

JAN 23 2019

No. 17-6034/17-6079

DEBORAH S. HUNT, Clerk

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

TAMARA LINDENBERG,
Plaintiff-Appellee/Cross-Appellant,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,
Defendant-Appellant/Cross-Appellee,

and

STATE OF TENNESSEE,

Intervenor-Defendant/Cross-Appellee.

On Appeal from the United States District Court
for the Western District of Tennessee
No. 2:13-cv-02657

***AMICI CURIAE* BRIEF OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
AMERICAN TORT REFORM ASSOCIATION,
NATIONAL ASSOCIATION OF MANUFACTURERS,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER, AND
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
IN SUPPORT OF PETITION FOR REHEARING EN BANC**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations
and Financial Interest**

Sixth Circuit

Case Number: 17-6034/17-6079

Case Name: Lindenberg v. Jackson Nat'l Life Ins. Co.

Name of counsel: Cary Silverman

Pursuant to 6th Cir. R. 26.1, Chamber of Commerce of the United States of America

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on January 23, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Cary Silverman
Shook, Hardy & Bacon, 1155 F St NW
Washington, DC 20004

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 17-6034/17-6079

Case Name: Lindenberg v. Jackson Nat'l Life Ins. Co.

Name of counsel: Cary Silverman

Pursuant to 6th Cir. R. 26.1, American Tort Reform Association

Name of Party

makes the following disclosure:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 17-6034/17-6079

Case Name: Lindenberg v. Jackson Nat'l Life Ins. Co.

Name of counsel: Cary Silverman

Pursuant to 6th Cir. R. 26.1, National Association of Manufacturers

Name of Party

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 17-6034/17-6079

Case Name: Lindenberg v. Jackson Nat'l Life Ins. Co.

Name of counsel: Cary Silverman

Pursuant to 6th Cir. R. 26.1, National Federation of Independent Business

Name of Party

makes the following disclosure:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations
and Financial Interest**

Sixth Circuit

Case Number: 17-6034/17-6079

Case Name: Lindenberg v. Jackson Nat'l Life Ins. Co.

Name of counsel: Cary Silverman

Pursuant to 6th Cir. R. 26.1, American Property Casualty Insurance Association*

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

*The American Property Casualty Insurance Association was formed through a merger of the American Insurance Association (AIA) and the Property Casualty Insurers Association of America (PCI) on January 1, 2019. The two groups merged into PCI and are doing business as American Property Casualty Insurance Association.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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s/January 23, 2019

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Washington, DC 20004

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INTEREST OF *AMICI CURIAE*¹

Amici curiae urge this Court to grant the petition for rehearing en banc to reverse the panel's ruling invalidating Tennessee's statutory limit on punitive damage awards, Tenn. Code Ann. § 29-39-104(a)(5), or to certify the issue to the Supreme Court of Tennessee for an authoritative ruling.

Amici are the Chamber of Commerce of the United States, American Tort Reform Association, National Association of Manufacturers, National Federation of Independent Business Small Business Legal Center, and American Property Casualty Insurance Association. *Amici* represent businesses of all sizes and their insurers. *Amici* support laws that facilitate predictability and fairness in the civil justice system by requiring that the level of punishment imposed on a defendant is proportional to the harm its conduct allegedly caused. Statutory limits on punitive damages, such as the Tennessee law that the panel found unconstitutional, contribute to such a system.

Amici participated as *amici curiae* when the Supreme Court of Tennessee granted certification of a question from the U.S. District Court for the Western District of Tennessee regarding the constitutionality of Tenn. Code Ann. § 29-39-

¹ This brief was submitted with an accompanying motion for leave to file out of time pursuant to Federal Rules of Appellate Procedure 29(a)(3) and 6 Cir. R. 26(a)(3). No counsel for any party authored this brief in whole or in part, and no entity or person other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting the brief.

104(a)(5). Ultimately, the court did not decide the issue due to the unresolved question of whether punitive damages are available in a statutory bad faith action. *See Lindenberg v. Jackson Nat'l Life Ins. Co.*, No. M2015-02349-SC-R2-CV, 2016 Tenn. LEXIS 390 (Tenn. June 23, 2016) (per curiam).

Allowing the split Sixth Circuit panel's decision to stand will expose *amici's* members to unchecked punitive damage awards in federal courts applying Tennessee law, despite the Tennessee General Assembly's adoption of a law that generally limits punitive damages to the greater of two times the amount of compensatory damages awarded or \$500,000. Tenn. Code Ann. § 29-39-104(a)(5).

RULE 35(b) STATEMENT

Amici support the petitions for rehearing filed by the State of Tennessee and Jackson National Life Insurance Company because this proceeding involves questions of exceptional importance: whether Tennessee's statutory limit on punitive damages, Tenn. Code Ann. § 29-39-104, is valid under the right to jury trial and separation of powers provisions of the Tennessee Constitution.

The panel majority invalidated Tennessee's statutory limit on punitive damages, finding it violated the right to trial by jury under the Tennessee Constitution. This decision rules on a matter of first impression under state law in a manner that is (1) inconsistent with Tennessee's longstanding presumption that statutory enactments are constitutional and history of upholding civil justice

reforms; (2) contrary to the vast majority of state courts, which have upheld the authority of states to place constraints on punitive damage awards; and (3) conflicts with every federal circuit that has considered the constitutionality of a state limit on damages, including this Court's own jurisprudence.²

For these reasons, the panel should have either upheld the statute or certified this issue to the Tennessee Supreme Court for an authoritative ruling.

REASONS FOR GRANTING REHEARING

I. The Panel Ruling is Inconsistent with Tennessee's Longstanding Presumption Favoring Constitutionality and History of Upholding Civil Justice Reforms

The panel decision's prediction that the Supreme Court of Tennessee would invalidate a statutory limit on punitive damages conflicts with the traditional respect that the Supreme Court of Tennessee has provided to the Tennessee General Assembly when it shapes the state's civil justice system.

The Supreme Court of Tennessee has recognized the legislature's authority "to weigh and to balance competing public and private interests in order to place reasonable limitations on rights of action in tort which it also has the power to create or to abolish." *Mills v. Wong*, 155 S.W.3d 916, 923 (Tenn. 2005). When faced with a challenge to a legislation that places reasonable constraints on

² In addition, the panel erred in overruling *Heil Co. v. Evanston Ins. Co.*, 690 F.3d 722, 728 (6th Cir. 2012), which found that Tenn. Code Ann. § 56-7-105(a) is the "exclusive extracontractual remedy" for an insurer's failure to pay amounts owed under a policy and does not authorize punitive damage awards.

liability, the state's high court has repeatedly recognized the legislature's power to modify common law rights, remedies, and punishments. *See, e.g., Lynch v. City of Jellico*, 205 S.W.3d 384 (Tenn. 2006) (upholding Workers' Compensation Reform Act of 2004 under Tennessee and U.S. Constitutions); *Mills*, 155 S.W.3d at 916 (upholding three-year statute of repose for medical malpractice claims); *Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994) (upholding contingent fee cap for medical malpractice claims); *Jones v. Five Star Eng'g, Inc.*, 717 S.W.2d 882 (Tenn. 1986) (upholding ten-year statute of repose for product liability actions); *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522 (Tenn. 1981) (upholding four-year statute of repose for claims against architects, engineers, and contractors stemming from improvements to real property). In fact, the Supreme Court of Tennessee has upheld a statute that "capped" *compensatory* damages in cases where parents are subject to liability for acts of their children, recognizing that the wisdom of a statutory limit on damages is a public policy issue for the legislature. *Lavin v. Jordon*, 16 S.W.3d 362, 369-70 (Tenn. 2000).

There is no indication that the Supreme Court of Tennessee would abandon these principles when faced with a challenge to a limit on punitive damage awards. Yet, despite the "strong presumption" of constitutionality that Tennessee law

extends to legislative enactments, *Lynch*, 205 S.W.3d at 390,³ and the court's history of upholding civil justice reforms, the panel took the extreme step of invalidate the statute. Absent a ruling from the Supreme Court of Tennessee saying otherwise, this case law requires that the Sixth Circuit uphold Tenn. Code Ann. § 29-39-104(a)(5).

II. The Panel Ruling is Contrary to the Vast Majority of State Courts, which have Upheld Statutory Limits on Punitive Damages, and Relies on an Outlier Decision

Contrary to the panel's decision, the vast majority of state supreme courts have ruled that punitive damage limits do not violate the right to a trial by jury because they do not infringe the jury's fundamental fact-finding role.

For example, the Virginia Supreme Court upheld a total cap on medical malpractice damages—compensatory and punitive—finding that the statute did not violate the right to a jury trial. *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999). A statutory limit on damages, the court found, “does nothing more than establish the outer limits of a remedy; remedy is a matter of law and not of fact; and a trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function.” *Id.* at 312.

³ See also *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003) (“We must ‘indulge every presumption and resolve every doubt in favor of the statute's constitutionality.’” (quoting *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002))).

Similarly, the Supreme Court of Alaska held that “[t]he decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury.” *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002) (upholding limits on punitive and noneconomic damages); *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807 (Alaska 2005) (reaffirming *Evans*).

The Supreme Courts of Ohio and North Carolina have likewise found punitive damage limits constitutional, including with respect to the right to jury trial. *See Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004). Consistent with the panel dissent here, the Ohio Supreme Court observed that a statute limiting damages should be treated the same as laws enhancing damages, including statutes that treble jury awards. *Arbino*, 880 N.E.2d at 476.

These decisions reflect that “[o]nce the jury has ascertained the facts and assessed damages . . . the constitutional mandate is satisfied [and thereafter] it is the duty of the court to apply the law to the facts. *Pulliam*, 509 S.E.2d at 312 (internal citation omitted). Courts also recognize that since a state legislature can abolish punitive damages, it can constrain their amount without infringing the right to a trial by jury. *See, e.g., Smith v. Printup*, 866 P.2d 985, 994 (Kan. 1993); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730 (Tex. Ct.

App. 1998).

While the Supreme Court of Tennessee has not yet addressed the issue, its decisions are in accord with this mainstream understanding of the right to jury trial. The “primary aspect” of the right to jury trial in Tennessee is for an unbiased, impartial jury to determine “all contested factual issues.” *Ricketts v. Carter*, 918 S.W.2d 419, 421 (Tenn. 1996). The court has recognized that there is no right to unlimited awards, as the legislature can modify common law rights of action and define the punishment available. *See Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 912 (Tenn. 1999) (finding punitive damages unavailable under Tennessee Consumer Protection Act because the General Assembly authorized treble damages for willful or knowing violations); *Mills*, 155 S.W.3d at 922 (recognizing the General Assembly has “sovereign power prospectively to limit and even to abrogate common law rights of action”). These holdings suggest that, under Tennessee law, the scope of available remedies, including punitive damages, is a legal question for the General Assembly and courts, not a contested factual issue for the jury.

Among state high courts, only the Missouri Supreme Court has invalidated a broad-based statute limiting punitive damages based on an interpretation of the

state's right to jury trial. *See Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014).⁴ The Missouri ruling is an outlier and is inconsistent with Tennessee jurisprudence. It has harmed the reputation of the state's civil justice system.⁵ Yet, the panel relies on this Missouri ruling.

III. The Panel Ruling is Contrary to Every Federal Circuit Court that has Considered the Constitutionality of a State Limit on Damages

The panel's decision appears to be inconsistent with every federal circuit that has considered whether a statutory limit on damages violates the Seventh Amendment or a state right to jury trial, including this Court's own jurisprudence.

Federal circuits have consistently upheld limits on total damages,⁶ and on noneconomic damages in medical liability⁷ and civil actions generally.⁸ For

⁴ The Arkansas Supreme Court invalidated a punitive damage limit, but only pursuant to a unique provision of the Arkansas Constitution barring limits on recovery outside the employment context. *See Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011). The Supreme Court of Alabama, which struck down a punitive damage limit in *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), later clarified that the state constitution does not restrict its legislature "from removing from the jury the unbridled right to punish." *Ex Parte Apicella*, 809 So. 2d 865, 874 (Ala. 2001).

⁵ *See* Carter Stoddard, *Survey: Missouri Among Worst States for Legal Fairness*, *Missourian*, Sept. 11, 2015, at http://www.columbiamissourian.com/news/state_news/survey-missouri-among-worst-states-for-legal-fairness/article_7d52876a-572d-11e5-9087-43bbfaab0ca4.html.

⁶ *See Schmidt v. Ramsey*, 860 F.3d 1038 (8th Cir. 2017); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989).

⁷ *See Estate of McCall v. United States*, 642 F.3d 944 (11th Cir. 2011); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005); *Owen v. United States*,

example, the Fourth Circuit has ruled that a Virginia law limiting the total amount of damages recoverable in a medical malpractice action—including both compensatory and punitive damages—does not violate the Virginia or U.S. Constitutions. *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (finding it is the role of the legislature, not the jury, to determine the legal consequences of the jury’s factual findings). The court recognized that as “[i]t is by now axiomatic that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,” a legislature “permissibly may limit damages recoverable for a cause of action” *Id.* (internal quotations and citations omitted); *see also Wackenhut Applied Technologies Ctr., Inc. v. Sygnatron Prot. Sys., Inc.*, 979 F.2d 980, 985 (4th Cir. 1992) (finding Virginia punitive damage cap rationally related to the “proper governmental purpose” of “limit[ing] juries’ punitive damages awards to those that punish and deter and to prevent awards that burden the state’s economy.”).

Likewise, the Third Circuit has held that the Seventh Amendment does not preclude a legislature from constraining damages (there, noneconomic damages in a medical liability case). After closely examining the historical underpinnings of

935 F.2d 734 (5th Cir. 1991); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

⁸ *See Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249 (5th Cir. 2013); *Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996).

the right to jury trial, the court found that a legislature can make a “rational policy decision in the public interest” to limit damages without “reexamining” a jury’s factual findings. *Davis v. Omitowoju*, 883 F.2d 1155, 1165 (3d Cir. 1989) (upholding Virgin Islands’ law). Recently, the Eighth Circuit rejected a Seventh Amendment challenge to Nebraska’s limit on noneconomic damages. *See Schmidt v. Ramsey*, 860 F.3d 1038, 1045-46 (8th Cir. 2017).

Learmonth v. Sears, Roebuck & Co., 710 F.3d 249 (5th Cir. 2013) illustrates what should have occurred here. After the Mississippi Supreme Court declined to answer a certified question,⁹ the Fifth Circuit ruled that a statute limiting noneconomic damages in personal injury cases did not violate the Mississippi Constitution’s right to jury trial. *See id.* at 255. The panel unanimously upheld the statute because it “guessed,” based on Mississippi case law, that a limit would not invade the jury’s fact-finding role and fit within legislature’s long-recognized authority to alter legal remedies. *See id.* at 261. Here, the Sixth Circuit panel, however, reached a diametrically polar conclusion, even though the right to jury trial provided by the Mississippi and Tennessee Constitution is identical.¹⁰

⁹ Similar to this case, the state high court declined to answer a certified question due to uncertainty regarding other issues in the underlying ruling. *See Sears, Roebuck & Co. v. Learmonth*, 95 So.3d 633 (Miss. 2012) (declining invitation due to the uncertainty in the amount awarded for noneconomic damages).

¹⁰ Both state constitutions provide that “the right of trial by jury shall remain inviolate.” Miss. Const. Art. 3, § 31; Tenn. Const. Art. I, § 6.

Finally, the panel decision is counter to this Court's own precedent. In *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 515, 517, 519 (6th Cir. 2005) the Court recognized that while "it is the role of the jury as factfinder to determine the extent of a plaintiff's injuries. . . . , it is not the role of the jury to determine the legal consequences of its factual findings." *Id.* It therefore found a Michigan law limiting noneconomic damages "implicat[ed] no protected jury rights." *Id.* Although the Supreme Court of Tennessee has called the Seventh Amendment "an analogous provision" and held that the Tennessee Constitution "should be given the same interpretation," *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 89 (Tenn. 1992), the panel reached a different result.

CONCLUSION

For these reasons, the Court should grant the petition for rehearing en banc and either find Tenn. Code Ann. § 29-39-104 represents a valid exercise of state legislative authority or certify the issue to the Tennessee Supreme Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 2,597 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Times New Roman 14-point proportional type.

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CERTIFICATE OF SERVICE

I hereby certify that the on this 23rd day of January 2019, the foregoing brief of *amici curiae* was served on all parties or their counsel of record through the CM/ECF system who are registered users:

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APPENDIX – DESCRIPTION OF AMICI CURIAE

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus* briefs in cases involving important liability issues.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes \$2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and

accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. Members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that will affect small businesses.

Representing nearly sixty percent of the U.S. property casualty insurance market, the American Property Casualty Insurance Association (APCIA) promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA represents the broadest cross-section of home, auto, and business insurers of any national trade association. APCIA members represent all sizes, structures, and regions, which protect families, communities, and businesses in the

U.S. and across the globe. The American Insurance Association and Property Casualty Insurers Association of America merged to form APCIA in 2019.