Case No. M2019-00511-SC-R23-CV

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE AT NASHVILLE

JODI McCLAY
Plaintiff – Petitioner

v.

AIRPORT MANAGEMENT SERVICES, LLC
Defendant – Respondent

ON CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

District Court Case No. 3:17-cv-00705

BRIEF OF DEFENDANT/RESPONDENT AIRPORT MANAGEMENT SERVICES, LLC

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ORAL ARGUMENT REQUESTED

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Tennessee Supreme Court Rule 23 provides that this Court "may, at its discretion, answer questions of law certified to it by . . . a District Court of the United States in Tennessee" when "there are questions of law of this state which will be determinative of the cause" and "there is no controlling precedent in the decisions of the Supreme Court of Tennessee." *Embraer Aircraft Maint. Servs. v. AeroCentury Corp.*, 538 S.W.3d 404, 409 (Tenn. 2017) (quoting Tenn. Sup. Ct. R. 23, Section 1).

STATEMENT OF THE CERTIFIED ISSUES PRESENTED FOR REVIEW

Judge Eli Richardson of the United States District Court for the Middle District of Tennessee, acting in case number 3:17-cv-0705, has issued a Certification Order pursuant to Rule 23 of the Supreme Court Rules, certifying the following questions to this Court:

1. Does the noneconomic damages cap in civil cases imposed by Tenn. Code Ann. § 29-39-102 violate a plaintiff's right to a trial by jury, as guaranteed in Article I, section 6, of the Tennessee Constitution?

2. Does the noneconomic damages cap in civil cases imposed by Tenn. Code Ann. § 29-39-102 violate Tennessee's constitutional doctrine of separation of powers between the legislative branch and the judicial branch?

3. Does the noneconomic damages cap in civil cases imposed by Tenn. Code Ann. § 29-39-102 violate the Tennessee Constitution by discriminating disproportionally against women?

STATEMENT OF THE CASE

Plaintiff Jodi McClay ("Petitioner") initiated this case on April 11, 2017, by filing a Complaint against Hudson Group, LLC, and Airport Management Services, LLC ("AMS"),[1] in the United States District Court for the Middle District of Tennessee.[2] Petitioner alleged that, while shopping at the Hudson News store in the Nashville International Airport, a panel from a drink cooler fell and hit the back of her foot, causing injury to her foot with "associated soft tissue damage and bruising." [Complaint, Doc. 1, ¶ 37].

The case was tried before a jury from January 8, 2019 through January 11, 2019, at which time the jury returned a verdict for Petitioner in the amount of $444,500.00 for future medical expenses and $930,000.00 for noneconomic damages. [Doc. 61]. Following the jury verdict, AMS made an oral motion to apply Tenn. Code Ann. § 29-39-102, Tennessee's statutory cap on noneconomic damages. In accordance with the court's instruction, AMS submitted the request as a written motion on January 16, 2019. [Doc. 63]. In response, the Petitioner challenged the constitutionality of Tenn. Code Ann. § 29-39-102. [Doc. 64]. AMS then filed a reply [Doc. 77], and Petitioner filed a sur-reply [Doc. 80].

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[1] At the January 7, 2019 Pretrial Conference in this case, counsel for the parties represented that AMS was the sole proper Defendant, and the Court ordered the case caption to be amended to include only one Defendant, AMS. [Doc. 53].

[2] This matter bears docket number 3:17-cv-00705. Citations are made to the docket entries as they exist in the Federal Court file, available through www.pacer.gov.

On March 19, 2019, the District Court issued an Order certifying the constitutional questions concerning Tenn. Code Ann. § 29-39-102 to this Court. [Doc. 81; *see also* Doc. 84].

STATEMENT OF THE FACTS

On or about August 22, 2016, Petitioner was a customer at the Hudson News store in the Nashville International Airport. [Doc. 1, ¶¶ 17-19]. She was awaiting departure of Southwest flight no. 673 to San Diego, California. [Doc. 1, ¶ 17]. Petitioner claims she took two water bottles out of a commercial cooler for beverages and, upon closing the cooler door, a panel fell forward, striking her on the back of her right foot. [Doc. 1, ¶¶ 31-32]. Despite the incident, the Petitioner was able to make her scheduled flight to San Diego. [Doc. 1, ¶ 36]. The Petitioner claimed, however, that after arriving in San Diego, she was diagnosed as having a "crush injury and associated soft tissue damage and bruising" caused by the incident. [Doc. 1, ¶ 37].

Petitioner initiated the subject lawsuit and argued that AMS negligently caused her injury. [Doc. 1, ¶¶ 41-42]. AMS generally denied Petitioner's allegations, and the case was submitted to a jury.

On January 1, 2019, the jury returned a verdict for the Petitioner in the amount of $444,500.00 for future medical expenses, and $930,000.00 for noneconomic damages. [Doc. 61].

SUMMARY OF ARGUMENT

The Tennessee General Assembly's obligation to set policy for our State includes the legislature's duty to create and define legal rights and remedies. The role of the legislature is long-standing. It is historic. It is constitutional.

Pointing to reasoning employed by the Sixth Circuit Federal Court of Appeals when nullifying Tennessee's statutory cap on punitive damages in *Lindenberg v. Jackson Nat'l Life Ins. Co.,* 912 F.3d 348, 353 (6th Cir. 2018) (*Petition for Rehearing denied* March 28, 2019), the Petitioner urges this Court to follow "similar reasoning" to undermine the legislature's cap on noneconomic damages. It is not, however, the role of this Court to seek federal guidance on construction of Tennessee laws and the Tennessee Constitution. To the contrary, as noted by the two judges who agreed to form the majority opinion in *Lindenberg,* "faithful application of a state's law requires us to 'anticipate how the relevant state's highest court would rule in the case,' and in doing so we are 'bound by controlling decisions of that court.'" *Id.* at 364. It is the job of this Tennessee Supreme Court, not the two judges hastily deciding *Lindenberg,* to evaluate the constitutionality of this Tennessee statute. "It is telling that the majority [in *Lindenberg*] cites no decision of the Tennessee Supreme Court – not one – that strikes down a law for violating the state constitution's guarantee of trial by jury, though there have been many such challenges." *Lindenberg v. Jackson Nat'l Life Ins. Co.,* 912 F.3d at 386 (Larsen, dissenting).

Perhaps the void in authority is due to the fact that Tennessee courts have repeatedly and effectively recognized that the legislature's duty to define and develop legal rights and remedies does not impede or undermine the importance of the jury's fact-finding function. Appellate courts throughout our State have routinely affirmed the jury's duty to ascertain and calculate damages; however, our courts have always been careful to preserve the legislature's role in developing and defining the proper measure of those damages. This constitutional balance of power is evident in the multitude of existing Tennessee statutes wherein our legislature has modified the common law to establish specified consequences of a jury's finding of damages, ranging from statutes trebling the jury's award in certain cases to statutes capping awardable damages in other cases. Petitioner's philosophical notion that the legislature cannot establish a measure of damages without invading the province of the jury represents a radical transformation of Tennessee law and, if adopted, would cast shadows of constitutional doubt on years of Tennessee legislation and jurisprudence.

Petitioner has acknowledged the General Assembly's policy objectives underpinning the statutory cap on noneconomic damages and, while Petitioner may disagree with the legislature's policy, there is no dispute that the statute is rationally related to the legislature's desire to attract business development and stabilize awards. Accordingly, there is no constitutional basis for Petitioner's equal protection argument. Moreover, the claim that the facially neutral legislation somehow discriminates against women fails inasmuch as it

is unsupported by any empirical data or other scholarly research relating to the Tennessee statute.

One foundational principle of constitutional construction has been echoed by this Court throughout time: acts of the General Assembly are presumed constitutional. The burden of proving a constitutional infirmity is heavy and requires elimination of all reasonable doubt. In the instant challenge, Petitioner fails to carry her heavy burden. The doubt is not only reasonable, it is overwhelming. Tenn. Code Ann. § 29-39-102 does not invade the province of the jury and represents appropriate legislative authority. It is constitutional.

ARGUMENT

STANDARD OF REVIEW

When considering whether a statute is constitutional, the issue presents a question of law to which a *de novo* review applies. This Court must "start with a strong presumption that acts passed by the legislature are constitutional" and "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *State v. Decosimo,* 555 S.W.3d 494, 506 (Tenn. 2018), *cert denied*, *Decosimo v. Tennessee*, 139 S. Ct. 817 (2019) (quoting *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006); *Gallaher v. Elam,* 104 S.W.3d 455, 459 (Tenn. 2003)). The presumption of constitutionality applies with even greater force when the facial constitutional validity of the statute is challenged. *Id.*

I. THE NONECONOMIC DAMAGES CAP IN CIVIL CASES IMPOSED BY TENN. CODE ANN. § 29-39-102 DOES NOT VIOLATE A PLAINTIFF'S RIGHT TO A TRIAL BY JURY, AS GUARANTEED IN ARTICLE I, SECTION 6 OF THE TENNESSEE CONSTITUTION.

A. The Constitutional Right to a Jury Trial in Tennessee.

In 1796, the State of Tennessee was born out of the State of North Carolina, and the Tennessee Constitution was adopted out of the laws and Constitution of North Carolina.[3] *Patten v. State*, 426 S.W.2d 503, 506 (Tenn. 1968), *cert denied*, 400 U.S. 844 (1970). Article I, section 6 of the Tennessee Constitution preserves the right to a jury trial: "[T]he right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors." *Young v. City of LaFollette,* 479 S.W.3d 785 (Tenn. 2015) (quoting Tenn. Const. art. I, § 6).

To be clear, the constitutional significance of the right to trial by jury is historic. It is both recognized and respected. One of the earliest descriptions of the right to a jury trial came from English jurist William Blackstone who characterized the right as "an essential attribute of the liberty that English citizens enjoyed." *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1036 (Or. 2016). "To say, however, that the right was viewed as an essential attribute of liberty does not say what the

[3] The constitutional guarantee of a jury does not apply to cases that could have been tried without a jury prior to 1796. Matters inherently legal in nature were tried in law courts by a jury while matters inherently equitable were tried by the Chancellor without a jury. Therefore, there is no constitutional right to a trial by jury in an equitable proceeding. *Young v. City of LaFollette*, 479 S.W.3d at 793.

right encompasses." *Id.* at 1036. In fact, Blackstone "did not state that the jury trial right checked the lawmaking authority of either the common law courts or parliament. Rather, he explained that courts retain the authority to define the applicable legal principles." *Id.* at 1038. Blackstone, whose role in developing the common law predates and underpins the Tennessee Constitution, recognized that a jury determines facts, and the legislature adopts laws redressing the facts. He stated: "[O]nce the fact is ascertained, the law must of course redress it." *Id.* The United States Constitution and individual state constitutions are all rooted in Blackstone's view that "the jury's fact-finding ability" did not impose any "substantive limitation on parliament or common law courts' authority to announce legal principles that guide and limit the jury's fact-finding function." *Id.*

The instant challenge to Tenn. Code Ann. § 29-39-102 is not rooted in constitutional preservation. To the contrary, the instant challenge calls for constitutional distortion. Designed as a shield to protect the role of the jury in Tennessee Jurisprudence, the constitutional guarantee of a right to jury trial would be demeaned if it were to be wielded as a sword to attack legislation and/or policy with which an individual or group disagrees.

B. Constitutional Challenges Must be Proven Beyond a Reasonable Doubt.

Recognizing that it is the General Assembly's role "to declare the policy of the State," *Baptist Mem'l Hosp. v. Couillens*, 140 S.W.2d 1088, 1093 (Tenn. 1940), this Court has repeatedly affirmed the extraordinary burden an individual or interest group must bear when attempting to

constitutionally nullify actions of the legislative branch. "In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional." *Gallaher v. Elam*, 104 S.W.3d at 459. "Any reasonable doubt about whether a statute is constitutional must be resolved in favor of its constitutionality." *Bailey v. County of Shelby*, 188 S.W.3d 539, 543 (Tenn. 2006). The presumption that an act of the General Assembly is constitutional "applies with even greater force when the facial constitutional validity of a statute is challenged." *Gallaher v. Elam,* 104 S.W.3d at 459 (citing *In Re: Burson*, 909 S.W.2d 768, 775 (Tenn. 1995)). Because Tenn. Code Ann. § 29-39-102 is valid legislation embodying the policy of the General Assembly, the Petitioner "must bear a heavy burden in establishing some constitutional infirmity of the Act in question." *Id.* (quoting *West v. Tenn. Hous. Dev. Agency*, 512 S.W.2d 275, 279 (Tenn. 1974)).

Constitutional challenge is not the appropriate avenue to attack legislative policy with which an individual or interest group disagrees. Our system of government arose out of John Locke's philosophy that "there remains still in the people a supreme power to remove or alter the legislative" if the body is acting contrary to their desires. J. Locke, *The Second Treatise of Civil Government,* ch. XIII (B. Blackwell ed. 1948). Put simply, our system of government protects the supreme right of the people to remove and replace the legislature through elections while simultaneously guarding against any person's effort to

selectively nullify disfavored legislation through constitutional challenge.

C. The Majority of States Addressing Statutory Damage Caps Have Held that Damage Caps Do Not Violate the Constitutional Right to a Jury Trial.

Tennessee's statutory cap on noneconomic damages is not an original or untested concept. Before the Tennessee legislature passed the 2011 statutory cap, several other states had passed statutes capping the noneconomic damages available in personal injury actions and/or the damages in medical malpractice cases. When the constitutional validity of those statutes has been tested, other state high courts have repeatedly upheld the statutes, often specifically finding that damage caps do not violate the right to a jury trial.[4] Noticeably, most of the

[4] Cases finding noneconomic damage caps and/or healthcare liability caps do not violate the state constitutional right to trial by jury: *Evans v. State*, 56 P.3d 1046, 1048 (Alaska 2002); *Stinnett v. Tam*, 130 Cal. Rptr. 3d 732, 734 (Cal. Ct. App. 2011) (*pet. for review denied Stinnett (Holly) v. Tam (Tony)*, No. S197135, 2011 Cal. LEXIS 12249 (Nov. 30, 2011)); *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 574 (Colo. 2004); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 589 (Ind. 1980); *Miller v. Johnson*, 289 P.3d 1098, 1105 (Kan. 2012); *Murphy v. Edmonds*, 601 A.2d 102, 104 (Md. 1992); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 725 (Mich. Ct. App. 2002); *Gourley v. Neb. Methodist Health Sys.*, 663 N.W.2d 43, 55 (Neb. 2003); *Tam v. Eighth Judicial Dist. Court*, 358 P.3d 234, 236 (Nev. 2015); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 424 (Ohio 2007); *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1034-35 (Or. 2016); *Salopek v. Friedman*, 308 P.3d 139, 146 (N.M. Ct. App. 2013); *Judd ex rel. Montgomery v. Drezga*, 103 P.3d 135, 137 (Utah 2004); *Pulliam v. Coastal Emergency*

states affirming damage caps have constitutional protections on the right to a jury trial worded identically or substantially similar to Tennessee's guarantee that the right shall remain "inviolate." The thoughtful opinions from these sister states wholly undermine Petitioner's reasoning that Tennessee's cap is a constitutionally intolerable infringement on the right to a jury.

1. States Upholding General Caps on Noneconomic Damages.

The Tennessee statute limiting noneconomic damages to $750,000[5] is very similar to the Ohio statute capping noneconomic damages in personal injury cases at $350,000 per person or $500,000 per occurrence. Ohio Rev. Code Ann. § 2315.18. Also, the Tennessee Constitution and the Ohio Constitution mirror each other inasmuch as both constitutions deem the right to a jury trial "inviolate." Tenn. Const., art. I, § 6; Ohio Const., art. I, § 5. Recognizing the numerous ways a "court may apply the law to change a jury award of damages without running afoul of the Constitution," Ohio's high court has affirmed its cap is not a violation of the constitutional right to a jury trial. *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 424 (Ohio 2007). Noting that statutes with treble damage provisions increasing the jury award have never been found to infringe on the right to a jury trial,

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Servs., 509 S.E.2d 307, 310 (Va. 1999); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 410 (W. Va. 2011).

[5] Tenn. Code Ann. § 29-39-102 caps recovery at $750,000 but allows for an award of up to one million dollars ($1,000,000) for catastrophic loss as statutorily defined and removes the cap under certain codified circumstances.

Ohio has reasoned, "the corresponding decrease as a matter of law cannot logically violate that right." *Id.*

The Idaho Constitution is also analogous in that it mandates the right to jury trial "shall remain inviolate," (Idaho Const., art. I, § 7), and Idaho has also definitively stated that its statute capping noneconomic damages "does not infringe upon the jury's right to decide cases." *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1120 (Idaho 2000). Negating the contention that caps preclude the jury from deciding an issue of fact, the Idaho court explained, "the jury is still allowed to act as the fact finder in personal injury cases. The statute simply limits the legal consequences of the jury's finding." *Id.* "Nothing in the statute prohibits a plaintiff from presenting his or her full case to the jury and having the jury determine the facts of the case based on the evidence presented at trial." *Id.* The legislature "has the power to modify or repeal common law causes of action" without violating the constitutional jury guarantee. *Id.* at 1118

"Inviolate" also describes the right to a jury trial in Oregon's Constitution. Or. Const., art. I, § 17. Overruling prior cases overturning its general noneconomic damage cap based on violation of right to a jury trial, the Oregon Supreme Court clearly found: "a damages cap does not reflect a legislative attempt to determine a fact in an individual case or to reweigh the jury's factual findings. Rather, a statutory cap is a legal limit on damages that applies generally to a

class of cases."[6] *Horton v. Or. Health & Sci. Univ.*, 376 P.3d at 1041. Rejecting the contention that the legislature cannot alter the measure of damages as it existed at common law, Oregon pointed out the fallacy of such an attempt to freeze the law:

> Specifically, a defendant could invoke its right to a jury trial to argue against any expansion of damages beyond those for which it would have been liable when the Oregon Constitution was framed. Nothing in the [constitutional right to a jury trial], its history, or our cases interpreting it suggests that the framers intended such sweeping consequences in guaranteeing the right to have a jury rather than a judge decide claims and defenses commonly heard at common law.

Id. at 1042.

Alaska has also found that its legislative cap on noneconomic damages does not invade the constitutional province of the jury.[7] *Evans v. State*, 56 P.3d 1046, 1051 (Alaska 2002). Adopting the reasoning employed by the Third Circuit Court of Appeals, (which interpreted the Seventh Amendment to the United States Constitution to allow damage caps), the Alaska Supreme Court found: "[t]he decision to place a cap on

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[6] The Oregon Supreme Court found a statute limiting a state employee's tort liability does not violate the constitutional right to a jury trial. *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998. In a later decision, the Oregon Supreme Court found the damage cap was unconstitutional under the state constitution's "remedy clause." *See Rains v. Stayton Builders Mart, Inc.*, 410 P.3d 336, 340 (Or. 2018).

[7] The Alaska Constitution provides that the right to a jury trial shall exist "to the same extent as it existed at common law." (Alaska Const., art. I, § 16).

damages awarded is a policy choice and not a reexamination of the factual questions of damages determined by the jury." *Id.* at 1051 (citing *Davis v. Omitowoju*, 883 F.2d 1155, 1159 (3rd Cir. 1989). The court reasoned the jury has the power to determine plaintiff's damages, but the legislature may alter the scope of permissible recovery available under the law by placing a cap on the available award. *Id.*

2. States Upholding Caps on Recovery in Medical Malpractice.

While Ohio, Idaho, and Alaska have upheld caps on noneconomic damages in personal injury cases, a multitude of other states have upheld analogous caps on recovery in medical malpractice actions.[8] The rationale employed by these states in concluding caps do not encroach upon the constitutionally protected right to a jury trial is both applicable and persuasive.

While the Tennessee General Assembly was, in 2011, announcing the legislative cap on noneconomic damages, a California Appellate Court was affirming that legislative caps do not diminish the constitutionally protected "inviolate right" to trial by jury. *Stinnett v.*

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[8] Cases holding legislative caps on damages in medical malpractice actions do not violate the state constitutional right to a jury trial: *Stinnett v. Tam*, 130 Cal. Rptr. 3d at 748-49; *Johnson v. St. Vincent Hosp.*, 404 N.E.2d at 589; *Miller v. Johnson*, 289 P.3d at 1105; *Murphy v. Edmonds*, 601 A.2d at 104; *Zdrojewski v. Murphy*, 657 N.W.2d at 725; *Gourley v. Neb. Methodist Health Sys.*, 663 N.W.2d at 55; *Tam v. Eighth Judicial Dist. Court*, 358 P.3d at 236; *Judd ex rel. Montgomery v. Drezga*, 103 P.3d at 137; *Pulliam v. Coastal Emergency Servs.*, 257 509 S.E.2d at 310; *MacDonald v. City Hosp., Inc.*, 715 S.E.2d at 410.

Tam, 130 Cal. Rptr. 3d 732, 748-49 (Cal. Ct. App. 2011) (*pet. for review denied Stinnett (Holly) v. Tam (Tony)*, No. S197135, 2011 Cal. LEXIS 12249 (Nov. 30, 2011)); Calif. Const., art. I, § 16. The court explained:

> It is well established that a plaintiff has no vested property right in a particular measure of damages, and . . . the Legislature possesses broad authority to modify the scope and nature of such damages (internal citation omitted) . . . and the Legislature retains broad control over the *measure*, as well as the *timing*, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest (internal citation omitted).

Stinnett v. Tam, 130 Cal. Rptr. 3d at 737 (emphasis in original).

Similarly, Maryland's Constitution also provides that the right to a jury trial "shall be inviolably preserved." Md. Dec. of R. art. 23. Upholding the constitutionality of Maryland's cap on noneconomic damages, the Maryland court recognized the legislature's ability to abrogate any action existing at common law and reasoned the General Assembly had, in enacting the cap, abrogated any cause of action for noneconomic tort damage in excess of the caps, thereby removing any such claims from the judicial arena. "Therefore, no question concerning the constitutional right to a jury trial is presented." *Murphy v. Edmonds*, 601 A.2d 102, 104 (Md. 1992).

In addition to California and Maryland, courts in Indiana, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, Utah, Virginia, Wisconsin, and West Virginia have all upheld their

legislatures' decisions to cap damage awards in medical malpractice cases, distinguishing between the legislature's right to define the remedy and establish the measure of damages from the jury's historic duty to decide questions of fact, including the calculation of damages.[9]

While the decisions of sister states are not binding on this Court, thoughtful deliberations on the same constitutional question are instructive, particularly given that most state constitutions guarantee the same "inviolate" right to a jury trial.[10] In sum, at least 18 states have upheld the constitutionality of legislative caps when scrutinized against the right to a jury trial. Another four states, including North Carolina, the state from which Tennessee was formed, impose legislative caps on damages without having faced constitutional challenge.[11] Notably, North Carolina found punitive damage caps constitutional with respect to the right to a jury trial. *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004).

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[9] *See* footnote 8 *supra* for cases upholding constitutionality of caps in medical malpractice actions.

[10] Some sister states who disfavor legislative caps have passed specific constitutional amendments prohibiting same. In doing so, they have presumptively refused to distort their existing constitutional right to a jury trial by artificially augmenting its meaning. Their approach is instructive. States with constitutional amendments prohibiting damage caps include: Arizona (Ariz. Const. art. II, § 31); Arkansas (Ark. Const. art. 5, § 32); Kentucky (Ky. Const. § 54); Pennsylvania (Penn. Const. art. III, § 18); and Wyoming (Wyo. Const. art. 10, § 4).

[11] States with damage caps that have not faced relevant constitutional challenge: Hawaii, Montana, North Carolina, South Carolina.

D. The Measure of Recoverable Damages is a Question of Law – Not a Factual Determination for the Jury

Petitioner's theory that *all* issues associated with damages are within the constitutional province of the jury is misguided inasmuch as it fails to distinguish between the *calculation* of recoverable damages (a question of fact) and the *measure* of recoverable damages (a question of law).[12] Citing the 1886 Supreme Court decision in *Barry v. Edmunds*, 116 U.S. 550, 565 (1886), the Petitioner inadvertently acknowledges in her own argument that the peculiar function of the jury to determine damages exists "**where no precise rule of law fixes the recoverable damages**," [Brief of Plaintiff/Petitioner at p. 6] (quoting *Barry v. Edmunds*, 116 U.S. at 565) (emphasis added), thereby signaling that the jury's duty to ascertain and calculate damages is unfettered unless there is a statute or "rule of law" fixing the measure of recoverable damages.

Tennessee Appellate Courts have repeatedly recognized the calculation of damages is separate and distinct from the measure of damages – the former being a question of fact for the jury but the latter

[12] In its decision in *Lindenberg v. Jackson Nat'l Life Ins. Co.*, the United States Court of Appeals for the Sixth Circuit also appears to have failed to correctly interpret the distinction between the measure of damages and the calculation of damages under Tennessee law. Specifically, the court held that "the proper measure of punitive damages is historically a 'finding of fact' within the exclusive province of the jury." 912 F.3d at 365. However, as discussed in detail in this Brief, it is well recognized under Tennessee law that "[t]he proper measure of damages is a question of law . . ." *Tennison Bros. v. Thomas*, 556 S.W.3d 697, 724 (Tenn. Ct. App. 2017).

being a question of law. *Turner v. City of Memphis*, No. W2015-02510-COA-R3-CV, 2016 Tenn. App. LEXIS 976, at *20 (Tenn. Ct. App. Dec. 20, 2016) ("Whether the trial court has used the proper measure of damages is a question of law, . . . but the actual amount of damages awarded, provided within the limits ascribed by law, is a question of fact.") "The proper measure of damages is a question of law, but the actual calculation of damages is a question of fact." *Tennison Bros. v. Thomas*, 556 S.W.3d 697, 724 (Tenn. Ct. App. 2017) (citing *Hanson v. J.C. Hobbs Co.*, No. W2011-02-523-COA-R3-CV, 2012 Tenn. App. LEXIS 807, at *36 (Tenn. Ct. App. Nov. 21, 2012); *Poole v. Union Planters Bank, N.A.*, 337 S.W.3d 771, 789 (Tenn. Ct. App. 2010)). *See also Ellis v. Vic Davis Constr., Inc.*, No. 03S01-9201-CV-00011, 1992 Tenn. LEXIS 508, at *3 (Tenn. Aug. 3, 1992). ("This appeal presents solely a question of law, namely, the proper measure of damages for injuries sustained due to trespass.") "Determinations concerning the amount of damages are factually driven. Thus, the amount of damages to be awarded in a particular case is essentially a fact question. However, the choice of the proper measure of damages is a question of law." *BancorpSouth Bank, Inc. v. Hatchel*, 223 S.W.3d 223, 228 (Tenn. Ct. App. 2006) (quoting *Beaty v. McGraw*, 15 S.W.3d 819, 827 (Tenn. Ct. App. 1998)) (citations omitted).

It is well established in many states that remedies, including the measurement of damages, are not questions of fact for jury deliberation:

> The primary function of a jury has always been factfinding, which includes a determination of plaintiff's damages. The court, however, applies

> the law to the facts. [The statutory cap on damages] provides the remedy. . . . The remedy is a question of law, not fact, and is not a matter to be decided by the jury. Instead, the trial court applies the remedy's limitation only after the jury has fulfilled its factfinding function. . . . We conclude that [the cap on damages] does not violate the right to a jury trial.

Gourley v. Neb Methodist Health Sys., 663 N.W.2d 43, 55 (Neb. 2003). "[T]he jury is still allowed to act as the fact finder . . . [n]othing in the [statute capping recovery] prohibits a plaintiff from presenting his or her full case to the jury and having the jury determine the facts of the case based on the evidence presented at trial. . . . Once those factual determinations have been made, it has been up to the judge to apply the law to the facts as found by the jury. . . ." *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d at 1120. "[A]lthough a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment." *Id.* (quoting *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 529 (Va. 1989).

E. It is the Tennessee Legislature's Role to Define Remedies.

The legal remedy or measure of damages available in any case represents a societal accord as to the appropriate realm of repercussions for a particular legal wrong. Part of the General Assembly's role in declaring the policy of the State includes determining the legal remedies recoverable for personal injuries. *Smith v. Gore*, 728 S.W.2d 738, 749 (Tenn. 1987). "The extent of recoverable damages is limited by this State's law and policy." *Id.* at 752. Imposing a damage cap falls

squarely within the legislature's role and authority to define legal remedies for personal injury. As noted by the Supreme Court of Oregon when upholding a damage cap enacted by the Oregon legislature:

> [L]egal limits on a jury's assessment of civil damages have been and remain an accepted feature of our law. To be sure, statutory damages caps differ from other types of legal limitations on a jury's authority to award damages. They specify, as a matter of law, a numerical limit on the amount of damages that a party can recover instead of describing that limit generically by using a phrase such as foreseeable damages or damages proximately caused by the defendant's act. However, the two types of limitations do not differ in principle. Each limits, as a matter of law, the extent of the damages that a jury can award in a class of cases. One is no more an interference with the jury's fact-finding function than the other.

Horton v. Or. Health & Sci. Univ., 376 P.3d at 1041.

F. The Tennessee Legislature Has Codified or Modified the Measure of Damages in Other Contexts.

The Tennessee legislature has enacted many statutes which define or otherwise affect the measure of damages for common law causes of action. This Court has repeatedly enforced such statutes. Indeed, this Court has long recognized that a statute may prescribe a remedy, i.e., "the form and manner in which the defendant in such case is to have his damages assessed," and that "where the statute has prescribed a specific remedy for a tort, or upon a contract, that remedy must, in general, be followed . . ." *Colby v. Yates*, 59 Tenn. 267, 268 (Tenn. 1873).

Statutes requiring a mandatory increase in damages are common under Tennessee law. For example, Tenn. Code Ann. § 47-50-109 requires that "in every case" where a breach of contract is procured "by inducement, persuasion, misrepresentation, or other means . . . the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract." Tenn. Code Ann. § 47-50-109. Procurement of breach of contract was actionable at common law and the statutory mandate on increased damages represents a legislative modification of the common law measure of damages. *See Polk & Sullivan, Inc. v. United Cities Gas Co.*, 783 S.W.2d 538, 542-43 (Tenn. 1989). This Court recognized the validity of the statutory increase in damages in *Dorsett Carpet Mills, Inc. v. Whitt Tile & Marble Distrib. Co.*, 734 S.W.2d 322 (Tenn. 1987), where the Court held that the statute "mandates the trebling of 'the amount of damages resulting from or incident to the breach of the contract.'" *Id.* at 324, 326.

The legislature also modified the common law measure of damages by enacting Tenn. Code Ann. § 43-28-312, which defines the measure of damages for "negligent cutting of timber from the property of another" as "an amount double that of the current market value of the timber." Tenn. Code Ann. § 43-28-312. This Court recognized in *Ellis v. Vic Davis Constr., Inc.* that the common law measure of damages for the non-intentional removal of trees was "fixed by the market value of the trees . . ." No. 03S01-9201-CV-00011, 1992 Tenn. LEXIS 508 at *2. Neither party in *Ellis* apprised the lower courts of the

statutory measure of damages and the lower courts assessed damages for the destruction of timber at basic market value, the common law measure of damages. *Id.* at **4-5. Nevertheless, this Court, of its own accord, overturned the lower decisions and assessed damages in accordance with the statutory measure, holding, "[w]hile neither party apprised the lower courts of this statutory provision, this fact will not prevent our enforcement of such clearly expressed legislative intent." *Id.* at *4. In doing so, the Court affirmed the legislature's power to modify the applicable measure of damages for common law claims.

In addition to statutory multipliers, this Court has recognized the legislature's modification of the common law measure of damages in other respects. The legislature modified the common law collateral source rule with Tenn. Code Ann. § 29-26-119, which reduces "the damages recoverable by tort victims from health care providers, by the amount the tort victim realizes from collateral sources" including "insurance provided by an employer either governmental or private, . . . social security benefits, service benefit programs, unemployment benefits" and other sources. *Nance v. Westside Hosp.*, 750 S.W.2d 740, 742 (Tenn. 1988); Tenn. Code Ann. § 29-26-119. The United States District Court for the Middle District of Tennessee upheld the statute as constitutional in *Baker v. Vanderbilt Univ.*, 616 F. Supp. 330 (M.D. Tenn. 1985) and this Court cited that decision with approval in *Dedmon v. Steelman*, 535 S.W.3d 431, 446 (Tenn. 2017).

This Court has also recognized statutory damage caps for common law claims. In *Lavin v. Jordon*, 16 S.W.3d 362 (Tenn. 2000), this Court

held that Tenn. Code Ann. § 37-10-103 supersedes "the common law tort of negligent control and supervision of children" and that such a claim is "subject to the statutory cap on damages contained in" Tenn. Code Ann. § 37-10-102. *Id.* at 362. The referenced statutes limit damages for the tort of negligent control and supervision of children to "actual damages in an amount not to exceed ten thousand dollars ($10,000) . . ." Tenn. Code Ann. § 37-10-102. In interpreting these statutes, the Court held that "the 'wisdom, or unwisdom[,] of a statute lies solely with the Legislature and is not the concern of the Court.'" *Id.* at 369. The legislature similarly modified the measure of damages for the death of a pet to allow for the recovery of "up to five thousand dollars ($5,000) in noneconomic damages" by enacting Tenn. Code Ann. § 44-17-403.

In each of the foregoing instances, the legislature has acted by statute to modify the measure of damages for common law claims. None of these statutes have been struck down by this Court. Like the many statutes affecting the measure of damages which came before it, the 2011 statutory cap must be upheld under the legislature's fundamental authority to prescribe "the form and manner in which the defendant . . . is to have his damages assessed . . ." *Colby v. Yates*, 59 Tenn. at 268.

G. The Tennessee Legislature Has the Power to Abrogate Common Law Causes of Action and Remedies.

Just as the General Assembly has the authority to alter available remedies, it also has the authority to abrogate a common law cause of action. "[T]he Legislature of the State for obvious reasons sets the public policy of the State by their Acts, and [this Court] ha[s] held time

and time again that the common law is applicable in Tennessee *unless* the Legislature enacts a statute otherwise. . . ." *Wooley v. Parker*, 432 S.W.2d 882, 884 (Tenn. 1968) (emphasis added). A basic survey of the Tennessee Code uncovers innumerable examples of legislative abrogation of common law rights and remedies.

For example, long ago the legislature enacted a workers' compensation scheme that supplanted an employee's common-law right to sue his employer for negligence. *See Scott v. Nashville Bridge Co.*, 223 S.W. 844, 852 (Tenn. 1919). Shortly after the advent of this new workers' compensation scheme, this Court was asked to evaluate its constitutionality, including whether the workers' compensation system violated the right to a jury trial under article I, section 6 of the Tennessee Constitution. *See id.* at 852. Looking to case law from other jurisdictions, the Court upheld the constitutionality of the Workers' Compensation Act and has reaffirmed that conclusion on several occasions in the years that followed. *Id.* *See also, e.g.*, *Mansell v. Bridgestone Firestone N. Am. Tire*, 417 S.W.3d 393 (Tenn. 2013) (upholding the constitutionality of medical impairment rating process under Tennessee Code Annotated section 50-6-204); *Lynch v. City of Jellico*, 205 S.W.3d 384 (Tenn. 2006) (upholding the constitutionality of the benefit review process established by the General Assembly in 2004); *Plasti-Line, Inc. v. Tenn. Human Rights Comm'n.*, 746 S.W.2d 691, 693 (Tenn. 1988) ("The workers' compensation systems in the United States have almost universally been held constitutional, even though they utilize administrative agencies, do not provide for trials by

jury and involve only private disputes."); *Nichols v. Benco Plastics, Inc.*, 469 S.W.2d 135, 137 (Tenn. 1971) (upholding the constitutionality of the exclusive remedy provision of the Workers' Compensation Act and affirming the trial court's dismissal of the surviving spouse's claim for loss of consortium arising out of the work-related death of her husband).

Like workers' compensation, the General Assembly has also expressly abrogated other common law causes of action, including "alienation of affections," "seduction," and "criminal conversation." *See* Tenn. Code Ann. § 36-3-701 ("The common law tort action of alienation of affections is hereby abolished."); Tenn. Code Ann. § 39-13-508(a) ("No cause of action shall be maintained that is based upon the common law torts of seduction or criminal conversation, and those torts are abolished."). In each instance, this Court recognized that the legislature's abrogation of these causes of action was simply the legislature's constitutional "express[ion] of the public policy of the state." *Hanover v. Ruch*, 809 S.W.2d 893, 896-87 (Tenn. 1991). *See also Dupuis v. Hand*, 814 S.W.2d 340, 342-43 (Tenn. 1991).[13]

Similarly, the General Assembly has enacted statutes of limitations and repose that preclude plaintiffs from pursuing common law claims after a specified period. *See, e.g.*, Tenn. Code Ann.

[13] The legislature has similarly enacted statutes that limit or eliminate liability in certain circumstances. *See, e.g.*, Tenn. Code Ann. § 43-39-102 (extending immunity to "agritourism professional[s]"); Tenn. Code Ann. § 44-20-103 (extending immunity to "equine activity sponsor[s]" and "equine professionals"); Tenn. Code Ann. § 68-114-102 (granting immunity to "ski area operators"); Tenn. Code Ann. § 70-7-102 (immunity for recreational use).

§ 28-3-103 (six-month limitations period for slander); Tenn. Code Ann. § 28-3-104 (one-year limitations period for personal injury claims); Tenn. Code Ann. § 28-3-105 (three-year limitations period for damage to real or personal property); Tenn. Code Ann. § 28-3-109 (six-year limitations period for contract claims); Tenn. Code Ann. § 29-26-116 (one-year limitations period for healthcare liability claims and a three-year repose); Tenn. Code Ann. § 29-28-103 (ten-year repose period for product liability claims). And at common law, these claims would have only abated at death or been barred by the equitable doctrine of laches. *Benton v. Knoxville News-Sentinel Co.*, 130 S.W.2d 105 (Tenn. 1939).

Despite numerous constitutional challenges, our courts have uniformly held that statutes of limitations and repose are policy decisions within the legislature's exclusive control. *See, e.g.*, *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) (upholding the constitutionality of the medical malpractice statute of repose and noting that statutes of repose and limitations "are justified on the basis of policy" and are best left to the legislature, not the courts); *Knoxville v. Gervin*, 89 S.W.2d 348, 352 (Tenn. 1935) ("In this state, as is now the case generally, the statutes of limitations are looked upon by the courts with favor as statutes of repose."); *Wyatt v. A-Best Prods., Co.*, 924 S.W.2d 98, 104-107 (Tenn. Ct. App. 1996) (holding that the so-called "asbestos exception" to the product liability statute of repose constituted a retrospective law in violation of article I, section 20 of the Tennessee Constitution but affirming the prospective application of the asbestos exception on equal protection grounds); *Adams v. Air Liquide Am., L.P.*,

M2013-02607-COA-R3-CV, 2014 Tenn. App. LEXIS 767 (Tenn. Ct. App. Sept. 2, 2014) (affirming the constitutionality of the product liability statute of repose on equal protection grounds). As discussed by the Supreme Court of Idaho when it upheld a statutory damage cap,

> the legislature has enacted statutes of limitation and repose which can effectively prevent plaintiffs from recovering damages in personal injury cases. We can discern no logical reason why a statutory limitation on a plaintiffs remedy is any different than other permissible limitations on the ability of plaintiffs to recover in tort actions.

Kirkland v. Blaine Cty. Med. Ctr., 4 P.3d at 1119.

These statutes and their resulting case law illustrate the General Assembly's extensive power to enact legislation that abrogates common law causes of action and remedies, and the noneconomic damages cap at issue here is no different. To the extent recovery exceeds $750,000, the Tennessee legislature has effectively abrogated the cause of action. Consequently, this Court should uphold the 2011 damages cap as a valid exercise of the legislature's constitutional authority.

II. THE NONECONOMIC DAMAGES CAP IN CIVIL CASES IMPOSED BY TENN. CODE ANN. § 29-39-102 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE ESTABLISHED IN ARTICLE II, SECTIONS 1 AND 2 OF THE TENNESSEE CONSTITUTION.

The Tennessee Constitution includes two explicit provisions establishing the separation of powers among the three branches of government. Article II, section 1 provides that "[t]he powers of the Government shall be divided into three distinct departments: the

Legislative, Executive, and Judicial." Tenn. Const. art. II, § 1. Article II, section 2 specifies that "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Tenn. Const. art. II, § 2.

While the Tennessee Constitution prohibits the three branches of government from encroaching "upon the powers, functions and prerogatives of the others," the separation of powers is not absolute. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 843 n. 8 (Tenn. 2008). There exists "by necessity, a certain amount of overlap because the three branches of government are interdependent." *State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001).

The Petitioner advocates for a rigid and complete separation of the legislative and judicial branches with respect to the measure of damages for personal injury claims. In doing so, the Petitioner fails to recognize that "areas exist in which both the legislative and judicial branch have interests, and that in such areas both branches may exercise appropriate authority." *Newton v. Cox*, 878 S.W.2d 105, 111 (Tenn. 1994). The Tennessee legislature has a legitimate interest and role to play in the rights and remedies available to litigants under Tennessee law. Without violating the separation of powers principles, the legislature can limit the life of a cause of action, define the remedies

available for injuries, create new causes of action or abrogate old ones, define the elements of a claim, and even establish evidentiary rules.[14]

As acknowledged by the Supreme Court of Utah when it upheld statutory damage caps, "[given the] extensive role [of the legislature] in so many aspects of the jury trial process, it is incorrect to view the right to a jury determination of the facts of a case to be so broad as to prohibit any legislative involvement in the types and extent of damages that may be awarded." *Judd ex rel. Montgomery v. Drezga*, 103 P.3d 135, 145 (Utah 2004). The 2011 damage cap is not a usurpation of the judiciary's power; rather, it is a legitimate exercise of the legislature's authority to control the rights and remedies available to personal injury plaintiffs in Tennessee.

[14] *See* *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) (upholding as constitutional the medical malpractice statute of repose); *Cavender v. Hewitt*, 239 S.W. 767, 770 (Tenn. 1921) (describing the legislature's "complete control over the remedies which it offers to suitors in its courts"); *Hanover v. Ruch*, 809 S.W.2d 893, 896-87 (Tenn. 1991) (upholding Tenn. Code Ann. § 36-3-701 which abrogates the "common law tort action of alienation of affections"); *Meek v. Healthsouth Rehab. Ctr. of Clarksville*, No. M2005-00920-COA-R3-CV, 2006 Tenn. App. LEXIS 503, at **7-8 (Tenn. Ct. App. July 28, 2006) (acknowledging that Tenn. Code Ann. § 29-26-115(a)(1-3) "codifies the common law elements of negligence"); *State v. McCoy*, 459 S.W.3d 1, 11 (Tenn. 2014) (upholding as constitutional a statute providing an exception to the rule against the admission of hearsay);

A. The Legislature Has Broad Power to Control the Rights and Remedies Available to Litigants in Tennessee Courts.

In evaluating a statute under the separation of powers doctrine, Tennessee courts "first determine whether the statute being challenged is predominantly substantive, remedial, or procedural in nature." *Tran v. Bui*, No. E2016-00544-COA-R3-CV, 2016 Tenn. App. LEXIS 879, at *8 (Tenn. Ct. App. Nov. 17, 2016). "Substantive law is that part of the law which creates, defines, and regulates rights . . ." *State use of Smith v. McConnell*, 3 S.W.2d 161, 162 (1927). Remedial laws provide "means or method whereby causes of action may be effectuated, wrongs redressed and relief obtained . . ." and procedural laws "establish the mode or proceedings by which legal rights are enforced." *Tran v. Bui*, No. E2016-00544-COA-R3-CV, 2016 Tenn. App. LEXIS 879 at **8-9.

While procedural statutes are susceptible to infringing on the authority of the judicial branch, "[s]tatutes enacted by the General Assembly that are substantive or remedial in nature normally do not infringe on state judicial power." *Id.* at *9 (citing *State v. Mallard*, 40 S.W.3d at 481). There can be no question that the damage cap at issue is substantive legislation in that it defines and regulates rights. "Statutes that create a new right of recovery or change the amount of damages recoverable are . . . deemed to have altered the parties' vested rights" and are, therefore, substantive laws. *Shell v. State*, 893 S.W.2d 416, 420 (Tenn. 1995). Because the damage cap is substantive in nature, it does not infringe on the judiciary's authority. *Tran v. Bui*, No. E2016-00544-COA-R3-CV, 2016 Tenn. App. LEXIS 879 at *9; *see also*

Zdrojewski v. Murphy, 657 N.W.2d 721, 739 (Mich. Ct. App. 2002) ("[b]ecause the [personal injury noneconomic damage caps] are substantive in nature, rather than procedural, they do not infringe the Supreme Court's rulemaking authority.").

The legislature's control over the substantive rights and remedies available to litigants in Tennessee courts has been broadly defined as follows:

> The State has complete control over the remedies which it offers to suitors in its courts, even to the point of making them applicable to rights or equities already in existence. It may change the common law and the statutes so as to create duties and liabilities which never existed before. It is entirely competent for a legislature to alter, enlarge, modify or confer a remedy for existing legal rights.

Cavender v. Hewitt, 239 S.W. 767, 770 (Tenn. 1921). This Court has further recognized that "where the General Assembly has enacted statutes that clearly and definitively set boundaries on rights, obligations, or procedures . . . 'it should be left to the legislature to change those boundaries, if any are to be changed, and to define new ones.'" *Hodge v. Craig*, 382 S.W.3d 325, 338 (Tenn. 2012).

In light of the legislature's broad authority to control the substantive rights of litigants, this Court has upheld statutes which dramatically alter rights which were available to Tennessee litigants at common law. As discussed *supra*, this Court has upheld the legislature's complete abrogation of common law causes of action. *Hanover v. Ruch*, 809 S.W.2d at 896-87 (upholding Tenn. Code Ann. § 36-3-701 which

abolishes the "common law tort action of alienation of affections"); *Dupuis v. Hand*, 814 S.W.2d at 342-43 (upholding Tenn. Code Ann. § 39-13-508(a) which abolishes "the common law torts of seduction or criminal conversation . . .).

If the legislature is empowered to abrogate entire causes of action which were allowed at common law, it must also be empowered to limit the damages allowable for a common law claim. While the Petitioner strains to characterize the damage cap as a "categorical adjudication" of all personal injury cases which infringes on the judiciary's power to consider controversies, the statute does no such thing. Instead, it simply abrogates any cause of action for noneconomic tort damages in excess of the statutory limit. *See Murphy v. Edmonds*, 601 A.2d at 117 (upholding statutory damage cap under Maryland legislature's power to abrogate common law right of recovery and finding that "the General Assembly abrogated any cause of action for noneconomic tort damages in excess of $350,000; it removed the issue from the judicial arena. . . . Therefore, no question concerning the constitutional right to a jury trial is presented.").

Interestingly, the Petitioner seemingly advocates for an infringement on the legislature's powers by the judiciary. This Court has recognized that "the determination of public policy is primarily a function of the legislature." *Taylor v. Beard*, 104 S.W.3d 507, 511 (Tenn. 2003). The judiciary may determine public policy only "in the absence of any constitutional or statutory declaration." *Id.* Where the legislature involves itself in an issue of public policy, it is "particularly appropriate for [the courts] to defer and leave [the] issue to the

discretion of the legislature." *Id.* Here, the legislature legitimately involved itself in the public policy issue of capping noneconomic damages and exercised its constitutional authority to abrogate a common law right of recovery beyond a specified limit. The Petitioner's attempt to attack this legislative policy through an unfounded constitutional challenge must be rejected by the Court.

B. The Majority of States Considering a Challenge to Statutory Damage Caps Under Separation of Powers Principles Have Found the Statutes to be Constitutional.

Many, if not most, of the statutory damage caps enacted in other states have been challenged under separation of powers principles and the majority of the courts considering such challenges have upheld the statutes. In *Zdrojewski v. Murphy*, discussed *supra*, the plaintiff challenged Michigan's statutory limitation on the amount of noneconomic damages for personal injury under separation of powers principles. 657 N.W.2d at 739. The plaintiff argued, among other things, that the statutory cap interfered with "the court's function as the forum for redressing grievances." *Id.* The Court of Appeals of Michigan found the statutory cap to be constitutional because they "are substantive in nature, rather than procedural . . ." The Supreme Court of Michigan cited the *Zdrojewski* decision with approval when it upheld a statutory damage cap for medical malpractice wrongful death claims in *Jenkins v. Patel*, 684 N.W.2d 346 (Mich. 2004).

The Supreme Court of Nebraska considered a similar argument in the context of a statutory cap on medical malpractice damages in

Gourley v. Neb. Methodist Health Sys. The court ultimately found "no merit in the argument that the cap acts as a legislative judgment of damages" because "the Legislature may abolish a common-law right or remedy. For the same reasons the cap does not violate the right to a jury trial, it also does not act as a legislative determination of the amount of damages in any specific case." 663 N.W.2d at 76.

The Supreme Court of Utah rejected a separation of powers challenge and upheld a statutory cap on medical malpractice damages in *Judd ex rel. Montgomery v. Drezga*. The court acknowledged the "legitimate and long-established role for legislative involvement in jury trials" and held that "[t]he damage cap represents law to be applied, not an improper usurpation of jury prerogatives. Consequently, it does not violate the separation of powers provision of the constitution." 103 P.3d at 145. The Supreme Court of Appeals of West Virginia similarly held that its state legislature "can limit noneconomic damages without violating the separations of powers doctrine" because "establishing the amount of damages recoverable in a civil action is within the Legislature's authority to abrogate the common law." *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 415 (W. Va. 2011).[15]

[15] While the Petitioner does not expressly argue that the damage cap at issue interferes with the judiciary's power of remittitur, many state supreme courts have also rejected this separation of powers argument. *See Evans v. State*, 56 P.3d at 1056 (statutory damage cap "is not remittitur because it is a general alteration applied to all cases, and is not case- and fact-specific like remittitur."); *Miller v. Johnson*, 289 P.3d at 1123 ("The cap is not a 'statutory remittitur'

Consistent with the broad legislative authority recognized by the highest courts in many other states, the Tennessee legislature has plenary power to abrogate the common law. *See* *Hanover v. Ruch*, 809 S.W.2d at 896-87; *Dupuis v. Hand*, 814 S.W.2d at 342-43. It necessarily follows that the legislature may abrogate or modify the right of recovery for common claims without violating the separation of powers doctrine. Accordingly, the 2011 damage cap must be upheld.

III. THE NONECONOMIC DAMAGES CAP IN CIVIL CASES IMPOSED BY TENN. CODE ANN. § 29-39-102 DOES NOT VIOLATE A PLAINTIFF'S RIGHT TO EQUAL PROTECTION UNDER THE TENNESSEE CONSTITUTION.

A. The Constitutional Right to Equal Protection in Tennessee.

"Both the United States and Tennessee Constitutions guarantee to citizens the equal protection of the laws." *Lynch v. City of Jellico*, 205 S.W.3d 384, 395 (Tenn. 2006). The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Tennessee Constitution provides its equal protection guarantee in two separate provisions. *See* *Brown v. Campbell Cty. Bd. of Educ.*, 915 S.W.2d 407, 412 (Tenn. 1995). The first is found in article I, section 8, known as the "law of the land clause," which states that individuals shall not be deprived of "liberties or privileges, or outlawed, or exiled, or in any manner destroyed or

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because it is not conditioned on an erroneous verdict, nor is it conditioned on the prevailing party's acceptance.").

deprived of . . . life, liberty or property but by the judgment of . . . peers or the law of the land." Tenn. Const. art. I, § 8. The second is found in article XI, section 8:

> [T]he Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

This Court has "consistently held that these two provisions confer the same protections as does the Fourteenth Amendment to the United States Constitution." *Brown v. Campbell Cty. Bd. of Educ.*, 915 S.W.2d at 412. As a result, this Court has "followed the analytical framework developed by the United States Supreme Court, which, depending on the nature of the right asserted, applies one of three standards of scrutiny: (1) strict scrutiny, (2) heightened scrutiny, and (3) reduced scrutiny, applying the rational basis test." *Id.*

B. Strict Scrutiny Does Not Apply to the Petitioner's Challenge.

The highest level of scrutiny, strict scrutiny, "is appropriate only if a classification 'infringes on a class of people's fundamental rights [or] targets a member of a suspect class." *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (quoting *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006)). *See also Webb v. Roberson*, 2013 Tenn. App. LEXIS 261, at *41 (Tenn. Ct. App. Apr. 17, 2013) ("A

legislative classification which disadvantages a 'suspect class' or which interferes with the exercise of a 'fundamental right' must be analyzed under strict scrutiny."); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000) "Under strict scrutiny, a regulation . . . will only be upheld if it is narrowly tailored to serve a compelling state interest." *Dubay v. Wells*, 506 F.3d 422, 429 (6th Cir. 2007).

1. Petitioner is Not a Member of a Suspect Class.

"A suspect class is one that has been 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian process.'" *Gallaher v. Elam*, 104 S.W.3d at 461 (quoting *State v. Robinson*, 29 S.W.3d 476, 481 (Tenn. 2000)). These include classifications premised on age, race, or alienage. *See Greenwood v. Tenn. Bd. of Parole*, 547 S.W.3d 207, 220 (Tenn. Ct. App. 2017). It is undisputed that Petitioner is not a member of any recognized suspect class. [*See generally* Brief of Plaintiff/Petitioner]. Indeed, the statute is facially neutral and contains no legislative classification of persons on the basis of age, race, or alienage. *See* Tenn. Code Ann. § 29-39-102. Moreover, Petitioner has not even alleged the statute has any disparate impact on a recognized suspect class. [*See generally* Brief of Plaintiff/Petitioner]. Accordingly, because Petitioner has failed to demonstrate that the statute targets a member of a suspect class, strict scrutiny does not apply.

2. The Noneconomic Damage Caps Do Not Infringe on Any Fundamental Right.

"[I]n the absence of a suspect class, a classification warrants strict scrutiny if it burdens the exercise of a fundamental right." *LULAC v. Bredesen*, 500 F.3d 523, 534 (6th Cir. 2007). Here, Petitioner's claim that the damage cap is subject to strict scrutiny is solely premised on an alleged infringement on the right to a jury trial under article I, section 6 of the Tennessee Constitution. [Brief of Plaintiff/Petitioner at p. 20]. However, as discussed at length in Section I *supra*, Petitioner's argument has no merit. Contrary to Petitioner's position, the statute does not infringe on the right to a jury trial because the damage cap does not remove from the jury the determination of facts.[16] Rather, the cap codifies the measure of damages, which is a question of law. Because the statute at issue does not infringe on the sole alleged fundamental right at issue, strict scrutiny does not apply.[17] *See Miller*

[16] The argument set forth in Section I *supra* is incorporated by reference as if set forth herein.

[17] Moreover, AMS does not concede the right to a jury trial is implicated at all in Petitioner's equal protection claim. As instructed by the United States Supreme Court, rights are always to be identified at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n. 6 (1989). The Michigan Supreme Court applied this guidance in the context of a constitutional challenge to a statute capping the amount of a lessor's liability in motor vehicle leases of thirty days or less. *See Phillips v. Mirac, Inc.*, 685 N.W.2d 174, 177 (Mich. 2004). There, the court rejected the plaintiff's position "characteriz[ing] the right at issue as the right to a jury trial" and instead found "that, rather than describing the right

v. City of Cincinnati, 622 F.3d 524, 538 (6th Cir. 2010); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000).

C. Heightened Scrutiny Does Not Apply to the Petitioner's Challenge.

Heightened scrutiny, also commonly referred to as intermediate scrutiny, "applies only to legislative classifications involving a quasi-suspect class, such as gender or illegitimacy." *Gallaher v. Elam*, 104 S.W.3d at 461. *See also Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988). Heightened scrutiny is often invoked where a law facially distinguishes between men and women. Under heightened scrutiny "such classifications must bear a close and substantial relationship to important governmental objectives. . . ." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) . *See* e.g. *United States v. Virginia*, 518 U.S. 515, 519 (1996) (applying heightened scrutiny to invalidate a policy barring women from admission to Virginia Military Institute); *Sessions*

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sweepingly, [it was required] to define it with the most precision possible." *Id.* at 185. It ultimately concluded the right at issue was "not the overarching right to have a jury trial but, *more precisely, a claimed right to have a jury's assessment of damages be unmodifiable as a matter of law*." *Id.* (emphasis added). As such, because "right to full recovery in tort is not only not a fundamental right, it is not a right at all . . . strict scrutiny does not apply." *Id.* Under the guidance of the *Phillips* decision, AMS respectfully avers that Petitioner's reference to the right to a jury trial is an overly-broad classification of the alleged right at issue. Instead, when analyzed with the requisite precision, Petitioner simply claims the cap infringes on the right to have a jury's assessment of damages be unmodifiable as a matter of law. As the right to full recovery is not only not a fundamental right, strict scrutiny does not apply.

v. Morales-Santana, 137 S. Ct. 1678, 1678 (2017) (applying heightened scrutiny and finding a statute's gender-based differential concerning acquisition of U.S. citizenship by a child born abroad violated the equal protection); *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 800 (10th Cir. 2019) (applying heightened scrutiny to public-nudity ordinance prescribing one rule for women and a different rule for men).

However, where a law contains no facial classifications as to any quasi-suspect class, as is the case here, it "does not violate the Equal Protection Clause solely because it results in a . . . disproportionate impact . . ." to such class. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. at 260. *See also Agg v. Flanagan*, 855 F.2d 336, 341 (6th Cir. 1988) ("A facially neutral law does not violate the equal protection clause merely because it has a disproportionate impact. . . ."). Rather, as instructed by the United States Supreme Court,

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an "important starting point," **but purposeful discrimination is "the condition that offends the Constitution**."

Pers. Adm'r of Mass. v. Feeney, 442 U.S. at 274 (internal citations omitted) (emphasis added).

Put simply, a neutral law is unconstitutional under the Equal Protection Clause only if the alleged disparate impact can be traced to a discriminatory purpose. *Id.* *See also* *United States v. Blewett*, 746 F.3d 647, 680 (6th Cir. 2013) ("A [facially neutral] law presents an equal protection violation and must therefore be struck down or read differently if it is motivated by a racially discriminatory purpose and has a disparate impact on an identifiable group.")[18]; *Moore v. Sch. Reform Bd.*, 147 F. Supp. 2d 679, 696 (E.D. Mich. 2000) ("A statute that is racially neutral on its face violates the Fifteenth Amendment only if it is motivated by a discriminatory purpose.").[19] Discriminatory purpose

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[18] Although some cited cases involve racial discrimination, the analysis remains the same, as "[t]he Supreme Court has held that these principles 'apply with equal force to cases, such as this, involving alleged gender discrimination.'" *Barcume v. Flint*, 638 F. Supp. 1230, 1232 (E.D. Mich. 1986) (citing *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979)).

[19] *Taylor v. Cuyahoga Cty. Land Reutilization Corp.*, 2014 U.S. Dist. LEXIS 146537, at *11 (N.D. Ohio Oct. 14, 2014) ("The administration by state officers of a state statute neutral on its face, which results in unequal application to those entitled to be treated alike, is not a denial of equal protection unless there is shown to be intentional or purposeful discrimination."); *Conway v. Purves*, 2016 U.S. Dist. LEXIS 128171, at *28 (E.D. Mich. Aug. 1, 2016) ("[P]roof of discriminatory purpose is required to show a violation of the Equal Protection Clause."); *Rack Room Shoes v. United States*, 718 F.3d 1370, 1376 (Fed. Cir. 2013) ("Where, as here, a law is facially neutral, a party pleading discrimination under equal protection must show that the law has a disparate impact on natural persons resulting from a discriminatory purpose."); *Samuel v. Hogan*, 2018 U.S. Dist. LEXIS 38748, at *18-19 (D. Md. Mar. 9, 2018) ("In other words, disproportionate impact alone is insufficient to demonstrate [*19] an equal protection violation by a facially neutral statute such as here—

"implies more than . . . awareness of consequences. It implies that the decision-maker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). "In other words, to establish intentional discrimination, plaintiffs must show that the state official acted with the purpose of creating an adverse impact on an identifiable group—not simply with an awareness that adverse consequences would result from the state action." *Conway v. Purves*, No. 13-10271, 2016 U.S. Dist. LEXIS 128171, at *28 (E.D. Mich. Aug. 1, 2016). "A discriminatory purpose will not be presumed." *Taylor v. Cuyahoga Cty. Land Reutilization Corp.*, NO. 1:14 CV 1273, 2014 U.S. Dist. LEXIS 146537, at *11 (N.D. Ohio Oct. 14, 2014) (citing *Tarrance v. State of Florida*, 188 U.S. 519, 520 (1903)).

In this matter, the statute is undisputedly neutral on its face and contains no express classification based on gender. *See* Tenn. Code Ann. § 29-39-102. Therefore, in order to invoke heightened scrutiny, Petitioner bears the burden of demonstrating the Tennessee General Assembly *acted with a discriminatory intent or purpose* in enacting the noneconomic damage caps. *See Feeney*, 442 U.S. at 274. The record before this Court is entirely void of any such evidence, and Petitioner fails to even reference this issue in her Brief. [*See generally* Brief of Plaintiff/Petitioner]. On the contrary, Petitioner appears to concede

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the plaintiff must also demonstrate that the statute was enacted with a discriminatory intent.").

that the Tennessee General Assembly possessed a legitimate, non-discriminatory purpose in enacting the statute, relying upon the statement of Representative Dennis that "[t]he purpose of this act is to create predictability and clarity for business owners, small and large throughout this state, in regards to risk management." [Brief of Plaintiff/Petitioner at p. 16]. Petitioner offers no statement by any member of the Tennessee General Assembly, or any person associated with the passage of the statute, concerning its impact on a particular gender or evidencing intent to utilize the statute to discriminate on that basis. [*See generally* Brief of Plaintiff/Petitioner]. With no such evidence, Petitioner cannot carry her burden and, as was the case in *Feeney*, heightened scrutiny cannot apply.

D. The Statute is Constitutional Because it is Rationally Related to a Legitimate State Interest.

If the classification does not involve a suspect or quasi-suspect classification or affect a fundamental right, it will be reviewed to determine whether it is rationally related to any conceivable legitimate state interest. *See Heller v. Doe*, 509 U.S. 312, 319 (1993). *See also Navarro v. Block*, 72 F.3d 712 (9th Cir. 1995) ("Unless a statute employs a classification that is inherently invidious -- such as race or gender -- or that impinges on fundamental rights, we exercise only limited review."). "Compared to heightened and strict scrutiny, the reduced scrutiny test imposes upon those challenging the constitutionality of a statute the greatest burden of proof." *Brown v. Campbell Cty. Bd. of Educ.*, 915 S.W.2d at 413.

> Equal protection does not require absolute equality. Nor does it mandate that everyone receive the same advantages. Unless the individual challenging the statutes can establish that the difference[s] are unreasonable, the statute must be upheld.

Id. at 414. (internal citations omitted). Thus, "under the rational basis test, a statute may discriminate in favor of a certain class, as long as the discrimination is founded upon a reasonable distinction or difference in state policy." *Id.* A court's inquiry is therefore limited to a determination of "whether the challenged classifications bear a reasonable relationship to a legitimate state interest." *Id.*

Importantly, "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller v. Doe*, 509 U.S. at 319 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). "Nor does it authorize 'the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" *Id.* (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). As such, "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Id.* "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)).

Under the rational basis standard, Tennessee courts presume that the legislature acted constitutionally and will uphold the statute "if any state of facts can reasonably be conceived to justify the classification or if the unreasonableness of the class is fairly debatable. . . ." *City of Chattanooga v. Davis*, 54 S.W.3d 248, 276 (Tenn. 2001) (quoting *Bates v. Alexander*, 749 S.W.2d 742, 743 (Tenn. 1988)). To carry the burden of demonstrating that a government action lacks a rational basis, a plaintiff must either "negative[] every conceivable basis which might support the government action, or . . . demonstrate[] that the challenged government action was motivated by animus or ill-will." *Club Italia Soccer & Sports Org. v. Charter Twp. of Shelby, Mich.*, 470 F.3d 286, 298 (6th Cir. 2006). *See also Heller v. Doe*, 509 U.S. at 320 ("[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."); *City of Humboldt v. McKnight*, No. M2002-02639-COA-R3-CV, 2005 Tenn. App. LEXIS 540, at *60 (Tenn. Ct. App. Aug. 25, 2005) ("The party attacking the statute bears the burden of showing that the classification does not rest upon a reasonable basis.").

When faced with a rational basis challenge, "[a] State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. at 320. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* Rather, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit

between means and ends." *Id.* "The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific." *Id.* (quoting *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913)).

In this matter, Petitioner has failed to present evidence the statute was motivated by government ill-will toward women and has failed to negative every conceivable basis which might support Tenn. Code Ann. § 29-39-102. In fact, Petitioner has attached transcripts from proceedings before the Tennessee General Assembly that evidence at least one rationale behind the enactment of the caps – a desire to provide business owners within the state and their insurers with a measure of predictability in tort awards. [Brief of Plaintiff/Petitioner at App. 6-37]. As explained by Representative Dennis, "[t]he purpose of this act is to create predictability and clarity for business owners, small and large throughout this state, in regards to risk management. . . ." [Brief of Plaintiff/Petitioner at App. 23:20-23]. This reasoning was echoed by Senator Norris: "if Company X is looking at the state of Tennessee, they say, Okay, they have certain parameters. They have caps on certain claims, we understand what their limits are, we can quantify what our risk might be there." [Brief of Plaintiff/Petitioner at App. 18:20-25].

This Court has previously recognized that "provid[ing] . . . employers and their insurers with a measure of predictability. . . ." is a valid rational basis for the enactment of damage caps. *Brown v. Campbell Cty. Bd. of Educ.*, 915 S.W.2d at 414. "[P]redictability in the

law is obviously a desirable and legitimate legislative objective, one that serves the interests of the parties, bench, and bar." *Id.* at 414-15.

An overwhelming number of courts from across the country have adopted a similar approach, and given deference to the policy judgment of the legislature, when upholding damage caps under a rational basis standard. *See e.g.* *Arbino v. Johnson & Johnson*, 880 N.E.2d at 424 ("The General Assembly's general justification for the tort reforms . . . was that the state has an interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation.") (internal quotations omitted). *Miller v. Johnson*, 289 P.3d at 1105 (2012) ("We hold that it is 'reasonably conceivable' under the rational basis standard that imposing a limit on noneconomic damages furthers the objective of reducing and stabilizing insurance premiums by providing predictability and eliminating the possibility of large economic damage awards.").[20]

In order to survive rational basis scrutiny, the Tennessee General Assembly was under no obligation to provide *any* specified reason for

[20] *Evans v. State*, 56 P.3d at 1048; *Stinnett v. Tam*, 130 Cal. Rptr. 3d at 748; *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 903 (Colo. 1993); *Miller v. Johnson*, 289 P.3d at 1105; *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517, 518 (La. 1992); *Murphy v. Edmonds*, 601 A.2d at 104; *Zdrojewski v. Murphy*, 657 N.W.2d at 725; *Gourley v. Neb. Methodist Health Sys.*, 663 N.W.2d at 55; *Tam v. Eighth Judicial Dist. Court*, 358 P.3d at 236.

enacting the damage caps. *See Heller v. Doe*, 509 U.S. at 320. By doing so, however, it *ensured* the damage caps would survive constitutional challenge.

The Petitioner does not and cannot offer any evidence showing that the legislature's basis for the damage caps is pretextual. Instead, Petitioner cites "evidence" which does nothing more than attempt to question the wisdom or effectiveness of the damage caps. Petitioner primarily relies upon a law review article written by Professor Lucinda M. Finley in 2004, seven years *before* the enactment of Tennessee's statute, criticizing noneconomic damage caps for a purported adverse impact on women. [Brief of Plaintiff/Petitioner at 18 (citing Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263 (2004))]. Yet, such an article has no relevance to this rational basis analysis, as it contains no discussion of the impact of such caps on creating predictability and clarity for business owners and whether doing so results in job growth. [*See generally Id.*]. Moreover, even to the extent the article has minimal relevance, the probative value of the findings contained therein are certainly questionable at best. Professor Finley readily acknowledges in her article that she "primarily concentrated on jury verdict reports in medical malpractice cases from California" in reaching her conclusions. [*Id.* at 1282]. The statute at issue, however, concerns noneconomic damage caps on all tort awards, not only medical malpractice. Also, the statute only affects awards by Tennessee juries, as opposed to

California.[21] Because Petitioner offers no material evidence on the issue, this Court is simply left to speculate as to if or how Professor Finley's limited sampling of various California medical malpractice cases may relate to Tennessee jury awards in all personal injury cases. Moreover, as Petitioner acknowledges in her brief, one set of scholars she relies upon has opined that the conclusions reached by the "studies" on the impact of noneconomic damage caps are often not reliable due to methodological flaws.[22] [*See* Brief of Plaintiff/Petitioner at p. 22[23]].

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[21] Petitioner additionally relies upon what purports to be the expert affidavit of Professor Lucinda M. Finley filed in separate litigation. [Brief of Plaintiff/Petitioner at App. 38]. AMS objects to Petitioner's attempt to rely on expert testimony from other cases. Petitioner offers no context for this testimony, AMS has had no opportunity to contest the substance of such testimony, it is impossible for this Court to determine what level of weight such testimony should be given, and it is unclear whether these witnesses are even aware Petitioner is relying upon their testimony.

[22] This statement would certainly call into question the significance and reliability of any such study cited by Petitioner in her brief. [*See generally* Brief of Plaintiff/Petitioner]. Additionally, Petitioner claims these scholars "reviewed extant empirical literature about caps, including sources cited by the State." [Brief of Plaintiff/Petitioner at p. 22]. As there has been no brief filed by the State of Tennessee in this case, it is unclear exactly what Petitioner is referencing here. As is the case with the reports and affidavits cited by Petitioner, Petitioner may be attempting to reference a brief filed in another matter.

[23] Citing Kathryn Zeiler and Lorian E. Hardcastle, *Do Damages Caps Reduce Medical Malpractice Insurance Premiums?: A Systematic Review of Estimates and the Methods Used to Produce Them*, at 3-4, available at https://scholarship.law.georgetown.edu/cgi/viewcontent.

Petitioner additionally relies upon what purports to be an expert report of J. Robert Hunter regarding medical malpractice insurance premiums in New Mexico [Brief of Plaintiff/Petitioner at App. 60], as well as articles concerning (1) medical malpractice litigation in Texas,[24] and (2) the location preferences of obstetricians and gynecologists.[25] Again, it is unclear how any portion of these sources is relevant to analyzing the rationale for the statute articulated by the Tennessee General Assembly, providing predictable liability exposure to business within Tennessee, resulting in job growth.

In her brief, Petitioner has done little more than take the position that the enactment of noneconomic damage caps by the Tennessee

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cgi?referer=https://en.wikipedia.org/&httpsredir=1&article=2140&context=facpub.

[24] Charles M. Silver, David A. Hyman, and Bernard S. Black, *Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and after HB 4* (January 3, 2019) U of Texas Law, Law and Econ Research Paper No. 284, 2019; Northwestern Law & Econ Research Paper No. 19-01, available at https://ssrn.com/abstract=3309785. Notably, a "key finding" of this report was that "unpredictability" was driven by a few larger awards and mean jury verdicts are stable once those large awards are excluded. [Brief of Plaintiff/Petitioner at 24]. This would tend to support the reasoning proffered by the Tennessee General Assembly in support of the noneconomic damages cap.

[25] Tony Yang, David M. Studdert, S. V. Subramanian, and Michelle M. Mello, *A Longitudinal Analysis of the Impact of Liability Pressure on the Supply of Obstetrician-Gynecologists*, available at https://doi.org/10.1111/j.1740-1461.2007.00117.x. AMS renews its objection to this report and all others reports and/or affidavits relied upon by Petitioner on the basis set forth in the preceding footnote.

General Assembly was not a wise or logical policy choice. [*See* Brief of Plaintiff/Petitioner at pp. 18-24]. However, such a position is insufficient, as a matter of law, to carry the burden of demonstrating a state action has no rational basis. *See* *Heller v. Doe*, 509 U.S. at 320. In fact, Petitioner's current request to have this Court constitutionally nullify legislation with which the Petitioner disagrees runs afoul of the very separation of powers doctrine the Petitioner has cited. Put simply, Petitioner is asking this Court to substitute its judgment for that of the Tennessee General Assembly on a heavily-debated issue of public policy, which is prohibited under Tennessee law. *See* *Helton v. Knox Cty.*, 922 S.W.2d 877, 885 (Tenn. 1996). ("[C]ourts must not intrude into realms of policy exceeding their institutional competence. The judicial branch lacks the fact-finding ability of the legislature, and the special expertise of the executive departments. . . . The courts . . . should not attempt to balance the detailed and competing elements of legislative or executive decisions."); *McKinney v. Jarvis*, No. M1999-00565-COA-R9-CV, 2000 Tenn. App. LEXIS 165, at **8-9 (Tenn. Ct. App. Mar. 16, 2000) ("The legislative power is the authority to make, order, and repeal law; the judicial power is to interpret and apply the law. It is primarily for the legislature to determine the public policy of this state. When the legislature . . . has spoken upon a particular subject, its utterance is the public policy of the State upon that subject, and the courts are without power to read into the Constitution a restraint of the legislature with respect thereto.") (internal citations and quotations omitted). As such, there are no grounds to invalidate the statute at issue on the basis of

the "evidence" cited by Petitioner in her brief. [*See* Brief of Plaintiff/Petitioner at p. 18-24].

As Petitioner has failed to carry her burden and introduce even a scintilla of evidence concerning the Tennessee General Assembly's rationale for the noneconomic damage caps, much less eliminate all potential reasonable rationales for such an enactment, the statute passes rational basis scrutiny, and its constitutionality must be upheld.

CONCLUSION

The cap at issue is a constitutionally valid exercise of the legislature's historic duty to declare the policy of the State, including the measure of damages available in a personal injury case. To hold otherwise would be a gross deviation from the judicial and legislative philosophy existing in Tennessee since common law and would cast constitutional doubt on innumerable longstanding Tennessee statutes. Under the cap, the jury retains its authority to ascertain and calculate damages while the legislature fulfills its duty to prescribe the measure of damages. There is no proof that the Tennessee cap discriminates against women. It is rationally related to a legitimate legislature policy. It is constitutional.

We respectfully request that this Court uphold the cap by answering "no" to each certified question.

Respectfully submitted this 29th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Section 3, Rule 3.02(c) of Tenn. Sup. Ct. R. 46, the undersigned certifies that this brief complies with the requirements set forth in Section 3, Rule 3.02(a)1. of Tenn. Sup. Ct. R. 46.

Number of words contained in this brief: 13,945

s/ John R. Tarpley

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2019, a true and exact copy of the foregoing was served via the court's electronic filing system and forwarded via first class mail, postage prepaid, to:

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