No. SC98977

In the Missouri Supreme Court

MARINA ORDINOLA VELAZQUEZ,
Plaintiff-Appellant,

v.

UNIVERSITY PHYSICIAN ASSOCIATES, et al.,
Defendants-Respondents,

STATE OF MISSOURI,
Intervenor

Appeal from the Circuit Court of Jackson County, No. 1716-CV20186
The Honorable John M. Torrence, Circuit Judge

Brief of *Amici Curiae* the Missouri Organization of Defense Lawyers and the Missouri Hospital Association in Support of Respondents-Appellants

Timothy C. Sansone, No. 47876
SANDBERG PHOENIX
& VON GONTARD P.C.
600 Washington Ave., 15th Floor
St. Louis, MO 63101
(314) 231-3332
tsansone@sandbergphoenix.com

John M. Reeves, No. 59634
Lead Counsel
REEVES LAW LLC
3703 Watson Road
St. Louis, MO 63109
(314) 775-69685
reeves@reeveslawstl.com

James R. Layton, No. 45631
TUETH KEENEY COOPER MOHAN
& JACKSTADT, P.C.
34 N. Meramec Ave., Suite 600
St. Louis, MO 63105
(314) 880-3600
jlayton@tuethkeeney.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

INTERESTS OF AMICI CURIAE

I. Missouri Organization of Defense Lawyers

The Missouri Organization of Defense Lawyers ("MODL") is a professional organization of over 1,300 attorneys involved in defending civil litigation, including healthcare providers like those involved in this case. MODL's goals include ensuring that parties in our civil justice system receive fair and impartial treatment by juries, the judiciary, and the legislature. To that end, MODL members work to advance and exchange information, knowledge, and ideas among themselves, the public, and the legal community to enhance the standards of trial practice throughout the state.

MODL's member attorneys devote a substantial amount of their professional time to representing defendants in civil litigation, including individual Missouri citizens. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients, so as to maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

II. Missouri Hospital Association

Since its creation in 1922, the Missouri Hospital Association ("MHA") has grown from 50 to more than 140 member hospitals. As a nonprofit

membership association, MHA represents every acute care hospital in the state, as well as most of the federal and state hospitals and rehabilitation and psychiatric care facilities.

Dedicated to sustaining an environment that helps hospitals serve their communities, MHA zealously advocates at the state and federal level to help shape public policy for the health care community. It supports policies that improve health and healthcare in the state, and provides data, decision-support tools and operational resources to help hospitals and health systems deliver care. As its member hospitals have broadened their scope to embrace the continuum of healthcare services, MHA also has expanded its services to members' needs and expectations throughout its history. In addition to representation and advocacy on behalf of its members, the association seeks to educate its members, the public, and the media, as well as legislative representatives, about healthcare issues.

III. The Amici's Interests in the Case

MODL and MHA support the position of the respondent healthcare providers in this matter. Healthcare providers, who comprise MHA's sole constituency and a major portion of MODL's client base, are increasingly subjected to large and unwarranted awards of noneconomic damages. Both organizations therefore see the standard by which such awards are made as a

significant issue and a growing legal threat. Consequently, the amici have a strong interest in ensuring judicious limits are placed on such awards, and that courts review such awards consistent with the manner in which the legislature intended. Amici's interest in the case is further explained in the introduction to the Argument section.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Marina Ordinola Velazquez ("Velazquez") appeals from the trial court's denial (D41:4-5) of her challenge to the constitutionality of Mo. Rev. Stat. §538.210's[1] cap on noneconomic damages as violating her right to a jury trial under Mo. Const. Art. I §22(a), after a jury returned a verdict in her favor on her claims against Defendants-Respondents[2] University Physician Associates, et al. (D41:3). Defendants cross-appeal, raising several non-constitutional challenges to the trial court's judgment. Velazquez initially appealed to the Missouri Court of Appeals, Western District. That court correctly recognized that Velazquez has made a timely, "real and substantial" constitutional challenge to §538.210. (Apx.A15)[3]. Consequently, that court lacked jurisdiction and entered an order transferring the entire matter to this Court. (Apx.A15). This Court has exclusive appellate jurisdiction over this case. Mo. Const. Art. V §3.

---

[1] All references to §538.210 are to the version that went into effect on August 28, 2015. All other statutory references are to the most recent version of the Missouri Revised Statutes.

[2] The jury found no fault against Defendant Dr. Susan Mou.

[3] For this Court's convenience, in the appendix to this brief amici have included a copy of the Western District's opinion transferring this matter to this Court.

ARGUMENT

I. Introduction

This appeal is about far more than tort reform and legislative caps on statutory damages—it goes to the very heart of the jury's role as a factfinder and a state legislature's authority to amend, modify, or abolish altogether common law causes of action and replace them with new statutory causes of action.

This Court has concluded that "the right to jury trial protected by article I, section 22(a) 'is that which existed at common law before the adoption of the first constitution' in 1820." *Overbey v. Chad Franklin Nat'l Auto Sales North, LLC*, 361 S.W.3d 364, 375 (Mo. 2012), quoting *State ex rel Diehl v.* O'Malley, 95 S.W.3d 82, 84 (Mo. 2003).[4] But the 1945 Missouri constitution also recognizes that the General Assembly's "power is plenary, so long as it follows constitutional procedure." *State ex rel. K.C. v. Gant,* 661 S.W.2d 483, 485 (Mo. 1983), quoted with approval, *State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d 589, 592 (Mo. 2012). That plenary power includes power over the legal elements and remedies of common law causes of action. The

[4] This Court has not articulated a rationale for construing the statement in 1945 that the "inviolate" right to trial by jury "as heretofore enjoyed" is the right as it existed in 1820, rather than the right as it existed in 1945. The date difference matters here only insofar as it could affect the collateral consequence of a decision in appellant's favor here on the validity of the workers' compensation system, as discussed pp. 30-35, *infra.*

right to a jury trial is procedural—that is, it provides the method by which to resolve any disputed material facts in a civil lawsuit. In other words, civil litigants are entitled to have twelve people decide *what* the ultimate facts are in a cause of action. But a jury has never had the authority, under the common law, to determine the *legal consequences* of its factual determinations. That is a job that has always been reserved for the courts, which apply the substantive elements and remedies of the cause of action to the jury's factual determinations. The substantive elements and remedies, furthermore, are determined by either the common law itself or the legislature pursuant to its plenary power to modify or abolish the common law. *See Dodson v. Ferrara*, 491 S.W.3d 542, 570-71 (Mo. 2016) (Fischer, J., concurring).

This Court has correctly recognized that, when it comes to statutory causes of action, statutory caps on noneconomic damages do not interfere with a jury's factfinding mission. *See id.* at 570-71; *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. 2012). This is because the General Assembly, as the legislature, has the authority to define the substantive legal remedies available under statutory causes of action. In other words, according to this Court's precedents, the substantive remedies available on a statutory cause of action are a matter of *law* for the General Assembly to promulgate and for the courts to apply, and not a matter of *fact* for the jury to decide. But there is

an outlier in this Court's jurisprudence: *Watts v. Lester E. Cox Medical Ctrs.*, 376 S.W.3d 633, 650 (Mo. 2012), in which the Court held that the substantive remedies for common law causes of action are matters of *fact* for the jury to decide, not matters of *law* for the General Assembly to promulgate and for the courts to apply.

This distinction cannot stand. Either the substantive remedies available in common law causes of action and statutory causes of action are both matters of law, or neither of them are. There should be no question that the statutory caps at issue here are constitutional, as "[t]o hold otherwise would be to tell the legislature it could not legislate; it could neither create nor negate causes of action, and in doing so could not prescribe the measure of damages for the same." *Sanders*, 364 S.W.3d at 205. So it is impossible to square this holding with *Watts'* holding that setting statutory caps on damages in common law causes of action is somehow interfering with a jury's factual determinations. So long as the reasoning of *Watts* remains in place, Missouri courts will continue to confuse the *process* by which civil claims are resolved—which is what a jury is for—with the *substance* of the claims and their remedies—which is for the General Assembly to establish and the courts to apply.

II. The right to a jury trial guarantees the procedure by which to resolve disputed factual issues, be they at the common law or under a statute.

A. A jury plays no role in determining the legal consequences of its factual findings.

There is a difference between "the judicial process by which [civil] claims are determined [and] the substance of the claims themselves." *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 142 (Mo. 2005). While "the legislature is free to establish the substance of a claim…it is not free to establish a procedure for adjudicating that substantive claim if the procedure contravenes the constitution." *Id.* Thus, a legislature may not bar a jury from resolving disputed facts in any claims that are analogous to claims available at common law. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 86 (Mo. 2003). But this does *not* bar the legislature from altering either the substantive elements or the remedies on either common law claims or on statutory claims that are analogous to common law claims. In other words, "[w]hile '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.'" *Schmidt v. Ramsey*, 860 F.3d 1038, 1046 (8th Cir. 2017) (quoting *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989)).[5]

[5] While federal courts have never decided whether the Seventh Amendment applies to the states via the Fourteenth Amendment, *see Schmidt*, 860 F.3d at 1045, and this Court has ruled that the Seventh

The New Mexico Supreme Court recently recognized this principle. It held "that the constitutional right to trial by jury applies in cases brought under a [statute analogous to a common law claim]." *Siebert v. Okuyn*, – P.3d –, 2021 WL 959248 at *3 (N.M. March 15, 2021). At the same time, it concluded that a statutory cap on damages "does not violate the right to trial by jury because the cap does not invade the province of the jury. Rather, this statutory damages cap merely gives legal consequence to the jury's determination of the amount of the verdict." *Id.* "[T]he 'inviolate' guarantee of a jury trial simply means that the jury right is protected absolutely in cases where it applies; the term does not establish what that right encompasses." *Id.* at *8 (internal quotation marks omitted).

The New Mexico Supreme Court further concluded "that the constitutional provision of an 'inviolate' right to jury trial does not 'limit[ ] the legislature's authority to define, as a matter of law, the substantive elements of a cause of action or the extent to which damages will be available in that action.'" *Id.* at *12 (quoting *Horton v. Oregon Health & Sci. Univ.*, 376 P.3d 998, 1040 (Or. 2016)). Finally, the court observed that "[o]f the thirty jurisdictions to consider whether a statutory cap on damages violates the

---

Amendment "does not apply to the states," *O'Malley*, 95 S.W.3d at 84, this Court has also ruled that the Seventh Amendment "invites the same kind of historical analysis as the Missouri provision [guaranteeing the right to a jury trial]." *Id.*

constitutional right to trial by jury, twenty-four have upheld such caps….Sixteen of these jurisdictions analyzed constitutional provisions of an 'inviolate' right to trial by jury." *Id.* at *12 n.3 (listing cases).

Quite simply, there is no substantive distinction between the procedure used to resolve factual disputes in a common law claim and the procedure used to resolve factual disputes in a statutory claim. Both involve a jury determining the facts, but in neither case does the jury apply the law to the facts it has determined. *Watts's* holding is to the contrary, and should be overruled.

B. To the extent Velazquez relies on the Kansas Supreme Court's decision in Hilburn, *that court misapplied federal caselaw discussing the Seventh Amendment right to a jury trial.*

In her opening brief (Br.22-26), Velazquez quotes extensively from the Kansas Supreme Court's opinion in *Hilburn v. Enterpipe, Ltd.,* 442 P.3d 509 (Kan. 2019), as grounds for claiming that, while a state legislature may abolish or abrogate the common law, this power does not extend to imposing statutory caps on damages in common law claims where the state constitution enshrines the right to a jury trial as it was understood under the common law. *Hilburn* concluded that what may have been a common-law right to jury trial (*i.e.*, on the day before ratification of the state constitution guaranteeing the right to a jury trial) was no longer a mere common-law

right from ratification onward. *Id*. at 516.[6] Comparing the Kansas Constitution's guarantee of a jury trial to the U.S. Constitution's guarantee of a jury trial under the Seventh Amendment, the court in *Hilburn* ruled that while the "common law is not immutable, but flexible," the fact remained that the court was "dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791." *Id*. at 1137 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935)). The Kansas Supreme Court concluded from this rationale that, according to the Supreme Court of the United States in *Dimick*, the Seventh Amendment prohibits imposing statutory caps on jury verdicts in the context of common law causes of action, as doing so would take away the jury's factfinding abilities. *See id*. Nothing could be further from the truth; *Dimick* says no such thing.

In *Dimick*, the plaintiff brought a personal injury action against the plaintiff based on diversity jurisdiction. 293 U.S. at 475. After the jury returned a verdict in the plaintiff's favor for $500, the plaintiff moved for a new trial, alleging the damages awarded were inadequate. *Id*. at 475-76. The

---

[6] In Kansas, "The right of trial by jury shall be inviolate." Kan. Const. Bill of Rights §5. While this provision does not have the "as heretofore enjoyed" language contained in Mo. Const. Art. V §22(a), the Kansas Supreme Court has ruled that it "preserves the jury trial right as it historically existed at common law when our state's constitution came into existence." *Hilburn*, 442 P.3d at 514 (internal quotation marks omitted).

trial court then declared it would grant a new trial "unless [the defendant] would consent to an increase of the damages to the sum of $1,500." *Id*. at 476. The defendant consented to the increase of damages to $1,500, and the trial court denied the plaintiff's motion for a new trial. The Supreme Court ruled that the trial court could not condition the granting of a new trial on the defendant's refusal to consent to a court-imposed increase in damages. *Id.* at 484-88. "[W]here the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict…." *Id*. at 486. "[H]ow can it be held," the Court continued, "with any semblance of reason, that the court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication?" *Id*. at 486-87.

In response to this argument, the defendants tried to argue that "the common law is susceptible of growth and adaption to new circumstances and situations," and that such a principle applied in their situation as a further development of the common law. *Id*. at 487. The Court rejected this notion outright, and in such a context noted, "we are dealing with a constitutional provision [that is, the Seventh Amendment] which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in

1791." *Id.* Under those rules, the judge could not serve as a factfinder, and consequently could not arbitrarily increase the amount of damages based on his subjective disagreement with the jury's assessment of the facts. *See id.* at 487-88.

The situation in *Dimick* is a far cry from the situation here, where the trial court did *not* substitute *its own judgment* on the damages for the jury's determination; rather, the court simply applied a statutory cap set by the legislature on the amount of damages. Stated another way, the trial court here did not arbitrarily interfere with the jury's factfinding based on *its subjective disagreement* with how the jury interpreted the facts. Rather, it applied the relevant statutory caps set by the legislature, as a matter of law, to the verdict. "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts." *Id.* at 486. Section 538.210 sets forth, as a matter of law, the maximum amount of noneconomic damages a plaintiff may recover, regardless of what the particular facts of the case may be. It is in no way a substitution of the trial judge's own personal conclusions about the facts for that of the jury. Indeed, as the next section discusses, not a single federal court has ever interpreted the Seventh Amendment or *Dimick* in the manner put forth by Velazquez here and the Kansas Supreme Court in *Hilburn*.

C. *The federal appellate courts have unanimously rejected the view of the Seventh Amendment put forth by this Court in* Watz, *the Kansas Supreme Court in* Hilburn*, and Velazquez*.

In concluding that the General Assembly lack authority to alter the substantive remedies of common law claims, this Court in *Watts* relied in part on the rationale of the Supreme Court of the United States in overruling a federal statute that had given the judge the right to determine damages in the first instance. *Watts*, 376 S.W.3d at 643-44 (citing and quoting with approval *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). The copyright law at issue in *Feltner* imposed statutory caps totaling $20,000 per incident of copyright infringement if the incident was unwilful, and statutory caps totaling $100,000 per incident if the incident was willful. *Feltner*, 523 U.S. at 343-44. But the law also provided that the court, and not the jury, was to assess the factual issue of damages in the first place. *Id*. at 344-47. The Court ruled this was impermissible, holding that "if a party so demands, a jury must determine the actual amount of statutory damages under [the Copyright Act] in order to preserve the substance of the common-law right of trial by jury." *Id*. at 355 (internal quotation marks omitted), *quoted in Watts*, 376 S.W.3d at 643-44.

This Court in *Watts* took the above language to mean that the Supreme Court of the United States had invalidated statutory caps under the Seventh Amendment. *See id*. But the case's subsequent procedural history shows that

this is *not*, in fact, what the Court decided. On remand, a jury trial took place on the claimed damages, and the jury found that the defendant willfully violated the statute multiple times, and awarded it damages of $72,000 per each incident. *Columbia Pictures Television, Inc. v. Krypton Bdcst. of Bir., Inc.*, 259 F.3d 1186, 1194-95 (9th Cir. 2001). The Ninth Circuit, in upholding this verdict, noted that the award was "well within the statutory range for willful infringement." *Id*. at 1195. Had the Supreme Court invalidated the statutory caps in their entirety, the Ninth Circuit would never have made reference to the statutory range for willful infringement in the first place.

In 2017, five years after *Watts*, the Eighth Circuit came to a similar conclusion when it rejected this Court's interpretation of *Feltner* as invalidating statutory caps on damages. *See Schmidt*, 860 F.3d at 1045-46. The plaintiff in *Schmidt* brought a malpractice case against the defendant governed by Nebraska law. *Id*. at 1042-45. Nebraska law imposed caps on damages arising out of malpractice cases. *Id*. at 1043; Neb. Rev. Stat. §44-2801.[7] Similar to this Court in *Watts*, the plaintiff in *Schmidt* argued that *Feltner* amounted to invalidating all statutory caps on damages.

[7] By the time the plaintiff brought his federal diversity lawsuit, the Nebraska Supreme Court had already ruled that statutory caps do not violate the "inviolate" right to a jury trial under the Nebraska Constitution. *See Gourley ex rel. Gourley v. Neb. Methodist Health Sys.*, 663 N.W.2d 43, 75 (Neb. 2003), *cited in Watts*, 376 S.W.3d at 650 (Russell, J., dissenting).

The Eighth Circuit was "not persuaded" by this argument. *Schmidt*, 860 F.3d at 1045. "The statute in *Feltner*," it continued, "allowed a judge to determine damages in the first instance. Because that role had historically belonged to juries the statute collided with the Seventh Amendment." *Id.* By contrast, under the Nebraska statute "[t]he jury…performed its historical role by finding liability and assessing damages. The Nebraska cap imposed an upper legal limit on that jury determination, and the district court applied that limit as a matter of law." *Id.* (internal citations omitted). Consequently, [t]he Seventh Amendment is not violated by a state-law cap on a jury's damages award." *Id.* The Third, Fourth, Fifth, and Sixth Circuits all agree with the Eighth Circuit's rationale. *See Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Learmonth v. Sears*, 710 F.3d 249 (5th Cir. 2013); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005).

In sum, *Watts'* reliance on *Feltner* as grounds for concluding that statutory caps interfere with the jury's factfinding mission is misplaced. Every single federal appellate court to consider the matter has concluded that such caps are no more than alterations of the substantive remedies available under a cause of action. As such remedies are a matter of law for the courts to impose, they do not interfere with one's right to a jury trial. This is all the more reason for this Court to overrule *Watts*.

III. The right to jury trial does not carve out perpetual exceptions to the authority of the Missouri General Assembly to modify and even abolish common law causes of action and substitute new ones in their place.

A. The Missouri General Assembly is vested with the authority to modify common law causes of action, and to abolish them and substitute new ones in their place..

As Judge Wolff noted in writing for this Court over 20 years ago, "[a] statute…may modify or abolish a cause of action that had been recognized by common law or by statute." *Kilmer v. Mun*, 17 S.W.3d 545, 550 (Mo. 2000). Indeed, "[t]here is no doubt…[that] the legislature [is] free to alter or abolish any statutory or common law cause of action." *Missouri Alliance for Ret. Am. v. Dept. of Labor and Ind. Relations*, 277 S.W.3d 670, 682 (Mo. 2009) (Teitelman, J., dissenting). This is because a "person has no property, no vested interest, in any rule of the common law."[8] *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 835 (Mo. 1991) (quoting *Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978)) (internal quotation marks omitted). Neither the United States Constitution nor the

[8] While a potential litigant does have a vested right in a cause of action that accrues *prior* to the action's abolishment or modification, *see Blaske*, 821 S.W.2d at 834, it is undisputed that Velazquez's actions against the defendants did not accrue until after the General Assembly abolished the common law causes of action under §1.010.2 and enacted a new cause of action under §538.210, as both of those statutes went into effect on August 28, 2015, and Velazquez did not sustain her injuries until September 5, 2015. (D2:5-8).

Missouri Constitution "forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative objection." *See id.* (quoting *Duke Power Co.*, 438 U.S. at 88 n.32) (internal quotation marks omitted).

The General Assembly's authority to abolish or modify the common law stems from how the Missouri "Constitution is not a grant but a restriction upon the powers of the legislature." *State v. Clay*, 481 S.W.3d 531, 537 (Mo. 2016) (quoting *Liberty Oil Co. v. Dir. of Revenue*, 813 S.W.2d 296, 297 (Mo. 1991)). In other words, and unlike the federal Congress, state legislatures "possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people." *See Munn v. People of the State of Illinois*, 94 U.S. 113, 124 (1876).

And it has been repeatedly, expressly confirmed in the schedules enacted with Missouri's constitutions—including the current, 1945 constitution. The state's first constitution, adopted in 1820, provided: "All laws now in force in the Territory of Missouri, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, ***or be altered or repealed by the general assembly***." Mo. Const. 1820, Schedule § 2 (emphasis added). The 1875 Constitution likewise provided "[t]hat all laws in force at the adoption of this Constitution, not inconsistent herewith, shall remain in full force ***until altered or repealed***

by the General Assembly …." Mo. Const. 1875, Schedule § 1 (emphasis added). Indeed, that provision was of particular importance to the framers of the 1875 Constitution – who adopted the current constitutional language that "the right to jury trial *as heretofore enjoyed* shall remain inviolate" – because they wanted to ensure that the constitution would ***not*** be construed as restricting the legislature's authority to alter or repeal the common law.[9]

---

[9] The history of the 1875 constitutional convention reflects the intent of its framers to underscore the authority of the legislature to abrogate common law. An earlier draft of the 1875 Constitution referred only to the General Assembly's power to repeal "statute laws," but the final version made clear that the legislative prerogative extended to "all laws." *See* Journal of the Missouri Constitutional Convention of 1875 ("Journal"), Vol. II, pp. 677, 731, 851; Debates of the Missouri Constitutional Convention of 1875 ("Debates"), Vol. XI, pp. 261, 497; *id*., Vol. XII, p. 139. In addition, the omission in another earlier draft of a reference to the legislature's authority to alter or repeal such laws caused concern among delegates. As James Broadhead expressed the concern:

> There is no provision there for the repeal of such laws by the Legislature. True, it may be inferred from the language that if this Constitution had not been adopted the Legislature would have the right to repeal them. But the first part of the section looked as if it declared that these laws should continue in force. Now, this Schedule adopted by the Convention is of higher authority than the Legislature and it raises a very serious question that unless we make an exception and give the right to alter or amend to the legislature, it would continue in force.

Debates, Vol. XII, pp. 142-43. John Shanklin, a member of the committee that had drafted the original language, explained that the intent of the provision was that the legislature could change the law: "I do not suppose it gives them any greater force nor undertakes to continue them beyond the action of the General Assembly. That was the understanding we had." *Id*., p. 144. Francis Black, stating that "I am not so sure but there is something in

The 1945 Constitution – Missouri's current constitution – contains a substantially identical provision: "All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect ***until amended or repealed by the general assembly***." Mo. Const. 1945, Schedule § 2 (emphasis added). Missouri's constitutions have not accorded immutable status to the incorporated common law, but on the contrary have expressly authorized its abrogation by the legislature.

B. The individual's right to a jury trial does not prohibit the legislative abolition of such a cause and substitution of it with a new one.

It is only with this background in mind that one can come to a proper understanding of what the Missouri Constitution means when it declares "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate…." Mo. Const. Art. V §22(a). This right does *not* deprive the General Assembly, as a state legislature, of its express constitutional authority to abolish common law causes of action and replace them with new ones with different substantive elements or remedies. Thus, the General Assembly acted within its authority when it "placed limits on the amount of non-

---

the suggestion made by Col. Broadhead," proposed an amendment to explicitly provide that "all laws" would remain in force only "until altered, amended or repealed by the General Assembly," language that would appear in slightly modified form in the final version of the constitution. *Id*., p. 146; *see* Journal, Vol. II, p. 738.

economic damages under a statutorily created cause of action [for wrongful death]." *Sanders v. Ahmed*, 364 S.W.3d 195, 204 (Mo. 2012) (internal footnote reference omitted). "To hold otherwise would be to tell the legislature it could not legislate; it could neither create nor negate causes of action, and in doing so could not prescribe the measure of damages for the same." *Dodson*, 491 S.W.3d at 556. With its holdings in *Sanders* and *Dodson*, this Court has acknowledged, at least when it comes to statutory causes of action, that "the right to a jury trial…does not entitle a plaintiff to any particular cause of action or any particular remedy. Instead, what causes of action a plaintiff may bring, or what remedies a plaintiff may seek, are matters of law subject to determination by the legislature." This accords with Judge Russell's observation that "[t]he right to jury trial does not limit the legislature's authority to determine what the elements of damages shall be." *Watts*, 376 S.W.3d at 650 (Russell, J., dissenting); *accord McClay v. Airport Mgmt. Serv., LLC*, 596 S.W.3d 686, 691 (Tenn. 2020) ("[T]he right to a jury trial…does not entitle a plaintiff to any particular cause of action or any particular remedy. Instead, what causes of action a plaintiff may bring, or what remedies a plaintiff may seek, are matters of law subject to determination by the legislature." (footnote reference omitted).

C. The General Assembly promulgated §538.210 under the same authority with which it abolished common law negligence actions against employers and substituted in their place the statutory worker's compensation scheme.

In 2015 the Missouri General Assembly explicitly abolished "the common law of England as it relates to claims arising out of the rendering of or failure to render health care services by a health care provider" for the purpose of "replac[ing] those claims with statutory causes of action." §1.010.2.[10] Having abolished such common law causes of action, the General Assembly then promulgated a new "statutory cause of action for damages against a health care provider for personal injury or death arising out of the rendering or failure to render health care services…." §538.210. But unlike the abrogated common law causes of action, which placed no substantive, legal limit on the recovery of noneconomic damages, the new statutory cause of action places a $700,000 limit, as a matter of law, on the recovery of catastrophic noneconomic damages, independent of any factual findings a jury may make on the matter. §538.210.2(3).

In taking the above actions, the General Assembly acted no differently than when, in the first half of the twentieth century, it abolished common law negligence claims against employers and substituted in their place the

[10] The entire text of §1.010 is reprinted in the appendix to this brief. (Apx.A3-A4).

modern workers' compensation statutory scheme. *See Peters v. Wady Industries, Inc.*, 489 S.W.3d 784, 791 (Mo. 2016) ("The workers' compensation laws were intended to replace common law actions against employers for an employee's work-related injuries."). Prior to the enactment of workers' compensation laws, an employee could only recover against an employer for injuries sustained on the job by demonstrating the employer's liability under a negligence claim. *See Gunnett v. Girardier Bldg. and Realty Co.*, 70 S.W.3d 632, 636 (Mo. App. E.D. 2002). Assuming the employee made a submissible case on the negligence elements of duty, breach, proximate cause, and injury, the issue of the employer's liability was a factual issue for the jury to decide. *See id.; see also Parr v. Breeden*, 489 S.W.3d 774, 778 (Mo. 2016) (listing the elements of negligence); *cf. Baker v. Chicago, B & Q R. Co.*, 39 S.W.2d 535, 542 (Mo. 1931) ("[L]iability arises when one suffers injury as the result of any breach of duty owed him by another chargeable with knowledge of the probable result of his conduct….).

The workers' compensation statutory scheme "altered the landscape of common law negligence actions against employers" by "creat[ing] a 'no-fault system of compensation for the employee' under which an employer was liable *irrespective of negligence*…." *Peters* 489 S.W.3d at 791 (emphasis added); §287.120.1 ("Every employer…shall be liable, *irrespective of negligence*, to furnish compensation under the provisions of this chapter for

personal injury or death of the employee by accident…arising out of and in the course of the employee's employment."). While under the common law the employer had the right for a jury, as the fact finder, to determine whether and to what extent it was liable for an employee's injury, the workers' compensation statutory scheme created an irrebuttable presumption of liability on the part of the employer, eliminating the jury altogether. *See id.*

Even though the worker's compensation statutory scheme prevented an employer from disputing liability, this Court very early on rejected the argument that this restriction ran afoul of the Mo. Const. Art. V §22(a)'s mandate that the right to a jury trial remain inviolate. *See DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640, 648-49 (Mo. 1931). "That the Legislature may regulate or entirely abolish the common-law rules of liability…is thoroughly established, and no valid reason exists why it may not require compensation to be made to an employee for accidental injuries received in the course of his employment…." *Id.* at 647. In other words, "[t]he right to have the liability of an employer for an accidental injury to an employee determined by a common law doctrine is not a constitutional [guaranty], and [workers compensation statutory schemes] in changing that rule of liability therefore invades no constitutional right." *Id.* at 648 (internal quotation mark omitted).

Velazquez might counter this by arguing that since the workers compensation statutory scheme did not exist in 1820, it was a matter

"unknown at common law," and consequently the right to a jury trial never attached to it at the first place. But this misses the point: the General Assembly has the authority to abrogate or modify a common law cause of action's substantive elements and remedies, and this does not interfere with the jury's factfinding duties. Suppose that the General Assembly, instead of abolishing workplace-related torts and enacting the workers' compensation statutory scheme, passed a statute eliminating such torts and replacing them with a statutory scheme authorizing negligence actions against employers without the need to prove proximate causation, similar to what Missouri's Dram Shop Act has done in the context of selling alcohol to individuals under twenty-one. *See* §537.053.2; *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638 (Mo. 2006) (rejecting constitutional challenge to the act). In other words, suppose that General Assembly removed from the jury the factual issue of whether the employer's actions proximately caused the employees injuries. Yet this would not amount to depriving the employee of the "inviolate" right to a jury trial—instead, it would amount to the legislature amending the substantive elements of a common law cause of action, something it is entitled to do.

Just as the General Assembly had the authority to abolish common law negligence actions against employers and replace them with the workers' compensation statutory scheme, so too it had the authority to abolish certain

common law claims against medical providers and replace them with §538.210 and its statutory caps on the substantive remedies. Indeed, as far as a jury trial is concerned, the General Assembly's enactment of §538.210 was far less drastic than its enactment of the workers' compensation statutory scheme: the latter merely imposes limits on the substantive remedies available following a jury trial, whereas the workers' compensation statutory scheme eliminates the employer's ability to even have a jury weigh its liability in the first place. If the General Assembly has the authority to remove a jury from determining an employer's liability, then it must also have the authority to impose substantive limits on the consequences of a jury's factual findings.

One cannot stand without the other. If this Court were to hold that the General Assembly lacks authority to abolish certain common law causes of action against medical providers and replace them with a statutory cause of action containing caps on noneconomic damages, it must necessarily conclude that the entire workers' compensation statutory scheme is likewise unconstitutional. A holding to that effect would upend nearly a century of legal precedent and destroy an area of law that has, over the same amount of time, become an entrenched part of the legal landscape not just in Missouri, but throughout the country. But there is no way to invalidate §538.205

without at the same time undermining the legal foundations supporting the legitimacy of the workers' compensation statutory scheme.

CONCLUSION

This Court should uphold the caps on noneconomic damages, overrule *Watts*, and affirm the trial court's judgment in this case.

/s/ Timothy C. Sansone
Timothy C. Sansone, No. 47876
SANDBERG PHOENIX
& VON GONTARD P.C.
600 Washington Ave., 15th Floor
St. Louis, MO 63101
(314) 231-3332
tsansone@sandbergphoenix.com

/s/ John M. Reeves
John M. Reeves[11], No. 59634
Lead Counsel
REEVES LAW LLC
3703 Watson Road
St. Louis, MO 63109
(314) 775-69685
reeves@reeveslawstl.com

/s/ James R. Layton
James R. Layton, No. 45631
TUETH KEENEY COOPER MOHAN
& JACKSTADT, P.C.
34 N. Meramec Ave., Suite 600
St. Louis, MO 63105
(314) 880-3600
jlayton@tuethkeeney.com

[11] Attorney John Reeves is unrelated to Defendant Dr. Jennifer Reeves.