IN THE SUPREME COURT OF MISSOURI
EN BANC

MARIA DEL CARMINE ORDINOLA VELASQUEZ, Plaintiff/Appellant/Cross-Respondent, vs. JENNIFER REEVES, et al., Defendants/Respondents/Cross-Appellants.	)	No. SC98977

Appeal from the Circuit Court
Jackson County

Hon. John M. Torrance
Circuit Judge

Amicus Brief of Missouri Pharmacy Association, Missouri Dental Association, Missouri Coalition for Community Behavioral Healthcare, Missouri Health Care Association, Association of Osteopathic Physicians and Surgeons, Missouri Emergency Medical Services Association, and Missouri Academy of Family Physicians

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Table of Contents

Page

Table of Cases 3

Interest of the Amici 5

Argument 8

I. The Legislature Has The Authority To Repeal A Common Law Cause Of Action And Replace It With A Statutory Cause Of Action 8

II. Because The Legislature Legally Replaced The Common Law Cause Of Action With A Statutory Cause Of Action, It Can Limit Or Condition The Rights Conferred 11

III. If A Common Law Court Can Modify Or Abolish A Cause Of Action, The Legislature Can Also Do So 14

Conclusion 16

Certificate of Compliance 18

Table of Cases

Page(s)

Cases

Blaske v. Smith & Entzeroth, Inc.,
821 S.W.2d 822 (Mo. banc 1991) 10

Boyle v. Vista Eyewear, Inc.,
700 S.W.2d 859 (Mo. App. 1985) 15

De May v. Liberty Foundry Co.,
37 S.W.2d 640 (Mo. 1931) 9, 10

Dodson v. Ferrara,
491 S.W.3d 542 (Mo. banc 2016) 12, 13

Duke Power Co. v. Carolina Environmental Study Group, Inc.,
438 U.S. 59 (1978) 11

Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC,
361 S.W.3d 364 (Mo. banc 2012) 11, 13, 14

Goodrum v. Asplundh Tree Expert Co.,
824 S.W.2d 6 (Mo. banc 1992) 10

Helsel v. Noellsch,
107 S.W.3d 231 (Mo. banc 2003) 15

Jones v. State Highway Com'n,
557 S.W.2d 225 (Mo. banc 1977) 15

Kelly v. Bass Pro Outdoor World, LLC,
245 S.W.3d 841 (Mo. App. 2007) 15

Kilmer v. Mun,
17 S.W.3d 545 (Mo. banc 2000) 9, 10, 16

Margiotta v. Christian Hosp. Northeast Northwest,
315 S.W.3d 342 (Mo. banc 2010) 15, 16

Missouri Alliance for Retired Americans v. Dep't of Labor & Industrial Relations,
277 S.W.3d 670 (Mo. banc 2009) 10

Rodriquez v. Suzuki Motor Corp.,
936 S.W.2d 104 (Mo. banc 1996) 16

Sanders v. Ahmed,
364 S.W.3d 195 (Mo. banc 2012) 11, 14

State v. Dalton,
114 S.W. 1132 (Mo. App. 1908) 9

Sturdivant Bank v. Wright,
168 S.W. 355 (Mo. App. 1914) 9

Thomas v. Siddiqui,
869 S.W.2d 740 (Mo. banc 1994) 15

Townsend v. Townsend,
708 S.W.2d 646 (Mo. banc 1986) 15

Watts v. Lester E. Cox Med. Ctrs.,
376 S.W.3d 633 (Mo. banc 2012) 12

*Wolf v. Midwest Nephrology Consultants, P*C,
487 S.W.3d 78 (Mo. App. 2016) 12

Statutes

Art. I, § 14, of the Constitution 8, 14, 15

§ 1.010, R.S.Mo 8, 9, 15

Other Authorities

Holmes, *The Common Law* (1881) 15

S.B. 239 ..... 7, 8, 9

Interest of the Amici

The Missouri Pharmacy Association ("MPA") is a professional society representing Missouri pharmacists, united to improve public health and patient care, enhance professional development, and advocate for the interests of the profession. MPA has approximately 1,200 members and is located in Jefferson City.

The Missouri Dental Association ("MDA") is an organization of approximately 2,300 individual dentists and dental students. MDA is committed to providing the highest quality of care to the public and serves as a resource for advocacy, education, communication, information, and fellowship. MDA is headquartered in Jefferson City.

The Missouri Coalition for Community Behavioral Healthcare ("Coalition") founded in 1978, represents Missouri's not-for-profit community mental health centers, as well as alcohol and addiction treatment agencies, affiliated community psychiatric rehabilitation service providers, and a clinical call center. Its 33 member-agencies are staffed with more than 11,000 caring and qualified staff, who provide treatment and support services to over 250,000 clients annually. It is headquartered in Jefferson City.

The Coalition is the largest trade association of community mental health centers in Missouri. The Coalition assists its members in government and regulatory affairs, education seminars, and through management of a host of programs and services critical to success in the field to provide needed mental and behavioral health services to Missouri residents.

The Missouri Health Care Association ("MHCA") is an association of long-term care facilities, headquartered in Jefferson City. MHCA is the largest long-term care trade association in Missouri and represents over 350 long-term care facilities. MHCA assists its members in government and regulatory affairs, convention, and education seminars, and through management of a host of programs and services critical to success in the field

The physicians who comprise the Association of Osteopathic Physicians and Surgeons ("Association") are the providers of health care to the American people. The Association is comprised of approximately 3000 Missouri licensed physicians.

The Missouri Emergency Medical Services Association ("MEMSA") is a professional association representing Emergency Medical Technicians, paramedics and others in the emergency medical service field. MEMSA has been representing EMS personnel regarding policy and legislative issues, and providing educational opportunities, for over 35 years.

The Missouri Academy of Family Physicians ("MAFP") is a non-profit medical society of more than 2,400 physicians, residents and medical students across the State. Headquartered in Jefferson City, MAFP is dedicated to optimizing the health of patients, families and communities through patient care, advocacy, education, and research. Founded in 1947, MAFP was the first chapter of the American Academy of Family Physicians ("AAFP").

All seven amici have first-hand knowledge of how tort law affects the cost and availability of medical care. They understand that the delivery of health care

services is an extraordinarily complex system requiring numerous tradeoffs. They are acutely aware that the Court's resolution of the constitutional issue in this case will directly affect the willingness and ability of providers to offer health care services to Missourians.

Amici's brief is limited to the issue of the constitutionality of S.B. 239, which reimposes statutory caps on non-economic damages in medical malpractice case. Amici express no opinion about the merits.

Argument

I. The Legislature Has The Authority To Repeal A Common Law Cause Of Action And Replace It With A Statutory Cause Of Action.

This Court has always recognized that the legislature has the legal authority to repeal a common law cause of action. It may be necessary to provide a statutory replacement to conform to the open courts provision of Art. I, § 14, of the Constitution. But that is exactly what the legislature did in enacting S.B. 239 in 2015.

The source of the common law in Missouri has always been statutory. The Territorial Act of January 19, 1816 – four years before Missouri became a state – adopted the common law of England. After statehood, the legislature adopted what is now § 1.010, R.S.Mo.[1] Section 1.010.1 adopts "the common law of England and all statutes and acts of parliament" before 1607.

Both the Territorial Act and § 1.010 explicitly reserved to the legislature the right to overturn that common law. The Territorial Act adopted the common law "until altered or repealed by the legislature." Section 1.010.1 adopted the common law only to the extent it is "not repugnant to or inconsistent with . . . the statute laws in force for the time being." So, the very Act and statute that adopted the common law expressly provide that the legislature has the power to modify or repeal it by subsequent statute.

In S.B. 239, the legislature exercised that power. It adopted § 1.010.2, which "expressly excludes from this section the common law of England as it

[1] All subsequent statutory references are to R.S.Mo.

relates to claims arising out of the rendering of or a failure to render health care services by a health care provider." Instead, the legislature intended to replace those claims with "statutory causes of action." *Id.* In enacting § 538.210, the legislature implemented that intent.

Missouri courts have long recognized that "the common law on a given subject may be repealed . . . by express words to that effect." *State v. Dalton*, 114 S.W. 1132, 1135 (Mo. App. 1908). *Accord, Sturdivant Bank v. Wright*, 168 S.W. 355, 358 (Mo. App. 1914) (common law "would yield to our statute, for in adopting the common law we adopted it only in so far as not repugnant to our own laws").

In 1931, in sustaining the workers' compensation statute, the Court held that the proposition that "the Legislature may regulate ***or entirely abolish*** the common-law rules of liability . . . is thoroughly established." *De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 647 (Mo. 1931) (emphasis added).

In 2000, the Court reiterated that the legislature "may modify ***or abolish*** a cause of action that had been recognized by common law" – unanimously on that point. *Kilmer v. Mun*, 17 S.W.3d 545, 550 (Mo. banc 2000) (Wolff, J.) (emphasis added):

> Claims for injuries are recognized by common law or by statute. ***The legislature may abolish such recognition***. If the legislature had eliminated dram shop liability entirely, the Kilmer family would have no claim against defendant Stefanina's . . . .

Id. at 554 (emphasis added). *Accord, id.* at 555 (Limbaugh, J.) (dissenting) (open courts provision "does not prohibit the courts from modifying or abolishing a

cause of action that has been recognized by the common law") (internal punctuation omitted).[2] *Accord, Missouri Alliance for Retired Americans v. Dep't of Labor & Industrial Relations*, 277 S.W.3d 670, 682 (Mo. banc 2009) (Teitelman, J.) (dissenting) ("no doubt" that the legislature is "free to alter or abolish any statutory or common law cause of action"); *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 833 (Mo. banc 1991) (statute of repose "modifies the common law to provide that there is no such cause of action").

If the constitutional right to jury trial precludes the legislature from replacing a common law cause of action with a statutory one, the ban on tort claims against an employer in the Workers' Compensation Act is unconstitutional. The Labor and Industrial Relations Commission, rather than a jury, determines whether the Act applies. If it does, the employee must litigate the claim before the Commission, not a jury. And any recovery is limited to the amounts allowed by the statute.

No Missouri court has ever held that these provisions violate the right to jury trial. As previously explained, a unanimous Court in *De May* sustained the Act against a jury trial challenge. 37 S.W.2d at 648. As recently as 1992, a unanimous Court reiterated that the Act does "not violate the constitutional right to trial by jury." *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 11 (Mo. banc 1992).

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[2] *Kilmer* did suggest that the legislature might have to provide a replacement cause of action rather than abolishing one outright. 17 S.W.3d at 554 n.24. Here, of course, the legislature did exactly that.

To the best of amici' knowledge, no Missouri court has ever held that the right to jury trial prevents the legislature from eliminating a common law cause of action, at least when the legislature replaced the common law cause of action with a statutory one. The Supreme Court of the United States has held that the federal Constitution "does not forbid the creation of new rights, or the abolition of old ones recognized by the common law." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978).

II. Because The Legislature Legally Replaced The Common Law Cause Of Action With A Statutory Cause Of Action, It Can Limit Or Condition The Rights Conferred.

The controlling case on the legislature's authority to limit remedies in a statutory cause of action is *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012). *Sanders* was a wrongful death case caused by medical malpractice. By statute, the legislature capped non-economic damages that could be recovered in medical malpractice cases. Plaintiff argued that the damage caps violated his constitutional right to trial by jury.

The Court disagreed. "The legislature has the power to define the remedy available if it creates the cause of action." 364 S.W.3d at 203:

> The legislature has the authority to choose what remedies will be permitted under a statutorily created cause of action. The legislature in so doing, at least in regard to a statutorily created cause of action limited the substance of the claims themselves, as it has a right to do in setting out the parameters of a statutory cause of action.

364 S.W.3d at 203, *quoting Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC*, 361 S.W.3d 364 (Mo. banc 2012) (internal punctuation omitted).

Shortly after *Sanders*, the Court held that damage caps in common law claims violated the constitutional right to jury trial. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. banc 2012). The Court quickly made clear that this holding was limited to common law claims and did not apply to statutory claims.

In *Dodson v. Ferrara*, 491 S.W.3d 542 (Mo. banc 2016), the trial court applied the non-economic damage caps to a wrongful death claim. The plurality opinion explained that *Watts* merely held that damage caps "violated the right to a jury trial as applied to medical malpractice actions alleging common law personal injury." 491 S.W.3d at 555. By contrast, for statutory claims, the legislature "has the right to create causes of action and to prescribe their remedies." *Id.* at 558.

The concurring opinion by Judges Fischer and Wilson makes it even clearer that the key distinction between *Sanders* and *Watts* is the source of the cause of action:

> [T]he issue before the Court in *Watts* was the constitutional validity of statutorily enacted caps on the amount of damages recoverable under a common law theory. *Sanders*, on the other hand, dealt with the constitutional validity of such caps on the amount of damages recoverable under a statutory cause of action, and *Overbey* and *Sanders* emphasize that the two issues are to be treated differently.

Id. at 570. *Accord, Wolf v. Midwest Nephrology Consultants, PC*, 487 S.W.3d 78, 82 (Mo. App. 2016) ("[a]s a statutorily created cause of action, the legislature has the power to define the remedy available for a wrongful death action").

Plaintiff's principal argument is that her cause of action was well-established in 1820, so the right to a jury trial must attach regardless of any

legislative attempts to replace it. She attempts to distinguish *Dodson* on the basis that a wrongful death action did not exist in 1820. Br. at 21.

The concurring opinion in *Dodson* refutes that argument and makes clear that the constitutionality of a damage cap depends on the source of the right, not when a similar cause of action existed. Whether a plaintiff has a right to a jury trial is a "decidedly different question" than "whether the constitutional right to a jury trial prohibited the enforcement of legislatively enacted caps on damages recoverable under common law or statutory causes of action." *Dodson*, 491 S.W. 3d at 569. The analysis of the right to a jury trial:

> is not the analysis to be used in determining whether the constitutional right to a jury trial bars enforcement of legislatively enacted caps on the amount of damages recoverable under a statutory cause of action. Instead, in *Overbey*, the Court held that such caps would be enforced even though the constitution protected the right to a jury trial.

Id.

The concurring opinion in *Dodson* emphasizes that the validity of caps on common law claims is "to be treated differently" than the validity of caps on statutory claims." *Id.* at 570:

> [T]he constitutional validity of legislatively enacted caps turns on whether the legislature is attempting to limit recovery on a common law cause of action (which the constitutional jury trial right does not allow) or under a statutory cause of action (which the constitution permits).

Id. at 571.

As the concurring opinion makes clear, if plaintiff's argument were valid, "the Court could not have reached the results it did in *Overbey*." *Id.* The Merchandising Practices Act may not have existed in 1820, but a fraud-based

claim for actual and punitive damages certainly did. 361 S.W.3d at 375. The blatant fraud proven in *Overbey* – deliberately misrepresenting the price of a car to 35 different people – would certainly have warranted a common law fraud submission. But the Overbeys "chose to bring a statutory claim under the MMPA rather than a common law fraud claim," *id.* at 376, and had to live with the consequences.

If plaintiff's argument were valid, the ban on tort suits against employers in the Workers' Compensation Act would violate the right to jury trial. The right to bring a negligence action against a tortfeasor was well-established by 1820. If the antiquity of the action were controlling, the legislature could not replace the uncapped negligence action with a limited no fault compensation system. It is the source of the right – common law or statute – that controls the validity of the cap.

Amici acknowledge Chief Justice Draper's argument in *Sanders* that the legislature could not replace an unlimited common law cause of action with a capped statutory one. 364 S.W.3d at 214. With all respect, we submit that (a) the argument appeared in a dissent; (b) the dissent cited no authority for that specific proposition; and (c) the dissent does not address the logic of the argument of amici.

III. If A Common Law Court Can Modify Or Abolish A Cause Of Action, The Legislature Can Also Do So.

Art. I, § 22(a), which creates the constitutional right to a jury trial, applies as much to the judiciary as to the legislature. This Court has long held that, as

a common law court, it has the power to modify or abolish common law causes of action and it has not hesitated to do so when appropriate. If § 22(a) does not constrain the judiciary, it should not constrain the legislature.

As Justice Holmes famously remarked, "[t]he life of the law has not been logic; it has been experience." Holmes, *The Common Law* (1881) at 1. In *Thomas v. Siddiqui*, 869 S.W.2d 740 (Mo. banc 1994), the Court relied on its experience to abolish the common law cause of action for criminal conversation. In *Helsel v. Noellsch*, 107 S.W.3d 231 (Mo. banc 2003), it abolished the common law cause of action for alienation of affection, holding that when a tort is "created by the courts, it is within the province of the courts to abolish it." 107 S.W.3d at 233. In neither case did the Court offer a replacement.

If the Court may abolish a common law cause of action, it surely has the power to modify one. Section 1.010 adopted the English common law as "decisional law of which th[e] Court is custodian, with authority to alter or abrogate a common law doctrine absent contrary statutory direction by [the] legislature." *Townsend v. Townsend*, 708 S.W.2d 646, 649-50 (Mo. banc 1986). *Accord, Jones v. State Highway Com'n*, 557 S.W.2d 225, 228 (Mo. banc 1977).

In *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. 1985), the court of appeals created a common law cause of action for wrongful discharge in violation of public policy. In *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841 (Mo. App. 2007), the Court held that a "reasonable belief" that the employer's conduct was illegal made a submissible case. In *Margiotta v. Christian Hosp. Northeast Northwest*, 315 S.W.3d 342 (Mo. banc 2010), however, this Court held

that a reasonable belief was not enough. Rather, plaintiff had to point to a "definite statute, regulation . . . constitutional provision, or rule" that "clearly gives notice to the parties of its requirements" to make a submissible case. 315 S.W.3d at 348.

No one has ever suggested that these rulings jeopardize the right to trial by jury. They simply recognize the power of a common law court to "design the framework of the substantive law by abolishing or modifying common law . . . claims." *Kilmer*, 17 S.W.3d at 550 (internal punctuation omitted).

If the Court chose to abolish the tort of medical malpractice, it has the power to do so, subject only to the open courts provision. If the Court chose to require clear and convincing evidence for such malpractice, it has the power to do so. *Rodriquez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc 1996). If the Court chose to cap the amount of non-economic damages in such cases, it has the power to do so.

If this Court has the power to limit non-economic damages, surely the legislature has the same power. To repeat, such a change in no way impacts the jury's role in the trial. It merely changes the substance of the cause of action, which is well within the legislature's power. *Kilmer*, 17 S.W.3d at 550.

Conclusion

For these reasons, amici respectfully submit that the Court should sustain the constitutionality of S.B. 239.

Respectfully Submitted,

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Certificate of Compliance

The undersigned certifies that pursuant to Mo. Sup. Ct. R. 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b) and contains 2,997 words excluding the parts of the brief exempted by Rule 84.06(b), based on the word count that is part of Microsoft 2010. The undersigned counsel further certifies that the electronic version of this brief has been scanned and is free of viruses.

/s/ Mark G. Arnold

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2021, I electronically filed the foregoing with the Clerk of Court using the court's case.net system which will send notification of such filing to all counsel of record.

/s/ *Mark G. Arnold*