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

BRIEF OF THE OKLAHOMA STATE CHAMBER OF COMMERCE AND INDUSTRY, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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TABLE OF AUTHORITIES AND CONTENTS

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Oklahoma State Chamber of Commerce and Industry ("Oklahoma Chamber") and the Chamber of Commerce of the United States of America ("U.S. Chamber") respectfully submit this *amicus* brief in accordance with Okla. Sup. Ct. Rule 1.12 upon consent of all parties. *Amici* include state and national business advocacy organizations that represent a broad spectrum of businesses of every stripe and size, from ranchers and hospitals to manufacturers and energy companies.

Amici's members will be adversely affected if this Court invalidates Okla. Stat. tit. 23, § 61.2, which imposes a $350,000 cap on noneconomic[1] damages in personal injury actions except in cases where the jury finds clear and convincing evidence that the defendant acted in reckless disregard of another's rights, was grossly negligent, fraudulent, intentional, or malicious. *Amici* and their members have a strong interest in a reasonable and predictable tort system. Noneconomic damages caps are an important component of a well-functioning tort system, because noneconomic damages awards (such as for pain and suffering) are highly subjective and unpredictable.[2]. Throughout the country, the overwhelming majority of states have adopted limits on noneconomic damages[3] in order to control outlier awards, provide greater predictability, lower insurance and health care rates, and other public policy reasons.[4] In addition to the economic justifications for

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[1] Under § 61.2, noneconomic damages include nonpecuniary losses including *inter alia* pain and suffering, and loss of consortium. Okla. Stat. tit. 23, § 61.2(B).

[2] *See, e.g.* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985).

[3] In passing § 61.2, Oklahoma joined the overwhelming majority of states that have also imposed caps on noneconomic damages. Indeed, at least 39 states have enacted caps on noneconomic damages. *See* David F. Maron, *Statutory Damages Caps: Analysis of the Scope of Right to Jury Trial and the Constitutionality of Mississippi Statutory Caps on Noneconomic Damages*, 32 Miss. C. L. Rev. 109, 111 & 136 (2013) (conducting a 50-state survey of noneconomic damages caps). As of 2013, 19 states had upheld the constitutionality of these statutes, and only a handful of caps have been invalidated. *Id. See also* http://www.atra.org/issues/noneconomic-damages-reform (noting the general status of damages caps in the various states).

[4] *See, e.g.* Ronald M. Steward, *Malpractice Risk and Cost Are Significantly Reduced After Tort Reform*, 212 J. Am. Col. Surg. 463 (2011).

noneconomic damages caps, these limits also mitigate potential due process problems by promoting more uniform treatment of plaintiffs and defendants.[5]

As *Amici* explain in this brief, Appellants have failed to establish "beyond a reasonable doubt" that the § 61.2 is unconstitutional.[6] *Amici* argue that § 61.2 can be interpreted in a constitutional manner; is well within the Legislature's police power and legislative authority; furthers a legitimate governmental interest in a rational way; and does not improperly create sub-classifications for separate treatment; and thus, the statute must be upheld as constitutional. Accordingly, Amici respectfully request that this Court uphold § 61.2.

ARGUMENT AND AUTHORITY

I. Appellants Must Prove "Beyond a Reasonable" Doubt That § 61.2 is Unconstitutional

The Court is restricted in its ability to strike down statutes as unconstitutional and must narrowly interpret the language of the statute in favor of its constitutionality. Only if legislation affects a fundamental right does a heightened "strict scrutiny" standard of review apply; otherwise, the legislation need only meet a rational basis test. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 19 (1973).[7] There is no fundamental right to a certain judgment based on a jury's assessment of damages nor is there a fundamental right to a full recovery. *See Gibbes v. Zimmerman*, 290 U.S. 326, 332(1933) (holding there is no protected right to a remedy) and *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 531 (Va. 1989) (holding although the right

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[5] *See, e.g. Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich 2004), cert. denied 546 U.S. 821 (2005) ("A grossly excessive award for pain and suffering may violate the Due Process Clause")

[6] Appellants contend the statute (1) erroneously creates special rather than general jury verdicts (2) interferes with a plaintiff's right to a jury trial, (3) creates a legislative remittitur, violating the separation of powers doctrine, (4) is an unconstitutional special law, (5) denies access to the courts, and (6) is not capable of being severed. See Appellants' Brief in Chief pp. 5-29.

[7] Fundamental rights are the right to free speech, the right to vote, the right to interstate travel, the right to a fair criminal trial, the right to marry, the right to bear children, and the right to fairness in procedures regarding a governmental deprivation of life, liberty, or property. *Hendricks v. Jones*, 2013 OK 71, ¶¶ 8, 9, 349 P.3d 531, 534; *Ross v. Peters*, 1993 OK 8, ¶¶ 17-21, 846 P.2d 1107, 1113-1117.

to have a jury determine damages is a vested right, there is no vested right in receiving the amount awarded).[8] Moreover, tort plaintiffs are not members of a protected class.[9] *Gladstone v. Bartlesville Indep. School Dist. No. 30*, 2003 OK 30, ¶ 10, 66 P.3d 442, 447 (finding governmental tort claimants are not a suspect classification, thus, the rational basis analysis was utilized and upheld the statutory limitations for tort recovery as constitutional).[10]

Under the rational basis test, a statute must "clearly, palpably and plainly" offend the Constitution to be invalidated. *Liddell v. Heavner*, 2008 OK 6, ¶16, 180 P.3d 1191, 1200 (citing *Reherman v. Okla. Water Res. Bd.*, 1984 OK 12, ¶ 11, 679 P.2d 1296, 1300 (Okla. 1984)). Whether a statute is supported by a rational justification turns on the *Legislature*'s intent, not on the *Court*'s interpretation of the "propriety, wisdom, desirability, necessity, or practicality" of the measure. *Id.* at ¶16, 180 P.3d at 1199-1200. Given two competing statutory interpretations, a court must choose the interpretation that will render [the statute] constitutional" unless the "constitutional infirmity" is shown "beyond a reasonable doubt." *Fent v. Oklahoma Capitol Improvement Authority,* 1999 OK 64, ¶¶ 3-4, 984 P.2d 200, 204 ("every presumption is to be indulged in favor of the constitutionality of a statute"), *cert. denied*, 528 U.S. 1021. If there is "any doubt" about a Legislature's authority, "the doubt should be resolved in favor of the validity of the action taken by the Legislature." *See Draper v. State,* 1980 OK 117, ¶ 10, 621 P.2d 1142, 1146.

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[8] *See* Maron, *supra*, note 4 at n. 130 (discussing the distinction between a right to a jury assessment and no right to the exact amount awarded by a jury). *See also, Parker v. Everetts*, 1946 OK 408, 165 P.2d 630 (finding courts may reduce excessive damages awards); *Henry v. Morris & Co.*, 42 OK 13, 140 P. 413 (Okla. 1914) (finding where a verdict is not less than the actual pecuniary loss, there is no need to overturn the verdict).

[9] Suspect classifications are generally limited to race, alienage, or national origin. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166(1980).

[10] Although Appellants' classification arguments are couched in terms of the Oklahoma constitutional provisions regarding special laws, it is important to note that equal protection challenges are subject to three potential analysis: the rational basis test, an intermediate or heightened scrutiny, or strict scrutiny. *Gladstone, supra,* 2003 OK 30, ¶ 9, n. 22; *City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432, 440–442(1985).

See also Cage v. Louisiana, 498 U.S. 39, 40(1990) (per curiam) (beyond a reasonable doubt is generally defined as beyond a "moral certainty").

To overcome the strong presumption in favor of constitutionality, Appellants must prove that § 61.2 cannot be construed in *any way* that is constitutional. Appellants have not come close to satisfying this standard because there are reasonable, constitutional interpretations of the noneconomic damages caps. Indeed, many courts have thoroughly analyzed and rejected the very arguments made by the Appellants in this action. *See e.g. Oklahoma State Election Bd. v. Coats*, 1980 OK 65 n.10, 610 P.2d 776, 781 & n.10 (citing to the controlling weight of authority in other jurisdictions facing constitutional challenges to similar statutory constructions at issue in the case, and finding that Appellants had failed to show unconstitutionality of the statute beyond a reasonable doubt).[11] Because a thorough analysis of the instant claims demonstrates a reasonable interpretation of noneconomic damages caps, the Court is bound to uphold § 61.2's constitutionality even if the Court questions the statute's rationale and even if the Court could conceivably construe it in a manner that might be considered unconstitutional. *Id.*

II. Section 61.2 Is a Valid Exercise of the Legislature's Police Powers

Legislation may only be invalidated if it involves "such palpable abuse of power and lack of reasonableness to accomplish a lawful end that [it is] arbitrary, capricious, and unreasonable, and hence irreconcilable with due process." *Adwon v. Oklahoma Retail Grocers Ass'n*, 1951 OK 43, ¶ 8, 228 P.2d 376, 378 (1951) (quoting *Application of Richardson*, 1947 OK 347, ¶ 6, 184

[11] *See also, Adwon v. Oklahoma Retail Grocers Ass'n*, 1951 OK 43, ¶ 8, 228 P.2d 376, 378 (1951) (citing to the laws of other states to find that Oklahoma's statute is constitutional in light of similar constitutional challenges failing in other states).

P.2d 642, 644).[12] A court's role is to determine whether the legislation exceeds legislative power, but the Legislature, not a court, articulates state policy through the legislation. *Id.*

A. Preserving Oklahoma as a "Business Friendly State" is a Legitimate Governmental Interest

A State's interest in protecting its economic environment and lowering employer costs is legitimate. *See Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 30, *as corrected* (Mar. 4, 2016). The Legislature's rationale for both the original CLRA and the subsequent § 61.2 legislation was to preserve Oklahoma as a "business friendly state" by keeping the costs of doing business down for entrepreneurs, doctors, and hospitals.[13] In 2004 with respect to the CLRA, the Oklahoma Legislature held public hearings addressing the very issues tort reform is designed to ameliorate, and since then, statistical evidence has proven it effective. *See* Dooley, *supra* note 13 (detailing tort reform history in Oklahoma) and Patricia Hatamyar, *infra* note 24 (noting decrease in filings in Oklahoma correspond to tort reform years). Accordingly, § 61.2 is rationally related to a legitimate economic interest.

B. Police Power Includes the Ability to Alter Personal Rights in Causes of Action

"[D]ecisions concerning public policy in creating and abolishing causes of action are routinely within the judgment of the Legislature." *Torres*, 2016 OK at ¶ 35. The Legislature's general police power includes the power "to alter private personal rights in contexts of creating or

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[12] *See* Okla. Const. art. 5, § 36: "The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."

[13] *See e.g.* Julie Bisbee and Michael McNutt, "Lawsuit reform deal reached in Oklahoma Legislature," *The Oklahoman* (published May 12, 2009) (accessible at http://newsok.com/article/3368727) (Regarding the 2009 tort reform legislation, "This agreement will benefit our state in terms of keeping access to health care and relieving burdens from business while protecting access to the courts for those with legitimate grievances. With this agreement we will stop the export of young Oklahoma doctors across the Red River and keep our best and brightest young physicians in this state.") *See also,* Socorro Adams Dooley, *It's Still a Peanut Butter Cookie: A Comment on Douglas v. Cox Retirement Properties, Inc.*, 39 Okla. City Univ. L. Rev. 243 (2014) (discussing a history of Oklahoma tort reform, the constitutionality of the CLRA, and the Court's ruling in *Douglas v. Cox*).

abolishing a cause of action." *Id.* However, legislatures may not arbitrarily immunize employers from liability for injuries to their employees. *Id.* at ¶ 36.[14] Section 61.2 does not immunize any defendant from liability nor does it remove the eligibility of plaintiffs to recover *all* of their economic losses and a substantial amount of noneconomic losses. In this regard, the statute is a valid exercise of police power and must be upheld as constitutional as Appellants fail to prove beyond a reasonable doubt that it was an invalid exercise of police power.

C. The Legislature Did Not Impermissibly Interfere with Judicial and Jury Roles

Oklahoma's noneconomic damages cap does not interfere with the judiciary's or the jury's role. Appellants allege that the Legislature's enactment of § 61.2, capping noneconomic damages in certain cases, infringes upon a judicial right of remittitur and exceeds legislative authority under the separation of powers doctrine. *See* Appellants' Brief in Chief pp. 8-10. The Oklahoma constitution, Okla. Const. art. 4, § 1, creates three separate and distinct branches of government that must not infringe upon the powers of one another. *See In re Opinion of the Judges*, Okla., 1909 OK 277, 25 Okla. 76, 105 P. 325 (1909). Courts must review legislative action by determining not what the Legislature is permitted to do, but rather, whether the Constitution prohibits the legislation. *Draper*, 1980 OK 117, ¶ 10, 621 P.2d at 1146. Appellants argue the Legislature (a) cannot place a noneconomic damages cap on all plaintiffs who suffer a bodily injury in negligence cases, (b) cannot articulate a clear and convincing standard of proof to lift the cap, and (c) cannot allow the judge to play any role in the jury's assessments.

1. Section 61.2 Does Not Displace the Jury's Constitutional Role To Determine the Prevailing Party and Assess the Damages Incurred

[14] In *Torres*, the Court also cited *Jimenez v. Weinberger,* 417 U.S. 628 (1974), which denied a class of social security claimants the ability to obtain recovery without an opportunity to prove their case. *Id.* at ¶¶ 38-39.

The jury is permitted to find for the prevailing party and to find what noneconomic and pecuniary damages have been suffered. Okla. Stat. tit. § 61.2 (E). Appellants contend that the judge *and* the jury are the fact finders regarding whether clear and convincing evidence of heightened culpability exists, citing § 61.2 (C) which states:

> 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 of the rights of others... (emphasis added).

However, Appellants read this language out of context. When § 61.2 is read as a whole, it is clear that the statement above relates to § 61.2 (D) which contemplates times where issues are resolved in a nonjury trial,

> If the verdict is for the plaintiff, the court, in a nonjury trial, shall make findings of fact....which shall specify...(4)...whether the conduct of the defendant was. . .reckless, etc. (emphasis added).

In this regard, the Court must construe the statutory language, providing it with a constitutional interpretation, to mean that in those instances where the judge is also the fact-finder, he must find by clear and convincing evidence certain facts to lift the noneconomic damages cap. *Fent v. Oklahoma Capitol Improvement Authority,* 1999 OK 64, ¶¶ 3-4. It should not be read to mean that at all times both the judge and the jury must agree on the facts of the case.

Further, § 61.2 (E) provides that the judge simply sets the amount of damages the plaintiff is entitled to recover *after* the jury has advised the judge regarding the amounts attributable to noneconomic damages.[15] *See also* Okla. Stat. tit. 12, § 556 ("issues of law must tried by the court" and "issues of fact arising in actions of money, . . .shall be tried by a jury"). Even though the jury issues a verdict and assesses damages, it is the judge who may cure excessive damages, *id.* at §§

[15] *See* Okla. Stat. tit. 12, § 661 ("whenever damages are recoverable, the plaintiff may claim and recover any rate of damages to which he may be entitled for the cause of action established.").

585, 590[16], may give credence to special findings where they are inconsistent with the general verdict, *id.* at § 589, and applies the law to the assessment, *id.* at § 556.

2. There is no Legislative Remittitur

Judicial remittitur is a court's power to reduce a jury's award that was influenced by "bias, passion or prejudice," or is "contrary to the overwhelming weight of credible evidence." 25A C.J.S. *Damages* § 459 (2016). If the judge determines it appropriate, a remittitur offers the prevailing party the option of a reduced verdict, and if rejected by the plaintiff, the judge remands the case for a new trial. *Id. See also* Joseph R. Posner, *Rethinking the Additur Question in Federal Courts*, 16 Suffolk J. Trial & App. Advoc. 97, 98 (2011).

Although there is a right to have a jury assess the amount of damages, there is no right to a *judgment* on a jury's assessment of damages. *See* 3 Wm. Blackstone, *Commentaries on the Laws of England* 349-67, 372-91, 383-85 (1st ed 1768).[17] Here, the Legislature merely capped the amount of *noneconomic* damages a plaintiff can recover without demonstrating recklessness, fraud, malice, intent, or gross negligence. Okla. Stat. tit. §§ 61.2 (B) & (C). In no way does the legislation eliminate a plaintiff's right to seek and obtain redress for bodily injury, recover all economic losses, and recover up to $350,000 in vague noneconomic damages.

A majority of states have found no separation of powers violations, or improper legislative remittitur. *See e.g. Learmonth v. Sears, Roebuck and Co.*, 710 F.3d 249, 264 (5th Cir. 2013) (per curiam) (finding no unconstitutional legislative remittitur because unlike a remittitur which sets

[16] For authority regarding a judge's ability to alter jury assessment of damages see *Parker v. Everetts*, 1946 OK 408, 165 P.2d 630 (holding judge may reduce a jury award) and *Henry v. Morris & Co.*, 42 OK 13, 140 P. 413 (Okla. 1914) (holding judge may set aside a jury's assessment if it clearly did not provide for actual pecuniary loss).

[17] Discussing the distinction between the judge's and the jury's roles and finding that even as early as British common law, the jury had the right to assess the amount of damages but judges determined what the ultimate judgment and amount of damages would be in a case. Matthew W. Light, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 Wash. & Lee L. Rev. 315, 329-331 & n. 78 (2001) (noting that Blackstone had discussed the jury's limited role and that its damages assessment is always subject to control).

aside a jury's verdict, the cap places a limit on the remedy, i.e. the damages amount, but does *not* interfere with the verdict); *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.*, 663 N.W.2d 43, 76 (Neb. 2003) (citing majority of cases that uphold damages caps under the same constitutional challenges raised by Appellants because the cap does not allow the Legislature to review a dispute or determine the amount of damages; it merely establishes a cap for noneconomic damages in certain personal injury cases and is a proper legislative function); *Etheridge v. Medical Center Hospitals,* 376 S.E.2d at 532-34 (Va. 1989) (adopting the view that there is no constitutional right to a judgment on a jury's verdict).

Oklahoma law is no different. The jury assesses the damages; the judge applies the law to that assessment, and issues a final judgment. Okla. Stat. tit. 12, § 681 ("A judgment is the final determination of the rights of the parties in an action."). Thus, Appellants have failed to prove beyond a reasonable doubt that § 61.2 is unconstitutional.

3. The Legislature has the Power to Set Standards of Proof

In Oklahoma, the Legislature may establish the "standard of proof" for substantive rights. *See Kentucky Fried Chicken of McAlester v. Snell,* 2014 OK 35, ¶ 14, 345 P.3d 351, 355-56. *Id.* (declining to find a special law even where legislature set a standard of proof for a class of plaintiffs in workers compensation cases). This is consistent with the approaches of sister-states. *See e.g. Seisinger v. Siebel*, 203 P.3d 483, 491 (Ariz. 2009) (examining similar constitutional and statutory constraints as Oklahoma, and distinguishing between a substantive rule of law, which the legislature is permitted to do, and a procedural one regulating the court's management of its cases). In this regard, Legislatures may increase a burden of proof as part of their inherent and police powers. *Id.* at 494. *See also* 16 C.J.S. *Constitutional Law* § 303 (2016) (noting legislatures have the power to prescribe methods of proof, and distinguishing constitutional concerns over

irrebuttable presumptions). Here, § 61.2 does not create an irrebuttable presumption. The determination of the facts remains with the jury, and the judiciary retains its inherent power to ensure the jury's determination is supported by the evidence, and apply the law. The heightened standard of proof only applies to the removal of the statutory noneconomic damages cap.

III. Section 61.2 Does not Unconstitutionally Create a Special Verdict

Appellants argue that §§ 61.2(D) and (F) improperly require jurors to return a special rather than general verdict. *See* Appellants' Brief in Chief, pp. 5-8. The argument is based on two misguided interpretations of article 7, § 15 of the Oklahoma Constitution:[18] First, Appellants contend that requiring jurors to answer *any* interrogatories transforms their general verdict into a special verdict,[19] and, second, the failure to inform jurors of the impact of their answers to interrogatories at a second stage of jury deliberations creates a special verdict.[20]

A. Section 61.2 Requires Juries to Return a "General Verdict" As to Whether a Defendant is Liable and A Factual Determination of the Amount of Damages Suffered by the Plaintiff

Although the Oklahoma Constitution requires the return of a general verdict, the definition of "general verdict" is provided by statute, Okla. Stat. tit. 12, § 587:

> The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds facts *only*. It must present the facts as established by the evidence, and not the evidence to prove them; and *they must be so presented as that nothing remains to the court but to draw from them conclusions of law.* (emphasis added).

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[18] 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." *See also* Okla. Stat. tit. 23, § 61.1 which 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, but the court, in its discretion, may direct such special findings."

[19] *See* Appellants' Brief in Chief, p. 8. For a discussion of the distinctions and articulating a hybrid definition of a general verdict with answers to interrogatories, *see* Jason Iuliano, *Jury Voting Paradoxes*, 113 Mich. L. Rev. 405, 407 (2014).

[20] Appellants' Brief in Chief, pp. 7-8.

In the case of a special verdict, the jury does not find in favor of one party or another; it only answers questions of fact. *See e.g. In re A.F.K.*, 2014 OK CIV APP 6, ¶7, n.5, 317 P.3d 221, 230 n.5 (finding separate verdict forms containing a box for jurors to check regarding precise conditions for termination of parental rights was a general verdict because jurors ultimately determined whether parental rights should be terminated and did not simply identify the facts surrounding their determination). Where a verdict contains a "complete pronouncement on the issue of termination, as opposed to finding of facts alone", it complies with the general verdict requirement as permitted by Okla. Stat. tit. 12, § 588. *Id.* (citing *Smith v. Gizzi*, 1977 OK 91, 564 P.2d 1009). *Federal Intermediate Credit Bank of Wichita, Kan. v. Cosby*, 1928 OK 635, ¶ 13, 272 P. 436, 439 (indicating the jury found, in response to the court's interrogatories, an express and implied agency existed and found in favor of the defendant which necessarily included a determination than an agency existed, constituting a general verdict despite the questions posed by the court). The Court has recognized a general verdict need not have specific language and merely because the court submits general questions instead of general forms of verdict does not necessarily render the verdict a nullity. *Vaught v. Holland*, 1976 OK 119, ¶ 3, 554 P.2d 1174, 1177.[21]

Section 61.2 clearly requires juries to return general verdict: juries must determine whether the defendant is fault, and what damages have been suffered. Nothing in 61.2 limits juries to making only factual determinations – the very definition of a "special verdict." It is true that 61.2 requires the jury to determine, after-the-fact, what portion of the damages it assessed are attributable to noneconomic damages. Yet asking a jury to make a factual determination as to what portion of its damages award is attributable to noneconomic injuries is no different than requiring

[21] Okla. Stat. tit. 12, § 588 and Okla. Stat. tit. 23, § 61.1.

a jury to return a factual determination of what, if any, of fault could be attributed to a plaintiff, which this Court has held do not transform a general verdict into a special verdict. *See Vaught*. 1976 OK 119, 554 P.2d at 1178 (determining that the interrogatories asking whether either party contributed to the injury did not transform a general verdict into a special verdict).

B. There Is No Constitutional or Statutory Requirement That the Jury Be Notified Of The Effect of Its Findings As to Damages

Appellants also contend that 61.2 requires the return of "special verdicts" because juries are not informed about noneconomic damages caps when they make a factual determination about the percent of damages attributable to noneconomic damages. Yet Appellants never provide a single citation where this Court has recognized that the Constitution compels juries to be notified of the effect of their findings on *damages*. Nor can Appellants point to any statutory requirement—in the legislation defining special and general verdicts, or elsewhere—that would compel juries to be informed of the effects of their findings.

Appellants rely on the Court's 1977[22] case involving a personal injury car accident where the jury form instructed the jurors on comparative negligence and the effect their percentage calculations would have on the outcome of the case. *Smith v. Gizzi*, 1977 OK 91, 564 P.2d 1009. The Court held that the general verdict form with respect to a comparative negligence case must advise the jury of the legal consequences of its findings *regarding comparative negligence only*. *Id.* Moreover, the Court also clarified that "[a]s long as a jury finds in favor of either the plaintiff or defendant," any "special findings of fact *will not deprive the verdict of its generality*." *Id.* (*emphasis* added). In the comparative negligence context, then, the factual finding alters how

[22] In 1977, comparative negligence was defined by Okla. Stat. tit. 23, §§ 11, 12 which provided that contributory negligence and assumption of the risk were questions of fact and within the jury's discretion later repealed by Laws 1979, c. 38, § 4 (July 1, 1979). *See* Patricia Hatamyar, *The Effect of "Tort Reform" On Tort Case Filings*, 43 Val. U. L. Rev. 559, 576, 592-93 (2009) (detailing history of tort reform in Oklahoma).

much fault can legally be attributed to the respective parties, and a jury must be made aware of that legal effect.

The reliance on *Smith* is inapposite, then, for two reasons: first: *Smith* only requires that juries be made aware of the effect of factual findings *about comparative negligence* that could affect the core question of whether and to what extent a party is at fault. Indeed, the Court made abundantly clear that its decision was limited to the unique context of comparative negligence determinations; the Court explained that although "the special verdict is the very cornerstone of the comparative negligence concept," interpretation of Oklahoma comparative negligence statutes "requires guarded treatment" because "no other state has a constitutional provision" requiring general rather than special verdicts. *Smith,* 564 P.2d at 1012. *Smith* simply cannot be cited for the general proposition that the jury must be informed of every legal effect of every factual finding.

Second, even if *Smith* might be applied to more than just comparative negligence determinations, *Smith* unequivocally holds that a verdict is "general" so long as the jury retains the power to find in favor of the plaintiff or defendant. Under Section 61.2, a factual determination about the amount of damages attributable to noneconomic injuries does not alter the legal determination of whether and to what extent a defendant is at fault. Instead, Section 61.2 preserves for the jury the power to make a finding "in favor of either the plaintiff or defendant" and therefore, the noneconomic damages interrogatories, even if "special" in nature, cannot "deprive the verdict of its generality." *Smith,* 564 P.2d at 1013. And such a distinction makes perfect sense: after all, knowledge of the jury's allocation of *damages* between economic and noneconomic loss does not alter the fundamental question of whether and to what extent the defendant is at fault. That core jury power remains undisturbed by Section 61.2.

IV. Section 61.2 is not an Unconstitutional Special Law

Appellants claim the damages cap creates an unconstitutional "special law" "[r]egulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings." Okla. Const. art. 5, § 46. As explained in greater detail below, Section 61.2 does not affect only "particular persons" within a class, nor does it impermissibly interfere with a judge's case management. Instead, it establishes a uniform "standard of proof" to all personal injury plaintiffs in any negligence action suffering bodily injury. Indeed, it would be remarkable for this Court to now find that Section 61.2 is a "special law" because this Court has already cited Section 61.2 as an example of a general rather than specific classification. *See Montgomery v. Potter*, 2014 OK 118, ¶ 7, 341 P.3d 660 (comparing the "special" classification of uninsured motorists in accidents to the "general" classification in 61.2 of those plaintiffs sustaining bodily injury).

A. Section 61.2 is a "General Law" Because It Affects An Entire Class of Plaintiffs

A special law "relates to particular persons or particular things within a class"; whereas, a general law, "relates to all persons or things of a class." *Lafalier v. Lead-Impacted Communities Relocation Assistance Trust,* 2010 OK 48, ¶ 27, 237 P.3d 181, 192. To determine whether a law is general or special, the Court examines whether the affected things within the class are the entire universe of "similarly affected persons or things," even if the law "may directly affect only a few." *Id.* "Article V, § 46 does not, however, prohibit legislative classification for remedial purposes; it requires the remedy to be uniform across the entire class of similarly situated persons or things throughout the state." *Glasco v. State*, 2008 OK 65, ¶ 26, 188 P.3d 177, 186 (finding legislation which permitted the termination of state employees after they have been on unpaid leave for over a year not a special law).

As is the case with determining the constitutionality of a statute, the Court must construe legislation in favor of it being a general rather than a special law. *Oklahoma State Election Bd. v. Coats*, 1980 OK 65, ¶ 12-16, 610 P.2d 776, 780-81.[23] The Court has determined that "[m]aking classifications is at the heart of the legislative function." *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30 (I-30)*, 2003 OK 30, ¶¶ 18-21, 66 P.3d 442, 450-52 (finding the Legislature has the power to restrict all persons from recovery for public tort liability, thus, limiting those who do have access to protect public finances does not violate equal protection or due process).[24] The issue here is whether distinguishing between injured plaintiffs on the amount of noneconomic damages the jury awards them creates a special law or, in essence, violates equal protection. The majority of states agree that it does not.[25] As long as the legislation furthering the Legislative interest, i.e. promoting the state as business friendly, does not eliminate a cause of action for one class of persons while permitting it for others, the legislation will be upheld.[26] *See e.g. Spragens v. Shalala*, 36 F.3d 947, 950 (10th Cir. 1991) (finding a rational basis in social security legislation which allowed blind recipients to earn $600 per month while prohibiting other recipients' receipt of benefits if their earnings exceed $300), *cert. denied*, 514 U.S. 1035 (1995). Classifications are

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[23] Appellants claim § 61.2 creates an unconstitutional special law, which has elements of an equal protection analysis. *Ross v. Peters*, 1993 OK 8, ¶¶ 5, 6 & n. 29.. To establish a claim, Appellants must demonstrate that the statute does not "rationally further[s] a legitimate state interest" or that the legislation is subject to a heightened scrutiny because it implicates a "suspect class" or infringes upon a "fundamental right." *Id.* at ¶¶ 5-10 & nn. 34, 35.

[24] "Legislative reform may take 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' The task of classifying persons for exclusion from public tort liability inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, judgment." *Gladstone*, 2003 OK 30, ¶ 18.

[25] *See* Maron, note 4 at. p. 132 & n. 185 (discussing the majority view that where a statute implicates personal injury plaintiffs as a whole, there is no equal protection violation). Even the notoriously plaintiff friendly, California Supreme Court has upheld the rationality of a noneconomic damages cap. *Fein v. Permanente Med. Grp.*, 695 P.2d 665, 680 (Cal. 1985) (finding no equal protection violation for noneconomic damages caps because legislature could have eliminated noneconomic damages in its entirety so limiting the amount was even less invidious).

[26] *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 48, the Court determined the legislation as written prevented fraud but also prevents an employee from filing a non-fraudulent worker's compensation claim, rendering the statute unconstitutional under the Due Process Clause.

generally made within the statutory language itself, e.g. regulation of municipalities based on the size of the population, or the regulation of only medical malpractice or professional negligence plaintiffs. *See e.g. Elias v. City of Tulsa*, 1965 OK 164, 408 P.2d 517, and *Reynolds v. Porter*, 1988 OK 88, 760 P.2d 816.

In contrast, Section 61.2 establishes an entire class of plaintiffs: personal injury plaintiffs in *any* negligence action. The Court has found this specific classification *general* in nature, not specific. *See Montgomery v. Potter*, 2014 OK 118, ¶ 7. Nothing on the face of Section 61.2 creates a subclassification like the quintessential example of "professional negligence plaintiffs." Instead, 61.2 establishes a uniform standard of proof for all personal injury plaintiffs in negligence actions to receive heightened noneconomic damages.

B. Section 61.2 Permissibly Establishes a "Standard of Proof" Rather Than a "Rule of Evidence" or a "Rule of Practice"

The constitutional prohibition on "rules of evidence" and "rules of practice" only limits the power of the Legislature to dictate how the judge administers the courtroom and what specific evidence is admissible to prove a case. *See Kentucky Fried Chicken of McAlester v. Snell,* 2014 OK 35, ¶ 14, 345 P.3d 351, 355-56. The Legislature may, however, establish the "standard of proof" for substantive rights. *Id.* (declining to find a special law even where legislature set a standard of proof for a class of plaintiffs in workers compensation cases). This is true in sister-states with similar constitutional provisions, as well. *See also* 16 C.J.S. *Constitutional Law* § 303 (2016) (noting legislatures have the power to prescribe methods of proof, and distinguishing constitutional concerns over irrebuttable presumptions). For example, the Arizona Supreme Court has recognized that its legislature may alter a burden of proof without interfering with a court's procedural authority to manage its cases. *See e.g. Seisinger v. Siebel*, 203 P.3d at 491-494.

Section 61.2 does not alter the admissibility of evidence, nor does it impermissibly interfere with case management. Section 61.2 does not create an irrebuttable presumption for the jury or the court, and no method of procedure is dictated. Instead, Section 61.2 merely establishes the standard of proof to receive noneconomic damages in excess of $350,000. The determination of the facts remains with the jury, and the judiciary retains its inherent power to ensure the jury's determination is supported by the evidence, and applies the law. The heightened standard of proof to remove the statutory noneconomic damages cap is squarely within the Oklahoma Legislature's power and is not a special law. It merely provides plaintiffs with an adequate and constitutional alternate remedy to recover more than $350,000 in noneconomic losses.

Even if this Court were to determine that Section 61.2 is an impermissible court "procedure," it nonetheless would be constitutional because it is "symmetrical and appl[ies] equally across the board for an entire class of similarly situated persons or things." *Zeier v. Zimmer,* 2006 OK 98, ¶ 13, 152 P.3d 861, 867. The "clear and convincing evidence" standard of proof for receiving heightened damages applies across the board to all plaintiffs in negligence actions involving bodily injury.

V. Section 61.2 Does Not Impair the Right to a Jury Trial

Appellants argue the noneconomic damages cap violates the right to a trial by jury. *See* Appellants' Brief in Chief, p. 10. A plaintiff's right to a jury trial is dictated by Oklahoma law.[27] Regarding the right to a jury trial in a civil case, Okla. Const. art. 2, § 19 provides: "[t]he right of trial by jury shall be and remain inviolate." An inviolate right to a jury trial does not mean a court must enter the verdict the jury sets and enter the damages they dictate. Rather, this Court

[27] The right to a trial by jury is contained within the United States Constitution's Seventh Amendment but has yet to be incorporated into state law under the Fourteenth Amendment. *See Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916) (declining to make Seventh Amendment binding on states).

has explained that a jury trial right is satisfied so long as the jury is permitted to conduct an assessment of the facts and to render a finding as to the prevailing party. *See Keeter v. State ex rel. Saye, Co. Atty.*, 1921 OK 197, ¶ 6, 198 P. 866, 868-69. A judge is permitted to the law to the findings of the jury. *Id. See also Paul v. N. L. Industries, Inc.*, 1980 OK 127, ¶ 17, 624 P.2d 68, 70 (finding harmless error in jury's failure to award plaintiff damages as judge was able to determine jury found defendant zero percent negligent, and absent tortfeasors responsible).

Section 61.2 does not eliminate a plaintiff's right to a trial by jury. In fact, Section 61.2 preserves the ability of a jury to determine whether the plaintiff prevails on its claims and to make a factual determines of the amount of damages suffered. The right is and remains inviolate. Section 61.2 merely advises a court that if a jury returns an assessment of noneconomic damages in excess of $350,000, the judge must limit the recovery to $350,000 unless the jury has found evidence supporting an exception to this cap.[28] Consistent with settled Oklahoma law, Section 61.2 permits the jury is to issue a verdict and then the court issues the judgment.[29] In light of the support noted herein, Appellants cannot show beyond a reasonable doubt that § 61.2 is an unconstitutional violation of right to a jury trial.

Nor would Oklahoma be an outlier should this Court hold that Section 61.2 does not impair the "right to a jury trial." Courts throughout the country have held that noneconomic damages caps do not restrict the right to trial by jury. For example, the Supreme Court of Oregon recently found that even though there is a right to a jury's factual determination of damages, the assessment can

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[28] Significantly, the majority of states that have addressed this question have determined noneconomic damages caps do not violate a plaintiff's right to a trial by jury. *See* Shaakirrah R. Sanders, *Uncapping Compensation in the Gore Punitive Damage Analysis*, 24 Wm. & Mary Bill Rts. J. 37, 91 & n. 265 (2015) (discussing and identifying the majority view that noneconomic damages caps are constitutional and do not violate the right to a state civil jury trial).

[29] *See* Maron, *supra*, note 4, p. 122 (noting the jury carries out its fact finding mission unrestricted. Once the jury renders its findings "the judge shall appropriately reduce any award of noneconomic damages that exceeds the applicable limitation.").

be constrained. *Horton v. Oregon Health and Science University*, __ P.3d ___, 2016 WL 2587403 (Or. May 5, 2016) (discussing governmental damages cap for all damages in tort actions against the state and collecting cases). Addressing the argument that plaintiffs are entitled to the rights established in early common law through their state's constitutions, the Oregon Court found common-law courts often "imposed legal limits on the type and amount of recoverable damages that a defendant's negligence, in fact, caused." *Id.* (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 280–90 (5th ed 1984) (discussing limits on damages).[30] *See also Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249 (5th Cir. 2013) finding the Mississippi Constitution's language that a right to a jury trial is inviolate does not render a noneconomic damages cap unconstitutional).[31]

VI. Section 61.2 Does Not Deny Plaintiffs "Access to the Courts"

Next, Appellants contend Section 61.2 restricts the constitutional "right to access to the courts" (including the right to a "remedy" for "every wrong" and "every injury")[32] by limiting the availability of higher noneconomic damages award only to those who can establish by clear and convincing evidence that the defendant acted in reckless disregard of another's rights, was grossly negligent, fraudulent, intentional, or malicious. Yet the right to access to the courts merely provides a plaintiff with the right to seek redress within the court *for a wrong that is recognized*

[30] Further support for the constitutionality of statutory caps on the amount of damages awarded for a noneconomic loss is examined by Mark A. Behrens, Cary Silverman, *Building on the Foundation: Mississippi's Civil Justice Reform Success and a Path Forward,* 34 Miss. C. L. Rev. 113, 129 (2015) (statistics reflect that damages caps have made a difference in healthcare costs and increasing the state's economic competitiveness, noting that a majority of courts addressing the noneconomic damages cap find these statutes survive challenges concerning the right to a jury trial, separation of powers, equal protection, due process, access to courts/right to a remedy, and special legislation challenges).

[31] Oklahoma's § 61.2(F) is similar to Mississippi, Miss. Code Ann. § 11-1-60, which provides that after the jury establishes liability, the "trier of fact shall not be advised of the limitations imposed by this subsection."

[32] Okla. Const. art. 2, § 6 provides the following: "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."

by the law. St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 1989 OK 139, ¶ 15, 782 P.2d 915, 919. The Oklahoma Legislature has the right to alter substantive rights and the associated remedies, subject to its changing policy goals. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 35; *see also St. Paul*, 1989 OK 139, ¶ 15, 782 P.2d at 919 (holding the Legislature may limit substantive rights). Nor does the Oklahoma Constitution "guarantee that any particular set of events would result in court-awarded relief." *Rollings v. Thermodyne Industries, Inc.*, 1996 OK 6, ¶ 9, 910 P.2d 1030, 1032. Indeed, this Court has recognized the constitutionality of a "clear and convincing evidence" standard for fraud cases. *See Johnson v. Bd. of Governors of Registered Dentists of State of Okl.*, 1996 OK 41, ¶ 18, 913 P.2d 1339, 1345-47, *corrected* (May 2, 1996) (citing *Addington v. Texas*, 441 U.S. 423 (1979)).

Section 61.2 does not prevent a plaintiff from having her day in court. Indeed, under Section 61.2 may seek and recover all of their pecuniary losses. Section 61.2 preserves the ability of a jury assesses the extent of economic and noneconomic damages. Where a judge deems it appropriate within his inherent power, plaintiffs are entitled to the substantial award of noneconomic losses up to $350,000. Further, where heightened culpability is found by the jury, the cap is lifted in its entirety. The "clear and convincing standard" simply alters the remedy available for substantive rights recognized by the Legislature.

VII. The Court Must Sever Unconstitutional Provisions Rather than Strike the Statute in its Entirety

As demonstrated above, Appellants fail to prove that 61.2 is unconstitutional beyond a reasonable doubt. However, should this Court conclude that some component of 61.2 is unconstitutional, the proper remedy is to sever *only* the unconstitutional provision. *In re Application of the Okla. Dept. of Transportation*, 2002 OK 74, ¶ 27, 64 P.3d 546, 552 (courts are to save statutes, not destroy them). For example, should the Court find that the "clear and

convincing evidence standard" is unconstitutional, the Court should only eliminate that requirement but retain the noneconomic damages caps for *all* plaintiffs in *all* negligence actions. Likewise, if the Court determines a jury has a right to know of the effect of its damages assessment, the Court can strike the language of the statute which prohibits the jury's knowledge, but leave the rest of § 61.2 in place.

CONCLUSION

The Court should uphold § 61.2 as constitutional as it can be read in a constitutional manner and was well within the Legislature's police power and authority. Appellants have failed to prove that it is unconstitutional beyond a reasonable doubt.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 6th day of June, 2016, a true and correct copy of the foregoing was mailed by First Class U.S. Mail, postage prepaid, addressed to the following:

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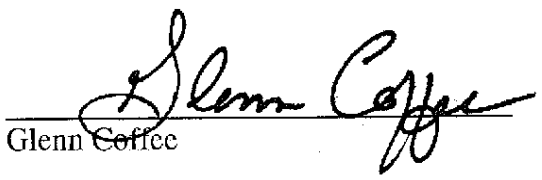

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