No. SC 99007

In the Supreme Court of Missouri

ALL STAR AWARDS & AD SPECIALTIES, INC.,
Appellant-Respondent,

v.

HALO BRANDED SOLUTIONS, INC.,
Respondent-Appellant

Appeal from the Circuit Court of Jackson County, No. 1816-CV06419
The Honorable John M. Torrence, Circuit Judge

BRIEF OF *AMICUS CURIAE* THE MISSOURI ORGANIZATION OF DEFENSE LAWYERS IN SUPPORT OF RESPONDENT-APPELLANT HALO BRANDED SOLUTIONS, INC.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The Missouri Organization of Defense Lawyers (MODL) is a professional organization of over 1,300 attorneys specializing in civil defense litigation, including the defendants of entities like Respondent-Appellant HALO Branded Solutions, Inc. MODL's goals include ensuring that defendants in the civil justice system receive fair and impartial treatment. It has a substantial interest in this latest challenge to the Missouri General Assembly's enactment of tort reform though the imposition of statutory caps on damages. It submits this brief in support of HALO and in opposition to Points I and II in the brief of Appellant-Respondent All Star Awards & Ad Specialties, Inc.

In 2012, this Court departed from a 20-year precedent and held that the General Assembly lacks the authority to impose statutory caps on damages for common law claims existing in 1820, holding that such caps violate a litigant's right to a jury trial under Article I, §22(a) of the Missouri Constitution. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 636 (Mo. 2012) (overruling *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. 1992)). It affirmed this holding two years later in *Lewellen v. Franklin*, 441 S.W.3d 136, 143-44 (Mo. 2014). The time has come for this Court to overrule both precedents, as they fundamentally misconstrue the jury's function and

interfere with the General Assembly's authority to modify the common law as it existed in 1820. *Stare decisis* does not favor retaining either precedent.

ARGUMENT (IN OPPOSITION TO ALL STAR'S POINTS I AND II)

I. This Court should overrule *Watts* and *Lewellen* and hold that the Missouri General Assembly may modify the legal remedies available for any civil claim, regardless of whether the claim is one that the common law recognized in 1820.

This Court recently affirmed that the General Assembly possesses the authority to abolish a common law cause of action existing in 1820 and replace it with a statutory scheme containing identical elements but a modified legal remedy capping the amount of damages available at a certain maximum, regardless of what factual conclusions a jury may make regarding damages. *Ordinola v. Univ. Phys. Assoc.*, 625 S.W.3d 445, 449-51 (Mo. 2021). Such caps do not violate a litigant's right to a jury trial under the Missouri Constitution because "when the General Assembly creates or replaces the cause of action, it is free to define what—and to what extent—remedies are available under that cause of action." *Id*. at 449 n.7. In other words, this Court recognized that, when it comes to statutory causes of action, the remedies available on such actions—including the amount of monetary damages available—are as a matter of law distinct from a jury's factual findings, and thus subject to the control of both the General Assembly and this Court. *See id*. at 450 ("This Court also retains the authority to abolish common law causes of actions and doctrines [alongside the General Assembly]."). Prior to *Watts*, this Court had utilized this exact rationale to

uphold statutory caps on common law claims that existed in 1820, ruling that "[i]f the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery in those causes of action." *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. 1992), *overruled by Watts*, 376 S.W.3d at 646. But in *Watts*, this Court reversed *Adams* and concluded, with regard to common law causes of action existing in 1820, that the jury—and only the jury—has the authority to determine and impose the legal remedy for damages. *See Watts*, 376 S.W.3d at 642 ("The application of [a statutory cap on damages] may permit the jury to perform its constitutional role, but it deprives [the plaintiff] of his or her *right to the damages awarded by the jury*.") (emphasis added). *Lewellen* upheld this holding two years later, concluding that, under common law causes of action, "*imposing* punitive damages [is] a peculiar function of the jury." *Lewellen*, 441 S.W.3d at 143 (emphasis added).

Watts and *Lewellen* were manifestly wrong at of their issuance, and they continue to be manifestly wrong today, especially in light of *Ordinola*'s subsequent recognition that General Assembly possesses the right to abrogate a common law cause of action entirely and replace it with a statutory scheme containing identical elements but a different, or more limited, remedy. It is undisputed that under the common law as it existed in 1820 the jury, while having the right to *resolve* disputed issues of fact, did not

have the right to *determine or impose the legal consequences* of such facts. If the General Assembly has the right to abrogate a common law cause of action existing in 1820 entirely, then it necessarily has the authority to modify the remedies that may be imposed under such an action, in accordance with what *Adams* concluded. *Adams*, 832 S.W.2d at 907-08. The time has come for this Court to do away with this artificial, baseless distinction between statutory caps on common law causes of action and statutory caps on statutory causes of action by overruling *Watts* and *Lewellen*.

Stare decisis cannot save these two cases. That doctrine promotes consistence and reliability in the law through adherence to precedent. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 379 (Mo. 2014) (quoting *Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 137 (Mo. 2007)). But *stare decisis* also recognizes that circumstances exist under which it is proper to overrule earlier precedent. This is especially so if (1) the precedent is manifestly wrong and clearly erroneous, (2) a short amount of time has passed since the precedent was issued, and (3) the precedent is contrary to a constitutional provision or right. *See id.*; *First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216, 224 (Mo. 2012); *see also Watts*, 376 S.W.3d at 644 (overruling *Adams* on the ground that the matter involved a constitutional right). All three circumstances apply here. There is no question that, under the common law as it existed in 1820, a jury lacked any

authority to determine the legal consequences of its factual findings or to impose any legal consequences upon a litigant—such authority rested exclusively with this Court and the General Assembly. Nor has much time passed since this Court handed down *Watts* and *Lewellen*—both were decided less than a decade ago, whereas *Watts* overruled *Adams* after the later case had been precedent for twenty years. Finally, *Watts*'s and *Lewellen*'s false notion that a jury has the exclusive authority to determine the legal consequences of its factual determinations is directly repugnant to the General Assembly's authority to modify—and not merely abrogate—the common law, resulting in a blatant infringement on the separation-of-powers. *Cf. Snodrgas v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. 2006) ("The open courts clause does not curtail the legislature's authority to . . . modify common law or statutory claims.").

Stare decisis is also far weaker here, in the context of constitutional interpretation, than in the context of statutory interpretation. *See Med. Shoppe Int'l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 335 n.5 (Mo. 2005). Even though "the Missouri Constitution is amended more readily than the United States Constitution . . . the amendment process is still cumbersome and 'much more difficult than a legislative change to correct an unwarranted interpretation of a statute.'" *Templemire*, 433 S.W.3d at 388 n.3 (Fischer, J., dissenting, joined by Wilson, J.) (quoting *Med. Shoppe*, 156 S.W.3d at 335

n.5). As a result, "[c]onstitutional reinterpretation is not disfavored to the extent statutory reinterpretation is disfavored because it is more problematic to infer that the People have approved or ratified a prior constitutional interpretation without explicit amendment, as compared to legislation, which is relatively easy to enact." *Id.* (Fischer, J., dissenting). Nor is that all—because this case involves the Missouri constitutional right to a jury trial as it existed under the common law in 1820, it necessarily also involves this Court's interpretation of the common law as it existed at that time, and *stare decisis* is "at its weakest in cases involving common law doctrines. *Id.* at 389 n.4 (Fischer, J., dissenting). Given how weak *stare decisis* applies here, no basis exists for continuing to adhere to *Watts* and *Lewellen*.

A. Both *Watts* and *Lewellen* are manifestly wrong.

There is a distinction between "the judicial process by which [civil] claims are determined [and] the substance of the claims themselves." *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 142 (Mo. 2005). While "the legislature is free to establish the substance of a claim . . . . it is not free to establish a procedure for adjudicating that substantive claim if the procedure contravenes the constitution." *Id.* Thus, a legislature may not bar a jury from resolving disputed facts in any claims that are analogous to claims available at common law, such as claims for monetary damages. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 86 (Mo. 2003). But this does *not* bar the legislature

from altering the substantive elements of, or the legal remedies available on, either common law claims or statutory claims that are analogous to common law claims. *See Kilmer v. Mun*, 17 S.W.3d 545, 550 (Mo. 2000) ("A statute . . . . may modify or abolish a cause of action that has been recognized by common law . . . .).

Watts and *Lewellen* failed to take any of this into account. *Watts* framed the issue as whether, in 1820, any statutory caps existed on common law claims, and whether the jury resolved disputed material facts. *Watts*, 376 S.W.3d at 639-40; *Lewellen*, 441 S.W.3d at 143 ("*Watts* recognized that, in 1820, the jury determined the amount of damages at common law and there were no legislative limits on damages."). But this was not the proper way to frame the matter. Rather, *Watts* (as well as *Lewellen*) left unaddressed what was actually the main issue—whether, in 1820, the imposition of damages on common law claims was a legal matter, as opposed to a mere factual assessment, and if it was a legal matter, whether the General Assembly possessed the power to modify it.

By the time Missouri joined the Union in 1820, juries no longer had the authority to decide legal issues, including what remedies to impose in a particular case—their authority was strictly limited to resolving disputed issues of fact. Up through the American Revolution, "juries in some of the colonies wielded broad authority over both legal and factual issues." *Siebert v.*

Okun, 485 P.3d 1265, 1276 (N.M. 2021) (citing Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 592-93 (1993); Morton J. Horwitz, *The Transformation of American Law, 1780-1860* 142-43 (1977)). But "[t]he nineteenth century saw a wave of judicial reform intended to vest more power in judges to determine the legal outcome in tort cases." *Id.* at 1276 (citing Landsman, *supra*, at 605; Horwitz, *supra*, at 143-44). Critically, by the year 1810—that is, one decade before Missouri's founding as a state—"it was clear that . . . juries no longer possessed the power to determine the law." *Id.* (quoting Horwitz, *supra*, at 142-43). Contrary to the conclusions of *Watts* and *Lewellen*, by 1820 the jury had no authority to determine or impose the *legal remedies* that may have resulted from its factual findings.

The mere fact that, in 1820, the jury had the authority to resolve all disputed facts in a case—including the *amount* of damages—is irrelevant to how the *imposition* of damages was—and still is—a legal remedy subject to modification or abrogation by the General Assembly. The General Assembly's authority to abolish or modify the common law as it existed in 1820 stems from how the Missouri "Constitution is not a grant but a restriction upon the powers of the legislature." *State v. Clay*, 481 S.W.3d 531, 537 (Mo. 2016) (quoting *Liberty Oil Co. v. Dir. of Revenue*, 813 S.W.2d 296, 297 (Mo. 1991)). In other words, and unlike the federal Congress, state legislatures "possess

all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people." *See Munn v. People of the State of Illinois*, 94 U.S. 113, 124 (1876)). To that end, "[a] statute . . . . may modify or abolish a cause of action that has been recognized by common law . . . ." *Kilmer*, 17 S.W.3d at 550.

Likewise, the mere absence of any statutory caps on damages at common law claims in 1820 is irrelevant to whether the General Assembly possessed the authority to impose such caps through its authority to modify the common law or abolish it entirely. So far as undersigned counsel has been able to determine, as of 1820 a state legislature had never abrogated a common law claim in its entirety and replaced it with a statutory scheme, yet this did not prevent this Court more than a century later from upholding the validity of the then-new workers' compensation statutory scheme. *See DeMay v. Liberty Foundry Co.*, 37 S.W.2d 240 (Mo. 1931); *see also Ordinola*, 625 S.W.3d at 450 ("[T]he General Assembly has used [its] authority [validly] to abolish common law negligence claims against employers and to create a statutory workers' compensation scheme."). But under the reasoning of *Watts* and *Lewellen*, the fact that as of 1820 a legislature had never abolished a common law cause of action and replaced it with a statutory scheme would mean that the General Assembly lacked the authority to enact the modern workers' compensation scheme—an absurd result if there ever was one.

The deficiency of *Watts*'s legal reasoning is particularly evident in its attempt to justify its conclusion through an appeal to the federal Seventh Amendment right to a jury trial and the case of *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), interpreting that amendment.[1] In *Feltner*, the Supreme Court of the United States overruled a federal statute that had given the judge the right to determine, as a factual matter, the amount of damages in the first place and without any involvement of a jury. *Feltner*, 523 U.S. at 355. The statute, which governed copyright infringement claims, imposed statutory caps totaling $20,000 per incident if the infringement was unwilful, and statutory caps totaling $100,000 per incident if the infringement was willful. *Id.* at 343-44. But the law also provided that the court, and not the jury, was to assess the factual issue of damages in the first place. *Id.* at 344-47. The Court ruled this was impermissible, holding that "if a party so demands, a jury must determine the actual amount of statutory damages under [the copyright law] in order to preserve the

[1] While federal courts have never decided whether the Seventh Amendment applies to the states via the Fourteenth Amendment, *see Schmidt v. Ramsey*, 860 F.3d 1038, 1046 (8th Cir. 2017), and this Court has ruled that the Seventh Amendment "does not apply to the states," *O'Malley*, 95 S.W.3d at 84, this Court has also ruled that the Seventh Amendment "invites the same kind of historical analysis as the Missouri provision [guaranteeing the right to a jury trial]." *Id.* Accordingly, federal appellate opinions interpreting the Seventh Amendment are instructive in determining the nature of the right to a jury trial under the Missouri Constitution.

substance of the common-law right of trial by jury." *Id*. at 355 (internal quotation marks omitted), *quoted in Watts*, 376 S.W.3d at 643-44.

Watts took the above language to mean that the Supreme Court of the United States had invalidated the statutory caps in their entirety, and not just the portion requiring the judge to determine the amount of damages in the first instance, without the participation of a jury. *See Watts*, 376 S.W.3d at 643-44. But *Feltner*'s subsequent history show that this is not, in fact, what the Court decided. On remand, a jury trial took place on the plaintiff's claim of damages. The jury found that the defendant willfully violated the statute multiple times, and awarded the plaintiff damages of $72,000 per each incident. *Columbia Pictures Television, Inc. v. Krypton Bdcst. of Birmingham, Inc.*, 259 F.3d 1186, 1194-95 (9th Cir. 2001). In upholding the verdict, the Ninth Circuit noted that the award was "well within the statutory range for willful infringement." *Id*. at 1195. Had the Supreme Court invalidated the statutory caps themselves, instead of the requirement that the judge, and not the jury, assess the amount of damages in the first place, the Ninth Circuit would never have made reference to the statutory range for willful infringement and how the damages awarded fell within that range. *Watts*'s failure to take this subsequent development in *Feltner* into account severely undermines its reliance on that case to support its conclusion that

the General Assembly may not impose statutory caps on common law causes of action existing in 1820.

Even more fatal to *Watts*'s reliance on *Feltner* is how the Eighth Circuit interpreted the later case in *Schmidt v. Ramsey*, 860 F.3d 1038 (8th Cir. 2017), five years after *Watts*'s issuance. The plaintiff brought a common law malpractice claim in a diversity jurisdiction case governed by Nebraska law. *Schmidt*, 860 F.3d at 1042-45. Nebraska law imposed caps on damages arising out of malpractice cases. *Id.* at 1043; Neb. Rev. Stat. §44-2801.[2] The plaintiff in *Schmidt* employed arguments similar to the conclusions in *Watts*, claiming that *Feltner*'s ruling amounted to an invalidation on all statutory caps on damages. The Eight Circuit was "not persuaded" by this argument. *Schmidt*, 860 F.3d at 1045. "The statute in *Feltner*," it noted, "allowed a judge to determine damages in the first instance. Because that role had historically belonged to juries the statute collided with the Seventh Amendment." *Id.* By contrast, under the Nebraska statute "[t]he jury . . . performed its historical role by finding liability and assessing damages. The Nebraska cap imposed an upper legal limit on that jury determination, and the district court applied

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

that limit as a matter of law." *Id.* (internal citations omitted). The Third, Fourth, Fifth, and Sixth Circuits all agree with the Eighth Circuit's rationale. *See Davis v. Omitowoju*, 883 F.2d 11554 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Learmonth v. Sears*, 710 F.3d 249 (5th Cir. 2013); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005).

In short, not a single federal appellate court has interpreted either the Seventh Amendment or *Feltner* in the manner this Court did in *Watts*. Neither the Seventh Amendment nor federal case law interpreting that amendment stand for the proposition that the right to a jury trial prohibits Congress from imposing statutory caps on damages. This all the more shows the degree to which *Watts* erred in misinterpreting the right to a jury trial, and why this Court should overrule it.

B. Less than a decade has passed since this Court handed down *Watts* and *Lewellen*.

Stare decisis discourages the overruling of opinions that have "remained unchanged for many years." *First Bank*, 364 S.W.3d at 224 (quoting *Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. 2002). But only a short amount of time has passed since this Court handed down *Watts*—9 years—and *Lewellen*—8 years. By contrast, when *Watts* had overruled *Adams* in 2012, the later case had been on the books for over 20 years, since 1992—more than twice the amount of time *Watts* and *Lewellen* have been binding

precedence. This Court has not hesitated in overruling cases far older than either one at issue here. *See, e.g., Templemire*, 433 S.W.3d at 373 (overruling a 30-year-old precedent); *D.E.G.*, 601 S.W.3d at 215 (overruling a 50-year-old precedent); *compare with First Bank*, 364 S.W.3d at 224 (declining to overrule precedent more than a century old). The previous section has already demonstrated that *Watts* and *Lewellen* are manifestly wrong. Their short lifespan is all the more reason for this Court to overrule them. As the next section demonstrates, failure to do so will unnecessarily continue to hinder the legislature from enacting meaningful tort reform via its authority to modify the common law as it existed in 1820.

C. *Watts* and *Lewellen* violate the separation-of-powers by unjustly hindering the General Assembly from modifying the common law as it sees fit.

There is no question that, in enacting caps on punitive damages with §510.265, the General Assembly desired to modify the substantive remedies available on all civil causes of action, be they common law actions that existed in 1820 or statutory causes of action. Given how manifestly wrong *Watts* and *Lewellen* are about the nature of a right to a jury trial, the General Assembly plainly had the authority to do this pursuant to its plenary power to modify the common law. *See Steerman v. State*, 10 Mo. 503, 505 (Mo. 1847) ("[I]t is competent for the General Assembly, to change, modify or alter [a] common law principle . . . ."). In light of how this Court has recently

recognized that the General Assembly may abolish a common law cause of action existing in 1820 entirely and replace it with a statutory scheme containing identical elements but different remedies in the form of caps on damages, *Ordinola*, 625 S.W.3d at 449-51, it makes no sense for this Court to continue to maintain that the General Assembly cannot also take the far less drastic step of merely *modifying* the substantive remedies available on common law causes of action existing in 1820 instead of abolishing them entirely, unlike what it held in *Watts* and *Lewellen*.

This is not a mere academic issue divorced from any real-world consequences. If *Watts* and *Lewellen* continue to exist alongside *Ordinola*, it will force the General Assembly to engage in a time-consuming, hyper-technical abrogation of every common law claim existing in 1820 that this Court determines is not eligible for a statutory damages cap and replace it with a statutory claim containing identical caps but a different remedy, just like it did with medical malpractice claims in *Ordinola*. This is a complete waste of the General Assembly's time and resources, given that in enacting §510.265 it has already expressed its intent to enact a general cap on punitive damages *regardless of the claim*.

Nor is that all—continuing adherence to *Watts* and *Lewellen* in light of *Ordinola* going forward it will result in this Court having to utilize its mandatory appellate jurisdiction to review every as-applied challenge to the

statutory punitive damages caps on every conceivable civil claim in order to determine whether the claim is one that existed under the common law in 1820.[3] This unduly burdensome process will continue so long as any plaintiff can make a reasonable argument that the claims at issue did not exist under the common law as of 1820 and that this Court has never resolved the matter with regard to such claims. *Compare with D.E.G. v. Juvenile Officer of Jackson Cty.*, 601 S.W.3d 212, 215 n.2 (Mo. 2020) ("If . . . the Missouri Supreme Court has addressed a constitutional challenge, the claim is merely colorable and the intermediate appellate court has jurisdiction.") (quoting *State v. Henry*, 568 S.W.3d 464, 479 (Mo. App. E.D. 2019)). Given how blatantly wrong *Watts* and *Lewellen* are, continuing adherence to them will

[3] It is unclear why All Star did not directly appeal to this Court in the first place, or why the Missouri Court of Appeals, Western District, did not transfer the matter here on its own motion pursuant to Mo. Const. Art. V, §11, as this Court has exclusive appellate jurisdiction over all real and substantial, and not merely colorable, challenges to a statute's validity under the Missouri Constitution. Mo. Const. Art. V, §3; *D.E.G. v. Juvenile Officer of Jackson Cty.*, 601 S.W.3d 212, 215-216 (Mo. 2020). All Star is making an as-applied constitutional challenge to §510.265.1 on its claims of civil conspiracy to breach the duty of loyalty and tortious interference with business expectancy, alleging that such claims involve factual issues that, as of 1820, a jury would have had unlimited authority not only to resolve, but also to impose legal consequences on such determinations. Whether All Star's claims involve such factual issues is an issue of first impression, making it a "real and substantial" constitutional challenge within this Court's exclusive appellate jurisdiction. *See D.E.G.*, 601 S.W.3d at 226.

result in an unnecessary waste not only of the General Assembly's time and resources, but also of this Court's own resources.

In *Dodson v. Ferrara*, 491 S.W.3d 542 (Mo. 2016), two judges on this Court noted that neither *Watts* nor *Lewellen* could "be ignored or overruled without a substantial showing that they were incorrectly decided," and that "[n]o such showing had been made" in that case. *Dodson*, 491 S.W.3d at 571 (Fischer, J., dissenting, joined by Wilson, J.). Unlike in *Dodson*, here MODL has substantially demonstrated that *Watts* and *Lewellen* are wrong, and that the time has come for this Court to overrule both of them.

II. Alternatively, this Court should hold that the claims at issue here did not exist at common law in 1820.

Should this Court nevertheless conclude that *stare decisis* precludes the overruling of *Watts* and *Lewellen*, MODL agrees with HALO that none of the claims at issue here are of the type that existed at common law in 1820, and accordingly §510.265.1's cap on punitive damages does not violate All Star's right to a jury trial, for all of the reasons discussed in HALO's brief.

CONCLUSION

This Court should affirm the trial court's reduction of punitive damages in accordance with §510.265.

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 84.06(C)

I certify that I have signed and retained the original of this document, and that on **November 1, 2021,** I filed this matter with the Court electronically via case.net, to be served on all counsel of record via the same case.net system. I further certify that this brief contains a total of **5,096** words and complies with the limitations in Rule 84.06(b).

/s/ John M. Reeves