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**No. 2024AP126**

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In the  
**Wisconsin Supreme Court**

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SAVANNAH WREN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE  
OF THE ESTATE OF CALVIN GORDON, JR., AND CALVIN GORDON,  
PLAINTIFF-APPELLANTS,

v.

COLUMBUS ST. MARY'S HOSPITAL MILWAUKEE, INC., JESSICA  
HOELZLE, M.D., JORDAN HAUCK, D.O., AND INJURED PATIENTS AND  
FAMILIES COMPENSATION FUND,  
DEFENDANTS-RESPONDENTS-PETITIONERS.

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On Appeal from Circuit Court for Milwaukee County, the  
Honorable Kristy Yang Presiding, Case No. 2023CV4960

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**NON-PARTY BRIEF OF WISCONSIN DEFENSE COUNSEL**

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## INTRODUCTION

This is not a tiers-of-scrutiny case. The issue here is whether the Wisconsin Constitution's right to a jury trial restricts the legislature's constitutional power to create, modify, or eliminate common-law causes of action. It does not. If this Court reaches a different conclusion, it would call into question countless laws that have long-established the contours of Wisconsin's various causes of action. It would also require the overruling of several precedents which no party asks this Court to revisit. The Court should decide this case in a way that preserves the legislature's constitutional power to create, modify, or eliminate common-law causes of action.

## STATEMENT OF INTEREST

The Wisconsin Defense Counsel ("WDC") is a statewide organization of attorneys and claims professionals dedicated to the defense of individuals, businesses, and municipalities in civil litigation. WDC's mission is to advocate for a fair, equitable, and impartial legal system. WDC pursues these goals by connecting defense attorneys across the state and by providing continuing legal education and written publications for its members. WDC's members firmly believe in the rights of injured persons to be fairly compensated, and they also believe that such compensation must be pursued and obtained within the parameters of the law.

WDC members frequently litigate cases involving statutes that, like Wis. Stat. § 895.4801, narrow or eliminate civil liability

in certain situations. The court of appeals' far-reaching decision in this case calls into question the constitutionality of countless civil-liability immunity statutes, not just § 895.4801. WDC submits this brief to urge this Court to issue a decision that preserves the legislature's constitutional prerogative to create, modify, or eliminate common-law causes of action.

### **ARGUMENT**

WDC wishes to make two points in this Brief that supports reversal of the court of appeals' decision below. First, the Wisconsin Constitution gives the legislature power to create, modify, or eliminate common-law causes of action. And second, the Wisconsin Constitution's right to a jury trial does not implicate the legislature's power to decide what causes of action are available to litigants.

#### **I. The Wisconsin Constitution gives the legislature power to create, modify, or eliminate common-law causes of action.**

Article XIV, Section 13 of the Wisconsin Constitution provides, "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state *until altered or suspended by the legislature.*" (Emphasis added.) As evidenced by the text "until altered or suspended by the legislature," this

provision contemplates that the legislature has power to create, modify, or even eliminate common-law causes of action.

Indeed, this proposition is relatively uncontroversial. As one respected treatise on the Wisconsin Constitution remarks of this constitutional provision, “The legislature may discontinue causes of action and remedies that were available at common law.” Jack Stark & Steve Miller, *The Wisconsin State Constitution*, 264 (2d ed. 2019) (citing *Guzman v. St. Francis Hosp. Inc.*, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776).

This Court has stated time-and-again that the Wisconsin Constitution’s conferral of law-making power on the legislature gives it power to create, modify, or eliminate common-law causes of action. For example, in *Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund*, 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849, this Court observed, “The legislature’s authority includes the power to define and limit causes of action and to abrogate common law on policy grounds.” *Id.*, ¶51. The Court added, “Article XIV, § 13 explicitly recognizes legislative authority to alter or suspend common law.” *Id.*, ¶42 n.12.

More recently, in 2018, this Court reaffirmed the legislature’s power under Article XIV, Section 13 to narrow or eliminate common-law causes of action:

Furthermore, the Wisconsin Constitution permits the legislature to eliminate common law causes of action altogether. Under Article XIV, Section 13 of the

Wisconsin Constitution, the common law may be “altered or suspended by the legislature.” A prominent example is worker’s compensation, where the legislature has eliminated claims for noneconomic damages by workers against their employers.

*Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶64, 383 Wis. 2d 1, 914 N.W.2d 678.

The court of appeals has also weighed in on the legislature’s power to create, modify, or eliminate common-law causes of action. In *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776, the court explained that Article XIV, Section 13 “specifically empowers the legislature to *modify* the common law, and indeed, to discontinue common-law causes of action or remedies.” *Id.*, ¶7. The court added, “Article XIV, § 13 is a powerful delegation of authority to the legislature by the constitution, and recognizes, as does *Aicher*, that it is the legislature’s function to establish the parameters of policy for Wisconsin, consistent with the changing needs of our society.” *Id.*, ¶8. “Once the legislature establishes the law, both courts and juries must follow it, unless, obviously, the law violates *a specific provision* of the constitution.” *Id.*

All of these precedents—which no party asks this Court to revisit—establish the uncontroversial proposition that the legislature enjoys broad power to create, modify, or eliminate common-law causes of action. Included in this power is the

legislature's power to create Wis. Stat. § 895.4801. That being the case, the question then becomes whether the Wisconsin Constitution's right to a jury trial somehow narrows that legislative authority. It does not.

**II. The right to a jury trial does not limit the legislature's power to modify or eliminate common-law causes of action.**

This is not the first time a court has been asked to invoke the right to a jury trial to strike down a statute modifying or eliminating a common-law cause of action. Litigants have made this pitch both in Wisconsin and at the U.S. Supreme Court. Such overtures have been roundly rejected—and not, mind you, based on the application of the tiers of scrutiny. Rather, these courts have simply ruled that the right to a jury trial does not implicate the legislature's power to create, modify, or eliminate common law causes of action.

***A. Wisconsin courts have repeatedly held that Article I, Section 5 does not limit the legislature's power to narrow or eliminate common-law causes of action.***

Most often, when a party has asked a court to invoke the jury trial right to strike down a law narrowing or eliminating a common-law cause of action, it has done so in the context of a challenge to Worker's Compensation laws. Such was the case in 1981 when the

Wisconsin Court of Appeals addressed the same type of argument advanced here.

In *Oliver v. Travelers Insurance Co.*, 103 Wis. 2d 644, 309 N.W.2d 383 (Ct. App. 1981), the court of appeals held that Wisconsin's Worker's Compensation Act—which eliminated the common-law cause of action for workplace negligence—did not violate Article I, Section 5's right to a jury trial. *Id.* at 651. The court reasoned as follows:

Oliver next argues that sec. 102.03(2), Stats., violates Wis. Const. art. I, s 5, in that it abrogates his right to a jury trial. Wis. Const. art. I, s 5, states in relevant part: “The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy . . . .”

Wis. Const. art. I, s 5, grants to citizens the right to trial by jury in all cases at law. The Wisconsin Supreme Court, however, has held that compensation statutes result in there being no common law tort action against an employer. Absent a case at law, there is no right to a jury trial under Wis. Const. art. I, s 5.

*Id.* (citation omitted). The final line of *Oliver's* analysis warrants repeating: “Absent a case at law”—*i.e.*, unless there is an existing cause of action—“there is no right to a jury trial under Wis. Const. art. I, s 5.” *Id.*

The court applied similar logic a few years later in *Messner v. Briggs & Stratton Corp.*, 120 Wis. 2d 127, 353 N.W.2d 363 (Ct. App. 1984). In that case, the legislature enacted a law expanding the

scope of the Worker's Compensation Act to eliminate the claim of bad faith denial of compensation. *Id.* at 132–33. An employee promptly sued, arguing the amended law violated the right to a trial by jury. *Id.* at 133. The court rejected that argument in short order, explaining:

The right to a trial by jury of *common-law* claims is protected by the 7th Amendment to the United States Constitution and by art. I, § 5, of the Wisconsin Constitution. Under our worker's compensation statutes, which are in abrogation of the common law, there no longer exists any common-law tort action against an employer for work-related personal injury. Hence, the aforementioned constitutional provisions are not violated by worker's compensation exclusivity provisions.

*Id.* at 134 (citations omitted). Simply put, the procedural right to a jury trial is not implicated by state laws setting the substantive scope of causes of action.

More recently, in *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, the court of appeals again rejected an attempt to invoke the procedural right to a jury trial to impose a substantive limit on the legislature's power to modify or eliminate common-law causes of action. In that case, the court considered whether a statutory cap on noneconomic damages violated Article I, Section 5's right to a jury trial. *Id.*, ¶9. The court held it did not, explaining that “no provision of the Wisconsin constitution” says that the legislature cannot “set the rules that the jury must follow.” *Id.* The

court reasoned that the right to a jury trial “was designed to set the boundaries between *judge and jury—not between the legislature’s power to make the law and the jury’s right to find facts.*” *Id.*, ¶10.

No party asks this Court to revisit any of these on-point Wisconsin precedents. As a matter of settled Wisconsin constitutional law, the right to a jury trial does not limit the legislature’s power to create, modify, or eliminate common-law causes of action.

***B. Analogously, the U.S. Supreme Court long ago rejected arguments that the Seventh Amendment limits legislative power to modify or eliminate common-law causes of action.***

It has been rightly observed that the “right to a jury trial in civil cases that is guaranteed by Article I, § 5 of the Wisconsin Constitution is substantially similar to the right guaranteed by the Seventh Amendment to the United States Constitution.” *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 225, 556 N.W.2d 326 (Ct. App. 1996). As such, Wisconsin courts have remarked that “we may be guided by the federal cases interpreting that provision.” *Id.*

Federal courts addressing this issue have consistently held that the Seventh Amendment’s right to a jury trial does not restrict legislative authority to eliminate or narrow causes of action. The U.S. Supreme Court recognized this over 100 years ago in *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). That case involved

challenges to Washington's then-new Worker's Compensation law, which, in relevant part, abolished employees' right to sue their employers for workplace negligence. *Id.* at 228. The Supreme Court held that the law did not implicate the Seventh Amendment's right to a jury trial: "As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by a jury." *Id.* at 235. Twelve years after *Mountain Timber*, the U.S. Supreme Court reaffirmed it, explaining: "We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver v. Silver*, 280 U.S. 117, 122 (1929).

In the years since *Mountain Timber*, courts have consistently rejected Seventh Amendment challenges to statutes that eliminate common-law causes of action. *See, e.g., Stumo v. United Air Lines, Inc.*, 382 F.2d 790, 787 (7th Cir. 1967) ("Plaintiff fails to recognize that Congress has the power to modify or abolish common law rights or remedies."); *Hargreaves v. Reis*, 977 F. Supp. 123, 130 (D.R.I. 1997) ("Thus, where a cause of action is otherwise validly eliminated, there is nothing left to which the Seventh Amendment right can attach."); *Stolz v. J&B Steel Erectors, Inc.*, 439 F. Supp. 3d 980, 987 (S.D. Ohio 2020) ("The Amendment does not provide a party the right to such a suit in the first instance, but

rather only that, when a party in fact has a right to such a suit, he or she also has a right to a jury to decide that action.”). Most recently, the federal court for the Eastern District of Wisconsin held that “the Seventh Amendment guarantees only a right to a jury where the party has a right to a suit.” *Camelot Banquet Rooms, Inc. v. Mesa Underwriters Specialty Ins. Co.*, No. 25-CV-703, 2025 WL 1807415, at \*5 (E.D. Wis. July 1, 2025).

These federal precedents lend further persuasive support for the view that the right to a jury trial does not limit the legislature’s power to create, narrow, or eliminate common-law causes of action.

### **III. The court of appeals’ decision calls into question countless longstanding laws that modify or eliminate common-law causes of action.**

WDC’s primary concern with the court of appeals’ decision in this case is that the immunity extended in Wis. Stat. § 895.4801 cannot be distinguished in any principled way from any other statute creating immunity from other common-law causes of action, like negligence. If § 895.4801 violates the Wisconsin Constitution’s right to a jury trial, it is difficult to see how other, less-controversial immunity statutes would not also fall.

Below are just a handful of statutes that create some type of civil liability immunity from negligence claims. Negligence is a common-law cause of action subject to the jury trial right. As such, it is difficult to see how many of these statutes would survive a

challenge under Article I, Section 5 if this Court were to adopt the logic articulated in the court of appeals' decision.

- Wis. Stat. § 895.48, Wisconsin's "Good Samaritan Statute," creates immunity for "any person who renders emergency care at the scene of any emergency or accident in good faith."
- Wis. Stat. § 895.478 creates immunity from liability for college residence hall directors who administer opioid antagonists.
- Wis. Stat. § 118.29 extends civil liability immunity to school personnel for emergency care rendered to students in good faith.
- Wis. Stat. § 895.51 creates civil liability immunity for charitable organizations that distribute emergency medical supplies free of charge.
- Wis. Stat. § 895.4802 provides immunity for those who take action to prevent, mitigate, or clean up the actual or threatened discharge of a hazardous substance.
- Wis. Stat. § 895.484 extends immunity for those who enter a vehicle to render assistance to a person or domestic animal in imminent danger of bodily harm.
- Wis. Stat. § 895.482 provides immunity for ski patrol members acting in their capacity as a ski patrol members, including by rendering emergency care.
- Wis. Stat. § 893.80 extends liability immunity for officers, agents, and employees of local governments for their discretionary acts.
- Wis. Stat. § 895.448 limits the liability a farm equipment mechanic may face for installing a safety device on a machine.

- Wis. Stat. § 895.475 provides that an insurer conducting a safety inspection will not be liable to the insured if the safety inspection fails to uncover potential issues with the insured's property.
- Wis. Stat. § 895.481 creates civil liability immunity for persons involved in equine activities for injuries that are the result of the inherent risk associated with horse-riding.
- Wis. Stat. § 895.52 limits the liability of owners of land used for recreational activities.
- Wis. Stat. § 895.512 limits the liability retail establishments may incur for permitting a person to use their toilet facilities.

Each of these statutes represents a legislative judgment to extend civil liability immunity to certain persons in particular settings. Said differently, they modify or eliminate common-law causes of action to promote particular legislative goals. They are the types of laws Article XIV, Section 13 of the Wisconsin Constitution empowers the legislature to enact. But, under the logic of the court of appeals' decision, all of these statutes are potentially unconstitutional because they wholly eliminate access to a jury for those who wish to bring claims that are barred by these statutes. This Court should clarify that the Wisconsin Constitution's right to a jury trial does not limit the legislature's constitutional authority to enact laws that create, modify, or eliminate common-law causes of action.

## CONCLUSION

For the foregoing reasons, WDC urges the Court to issue a decision that preserves the legislature's constitutional prerogative to create, modify, or eliminate common-law causes of action.

Dated: September 4, 2025

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,804 words.

Dated: September 4, 2025.

*Electronically Signed by Caleb R. Gerbitz*  
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