the amount of punitive damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance.

State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1091 (Ohio 1999) (internal quotations marks and citations omitted).⁵ The outcome should be the same under the Tennessee Constitution.

B. The Cap Also Violates the Separation-of-Powers Principles Contained in the Tennessee Constitution.

Tennessee’s statutory cap on punitive damages also violates the separation-of-powers principles contained in the Tennessee Constitution. Article VI, section 1 vests the “judicial

⁵ The Ohio Supreme Court later upheld punitive damages caps passed by the Ohio legislature following *Sheward*. See *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

power of this state . . . in one Supreme Court and in such Circuit, Chancery and other Inferior Courts” as may be created. *Id.* This exclusive vesting of power in the judiciary means that the “legislature can have no constitutional authority to enact rules . . . that strike at the very heart of a court’s exercise of judicial power.” *Mallard*, 40 S.W.3d at 483.

Because juries function as the judges of damages awards, a jury’s “constitutional function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate.” *Id.* (internal quotation marks omitted). It makes no difference that the jury is not explicitly instructed regarding the punitive damages cap because a trial court, in applying the cap, is by necessity limiting the jury’s determination by applying a hard-and-fast cap to that determination post-verdict.

The Tennessee legislature cannot so infringe upon the exclusive functions of the judiciary. *Moore v. Love*, 107 S.W.2d 982, 983 (Tenn. 1936) (“It will therefore be observed that the power of the legislature over the judicial branch of the government must conform to the limitations expressed in the Constitution.”). The Court, therefore, must strike down Section 29-34-104’s punitive damages cap, as “[t]he fundamental responsibility of an independent judiciary is to protect against the unwarranted intrusion of the legislative branch.” *Rye v. Women’s Care Ctr. of Memphis, M PLLC*, 2015 WL 6457768, at *45 (Tenn. Oct. 26, 2015) (Wade, J., concurring in part and dissenting in part).

C. Cases from Other States Upholding Punitive Damages Caps Are Distinguishable.

It is true that the appellate courts in other states have sometimes upheld punitive damages caps and, relatedly, statutory caps on non-economic damages. And the Supreme Court of the United States has held that grossly excessive punitive damages awards may in some instances

analysis). The majority opinion also prompted a strong dissent, which stated in part: “Construing constitutional provisions that are textually and historically similar to Alaska’s, courts in Kansas, Oregon, Washington, and Alabama have held that . . . damages caps violate a plaintiff’s right to a jury trial.” *Id.* at 1071 (Breyer, J., dissenting) (collecting cases).⁷ Because Tennessee’s constitutional language guaranteeing the right to a jury trial is even stronger than Alaska’s, the dissent in *Evans* has persuasive value here.

Still other state courts have concluded that a jury’s determination of punitive damages is not a fact-finding function. *See State v. Doe*, 987 N.E.2d 1066, 1071 (Ind. 2013) (citing a 2003 Supreme Court of Indiana case); *see also Peters v. Saft*, 597 A.2d 50, 53-54 (Me. 1991) (construing Maine’s constitution and explaining that “Plaintiff does not have the right to have the jury determine any question he desires.”). This may be so in other states, but it is not true in Tennessee, where the right to a jury trial has always been sacrosanct.

Indeed, Tennessee has long recognized that the calculation of damages, including punitive damages, is a “question peculiarly within the province of the jury, and the court would not reverse for a mistake as to the amount unless it were gross and palpable. . . .” *Thompson*, 18 Tenn. at 459; *see also Wilkins*, 21 Tenn. at 141 (“[T]he jury are [sic] not restrained, in their assessment of damages, to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect of the malicious conduct of the defendant, and the degree of

⁷ The relevant provision of Alaska’s constitution provides: “In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law.” Alaska Const. art. I, § 16.

insult with which the trespass has been attended.”).⁸ Although other states may have taken a different approach over their histories, the amount of a punitive damages award has always been a factual question for the jury under Tennessee law.⁹

Nor is the pertinent federal case law to the contrary. Notwithstanding that the Supreme Court of the United States has observed in dicta that the “level of punitive damages is not really a ‘fact’ ‘tried’ by the jury,”¹⁰ the Supreme Court’s actual holdings with respect to punitive damages have been narrow in scope. Most of the recent cases involved claims that extremely large punitive damages awards violated defendants’ due process rights (or, in one case, the maritime law equivalent) because of their excessive nature. *See Gore*, 517 U.S. at 585-86 (“[W]e are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit.”); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-15 (discussing permissible damages ratios); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425-26 (2003) (same). Another recent case involved an arcane constitutional issue, namely, the standard of review that governs a federal appellate court’s review of a district court’s decision

⁸ *Accord Dougherty v. Shown*, 48 Tenn. 302, 306 (Tenn. 1870) (“The doctrine that, in cases where the elements of fraud, malice or gross negligence or oppression, enter into the injury, the interest of society, and the aggrieved party are blended; and that the jury in such cases may award exemplary damages, has been too long enforced in our lower Courts, and too often construed by this Court, to be now disturbed.”).

⁹ As explained above, the Tennessee Constitution safeguards the right to a jury trial as it existed at common law. *See Willard v. State*, 130 S.W.2d 99, 100 (Tenn. 1939) (so stating). Juries determined the amount of punitive damages at common law. *See Corywell v. Colbaugh*, 1791 WL 380, at *1 (N.J. 1791) (reciting that the jury was “bound to no certain damages, but might give such a sum as would mark their disapprobation, and be an example to others”); *Genay v. Norris*, 1784 WL 26, at *7 (S.C. 1784) (affirming a jury award of punitive damages where the “proceedings appeared to be . . . such a one as entitled [the plaintiff] to very exemplary damages”); *see also Day v. Woodworth*, 54 U.S. 363, 371 (1851) (explaining that “courts permit juries to add to the measured compensation of the plaintiff” and that this “has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case”).

¹⁰ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting).

regarding the constitutionality of a punitive damages award. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 443 (2001) (so summarizing the issue and concluding that the proper standard of review is de novo).

Furthermore, any federal decision construing the Seventh Amendment to the United States Constitution has only limited utility because the Seventh Amendment's civil jury trial right, unlike most other provisions contained in the Bill of Rights, has never been incorporated against the states.¹¹ The civil jury trial guarantee found in various states' constitutions (including Tennessee's) are not necessarily co-extensive with that of the Seventh Amendment, and in fact may offer broader protections. *See Cooper Indus.*, 532 U.S. at 437 n.10 (explaining that the Supreme Court's decision in a 1994 case, which involved a punitive damages award made under Oregon law, was controlled in part by the Oregon Supreme Court's interpretation of the Oregon constitution's civil jury trial guarantee, and not the Seventh Amendment). None of the recent federal Supreme Court cases on punitive damages mandate a particular result in this case.¹²

D. Doctrines Permitting Case-by-Case Reductions of Jury Awards Are Distinguishable.

Still other state appellate court decisions on punitive damages caps treat the issue of damages caps (whether those caps involve non-economic damages or punitive damages) as an all-or-nothing proposition. Put differently, some courts have upheld damages caps on the theory that plaintiffs do not "have a right to an unlimited remedy." *Peters*, 597 A.2d at 54. This is a faulty premise because the inviolate nature of the right to a jury trial does not mean that limits on

¹¹ *See McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010) (so explaining).

¹² The same is true of those state court decisions that have erroneously relied on the above-cited federal cases. *See, e.g., Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 441 (Ohio 2007) (relying on *Cooper Industries* and *Gore* in upholding Ohio's punitive damages cap).

jury awards are always unconstitutional. Instead, such limits may be constitutional if they are applied on a case-by-case basis.

The doctrine of remittitur offers the best example of a constitutionally sound, case-by-case limitation on a jury's power. That doctrine, pursuant to which a trial court suggests a reduction of a jury verdict if it finds the verdict excessive, operates on an individual basis rather than as a blanket rule, which distinguishes the doctrine from statutory caps. *See Webb v. Canada*, 2007 WL 1519536, at *2 (Tenn. Ct. App. May 25, 2007) (discussing Tennessee's remittitur statute and its operation). Moreover, remittitur is constitutional only because, as a condition of remittitur, the plaintiff must be offered the option of accepting a new trial as an alternative to a reduction of the jury's award. *See Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 74 (1889) (opining that remittitur does not "impair the constitutional right of trial by jury" in part because the trial court "necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive"); *see also Dimick v. Schiedt*, 293 U.S. 474, 487 (1935) ("It is worthy of note that . . . for more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages. . . .").


Caps on punitive damages, by contrast, are at bottom arbitrary. Applying a hard-and-fast cap to a punitive damages award does not require a trial court to determine in its own mind whether a particular punitive damages award is "palpably or outrageously excessive." *See Mann*, 130 U.S. at 74 (discussing the standard for remittitur). The arbitrary application of a cap by a court does at least two harms. First, for the reasons discussed above, it violates a plaintiff's right to a jury trial, which is a fundamental right under the Tennessee Constitution. It also undercuts one of the central purposes of punitive damages awards, namely, deterrence. *See*

Amelia J. Troy, Comment, *Statutory Punitive Damages Caps and the Profit Motive: An Economic Perspective*, 40 Emory L.J. 303, 304 (1991) (arguing that deterrence is best accomplished when punitive damages awards, including large awards, cannot be predicted with certainty by tortfeasors). In short, Tennessee juries need flexibility—and not the rigidity imposed by an arbitrary cap—in imposing punitive damages awards. The punishment must fit the crime, and Tennessee’s caps frustrate this longstanding principle of justice.

VIII. CONCLUSION

Based on the foregoing, the Court should accept the certified questions from the District Court and find the punitive damages caps set forth in Tennessee Code Section 29-39-104 unconstitutional.

Respectfully submitted,



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