NO. M2015-02349-SC-R23-CV

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TAMARIN LINDENBERG, ET AL.

Plaintiffs

v.

JACKSON NATIONAL
LIFE INSURANCE COMPANY

Defendant

BRIEF OF THE BEACON CENTER OF TENNESSEE AND CONCERNED LEGISLATORS AS PROPOSED *AMICI CURIAE*

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STATEMENT CONCERNING ORAL ARGUMENT

Amicus does not request oral argument. The constitutional issues raised are pure issues of law and fully outlined in the pleadings. *Amicus* believes its points are sufficiently raised in its brief. Arguments on questions of certification are disfavored, *see* Tenn. Sup. Ct. R. 23, but should this Court desire it, the defendant and the Office of the Tennessee Attorney General are fully capable of presenting. While certainly available should this Court request, *Amicus* thinks that it would not substantially illuminate the discussion for it to participate in oral argument.

EXPLANATION OF THE TERMS

In this brief, the following intelligible abbreviations will be used to refer to the record. *See* Tenn. R. App. P. 27(g) (2016). All lower court proceedings were in Case No. 13-cv-02657-JPM-cgc (W.D. Tenn.). In the interest of brevity, this citation shall not be repeated when referring to the record. The record itself is publicly available on the Pacer.gov system for United States federal courts. Reference to this record shall be by the document number record entry, denoted as (R.) followed by the appropriate number, a brief description of the entry, and, when helpful, the PageID number stamped upon the page by the federal court's electronic filing system. Trial transcripts shall be abbreviated to (T.) followed by a brief description identifying the quoted party, and the PageID number.

JURISDICTIONAL STATEMENT

Pursuant to Tenn. R. App. P. 27(b) and 31(b) *Amicus* deems the jurisdictional statements of the parties sufficient.

STATEMENT OF INTEREST

The Beacon Center of Tennessee is a non-profit, nonpartisan, and independent Section 501(c)(3) organization dedicated to providing expert empirical research and timely free market solutions to public policy issues in Tennessee. The Beacon Center's mission is to empower Tennesseans to reclaim control of their lives, so that they can freely pursue their version of the American Dream. The Beacon Center's policy arm was involved in the passage of the Tennessee Civil Justice Act of 2011. The Beacon Center's Legal Foundation is dedicated to the promotion of the Tennessee Constitution, administered as written and consistent with its original intended meaning as determined through a rigorous and scholarly method.

Also in agreement with this brief are proposed *Amici*, who are all members of the Tennessee General Assembly who were part of the broad coalition that enacted the Tennessee Civil Justice Act of 2011.[1] The proposed *Amici* include leadership from both the House and Senate, and the sponsors of the Civil Justice Act of 2011. Proposed *Amici* have an unquestionable interest in protecting and defending constitutionally designated legislative

[1] The Beacon Center has contemporaneously filed a motion seeking leave to add the additional *Amici* to the brief. The joining of the additional *Amici* is thus made conditionally, subject to this Court's granting of leave. *See* Tenn. App. P. 31(a) (brief may be conditionally filed with the motion for leave to file an *amicus* brief).

law making functions assigned to them in the Tennessee Constitution. Moreover, they have a special duty to protect the Tennessee Constitution's Declaration of Rights from unwarranted and ahistorical interpretations. Furthermore, as elected representatives, proposed *Amici* have a substantial interest in the promotion of Tennessee's economy and providing a stable, predictable environment for litigants in Tennessee's courts.

The proposed *Amici* are identified as follows:

- **The Honorable Ron Ramsey**
  Lieutenant Governor & Speaker of the Senate
  Senate District 4

- **The Honorable Beth Harwell**
  Speaker of the House of Representatives
  House District 56

- **The Honorable Mark Norris**
  Senate Majority Leader
  Senate District 32
  Prime Sponsor of the Civil Justice Act of 2011

- **The Honorable Gerald McCormick**
  House Majority Leader
  House District 26
  Prime Sponsor of the Civil Justice Act of 2011

- **The Honorable Bill Ketron**
  Senate Majority Caucus Chairman
  Senate District 13

- **The Honorable Glen Casada**
  House Majority Caucus Chairman
  House District 63

- **The Honorable Jack Johnson**
  Senate Commerce Committee Chairman
  Senate District 23
  Co-Prime Sponsor of the Civil Justice Act of 2011

- **The Honorable Brian Kelsey**
  Senate Judiciary Committee Chairman
  Senate District 31
  Co-Prime Sponsor of the Civil Justice Act of 2011

- **The Honorable Pat Marsh**
  House Business & Utilities Committee Chairman
  House District 62
  Co-Prime Sponsor of the Civil Justice Act of 2011

The proposed *Amici* reviewed the content of this brief and are in agreement with its viewpoints. The parties individually consented to the filing of this brief to personal representatives of the Beacon Center of Tennessee.

STATEMENT OF THE ISSUES

In 2011, the Tennessee legislature substantively changed the law to provide parameters within which juries award punitive damages in the form of a maximum damages cap.

1) Does this cap violate the right to trial by jury when punitive damages were unrecognized in Tennessee and only barely emerging in the Nation at the time that right was recognized?

2) If not, could a cap still constitute a violation of separation of powers?

STATEMENT OF THE CASE AND FACTS

This case is about whether the Tennessee legislature may place reasonable limits on the amount of punitive damages that juries may award without giving offense to the Tennessee Constitution's guarantee of right to trial by jury, or the separation of powers.

On July 19, 2013, the plaintiffs filed a civil complaint in the Shelby County Circuit Court, seeking damages and fees for breach of contract and bad faith. (R. 2: Notice of Correction, Attachment 1, Exhibit Redacted Complaint, PageID 46). The defendant removed the case to federal court on August 23, 2013. The United States District Court for the Western District of Tennessee, the Honorable Jon P. McCalla, presided ("the trial court"). (R. 2: Notice of Correction).

A jury found for the plaintiffs following a trial. (R. 151: Jury Verdict, PageID 2015-18). The trial court then asked the jury to make a finding as to the amount of punitive damages. (R. 160: T, Trial Court Instructions, PageID 2229-230). The jury awarded the plaintiffs punitive damages totaling $3,000,000. (R. 152: Special Jury Verdict).

The punitive damages amount exceeded the maximum amount allowable under Tennessee law. Specifically, Tenn. Code Ann. § 29-39-104(a)(5) states that punitive damages may not exceed an amount equal to two times the amount of compensatory damages awarded, or $500,000, whichever is greater. The defendant moved for a judgment as a matter of law

arguing, *inter alia*, that the punitive damages award was limited by Tennessee's statutory cap (R. 158: Brief in Support of Motion for Judgment as a Matter of Law, PageID 2118, 2121).

This punitive damage award prompted a constitutional question regarding the constitutionality of the statutory cap. The plaintiffs contended that the cap was unconstitutional and moved for certification of the question to the Tennessee Supreme Court. (R. 167: Motion for Certification of Questions). On November 24, 2015, the trial court certified the following two questions of state law to this Court via Tenn. S. Ct. R. 23:

1. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 violate a plaintiff's right to 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 Annotated 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 in the Tennessee Constitution?

(R. 188: Order Certifying Questions of State Law, PageID 4270). The trial court denied a flurry of requests that it reconsider, entering a final order on February 1, 2016. (R. 198: Order Denying Motions).

On February 8, 2016, this Court ordered briefing from the parties.

SUMMARY OF THE ARGUMENT

Tennessee's right to a trial by jury does not prohibit substantive legislative change to available tort remedies such as punitive damages. Even embracing the logic that the right prohibits interfering with a jury remedy available in 1796, a cap on punitive damages would still be constitutional. The plaintiffs fail to show that punitive damages were recognized in Tennessee at the time of statehood. They appear much later in Tennessee and were just emerging in American law at the time. And they have always been an evolving doctrine, never thought beyond the reach of the legislature.

A cap on punitive damages is simply a change in the law that does not implicate the jury right. Legislatures are imbued with the authority to alter the common law, including remedies. Just as they make substantive changes to entitlements without offending due process and set criminal sentencing ranges, legislatures have a vital role to play in setting the parameters in which juries operate when they award punitive damages.

The North Carolina Supreme Court's ruling that a cap on punitive damages is constitutional has special resonance because this Court accords that precedent special weight, for very valid historical reasons.

Finally, a cap does not violate separation of powers. For the reasons set forth above, legislatures are authorized to set the substantive parameters for juries.

ARGUMENT

I. THERE IS NO HISTORICAL OR CONSTITUTIONAL BASIS TO DENY THE LEGISLATURE THE ABILITY TO SET SUBSTANTIVE LIMITS ON REMEDIES SUCH AS PUNITIVE DAMAGES. THE RIGHT TO TRIAL BY JURY DOES NOT GUARANTEE A RIGHT TO RECOVER UNLIMITED AWARDS OF PUNITIVE DAMAGES.

A. Introduction and overview.

The Tennessee Declaration of Rights has long protected the right to trial by jury. Article I, section 6 provides: "That the right to trial by jury shall remain inviolate. ..." This Court has long held this right guarantees a trial by jury "as it existed and was in force and use according to the course of the common law under the laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution of 1796." *Patten v. State*, 426 S.W.2d 503, 506 (Tenn. 1968).

The plaintiffs read this with excessive formalism, taking it to mean that the right accords constitutional status to trial practice as it existed under the common law at the time of the ratification of the Tennessee Constitution.[2] (Plaintiffs' brief, p. 13). Thus, they reason that if a cap did not exist in 1796, it may not exist now. The plaintiffs simply misconstrue the nature of the right, for the reasons explained by the defendant and the Attorney General.

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[2]The plaintiffs frame the question by arguing that "[b]ecause a limitation on punitive damages did not exist at the time of the creation of the Tennessee Constitution," it infringes on the right to trial by jury. (Plaintiffs' brief, p. 13). That is, the cap is improper not because of what it took away, but because it did not previously exist, making it appear to argue the legislature may not innovate whatsoever.

Suffice it to say, this right was not meant to freeze in amber trial practice as it existed in 1796 when Tennessee was a rough frontier state with what no one would consider to be a robust and well developed legal practice.[3][4] Tennessee was, after all, a depopulated territory at the time with only two judicial districts and an inferior court in each of the seven counties presided over by justices of the peace.[5] It hardly had a legal practice to speak of, let alone one so developed that the founders would have considered any further innovation to be beyond the pale. The right was meant to protect the jury's ancient role as trier of fact, not to obstruct the development of the law as explained in great detail in the principal briefs.

Nevertheless, even accepting the premise that the right was meant to embed trial practice circa 1796 as a constitutional right, the plaintiffs fail to show that punitive damages were a fundamental jury right in Tennessee at the time, or *even that they existed at all.* The most that can be said about punitive damages is that they did not appear in the annals of Tennessee law

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[3] At the time of Tennessee's constitutional convention, Tennessee barely had the 60,000 free inhabitants required by the Northwest Ordinance to petition for statehood. William Robertson Garrett, Albert Virgil Goodpasture, *History of Tennessee: Its People and Its Institutions from the Earliest Times to the Year 1903*, p. 124 (rev. ed. 1903). Viewed on Google Books: https://books.google.com/books?id=HlUVAAAAYAAJ&printsec=frontcover&dq=History+of+tennessee:+it's+history&hl=en&sa=X&ved=0ahUKEwjA8IHgoevLAhXBWh4KHUUEDAMQ6AEIHzAA#v=onepage&q=History%20of%20tennessee%3A%20it's%20history&f=false (Last viewed on April 4, 2016).

[4] By 1800, the state still only had approximately a population 105,602, with a majority of its 13,893 black residents enslaved. Stanley J. Folmsbee, Robert E. Corlew, Enoch L. Mitchell, *Tennessee: A Short History*, p. 114 (1969).

[5] Garrett, p. 107.

for nearly another fifty years and were an emergent concept in American law at the time of statehood.

Furthermore, the meaning of punitive damages has changed. They once meant something very different than they do now. Rarely used, available only for some causes of action, and not for cases like breach of contract, unlimited punitive damages would certainly not be available to juries as a historical matter.

A cap on punitive damages is nothing more than a substantive change in the law. Far from being impermissible, legislation on this front is right in the legislature's wheelhouse. Legislatures already set substantive boundaries for juries. The legislature alters the scope of entitlement programs. The legislature sets criminal sentencing ranges. So may it cap punitive damages. There is even a particularized need for legislative involvement in this context given the Supreme Court's admonition that excessive punitive damages may violate substantive due process guarantees.

North Carolina, from where our constitutional right to trial by jury derives, has considered this very issue and rejected the plaintiffs' argument. Following North Carolina's precedent as this Court has done so many times before is the natural conclusion of precedent this Court has already laid in place.

B. Plaintiffs fail to show that punitive damages were a part of Tennessee practice in 1796.

Plaintiffs make two unconvincing arguments. First, they argue that the question of damages is historically one for the jury (plaintiffs' brief, pp. 13-14) and, second, punitive damages have "deep roots in Tennessee common law." (Plaintiffs' brief, p. 14). Both points prove that punitive damages are old but stop far short of demonstrating that they stretch back to 1796. The former argument also fails to address the *type* of damages available at the time, or that they were unlimited, or that a cap would not have been considered a matter of substantive law well within legislative purview.

The second argument raises the question: how deep are the roots? To be in existence "at the time of the adoption of the Tennessee Constitution" punitive damages would have to date to 1796. *Patten,* 426 S.W.2d at 506. Plaintiffs cite to the 1840 case of *Wilkins v. Gilmore,* 21 Tenn. 140, 141 (Tenn. 1840). (Plaintiffs' brief, at 14). Roots that reach 1840 may be deep but have not penetrated to the strata of statehood. That plaintiffs can do no better than present case law from 1840 goes a long way in disproving their own argument that punitive damages were established in 1796.

The supporting authority of *Silkwood v. Kerr-McGee,* 464 U.S. 238, 255 (1984) fares no better. Plaintiffs cite it for the proposition that punitive damages have long been a part of state law. (Plaintiffs' brief, p. 14). *Silkwood* was a U.S. Supreme Court case. It did not specifically address Tennessee. And much like the claim that punitive damages have "deep roots," this one

relies on uncritical acceptance of a vague observation. Punitive damages may have long been a part of state law, and still have not existed in Tennessee in 1796.

This does not appear to be the case. In *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900 (Tenn. 1992), this Court analyzed the history of punitive damages in Tennessee. This Court *began* in 1840, long after constitutional ratification.

> As early as 1840, this Court stated: "in an action of trespass the jury are 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 to the malicious conduct of the defendant, and the degree of insult with which the trespass has been attended."

Id. (quoting *Wilkins v. Gilmore*, 21 Tenn. 140, 141 (1840)). The 1840 date accords with the plaintiffs who cite to the very same case in describing punitive damages as having "deep roots," (plaintiffs' brief, p. 14), indicating that there is little disagreement that punitive damages did not exist in Tennessee prior. The necessary implication then is that punitive damages were unrecognized in Tennessee in 1796.

This Court then noted in *Hodges* that "shortly thereafter" it began to recognize the more modern notion that punitive damages "should operate to punish the defendant and deter others from like offenses," suggesting that even after 1840 the current notion of punitive damages were hardly a time-honored institution. *See Hodges*, 833 S.W.2d at 900 (quoting *Polk, Wilson & Co. v. Fancher*, 38 Tenn. 336, 341 (1858)). In fact, this Court characterized

the function of punishment and deterrence as "[t]he contemporary purpose," again in tacit recognition of their fluidity.[6] *See id.*

Later still, the doctrine of punitive damages continued to evolve. This Court next detailed the instances in which punitive damages were an appropriate remedy. *Id.* In a holding that undercuts the idea that punitive damages are protected as part of the "inviolate" right to trial by jury, this Court recognized the evolution of punitive damages, concluding that "whatever [the common law causes of action for them] may have once meant, by contemporary standards it is both vague ('social obligations') and overbroad ('gross negligence')." *Id.* at 901. This Court saw no problem in disrupting the common law of punitive damages, recognizing that "the time has come to reexamine, and modify, the manner in which punitive damages are awarded in Tennessee." *Id.* This perfectly logical result emerges from the well-recognized principle that punitive damages are an evolving, common law doctrine subject to change, even abolition.

This shows that in Tennessee, punitive damages were not available in 1796, and even when they emerged they were, as they are now, a somewhat floating concept. They simply were not deeply rooted at the time of statehood. They begin to appear in Tennessee in the middle of the 19th century in embryonic form, and were subject to modification in 1992 when *Hodges* was decided.

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[6] The changing meaning of the punitive damages doctrine is addressed more fully below.

Even if the right to trial by jury protects everything in existence in Tennessee common law at the time of statehood (and obstructs against any future innovation), it would still not matter because punitive damages were anything but an established practice in 1796. This Court thus acted legitimately when it altered them in *Hodges*. It did not infringe on a jury right. The jury right did not enshrine the common law of punitive damages as an inviolate right. So too the legislature may make alterations to them to adapt to the changing times.

C. Punitive damages were not well established in America at the time of statehood either.

The national historical record portrays a similar picture, even though it is only useful inasmuch as it tends to demonstrate what was accepted practice in Tennessee at the time. In an exhaustive history of punitive damages under Anglo-American law in his concurrence in *Pac. Mut. Life Ins. Co. v. Haslip*, Justice Scalia observed: "As recently as the mid-19th century, treatise writers sparred *over whether they even existed*." 499 U.S. 1, 25 (1991) (Scalia, J., concurring) (emphasis added). Justice Scalia concluded that punitive damages, whatever their origin, were "undoubtedly an established part of the American common law of torts" by the time the Fourteenth Amendment was ratified in 1868. *Id.* at 26. Implicit from this statement and his sources, all of which reflect ongoing debate about the dubious origins of punitive damages throughout the mid-19th century, is the inescapable conclusion that punitive damages would not have been regular practice in

Tennessee courts or anywhere else in 1796, even if Tennessee was of the highest legal sophistication for the time and reflected national practice.

While the majority opinion in *Haslip* included late 18th century sources, this in no way undercuts the argument. *Id.* at p. 15. According to the majority, "the first reported American cases" of punitive damages were in 1784 and 1791. *Id.* If the very first reported American cases were emerging relatively contemporaneously with Tennessee's founding, then it defies belief to think that this cutting edge concept would have become established in Tennessee's frontier courts by 1796. If this Court's historical analysis in *Hodges* is to be taken as authoritative, it would be another fifty years before they began to appear in Tennessee. *See Hodges*, 833 S.W.2d at 900. Punitive damages would certainly not have been considered an "inviolate" trial right in Tennessee in 1796.

D. The meaning of punitive damages has changed over time. Their current meaning is different from their historic meaning.

1. *Punitive damages were and are a changing doctrine.*

The contention that punitive damages must retain their alleged historic status fails to appreciate that punitive damages have had an amorphous and shifting meaning over time. While they have undoubtedly long been around in some form, what precisely punitive damages were, and were for has metamorphosed. *See Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n. 11 (2001) ("In any event, punitive damages have

evolved somewhat."); *Hodges*, 833 S.W.2d at 900 (noting the change in purpose). As exhaustively shown by *amici* Tennesseans for Economic Growth, *et al.*, for most of the country's legal history, punitive damages awards were rare, and went to serve different interests.

The broader concerns of society at large were not a concern. "When the Supreme Court, in the 19th century, upheld punitive damages based on their historical pedigree, it understood them to punish 'the wrong done to the plaintiff'—that is, to be imposed 'for the redress of private wrongs.'" Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: the Past, Present, and Future of Punitive Damages*, 118 Yale L.J. 392, 420 (Dec. 2008). Clearly this is no longer so as juries award punitive damages to address concerns that do not even involve the actual parties, like deterrence of others. *See Hodges*, 833 S.W.2d at 900 (calling this the "contemporary purpose"). One court has altogether disavowed punitive damages as currently constituted for want of a nexus to any historical analogue at tort. *See, e.g., Fay v. Parker*, 53 N.H. 342, 382, 397 (1973) (calling them a "false doctrine"--"The idea is wrong. It is a monstrous heresy."). Punitive damages are now a different creature.

The current purposes assigned to punitive damages (deterrence and sending a message to third parties) are relative newcomers to the law. The jury award in this case was in response to these sorts of appeals. Plaintiffs argued to award punitive damages thusly:

- "you are in a unique position ... to determine ...what message you send to a company that has clearly forgotten the purpose of what it's doing."
- "that's exclusively in your purview as to what you think would deter a company like Jackson National Life Insurance Company from doing this to another family."
- "You have plenty of proof in the record that talks about the resources of this company such that you can derive what number would punish them sufficiently so that no one else has to endure what Tamarin Lindenberg and her family did. ..." (R. 160: T. of plaintiffs' closing, PageID 2221-22).
- "You all are in such a good position to send a loud and clear message from this community that changes need to be made at Jackson National Life Insurance Company. ..." (*Id.* at 2227).

The trial court likewise told the jury that punitive damages had a purpose that did not even have anything to do with this defendant: "The purpose of an award for punitive damages is to punish a wrongdoer and to deter misconduct by the defendant *or others*." (*Id.* at PageID 2076) (emphasis added).

Punitive damages were, in this case, about interests unfamiliar to the purposes of punitive damages historically. *See* Colby, 118 Yale L.J. at p. 421. ("History, therefore, provides no basis" for contemporary function of punitive damages). So while demanding their historic due, plaintiffs fail to appreciate

what that entails. The plaintiffs asked for and got something that would not have been considered punitive damages in the first place.

Times have changed. "As a living and breathing thing, the law changes when necessary to serve the needs of the people." *Depuis v. Hand*, 814 S.W.2d 340, 345-46 (Tenn. 1991). Legislatures are entitled to respond. The plaintiffs have benefited from developments. They certainly have no reason to grouse on constitutional or historical grounds about a legislative response to a changing doctrine.

2. *Punitive damages now embrace new causes of action like breach of contract.*

Unsurprisingly, broadening the doctrine meant that punitive damages began to be awarded at an unprecedented rate, as shown by *amici* Tennesseans for Economic Growth, *et al.* This is a phenomenon unique to the United States, even among other English common law countries. The U.S. Supreme Court has observed that even with legislative limits, "punitive damages overall are higher and more frequent in the United States than they are anywhere else." *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495 (2008). Even today, punitive damages are only available in England for a narrow range of cases. *Id.* at 496. Positive or not, these changes are distinctly modern. A modern legislative corrective like a statutory is hardly unthinkable.

Loosed from their historic mooring, punitive damages have drifted into unfamiliar waters, crashing into causes of action in which punitive damages

were not previously thought available. This includes bad faith breach of contract, the cause of action in this very case. (Plaintiffs' brief, p. 5) ("This case arises from Jackson National's breach of contract and bad faith failure to pay the life insurance policy benefits. ..."). Justice O'Connor explains:

> Much of this is attributable to changes in the law. For 200 years, recovery for breach of contract has been limited to compensatory damages. In recent years, however, a growing number of States have permitted recovery of punitive damages where a contract is breached or repudiated in bad faith. *See, e.g., Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 686 P. 2d 1158 (1984). Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards. *See* RAND iv.

Haslip, 499 U.S at 62 (O'Connor, J., dissenting). The very awarding of punitive damages whatsoever for breach of contract cases is itself of modern vintage.

Whatever their historical antecedents under English common law, it is evident that punitive damages no longer resemble punitive damages under English common law. The meaning of the term is simply different. It is misguided to attribute historic sentiment to damage awards such as the one in this case.

To conclude, tinkering with terminology does not fundamentally alter the question. Punitive damages cannot be described as a "sacrosanct" (plaintiffs' brief, p. 19) and venerable tabernacle that would be sullied by legislative limits when plaintiff-friendly innovations were long ago smuggled behind the veil. Merely dubbing something "punitive damages" cannot

elevate developments that were not historically considered to be an aspect of the punitive damages doctrine to constitutionally protected status:

> The Court has, for instance, upheld the constitutionality of obscenity laws in large part on the basis of their long tradition of historical acceptance. But of course a state could not pass a law redefining "obscenity" to include any speech critical of the Governor and then rely on the cases upholding obscenity bans on historical grounds as an absolute justification for the new law. Even if we accept the basic claim that history justifies exempting obscenity from the rules that would otherwise govern the regulation of speech under the First Amendment, an "obscenity" ban that goes well beyond what was historically encompassed by that term - to an entirely different kind of speech - would have no claim to a valid defense grounded in history simply because it co-opts an old historical label.
>
> The same is true of punitive damages. As I have previously written, the fact that the historical institution of punitive damages has been around for centuries ... does not ... mean that any remedy that a modern court chooses to call "punitive damages" is automatically constitutional. If the courts completely change the fundamental nature of the institution of punitive damages, slapping the old label on them will not avoid all questions of constitutional infirmity.

Colby, 118 Yale L.J. at 419. The shifting sands of syntax can provide no foundation for an argument that purports to rest on the bedrock of historic fact.

So long as the legislature has not limited the availability of juries to litigants, or intruded into the role of the jury as a finder of fact, the legislature has not infringed on the right to trial by jury.

E. A cap on punitive damages is a substantive change in the law, well within legislative purview. This Court has approved of legislative changes to the common law.

A cap on damages is nothing more than a substantive change in the law. A cap "merely establish[es] the parameters within which a jury's fact-finding deliberations proceed." Randall R. Bovbjerg, Frank A. Sloan, and James F. Blumstein, *Public Policy: Valuing Life and Limb in Tort: Scheduling "Pain and Suffering."* 83 Nw. U.L Rev. 908, 973 (Summer, 1989). *See also Kirkland by & ex rel. Kirkland v. Blaine Cty. Med. Ctr.*, 4 P.3d 1115, 1120 (Idaho 2000) (cap on noneconomic damages does not violate Idaho's right to trial by jury because it does not infringe on ability of jury to decide cases).[7] The core confusion in the present argument rests with the view that a cap interferes with a traditional jury function. But the jury's constitutionally protected role is to make findings of fact, not assess penalties. *See Woods v. State*, 169 S.W. 558, 559 (Tenn. 1914) ("It is not essential that the jury assess the [criminal] punishment, unless the statutes of the State so direct."). To be

[7] The plaintiffs dismiss cases from other states as distinguishable because in Tennessee, "the right to a jury trial has always been sacrosanct." (Plaintiffs' brief, p 19). They do not mention *Kirkland*, which concerned a cap on noneconomic damages. But like Tennessee, Idaho's Constitution guarantees that the right to trial by jury "shall remain inviolate," 4 P.3d at 1117, n. 4, making it defy the hasty distinction. In fact, the *Kirkland* plaintiffs relied on the same line of reasoning as the plaintiffs here. The Idaho right protected "[t]he right to jury trial as it existed in common law and under the territorial statutes when the Idaho Constitution was adopted." *Id.* at 1118. The plaintiffs "correctly" noted that at the time of statehood, a jury's right to award compensatory damages was established. *Id.* It did not matter because the Idaho Court recognized that the legislature has the right to make substantive law, including abolish the common law and therefore, limit the remedies. *Id.* at 1119. Because the jury retained the ability to decide cases and act as the trier of fact, "[t]hat is all to which the jury entitles them." *Id.* at 1120.

sure, this includes finding fault and awarding damage, but within legislative boundaries, duly enacted.

Legislatures are not prohibited from limiting the penalties available. *See id. See Henley v. State*, 41 S.W. 352, 361 (Tenn. 1897) (trial right "did not mean that no law should in the future be passed to regulate such trials and prescribe in such cases, but that the right should not be denied the citizen, with its material and substantial benefit"). *See also Kirkland,* 4 P.3d at 1120 (punitive damages cap does not infringe on jury's right to decide cases). According to this Court, "it was never for a moment supposed," *Henley*, 41 S.W. at 361, that the common law would never change. *See also Hodge v. Craig*, 382 S.W.3d 325, 338 (Tenn. 2012) ("beyond reasoned argument" that the legislature may alter common law).

Common law remedies are no exception. "The State has complete control over the remedies of its citizens in the Courts. It may give new and additional remedy for a right already in existence—or may abolish old and substitute new remedies." *Collins v. East T., V. & G. R. Co.*, 56 Tenn. 841, 847 (Tenn. 1872). *See Morris v. Gross*, 572 S.W.2d 902, 905 (Tenn. 1978) (no right to a particular remedy; legislature may change them). The cap is a simple matter of substantive law lying at the very heart of the legislature's function.

The right to jury trial no more protects against substantive changes to remedies than it would against substantive changes to causes of action. As

both the defendant (defendant's brief, p. 17) and the Attorney General ably point out (Attorney General brief, pp. 9, 16), common law causes of action are subject to elimination altogether. In support of this point, *amicus* offers the following examples of the abolishment of common law: interspousal immunity, *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983); alienation, *Depuis v. Hand*, 814 S.W.2d 340, 345 (Tenn. 1991) (listing cases abolishing obsolete common law doctrine); negligent supervision of minor children, *Lavin v. Jordan*, 16 S.W.3d 362, 364 (Tenn. 2000). Were the common law not subject to revision, even, revocation, then any judgments that were rendered on a Sunday would be void. Yet the doctrine of *dies dominicus non est juridicus* was abolished by this Court in 2001. *See State v. King*, 40 S.W.3d 442, 448 (Tenn. 2001) ("There is no ... constitutional provision that prohibits judicial functions on a Sunday.").

Causes of action have been created by the legislature as well. Wrongful death did not exist at common law. *See Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 596 (Tenn. 1999). The defendant observes that statutes of repose are within legislative purview. (Defendant's brief, p. 18). So are statutes of limitations. *See Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) (citations omitted) (calling them "exclusively the creature of the legislative branch"). These are not thought to be impermissible legislative enactments, yet they too limit the availability of a plaintiffs' right to recover at tort, even on common law causes of action and even on damages that,

unlike punitive damages, clearly existed at the time of statehood and were awarded by juries.

It follows that if a common law cause of action can be abolished altogether, then the legislature "necessarily had the power to limit the damages recoverable for the cause of action." *Kirkland,* 4 P.3d at 1119 (if legislature can enact statutes of limitation, then it can pass other limitations on recovery). The establishment of a jury right did not mark the end of history. The fundamental role of a jury to make findings of fact, determine liability, and award damages is unchanged. The legislature is merely setting the substantive parameters in which juries are to operate, an action to which it is entitled.

F. Juries operate within parameters set by the legislature. This is a relationship familiar in the due process and criminal sentencing context.

This path is well trod. Two examples demonstrate how overwrought the constitutional concerns over caps truly are. The area of entitlements and due process provides one precedent, an analogy drawn directly by Bovbjerg, Sloan, and Blumstein. 83 Nw. U.L Rev. at 974. To prevail, a plaintiff must show a deprivation of a protected liberty or property interest. *See Board of Regents v. Roth*, 408 U.S. 564, 569-570 (1972). Property interests themselves are not "created by the Constitution," *id.* at 577, but by the states themselves. Procedural due process does not prohibit a legislative change in the nature or scope of an entitlement. *Atkins v. Parker*, 472 U.S. 115, 128-29 (1985). This is

a matter of substantive law. *See id.* States are free to modify the scope of the protected interest, but once they do, citizens cannot be deprived of that entitlement absent adequate procedural due process. *See Cleveland Bd. of Educ. v. Laudermill,* 470 U.S. 532, 541 (1985). There is no basis for a due process hearing to determine facts when the nature or scope of the entitlement changes by the terms of the legislation. *See Atkins*, 472 U.S. at 130-31. So long as the change is prospective, the legislature is perfectly free to alter, amend, or revoke the interest altogether. It is no different with a cap on damages.

The due process field provides a cogent template for resolving the plaintiffs' constitutional concern. This Court long ago recognized that the State has "complete control over the remedies of its citizens in the Courts," and that so long as the legislature does not alter a vested right it may abolish old remedies. *See Collins*, 56 Tenn. at 847. *See also Morris,* 572 S.W.2d at 905 (same, legislature may not abolish a remedy that would affect substantive rights of pending litigants). Like entitlements, the legislature may alter those remedies prospectively, but not take them away once vested absent due process. With a cap on damages the legislature has substantively altered the scope of remedies, just like an adjustment to an entitlement. While a plaintiff has a right to expect juries to find facts and award damages within those parameters, and certainly the legislature may not affect pending litigation,

that plaintiff has no right to object to a limitation on a remedy passed prior to the commencement of the action.

The interest in legislative involvement weighs particularly heavily when, as with punitive damages, a component of punishment is involved. *See Cooper Indus.*, 532 U.S. at 432 (comparing punitive damages to criminal punishment). Not only has the Supreme Court and this Court shined its favor on legislative change in the due process setting, it has conversely held that jury awards of punitive damages may be so excessive as to violate the Fourteenth Amendment's *substantive* due process protections, *see B.M.W. of N. Am. v. Gore*, 517 U.S. 559 (1996), setting the argument for unrestrained punitive damages based on the Tennessee Constitution on a collision course with the U.S. Constitution. Indeed, in evaluating a challenge to punitive damages, one of the factors the courts are to consider is how severely analogous criminal behavior is punished by the politically accountable branch. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003). A cap on a form of punishment is uniquely within the special sphere of competence and accountability of the legislature. Far from prohibited, the legislature's involvement is quite necessary. The Supreme Court's procedural due process cases show how substantive boundaries set by the legislature do not offend a procedure or fact finding prerogative of the jury.

The second precedent available for this Court is criminal sentencing. At the time of our Nation's founding, the punishment was closely linked to

the crime itself. Under the common law, the punishment was fixed, either by common law or statute. *See Apprendi v. New Jersey*, 530 U.S. 466, 479-480 (2000); *Jones v. United States*, 526 U.S. 227, 244-45 (1999) (noting the norm of fixed sentences in felony cases). It was the jury who made the determination of guilt, effectively sentencing the defendant. The judge simply imposed the sentence. He had virtually no authority to alter it. *Apprendi*, 530 U.S. at 479 ("As Blackstone, among many others, has made clear 'the judgment, though pronounced or awarded by the judges, is not their determination or sentence. ...").

The modern practice is quite different. Now felony penalties are set by the legislature in predetermined ranges. *See* Tenn. Code Ann. §§ 40-35-111, 112 (LexisNexis 2015). Not only must sentences fall within the legislatively determined range, it is the now the judge, not the jury, who (except in capital cases) must select the actual sentence within the legislatively determined range. *See* Tenn. Code Ann. § 40-35-203(a) (LexisNexis 2015). In fact, the revision of the entire Tennessee Criminal Code replaced common law offenses with statutory offenses to better accomplish the legislatively desired goals of punishment. Tenn. Code Ann. § 39-11-102(a), Sent. Comm'n Comments (LexisNexis 2015). This Court has long rejected the idea the legislatures cannot set criminal penalties without running afoul of the right to trial by jury. *See Woods*, 169 S.W. at 559 ("The power to declare what shall be the

appropriate punishment for an ascertained crime belongs solely to the legislature.")

A legislature that can set sentencing ranges may set a punitive damages cap. A cap on damages could fairly be characterized as the civil equivalent to sentencing ranges. As noted above, the Supreme Court has even recognized that punitive damages are akin to criminal sentencing. *See Cooper Indus.*, 532 U.S. at 432. Legislatures are free to set sentencing ranges, or even mandatory minimum sentences, so long as the jury makes the requisite findings of fact that trigger the mandatory minimum. *See Jones*, 526 U.S. at 230. The Supreme Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *United States v. Booker*, 543 U.S. 220, 233 (2005) (citing *Apprendi*, 530 U.S. at 481). If the legislature may impose ranges for *felony crimes* upon juries when the loss of personal liberty is at stake, then it most certainly may impose caps on punitive damages in civil actions such as breach of contract. A cap setting the range of civil penalties for the jury to utilize is harmonious with the time honored relationship between legislatures and juries.

G. The North Carolina Supreme Court's favorable treatment of the constitutionality of punitive damages should be given special precedential weight.

The defendant takes special care to single out the North Carolina Supreme Court's rejection of the same constitutional argument against punitive damages caps in *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 10 (N.C.

2004). (Defendant's brief, pp. 14-16). The defendant has good reason. Tennessee's constitutional origins are inextricably interwoven with North Carolina's. While the defendant capably demonstrates the precedential weight this Court has attributed to North Carolina's jurisprudence, its importance is magnified by a fuller examination of the relationship between the two states as set forth below.

Tennessee and North Carolina have long been intertwined. In May of 1772, four years before the Declaration of Independence, a group of settlers, disgusted with decades of royalist corruption and official abuse, fled from neighboring colonies, primarily North Carolina.[8] They settled along the Watauga River near present day Elizabethton, Tennessee, and, unsure as to whether they were within the bounds of any organized government, executed a document known as the Watauga Compact.[9] The Compact set forth the terms of a rudimentary government, thus whelping the first incarnation of self-governance in Tennessee.[10]

The Watauga Compact has been described somewhat debatably as "the first written constitution (1772) to be prepared on American soil and adopted by native Americans, who sought to remove themselves from the rule of

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[8] Stanley J. Folmsbee, Robert E. Corlew, Enoch L. Mitchell, *Tennessee: A Short History*, pp. 52-54 (1969).

[9] *Id.* at 52-53, 56-57.

[10] Garrett, p. 55.

British Colonial Governors."[11] *Cooper v. Rutherford County*, 531 S.W.2d 783, 786-87 (Tenn. 1975) (Henry, dissenting). Fearing for their fragile state following the outbreak of the American Revolution, the Wataugans later submitted their settlement for annexation by North Carolina.[12] These early Tennesseans subsequently participated in the drafting of the North Carolina Constitution in 1776, with four (4) of them actually signing it, including such luminaries from Tennessee history as John Sevier.[13]

This point bears further emphasis. The North Carolina Constitution has special importance not just because Tennessee's Constitution in many ways derives from North Carolina's, but also because Tennessee's founders helped draft the North Carolina Constitution. Tennessee has influenced North Carolina in kind. The resultant two state constitutions could fairly be described as an act of cross-pollination from bees of the same hive.

Tennessee was physically divided from North Carolina as a separate territory on February 25, 1790, as a condition set by Congress before North

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[11] To credit the Watauga Compact as the "first American Constitution" is a common historical observation, one echoed throughout the literature and by, among others, Theodore Roosevelt in his seminal work, *The Winning of the West.* More recent histories criticize "the assertion that the Wataugans exercised full rights of statehood by emphasizing the temporary nature of their agreement." Lewis L. Laska, *The Tennessee State Constitution,* p. 2 (1990). This debate is unlikely to ever be resolved satisfactorily. The actual Watauga Compact has been lost to posterity and its exact contents referenced only obliquely in the historical record. Folmsbee, pp. 56-57.

[12] *Id.* at p. 61. Laska, p. 2.

[13] Folmsbee, p. 61. Laska, p. 2.

Carolina could join the Union.[14] Following the American Revolution, no less an historical figure than President George Washington signed an act creating a territorial government for the southwestern lands of what was formally North Carolina but was soon to become Tennessee.[15] Tennessee was later to submit in its official bid for statehood a proposed constitution that began with recognition of this history, declaring their intention to act consistently with the U.S. Constitution and "the act of Cessation of the State of North Carolina" in 1796. Tenn. Const. pmbl. (1796).

Tennessee's constitutional history is likewise tightly related to North Carolina.[16] In drafting the proposed constitution, the draftsmen included a Declaration of Rights which "has remained virtually unchanged for the past two centuries," *Martin v. Beer Bd.*, 908 S.W.2d 941, 949 (Tenn. Ct. App. 1995) (citing *Waugh v. Slate*, 564 S.W.2d 654, 657 (Tenn. 1978)). Tennessee's Declaration of Rights was drafted in three days, suggesting that little thought accompanied the process other than to incorporate provisions found in other state constitutions. *See Martin,* 908 S.W.2d at 948, n. 12. The Declaration of Rights was the longest section of the proposed constitution and was almost entirely taken from North Carolina's.[17] This is the same

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[14] Garrett, p. 103.

[15] *Id.*

[16] *Id.* at 124. Laska, at p. 2.

[17] *Id.* at p.5.

constitution that, as shown previously, Tennesseans like John Sevier themselves aided in crafting. So not without cause this Court was referring to North Carolina as "our parent State" as early as 1833. *Garner v. State,* 13 Tenn. 159, 171 (1833).

For good reason then this Court has long placed great precedential weight on North Carolina's decisions. Never is this more correct than when interpreting Tennessee's constitutional right to trial by jury. *See Garner,* 13 Tenn. at 176 ("The trial by jury is the same that was handed down to us from the State of North Carolina by her act of cessation in the year 1789. ..."). Employing very similar language as Tennessee's, North Carolina's original constitution from 1776, and continuing until today, reads: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and violable." *Rhyne,* 594 S.E.2d at 10.

The two states provide the same protections, despite the minor difference in verbiage. In Tennessee, the right has "been interpreted to be a trial by jury as it existed and was in force and use according to the course of the common law under the laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution of 1796." *Patten v. State,* 426 S.W.2d 503, 506 (Tenn. 1968). Relying on *Patten*, this Court wrote, "Tennessee, however, differs from all other states in focusing upon the common law of North Carolina to interpret the jury trial guarantee under the

State Constitution." *Helms v. Tennessee Dep't of Safety*, 987 S.W.2d 545, 549 (Tenn. 1999). When a Tennessee constitutional provision is largely modeled on another state's, this Court accords special weight to that state's jurisprudence on the subject. *See State v. Marshall*, 859 S.W.2d 289, 292 (Tenn. 1993). When it comes to Tennessee's constitutional right to trial by jury guaranteed by article 1, section 6, this Court even very recently reaffirmed the significance of North Carolina's jurisprudence. *See Young v. City of LaFollette*, No. E2013-00441-SC-R11-CV, 2015 Tenn. LEXIS 695 (Tenn. Aug. 26, 2015).

As the defendant observes (defendant's brief, p. 15), North Carolina has resolved this issue, considering the very same claims presented by the plaintiffs. *See Rhyne,* 594 S.E.2d 1. North Carolina capped punitive damages with a provision remarkably similar to Tenn. Code Ann. § 29-39-104(a)(5). Whereas Tenn. Code Ann. § 29-39-104(a)(5) caps an award of punitive damages at the greater of either twice times the amount of compensatory damages or $500,000, North Carolina capped them at the greater of either thrice the amount of damages or $250,000. *Rhyne*, 594 S.E.2d at 6. The North Carolina Supreme Court held that, irrespective of the "established place" punitive damages have in North Carolina common law, "it is well settled that North Carolina common law may be modified or repealed by the General Assembly, except [for] any parts of the common law which are incorporated in our Constitution." *Id.* at p. 8 (citations and quotations omitted). Punitive

damages are not about compensating the plaintiff, so they are not property. *Id.* at pp. 9, 12. Furthermore, the greater right to limit or abolish common law doctrine includes the lesser right to limit recovery on those actions. *Id.* at 9.

This Court should endorse this logic on the grounds of shared constitutional history, but also on its strength. This Court has already erected the architecture undergirding the *Rhyne* decision. As in North Carolina, punitive damages in Tennessee are not about compensating the victim. *See Huckeby v. Spangler*, 563 S.W.2d 555, 558-59 (Tenn. 1978) ("In this state, the theory of punitive damages is not to compensate an injured plaintiff. ..."). Rather, "[t]hey refer to the nature of the defendant's conduct rather than to the injury thereby inflicted." *Breault v. Friedli*, 610 S.W.2d 134, 136 (Tenn. Ct. App. 1980) (citing *Inland Container Corp. v. March*, 529 S.W.2d 43 (Tenn. 1975)). Thus, this Court has long recognized that "punitive damages are not recoverable as a matter of right, but rest within the sound discretion of the trier of fact." *Huckeby*, 563 S.W.2d at 558 (citing cases). Also as in North Carolina, this Court has repeatedly supported the ability of the legislature to alter the common law and even abolish it. *See Lavin*, 16 S.W.3d at 268. If it can be abolished and altered as a matter of substantive law, it necessarily follows that the amount of recover can be limited. This Court should extend its existing rulings to the next step and, as in *Rhyne*, find that the right to a jury trial in Tennessee would not include punitive damages.

It is respectfully submitted that this Court should continue its longstanding practice of ruling in accordance with North Carolina constitutional law. This Court has been consistent in analyzing the right to trial by jury by focusing upon North Carolina's rulings. *See Helms*, 987 S.W.2d at 549. It is not suggested that this Court is bound by the *Rhyne* decision; naturally, this Court always maintains its "authority as 'the court of last resort' in interpreting the Constitution of Tennessee." *Marshall*, 859 S.W.2d at 295. And such autonomy should remain. But reaching a different result from North Carolina regarding the right to trial by jury would represent a sharp departure from this Court's past practice. Finding that punitive damages are not a protected jury trial right is fully in keeping with this Court's longstanding recognition of the close constitutional relationship with North Carolina, and prior precedent regarding punitive damages.

II. A CAP DOES NOT VIOLATE SEPARATION OF POWERS. IT IS WELL WITHIN THE ROLE OF THE LEGISLATURE TO SET THE PARAMETERS FOR A JURY REMEDY.

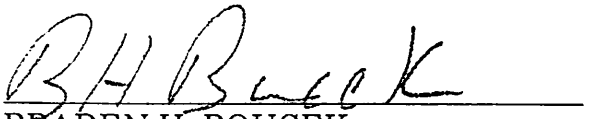
Resolution of the first question largely resolves this one. Even accepting the dubious premise that juries are part of the judicial branch (Attorney General brief, p. 26), a cap on punitive damages is not an objectionable encroachment on the judiciary. This Court has reiterated that the legislature has "plenary power" to alter the common law and "definitively set boundaries on rights, obligations or procedures," unless there is a constitutional limit in play, *Hodge*, 382 S.W.3d at 338, an admonition that makes no sense if this was a freestanding right. If a cap is nothing more than a substantive change in the law that juries are obliged to operate within, then the legislature has acted within its proper boundaries.

CONCLUSION

This Court should accept the questions certified by the trial court. This Court should rule that Tenn. Code Ann. § 29-39-104 does not violate the Tennessee Constitution, or violate separation of powers.

Dated: April 14, 2016

Respectfully submitted,



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ADDENDUM

TRIAL BY JURY

Sec. 6. Trial by jury – Qualifications of jurors.

"That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."

Tenn. Const. Art. I, § 6 (LexisNexis 2015).

DAMAGES CAP

29-39-104. Punitive Damages.

(a) In a civil action in which punitive damages are sought:

....

(5) Punitive or exemplary damages shall not exceed an amount equal to the greater of:

(A) Two (2) times the total amount of compensatory damages awarded; or

(B) Five hundred thousand dollars ($500,000).

Tenn. Code Ann. § 29-39-104 (LexisNexis 2015).

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, by the following means:

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