No.

In the Supreme Court of the United States

JACKSON NATIONAL LIFE INSURANCE COMPANY,
PETITIONER

v.

TAMARIN LINDENBERG, Individually and as Natural Guardian of Her Minor Children ZTL and SML

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DANIEL W. VAN HORN
AMY M. PEPKE
ELIZABETH E. CHANCE
GADSON W. PERRY
BUTLER SNOW LLP
6075 Poplar Avenue, Suite 500
Memphis, TN 38119
(901) 680-7200

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
dortiz@law.virginia.edu

ROBERT N. HOCHMAN
SIDLEY AUSTIN LLP
One South Dearborn St.
Chicago, IL 60603
(312) 853-7000

QUESTIONS PRESENTED

The Sixth Circuit has struck down Tennessee's statutory cap on punitive damages. It did so as a matter *not* of federal law, but as a matter of its own interpretation of the Tennessee Constitution. On June 19, 2019, in *McClay* v. *Airport Mgmt. Services, LLC*, No. M2019-00511-SC-R23-CV, the Tennessee Supreme Court accepted certification of the closely related question of whether Tennessee's non-economic damages cap is consistent with the Tennessee Constitution. That ruling will likely provide clear guidance on the two state constitutional law issues in this case.

The questions presented are:

1. Do principles of cooperative federalism, judicial efficiency, and concern for the consistent application of state law compel the Sixth Circuit to certify to the Tennessee Supreme Court three questions of Tennessee law that the Tennesse Supreme Court specifically indicated it was willing to consider, all of which determine liability and the scope of relief in this case, none of which had previously been addressed by the Tennessee Supreme Court, and two of which concern the Tennessee Constitution.

2. In the alternative to setting this case for briefing and argument on the merits, should this Court hold this petition with a view to granting, vacating, and remanding to the Sixth Circuit to reconsider in light of the Tennessee Supreme Court's disposition of *McClay* v. *Airport Mgmt Services, LLC*.

PARTIES IN THE COURT OF APPEALS

In addition to the parties listed on the cover, the State of Tennessee appeared as an intervenor-appellee.

CORPORATE DISCLOSURE STATEMENT

Jackson National Life Insurance Company is indirectly wholly owned by Prudential plc, a publically-owned British company that trades on the New York Stock Exchange under the symbol "PUK."

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-78a) is reported at 912 F.3d 348 (6th Cir. 2018). The denial of the petition for rehearing en banc and accompanying opinions (App., *infra*, 170a-198a) are reported at 919 F.3d 992 (6th Cir. 2019). The district court's orders (1) denying defendant's motion to dismiss plaintiff's claim for punitive damages (App., *infra*, 79a-100a) is unreported but may be found at 2014 WL 11332306 (W.D. Tenn. Dec. 9, 2014); (2) denying defendant's motion for judgment as a matter of law and granting plaintiff's motion for certification of questions to the Tennessee Supreme Court (App., *infra*, 101a-126a) is reported at 147 F. Supp. 3d 694 (W.D. Tenn. 2015); (3) certifying questions of state law to the Supreme Court of Tennessee (App., *infra*, 127a-132a) is unreported; and (4) on defendant's motion for judgment as a matter of law as to punitive damages (App., *infra*, 136a-169a) is reported at 304 F. Supp. 3d 711 (W.D. Tenn. 2016). The order of the Supreme Court of Tennessee declining to answer the district court's certified questions (App., *infra*, 133a-135a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2018. On January 4, 2019, petitioner filed a petition for rehearing en banc, which was denied on March 28, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND TENNESSEE SUPREME COURT RULE

Article I, section 6 of the Tennessee Constitution provides:

> That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

Article II of the Tennessee Constitution provides:

> Section 1. The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial.
>
> Section 2. No 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. Code Ann. § 29-39-104 provides, in pertinent part, that:

> (a) In a civil action in which punitive damages are sought:
>
> * * *
>
> (5) Punitive or exemplary damages shall not exceed an amount equal to the greater of:
>
> (A) Two (2) times the total amount of compensatory damages awarded; or
>
> (B) Five hundred thousand dollars ($500,000).

Tenn. Code Ann. § 56-7-105(a) provides, in pertinent part, that

> [t]he insurance companies of this state * * * in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days * * * shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest on the bond, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that * * * the refusal to pay the loss was not in good faith, and that the failure to pay inflicted additional expense, loss, or injury including attorney fees upon the holder of the policy or fidelity bond; and provided * * * the additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury.

Rule 23(1) of the Tennessee Supreme Court provides:

> The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a District Court of the United States in Tennessee, or a United States Bankruptcy Court in Tennessee. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

INTRODUCTION

In 2011, Tennessee enacted a cap on punitive damages that limits such awards to $500,000 or two times compensatory damages, whichever is larger. Tenn. Code Ann. § 29-39-104(a)(5). The law exempts from its limits certain intentional or criminal misconduct. *Id.* at § 29-39-104(a)(7). The Tennessee legislature adopted the provision to encourage greater business investment and activity in the state by providing a greater degree of predicatability for civil litigation.

A divided panel of the Sixth Circuit in this case has declared that Tennessee's punitive damages cap violates the Tennessee Constitution. The Sixth Circuit decided this novel question of fundamental Tennessee law despite being asked by the State of Tennessee, acting through its Attorney General, to certify it to Tennessee's Supreme Court, despite the Tennessee Supreme Court's express willingness to consider the issue, and despite the absence of any authority from the Tennessee Supreme Court to guide its adjudication.

This Court has encouraged lower federal courts to certify uncertain questions of state law to state courts to avoid precisely this outcome. "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 79 (1997) (acknowledging that) (quoting *Brockett* v. *Spokane*

Arcades, Inc., 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)). Certification of questions of state law "save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974).

But this Court has yet to provide lower courts clear benchmarks for when they should exercise their discretion to certify questions to state supreme courts. As a result, lower courts are inconsistently employing the procedure. Respect for judicial efficiency and state Supreme Court authority over the development of state law demands more. This case provides an especially strong opportunity to make clear that some circumstances weigh so heavily in favor of certification that, barring exceptional circumstances, it is an abuse of discretion not to certify questions to the State Supreme Court. This case also provides an ideal occasion for this Court to articulate more clear standards that can be consistently applied by both the circuit and district courts when determining whether to certify questions to state supreme courts.

STATEMENT

A. Factual Background And District Court Proceedings

Respondent Tamarin Lindenberg, on behalf of herself and her children, filed a claim with petitioner Jackson National Life Insurance Company (Jackson National) to recover the benefit of a life insurance policy after the death of her ex-husband. App., *infra*, 5a. After unsuccessfully negotiating, largely over the rightful beneficiaries of the insurance proceeds, she

sued in state court, alleging breach of contract and statutory and common-law bad faith. *Ibid.* Jackson National removed the case to federal district court and filed an answer with an interpleader complaint. App., *infra*, 83a. There, it explained that it was "not in a position to determine, factually or legally, who is entitled to the Death Benefit" and asked the district court to determine the proper beneficiary. App., *infra*, 5a-6a, 83a.

Ultimately, the district court dismissed the interpleader complaint and ordered Jackson National to pay Lindenberg the full value of the policy plus interest. App., *infra*, 6a. Jackson National then moved to dismiss Lindenberg's remaining punitive damages and bad-faith claims. It argued, among other things, that under Tennessee law, an award against an insurance company for bad-faith refusal to pay promptly (*see* Tenn. Code Ann. § 56-7-105) precludes both common-law bad-faith damages and punitive damages. App., *infra*, 86a-87a. The district court dismissed Lindenberg's common-law bad-faith claim, but allowed her claims for punitive damages and for statutory bad faith to proceed. App., *infra*, 6a. The case was tried to a jury. App., *infra*, 7a. During the trial, Jackson National moved for judgment as a matter of law, which the court denied. App., *infra*, 7a-8a.

The jury returned a verdict finding that (1) Jackson National had breached the insurance contract causing $350,000 in actual damages; (2) Jackson National's nonpayment was in bad faith, resulting in additional damages of $87,500; and (3) its "refusal to pay was

either intentional, reckless, malicious, or fraudulent." App., *infra*,7a. After hearing further testimony, the jury returned a special verdict awarding $3,000,000 in punitive damages. App., *infra*, 7a.

Jackson National renewed its motion for judgment as a matter of law against the punitive damages award and argued that even if permissible in light of the bad-faith award, the punitive damages award still must be reduced under Tennessee's statutory punitive damages cap. App., *infra*, 7a. Lindenberg responded that the statute capping punitive damages violated both state constitutional separation of powers principles and the state constitution's right to trial by jury. App., *infra*, 7a. She moved to certify these questions of Tennessee constitutional law to the Tennessee Supreme Court, arguing, among other things, (1) that "the questions of law before the Court have not been answered by the Tennessee Court of Appeals, much less the Tennessee Supreme Court"; (2) that "certification would 'afford the [Tennessee Supreme Court] the opportunity to address a not insubstantial issue under the law of that State'"; and (3) that "certifying the questions will reduce the twin risks of forum shopping and inconsistent outcomes." Lindenberg D.C. Mot. For Certification, ECF 167 at 3-4. Jackson National countered that certification would be premature, since the district court had yet to decide the threshold issue of whether Lindenberg proved her claim for punitive damages as a matter of law. Jackson National D.C. Resp. to Pl.'s Mot. for Cert'n of Questions to the Tenn. Sup. Ct., ECF 174 at 2-3. It also argued, however, that

it should win on the constitutional questions should the court decide them. *Id.* at 6, 7-14. The State of Tennessee then intervened as a party to defend against Lindenberg's state constitutional challenges and agreed with Jackson National that the issues were not yet ripe for certification. State of Tenn. D.C. Resp. in Opp. To Pl.'s Mot. for Cert'n of Questions to the Tenn. Sup. Ct., ECF 178 at 3.

The district judge nevertheless certified the following state constitutional questions to the Tennessee Supreme Court:

> 1. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 violate a plaintiff's right to a trial by jury, as guaranteed in Article I, section 6 of the Tennessee Constitution?
>
> 2. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 represent an impermissible encroachment by the legislature on the powers vested exclusively in the judiciary, thereby violating the separation of powers provisions of the Tennessee Constitution?

App., *infra*, 7a-8a, 131a. The district court believed the questions deserved certification because they were "determinative of the cause and because there are no Tennessee Supreme Court decisions that control." App., *infra*, 124a.

On receipt of the certified questions, the Tennessee Supreme Court agreed that they "raise issues of first impression not previously addressed by the appellate

courts of Tennessee." App., *infra*, 134a. But it concluded that to consider these two questions it would first have to consider the statutory question Jackson National had raised, namely whether Tennessee's law providing for an award against an insurance company for bad-faith refusal to pay promptly precludes an award of punitive damages. The district court had not certified that statutory question. App., *infra*, 135a. So, the Court explained, "it would be imprudent for it to answer the certified questions concerning the constitutionality of the statutory caps on punitive damages" because at that point in the case "the question of the availability of those damages in the first instance ha[d] not been and [could not] be answered by this Court." *Ibid.* The Tennessee Supreme Court further indicated its willingness to consider the statutory and constitutional questions together:

> Nothing in this Court's Order is intended to suggest any predisposition by the Court with respect to the United States Court of Appeals for the Sixth Circuit's possible certification to this Court of both the question of the availability of the remedy of common law punitive damages in addition to the remedy of the statutory bad faith penalty and the question of the constitutionality of the statutory caps on punitive damages, in the event of an appeal from the final judgment in this case.

App., *infra*, 135a n.1.

Instead of recertifying all three state law questions together, the federal district court decided the issues

itself. App., *infra*, 8a. It ultimately denied Jackson National's motion for judgment as a matter of law, holding that the Tennessee statutory bad-faith provision did not preclude punitive damages. App., *infra*, 140a-141a. But the court upheld the punitive damages cap under the Tennessee Constitution, App., *infra*, 158a, 167a, and accordingly reduced the punitives from $3,000,000 to $700,000, App., *infra*, 168a. Jackson National and the State of Tennessee appealed. App., *infra*, 8a. Lindenberg cross-appealed. *Ibid.*

B. Court Of Appeals Proceedings

On appeal, the State of Tennessee asked the Sixth Circuit to certify the state constitutional questions if it held that punitive damages were authorized. Tenn. C.A. Opening Br. 9 n.2. Both Linderberg and Jackson National supported certification at oral argument. Lindenberg stated that "I think [certification is] an option this court has. And certainly we don't object to [it] and think [it] would be reasonable." Oral Argument at 19:05, *Lindenberg* v. *Jackson Nat'l Life Ins. Co.*, 912 F.3d 348 (6th Cir. 2018) Nos. 17-6034, 17-6079), http://tinyurl.com/y59uqvnl. Jackson National argued that the court did not need to reach any of these state law issues because punitives were inappropriate, but agreed that "of course it would be better to allow the state high court to opine on th[e] question[s] if the court should reach [them]." *Id.* at 15:20.

Despite the invitation from the Tennessee Supreme Court, the urging of the Tennessee Attorney General, and the agreement of both private parties in the case that certification was warranted, the Sixth Circuit

decided the state law issues on its own. And though the panel opinion did not present any reasons why the court declined certification, the author of the panel opinion, Judge Clay, left no doubt, in his separate opinion accompanying the denial of rehearing, that the issue had been considered. Judge Clay expressed the view that certification is not subject to any "mathematical" or "rigid formula." App., *infra,* 174a-175a. He also expressed the view that clear guidance regarding certification would be inconsistent with the obligations imposed on courts by Congress when it authorized jurisdiction in diversity cases. *Id.* at 174a-175a.

On the merits, the panel first held that Tennessee's statutory bad-faith provision, Tenn. Code Ann. § 56-7-105, did not preclude punitive damages. App., *infra*,18a-19a. In reaching this conclusion, it conceded that circuit precedent would hold such damages foreclosed. See App., *infra*, 13a ("If *Heil* [*Co.* v. *Evanston Ins. Co.*, 690 F.3d 722, 728 (6th Cir. 2012),] remains good law * * * then the district court should have dismissed Plaintiff's claim for punitive damages in its entirety."). It held, however, that "the Tennessee Court of Appeals has abrogated [our prior] pronouncement that the statutory remedy of bad faith is the 'exclusive extracontratual remedy for an insurer's bad faith refusal to pay on a policy,'" App., *infra*, 14a (quoting *Heil*, 690 F.3d at 728), and so held further that under Tennessee law "a plaintiff may freely pursue common law claims and remedies alongside a statutory bad faith claim," App., *infra*, 16a.

Second, it held that Tennessee's cap on punitive damages "violates the individual right to a trial by jury set forth in the Tennessee Constitution." App., *infra*, 28a. It began by noting that "the state's appellate courts have not addressed the issue presented" and conceded both that "Tennessee statutes receive 'a strong presumption' of constitutionality" and that the Tennessee Supreme Court sees its "charge [as] uphold[ing] the constitutionality of a statute whenever possible." *Ibid.* It nevertheless went on to hold, on the basis of one North Carolina case from 1797 and one Tennessee case from 1840, "that punitive damages awards were part of the right to trial by jury at the time the Tennessee Constitution was adopted." App., *infra*, 29a. "Further review," it thought, supported this holding by "show[ing] that [in Tennessee] the proper measure of punitive damages is historically a 'finding of fact' within the exclusive province of the jury." App., *infra*, 31a.

Further confirming that certification was thoroughly considered by the panel, Judge Larsen dissented from the court's refusual to certify. "This case," she noted,

> presents two uncertain and important questions of state law: one concerning the proper construction of a Tennessee statute; the other concerning the conformity of a different Tennessee statute with the Tennessee Constitution. The Tennessee Supreme Court has signaled its willingness to decide both of these state law questions, and we have a mechanism—certification—that allows the Tennessee Supreme Court to decide them. I would

> take advantage of that mechanism to learn from Tennessee's highest court how it would interpret its statutes and its Constitution.

App., *infra*, 43a (Larsen, J., concurring in part and dissenting in part). In particular, she noted that "the preclusive effect of Tennessee's bad faith statute and the constitutionality of the punitive damages cap are both unsettled questions on which there is no Tennessee Supreme Court authority and little (and conflicting) state law guidance. As such, both questions are ideally suited for certification." App., *infra*, 44a-45a). And because "Tennessee's highest court has expressed its receptiveness to certification; the State urges certification; and neither Lindenberg nor Jackson National objects to certification," App. *infra*, 45a, the case, in her view, presented a substantial danger of the "friction-generating error" common when federal courts "endeavor[ ] to construe a novel state Act not yet reviewed by the State's highest court," App. *infra*, 46a (citing *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 79 (1997)).

Jackson National and Tennessee both petitioned for rehearing en banc. Jackson National argued, among other things, that the Sixth Circuit should certify both the statutory preemption question and the constitutional questions to the Tennessee Supreme Court. Jackson National C.A. Pet. Reh'g En Banc 13-14, 16, 18. Tennessee argued that "[t]he [s]tate [c]onstitutional [q]uestions [a]re [n]ovel and [u]nsettled and [s]hould [h]ave [b]een [c]ertified to the Tennessee Supreme Court," Tenn. C.A. Pet. Reh'g En

Banc 6, and that "[t]he [s]tate [c]onstitutional [q]uestions [a]re [e]xceptionally [i]mportant," *id.* at 10.

The Sixth Circuit denied the petition for rehearing en banc, App., *infra*, 172a, but at least four judges—Judges Thapar, Bush, Larsen, and Nalbandian—"would have granted rehearing en banc to certify the state-law questions to the Tennessee Supreme Court." App., *infra*, 195a (Nalbandian, J., statement regarding the denial of rehearing en banc). Judge Bush, who dissented separately, argued that "th[e] case presents an unusually strong set of reasons for certification to the Tennessee Supreme Court." App., *infra*, 178a (Bush, J., dissenting). The underlying problem, as he saw it, was lack of guidance from the Supreme Court: "[b]ecause the Supreme Court has not announced concrete rules to govern lower federal courts in deciding whether to certify questions, th[e] lower federal courts have had to make their own guidelines [and o]ur circuit standards do nothing to narrow the discretion left to each district judge and Sixth Circuit panel." App., *infra*, 182a. Although "Sixth Circuit case law states that certification is appropriate if the question of state law is 'new' and 'unsettled,'" he noted, it

> fails to provide guidance in a recurring set of cases * * * in which the question may not be new in the sense that no court has addressed it, but a decision from a federal court has the foreseeable potential to create a different state-law rule than what the state supreme court would have produced.

App., *infra*, 183a. He therefore "would welcome" "further guidance" from "the Supreme Court" to

ensure that "an encroaching federal judiciary [does not] use federal judicial power to diminish the power of state judiciaries." App., *infra*, 193a. Indeed, he observed that the Tennessee Supreme Court itself has made clear that it views "the certification procedure [as] protect[ing] state sovereignty." *Id.* at 187a (quoting *Haley* v. *Univ. of Tenn.-Knoxville*, 188 S.W.3d 518, 521 (Tenn. 2006)).

In the meantime, the Tennessee Supreme Court has accepted certification of two closely related questions of Tennessee constitutional law: whether Tennessee's similar cap on non-economic damages, Tenn. Code Ann. § 29-39-102, violates the Tennessee Constitution's right to trial by jury or separation of powers. *McClay* v. *Airport Mgmt. Services, LLC,* No. M2019-00511-SC-R23-CV, order at 1 (Tenn. S.C. June 19, 2020), https://www2.tncourts.gov/PublicCaseHistory/CaseDetails.aspx?id=76003&Party=True. The parties have fully briefed those questions and the Tennessee Supreme Court's answers will likely provide clear guidance on the state constitutional questions at issue here. (In addition, the Tennessee Supreme Court will consider whether the cap violates the Tennessee Constitution because it discriminates against women.)

REASONS FOR GRANTING THE PETITION

I. The Lower Federal Courts Are Confused As To When They Should Certify Uncertain Issues Of State Law To State Courts

This Court has long recognized that certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76 (1997). "[I]n the long run," doing so not only "save[s] time, energy, and resources[, but even more importantly] helps build a cooperative judicial federalism." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974).

But this "Court has addressed" the standard governing "certification in only one case: *Lehman Brothers v. Schein*." Deborah J. Challener, *Distinguishing Certification From Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 Rutgers L.J. 847, 872 (2007). There, it simply noted, "in view of the novelty of the question and the great unsettlement of [state] law," certification "would seem particularly appropriate." *Lehman Bros.*, 416 U.S. at 391.

The result has been unpredictably varying use of the mechanism. The Ninth Circuit, for example, complained as early as the 1980s that "*Lehman Bros.* * * * provides no clear standards as to when certification should be used." *In re Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984); see also

App., *infra*, 193a (Bush, J., dissenting from denial of rehearing en banc) ("I would welcome" "guidance" from "the Supreme Court."). Commentators agree. See, *e.g.*, Challener, 38 Rutgers L.J. at 866 ("[The Supreme] Court has provided little guidance to the lower courts regarding the circumstances under which certification is appropriate."). Given the important state sovereignty and judicial economy interests at stake, it is time for this Court to speak to the standards for certifying questions to state courts in a way that will promote greater consistency. This case provides an unusually strong opportunity to do so.

A. Ten Circuits Hold That Uncertainty Is The Most Important Or A Key Factor In Deciding Whether To Certify

The Fifth, Seventh, Eleventh, and D.C. Circuits hold that a state law's uncertainty is the "most important" factor separating routine decisions about state law from those warranting certification. See, *e.g.*, *Florida ex rel. Shevin* v. *Exxon Corp.*, 526 F.2d 266, 274-275 (5th Cir. 1976) ("The most important [factors] are the closeness of the question and the existence of sufficient sources of state law."); *Cleary* v. *Philip Morris, Inc.*, 656 F.3d 511, 520 (7th Cir. 2011) (holding "the most important consideration" is "whether the reviewing court finds itself genuinely uncertain about a question of state law") (quoting *State Farm Mut. Auto. Ins. Co.* v. *Pate*, 275 F.3d 666, 671 (7th Cir. 2001)); *Colonial Props., Inc.* v. *Vogue Cleaners, Inc.*, 77 F.3d 384, 387 (11th Cir. 1996) ("Where there is any doubt as to the application of state law, a federal court should certify the question to

the state supreme court.") (quoting *Mosher* v. *Speed-star Div. of AMCA Int'l, Inc.*, 52 F.3d 913, 916-917 (11th Cir. 1995)); *Owens* v. *Republic of Sudan*, 864 F.3d 751, 812 (D.C. Cir. 2017) ("The most important consideration guiding [certification] . . . is whether the reviewing court finds itself genuinely uncertain about a question of state law.") (quoting *Tidler* v. *Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988)).

The First, Second, Eighth, Ninth, Tenth, and Federal Circuits hold that uncertainty, if not the most important factor, is a key factor in determining whether to certify. See, *e.g.*, *Showtime Entm't, LLC* v. *Town of Mendon*, 769 F.3d 61, 79 (1st Cir. 2014) (holding certification appropriate where state law lacks sufficient "controlling precedent," in that the "course the state court would take is [not] reasonably clear" but instead "presents close and difficult legal issues") (quoting *In re Engage, Inc.*, 544 F.3d 50, 53 (1st Cir. 2008)); *Doe* v. *Guthrie Clinic*, 710 F.3d 492, 497 (2d Cir. 2013) (holding certification appropriate where "we cannot predict with confidence how the [state high court] would rule on this legal question") (citation and internal punctuation omitted); *Hatfield* v. *Bishop Clarkson Mem'l Hosp.*, 701 F.2d 1266, 1268 (8th Cir. 1983) (en banc) (holding certification appropriate where "this court is without guidance from the [state] courts"); *Slayman* v. *FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1041 (9th Cir. 2014) (declining to certify because case did "not raise an unsettled question of substantive state law"); *Pino* v. *United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (Gorsuch, J.) (holding certification appropriate where

potentially dispositive state law question "is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance"); *Klamath Irrigation Dist.* v. *United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008) (holding certification appropriate where "[t]his court discerns an absence of controlling [state] precedent"); see also *Gilbert* v. *Seton Hall Univ.*, 332 F.3d 105, 114 (2d Cir. 2003) (Sotomayor, J., dissenting from denial of certification) ("Certification * * * is appropriate where * * * existing state precedents do not enable us to predict how that state's highest court would decide the question.").

This emphasis on uncertainty avoids certifying in the ordinary course in cases where state law is at issue. These circuits have thus recognized that certification is inappropriate where "sources of state law—statutes, judicial decisions, attorney general's opinions" are "sufficient" to "allow a principled rather than conjectural conclusion." See, *e.g.*, *Shevin*, 526 F.2d at 274; *Showtime Entm't*, 769 F.3d at 79 (holding certification inappropriate if "the course the state court would take is reasonably clear"); *Slayman*, 765 F.3d at 1041 (holding certification unnecessary when resolution of the state issue requires "simply * * * apply[ing] legal tests that [state] courts have applied many times in prior cases").

Respect for federalism underlies this focus on uncertainty. The Second, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits explicitly hold the federalism concerns this Court identified in *Lehman Brothers* are "compelling comity interests" that "guide us in deciding whether to certify a question to a state

supreme court." See, *e.g.*, *Munn* v. *Hotchkiss Sch.*, 795 F.3d 324, 329-334 (2d Cir. 2015) ("[E]specially where the [state issues] implicate the weighing of policy concerns, principles of comity and federalism strongly support certification."); *Swindol* v. *Aurora Flight Sci. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015) (citing *Shevin*, 526 F.2d at 274-275) (discussing "the degree to which considerations of comity are relevant in light of the particular issue and case to be decided"); *Hatfield*, 701 F.2d at 1269 ("Delay in the factual context of the present case does not outweigh the significant principle of comity."); *Kremen* v. *Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003) ("[T]he spirit of comity and federalism cause us to seek certification."); *Pino*, 507 F.3d at 1236 ("In making the assessment whether to certify, we also seek to give meaning and respect to the federal character of our judicial system, recognizing that the judicial policy of a state should be decided when possible by state, not federal, courts."); *Blue Cross & Blue Shield of Ala., Inc.* v. *Nielsen*, 116 F.3d 1406, 1413 (11th Cir. 1997) (certifying because "[f]ederalism and comity require at least that much deference to state courts on ultrasensitive state law matters").

Though not expressly justifying certification through federalism and comity, the First, Seventh, D.C., and Federal Circuits emphasize closely analogous concerns about state issues of "extreme public importance in which the [state] has a substantial interest" justifying certification. See, *e.g.*, *In re Engage, Inc.*, 544 F.3d at 57 (holding certification warranted for "importan[t] and complex[]" state law

questions); *Todd* v. *Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (en banc) (holding certification avoids "the state los[ing] the ability to develop or restate the principles that it believes should govern the category of cases"); *Metz* v. *BAE Sys. Tech. Sol'ns & Servs. Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014); *Klamath Irrigation Dist.*, 532 F.3d at 1377 (certifying where state supreme court was "in a better position" to interpret uncertain state law).

B. Four Of These Circuits Also Consider The Importance Of The State-Law Issue

The Second, Seventh, Ninth, and D.C. Circuits also consider the importance of the issue although they consider it somewhat differently. See, *e.g.*, *Chauca* v. *Abraham*, 841 F.3d 86, 93 (2d Cir. 2016) ("In determining whether to certify a question, then, 'we consider: (1) the absence of authoritative state court decisions; (2) the importance of the issue to the state; and (3) the capacity of certification to resolve the litigation.'") (quoting *O'Mara* v. *Town of Wappinger*, 485 F.3d 693, 698 (2d Cir. 2007); *In re Badger Lines, Inc.*, 140 F.3d 691, 698 (7th Cir. 1998) ("We have held that * * * certification is appropriate when the case concerns a matter of vital public concern."); *Kremen*, 325 F.3d at 1037 ("The certification procedure is reserved for state law questions that present significant issues, including those with important public policy ramifications."); *Metz*, 774 F.3d at 24 ("Not only is the question Metz poses insufficiently uncertain, it is also insufficiently significant."). Considering an issue's importance ensures that the "[state's] interest [is] something more than that the

question is one of [state] law," thus preventing "every diversity case [from] com[ing] within its compass." *Ibid.*

C. The Sixth Circuit, By Contrast, Holds That An Issue Must Be Both "New" And "Unsettled" To Certify It

The Sixth Circuit holds that "[r]esort to the certification procedure is most appropriate when the issue is new and state law is unsettled." *Transamerica Ins. Co.* v. *Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995). Both elements are required before the Sixth Circuit may consider certification. See, *e.g.*, *Smith* v. *Joy Techs., Inc.*, 828 F.3d 391, 397 (6th Cir. 2016) ("We may therefore decline certification even if the [state] [s]upreme [c]ourt 'has not addressed the exact question at issue,' so long as [state] law provides 'well-established principles to govern' the outcome of the case.") (quoting *Transamerica*, 50 F.3d at 372).

Although this standard may appear facially similar to other circuits' general formulations, the distinction between a "new" and an "unsettled" or "uncertain" issue is critical. In the Sixth Circuit, "new" is used "in the sense that *no* court has addressed it [i.e., the issue]." App., *infra*, 183a (Bush, J., dissenting from denial of rehearing en banc) (emphasis added). "Uncertain," on the other hand, means that the answer is unclear. Thus, even if "a decision from a federal court has the foreseeable potential to create a different state-law rule than what the state supreme court would have produced" because the law is unclear, the Sixth Circuit's standard bars certification if a prior lower state court "has addressed" the issue. See *ibid.*

This is exactly the situation here with respect to the statutory bad-faith question. Since an intermediate state appellate court has previously addressed it, it is no longer "new" and certification-worthy—even though its answer is so unclear that the Sixth Circuit had in a prior case reached the opposite conclusion. Compare *Heil Co.* v. *Evanston Ins. Co.*, 690 F.3d 722, 728 (6th Cir. 2012) (holding punitive damages unavailable on a claim for bad-faith breach of insurance contract), with *Riad* v. *Erie Ins. Exch.*, 436 S.W.3d 256, 275-276 (Tenn. Ct. App. 2013) (holding punitive damages available). "As a result," Judge Bush noted, "the panel majority" failed to certify and "reached a decision that is not opposed by any controlling Tennessee authority but that nonetheless presents a significant danger of being wrong." App., *infra*, 183a (Bush, J., dissenting from denial of rehearing en banc).

D. The Bare Guidance That Exists Fails To Promote Consistent Decisions Regarding Certification

Whether put in terms of "uncertain" or "unsettled," and whether with or without a gloss of "importance," the current lack of meaningful standards promotes inconsistent outcomes. For example, lower courts have taken different views regarding the impact on certification of the presence of lower intermediate appellate decisions. The Tenth Circuit certified in a case lacking an "authoritative decision of the [state] [s]upreme [c]ourt," despite the presence of a "state [intermediate appellate] court decision directly on point." *Pino*, 507 F.3d at 1237-1238 (Gorsuch, J.). The

reason: the state supreme court had "explicit[ly] reserve[ed]" the "exact question presented in [the intermediate appellate decision], indicat[ing] that the state's highest court considers it still very much open." *Id.* at 1238. In other words, the Tenth Circuit has considered uncertainty less in terms of the quantum of state court authority and more in terms of reason to believe that the State Supreme Court recognizes the issue as one that remains open for it to resolve. See also *Zahn* v. *N. Am. Power & Gas, LLC*, 815 F.3d 1082, 1085 (7th Cir. 2016) ("[W]e have looked at * * * 'whether "the state supreme court has yet to have an opportunity [to] illuminate a clear path on the issue."') (quoting *Plastics Eng'g Co.* v. *Liberty Mut. Ins. Co.*, 514 F.3d 651, 659 (7th Cir.2008) (citation and quotation marks omitted)).

The Sixth Circuit here, quite plainly, concluded otherwise. The Tennessee Supreme Court has indicated its view that the statutory and constitutional issues remain open for it to resolve, and that it is open to doing so. Despite its familiarity with the intermediate state appellate opinion directly on point, it stressed that the statutory bad-faith question is one that "has not before been addressed by this Court." App., *infra*, 135a. The statutory question's uncertainty, in fact, made it "imprudent for [the court] to answer" the two certified constitutional questions. *Ibid.* Those two questions, the Tennessee Supreme Court noted, were even more uncertain than the statutory one. They "raise issues of first impression not previously addressed by [*any*] *appellate court*[in] Tennessee." App., *infra*, 135a (emphasis added). The

Tenth Circuit would have thus certified, as it did in *Pino*.

Judge Calabresi has noted the distorting effect over-reliance on state intermediate appellate decisions can have on a litigant's choice of forum:

> [F]ederal courts have all too often refused to certify when they can rely on state lower court opinions to define state law. * * * Reluctance to certify is wrong because it leads to precisely the kind of forum shopping that *Erie R.R. Co. v. Tompkins* was intended to prevent. This is especially so in situations where there is some law in the intermediate state courts, but no definitive holding by the state's highest tribunal. In such cases, and in the absence of certification, the party that is favored by the lower court decision will almost invariably seek federal jurisdiction. It will do this in order to prevent the state's highest court from reaching the issue, in the expectation that the federal court—unlike the state's highest court—will feel virtually bound to follow the decisions of the intermediate state courts.

McCarthy v. *Olin Corp.*, 119 F.3d 148, 15-158 (2d Cir. 1997) (Calabresi, J., dissenting) (footnote and citations omitted). Judge Easterbrook, too, has observed a similar effect from federal courts over-weighing state intermediate appellate court decisions. See *Todd*, 9 F.3d at 1222 ("The panel's analysis had substantial propensity to attract all future cases of this kind into federal court; an error in either direction could do so. Little would be served by substituting the guess of eleven judges for that of three; far better to pose the

questions to the only judges who can give definitive answers.").

Layering a vague reference to "importance" over the vague determination of "uncertainty" does not promote greater clarity. Here, the Sixth Circuit apparently concluded that a question of state constitutional law was insufficiently important to merit certification. Other courts would take a different view. The "ultrasensitive" "state constitutional law issues" are precisely the kind that should be certified because of "how closely they sound to the heart of a state's self-government." *E.g.*, *Blue Cross & Blue Shield of Ala.*, 116 F.3d at 1413. At a minimum, whether statutory bad-faith damages abrogate common law damages and, if not, whether Tennessee's punitive damages cap is constitutional are "significant issues of state law," which implicate the state's prerogative to "weigh[]" competing "policy concerns." *Munn*, 795 F.3d at 334 (quoting *Parrot* v. *Guardian Life Ins. Co. of Am.*, 338 F.3d 140, 144 (2d Cir. 2003)).

II. This Case Provides An Excellent Opportunity To Promote Consistency In Certification Of State-Law Questions

This Court's few statements regarding certification offer general values that certification promotes. This case provides an opportunity to operationalize those values into standards capable of consistent application.

B. Respecting State Sovereign Interests, Judicial Efficiency, And Reducing Forum Shopping Are The Primary Values Served By Certification

"Through certification of novel or unsettled questions of state law for authoritive answers by a State's highest court, a federal court may save 'time, energy, and resources and help build a cooperative judicial federalism.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 77 (1997) (quoting *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974)). When the law is unclear and courts of appeal hazard a guess as to what a state court would do, they may be correct; "[y]et under the regime of *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), a State can make just the opposite her law." *Lehman Bros.*, 416 U.S. at 389. "Federal courts lack competence to rule definitively on the meaning of state legislation." *Arizonans for Official English*, 520 U.S. at 48. State high courts, rather than federal courts, should thus be given the opportunity to determine unsettled matters of state law.

From *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), on, this Court has sought to promote uniform application of state law in state and federal courts and so discourage forum shopping. See, *e.g.*, *Hanna* v. *Plummer*, 380 U.S. 460, 468 (1965) (discussing "the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws"). Indeed, this was one of the reasons why Lindenberg initially asked the district court to certify the constitutional questions. "[C]ertifying the questions," she argued, "will reduce the twin risks of

forum shopping and inconsistent outcomes." Lindenberg D.C. Mot. For Certification, ECF 167 at 3-4. Certification promotes these "twin aims" by limiting divergence in the application of state law between state and federal courts.

Certification thus reflects a particular instance of "Our Federalism," or "the notion of 'comity,' that is, a proper respect for state functions" and "recognition of the fact that the entire country is made up of a Union of separate state governments." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). Respecting this comity not only benefits the States but also the federal government: "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Ibid.* Of particular importance to the courts, doing so promotes a healthy "cooperative judicial federalism." *Lehman Bros.*, 416 U.S. at 391.

Judges on both lower federal courts and state high courts have praised the positive impact that certification has on federal-state court relations. See Jona Goldschmidt, *Certification of Questions of Law: Federalism in Practice* 53 (Am. Judicature Soc'y 1995) (surveying "federal judges and state justices" and finding "comity," "expeditious resolution of unsettled questions of state law," "reducing risks of different outcomes depending on forum choice," and helping "federal courts avoid the embarrassment of a wrong guess on the development of state law" to be "major benefits of certification"); Judith S. Kaye & Kenneth I. Weissmann, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373, 422

(2000) ("[T]he procedure has enabled state and federal courts to speak openly to one another in the resolution of cases that concern them both, thereby promoting a cooperative federalism that independent court systems and overflowing dockets do not ordinarily permit."). In a comprehensive survey, Goldschmidt found that "[a]lmost all circuit judges (98%), district judges (90%), and state justices (93%) agree that certification allows the court to resolve the issues in the case, 'while respecting the answering court's authority.'" Goldschmidt 64 (emphasis and citation omitted). Additionally, the author found that "[a]lmost all of the circuit judges (93%), district judges (86%), and state justices (87%) agree that certification improves federal-state comity." *Id.* at 66 (emphasis omitted).

When abstention remained the only option for sending a question to the states, federal courts sometimes hesitated to seek guidance, but "the availability of certification greatly simplifies the analysis." *Bellotti* v. *Baird*, 428 U.S. 132, 151 (1976). By "put[ting] the question directly to the State's highest court," certification "reduc[es] the delay [and] cut[s] the cost" of litigation in the long run. *Arizonans*, 520 U.S. at 76. Rather than itself conducting potentially indeterminate research in a quest for an uncertain answer, a federal court may simply ask the authoritative interpreter what state law means.

Certification also prevents future parties unhappy with the federal rule from litigating the identical issue in state court in an effort to obtain a better result.

Since it is a "proposition, fundamental to our system of federalism" that "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State," *Johnson* v. *Fankell*, 520 U.S. 911, 916 (1997) (citations omitted), the federal courts would have to conform their view of the law to the state supreme court's after it issued its decision.

As discussed above, pp. 25-26, *supra*, both Judges Calebresi and Easterbrook have observed how insufficient use of the certification process encourages litigation of unsettled state law issues in federal court. See, *e.g.*, Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485, 1511-1512 (1987) ("Plaintiffs will choose to litigate their state law rights in a federal forum if they believe—as many do—that a federal judge will be more sympathetic to their claims and more likely to translate favorable findings into generous remedies."). Discouraging such gamesmanship, moreover, would encourage parties from the beginning to litigate cases containing uncertain issues of state law in state court, thereby promoting efficiency in the federal court system and respect for state supreme court authority over the development and interpretation of state law. If litigants knew that the state supreme court, not the federal court, would decide any uncertain and possibly controlling issues of state law no matter where the case was litigated, they would be unlikely to see any advantage in taking the case to federal court. A properly functioning certification system will

efficiently encourage parties to develop state law through adjudication before state authorities.

B. Review In This Case Provides A Robust Opportunity To Announce Materially Clearer Standards For Certification

Given the variety of circumstances present here favoring certification, this case provides an ideal opportunity for this Court to promote consistency in the certification procedure.

First, and most importantly, this case makes clear that, absent exceptional circumstances, a federal court should certify when a state supreme court has previously made clear that an unresolved question of state law merits its review. This approach satisfies all the values motivating the certification procedure better than a vague standard of "uncertainty" or "unsettled law." This approach looks beyond the bare question whether intermediate state courts have ruled on the issue. That may be relevant in the absence of a clear indication from the state supreme court of its interest in an issue, but it cannot and should not, by itself, overcome such an expression of interest. "In making the assessment whether to certify, we also seek to give meaning and respect to the federal character of our judicial system, recognizing that the judicial policy of a state should be decided when possible by state, not federal, courts." *Pino* v. *United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (Gorsuch, J.).

Second, in the absence of such an express indication by the state supreme court, a federal court

should certify a question whenever the federal court, after examining the state supreme court's standards for accepting review within the state's own court system, concludes that the issue would be among those to generate at least serious discussion among the state justices regarding whether to accept review. If the federal court concludes that it would, it should, absent exceptional circumstances, certify the issue. Once again, this approach is less focused on the bare identification of state intermediate appellate court decisions than it is on the likely behavior of the state's highest court. That remains the proper focus. Considerations familiar to this Court would prove relevant: whether there is disagreement among state intermediate courts, whether the state supreme court has previously been presented the opportunity to review the issue and declined, whether the issue frequently recurs or arises only rarely, etc.

Third, except in rare circumstances, a federal court that concludes a state statute raises a substantial question of consistency with a state constitutional provision should not resolve the state constitutional question unless the state supreme court has spoken to the issue with sufficient clarity to leave the federal court highly confident in its ruling. Questions of state constitutional authority necessarily speak to matters of public policy, expressed through legislation as well as judicial pronouncements, that are the heart of state soverign authority. Federal courts should not wander into such controversies without clear guidance.

And when, as here, a federal court has a state statutory question that presents a threshold question

that could, depending on how it is resolved, raise a substantial state constitutional question, certification of the statutory and constitutional questions is appropriate As Judge Bush noted, "[b]ecause federalism concerns as well as avoidance concerns appear in a case like this one, where a *state* constitutional question lurks behind a predicate state-law question, certification seems doubly wise." App., *infra*, 189a (Bush, J., dissenting).

Fourth, federal courts should give due respect to the requests for certification from duly authorized state executive branch officials. Cooperative federalism is a matter not merely for court-to-court interactions. Federal courts owe special regard to state executive branch officials who speak for the interests of the state in determining its own law.

To be sure, it is important not to bog down the adjudication of diversity cases in federal courts by making certification of state law issues routine. But nothing in the standards noted above threatens to promote routine certification. As this Court is well aware, it is not the routine case that generates potential legal issues for a jurisdiction's highest court to resolve. There should also be some clear negative guidelines. For instance, in no case should a federal court certify a state law question unless it concludes that an aswer to the question is necessary to a proper adjudication, including the scope of relief, of the claim at issue. And, obviously, a federal court may certify a state law question only if doing so comports with the requirements for certification embodied in the relevant state certification statute or rule.

Contrary to Judge Clay's suggestion, clear guidance that identifies more precisely when certification is appropriate does not impinge on federal court obligations to resolve cases that fall within its diversity jurisdiction. The ultimate judgment in the case, even after certification, remains a *federal* court judgment. Congress's grant of federal jurisdictional authority in diversity cases provided authority to resolve disputes that fall within the diversity jurisdiction. But, as every first-year law student learns, at least since *Erie*, the diversity jurisdiction is *not* a grant of authority to federal courts to make state law. Certification operationalizes one of our federal system's most fundamental tenets—a state's prerogative to say what its own law is. See, *e.g.*, *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938) ("[T]he constitution of the United States * * * recognizes and preserves the autonomy and independence of the states.") (quoting *Baltimore & Ohio R.R. Co.* v. *Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)). The certification standards described above aim at fulfilling a federal court's twin duties of resolving diversity cases and respecting each state's sovereign authority over its own law.

Neither would providing more clear standards undermine the discretionary nature of certification. It is the role of a supervising court to define for lower courts what is the proper *range* of discretion properly committed to them. A federal appellate court may abuse the discretion committed to it regarding certification just as a trial court may abuse the discretion committed to it.

Under appropriate certification standards, the Sixth Circuit should have certified here. The Tennessee Supreme Court's order declining to accept certification from the district court indicated that both the statutory and constitutional questions were uncertain. App., *infra*, 134a-135a; see also *Gilbert* v. *Seton Hall Univ.*, 332 F.3d 105, 114 (2d Cir. 2003) (Sotomayor, J., dissenting) ("Certification of a determinative question of state law is appropriate where, as here, existing state precedents do not enable us to predict how that state's highest court would decide the question."). It also indicated that it was declining to accept certification only because the district court had failed to certify the statutory bad-faith question, which, in its view, might have allowed it to avoid deciding any issue of Tennessee constitutional law. App., *infra*, 135a. And it invited the Sixth Circuit to consider properly certifying all three questions on any appeal. *Id.* at 135a n.1. Tennessee itself, acting through its Attorney General, urged the Sixth Circuit to certify the constitutional questions, if it did not avoid them by interpreting the bad-faith statutory remedy to preclude punitive damages on the contract claim.

Finally, there are no obstacles to this Court's review of the certification question. The issue of certification was plainly considered by the appellate panel and the full Sixth Circuit. While the panel opinion does not discuss its reasons for refusing to certify, Judge Clay's separate opinion on rehearing discusses those reasons at length. App., *infra*, 173a-177a (Clay, J., concurring in denial of rehearing en

banc). The issue was the subject of a reasoned partial dissent from one judge on the panel, App., *infra*, 43a-78a (Larsen, J., concurring in part and dissenting in part), and in two separate opinions regarding rehearing, App., *infra*, 178a-194a (Bush, J., dissenting); App., *infra*, 195a-198a (Nalbandian, J., statement regarding denial of rehearing en banc). There is no doubt that the issue received full consideration by the Sixth Circuit. It is true that Jackson National did not itself request certification *in its brief* before the Sixth Circuit panel, but that is no barrier here. The issue was briefed before both the district court and the Sixth Circuit (at the urging of the State of Tennessee), see pp. 7-8, 10, *supra*, discussed during the oral argument before Sixth Circuit, see p.10, *supra*, and briefed again in Jackson National and Tennessee's petitions for rehearing en banc, see pp. 13-14, *supra*.

III. As An Alternative To Full Briefing And Argument On The Merits, This Court Should Hold This Petition With A View To Granting, Vacating, And Remanding The Decision Back To The Sixth Circuit In Light Of The Tennessee Supreme Court's Decision In *McClay*

The Tennessee Supreme Court, in fact, has accepted certification of the state constitutional questions this dispute presents in a closely related context: whether Tennessee's statutory cap on non-economic damages, Tenn. Code Ann. § 29-39-102, violates the same two Tennessee constitutional provisions involved in this case. See *McClay* v. *Airport*

Mgmt. Services, LLC, No. M2019-0051-SC-R23-CV, order at 1 (Tenn. S.C. June 19, 2020), https://www2.tncourts.gov/PublicCaseHistory/CaseDetails.aspx?id=76003&Party=True. The parties have fully briefed the issues and the court has requested oral argument. *Ibid*. When it resolves the certified questions, its answers will provide guidance likely to control the same questions as applied to punitive damage caps.

This Court has in the past used the GVR process to account for recent state court decisions, see, *e.g.*, *Arizona* v. *Gant*, 540 U.S. 963 (2003) (per curiam), including in diversity cases, like this one, where the development in state law informed the rule of decision regarding the underlying claim, *e.g.*, *Lords Landing Village Condo. Council of Unit Owners* v. *Continental Ins. Co.*, 520 U.S. 893, 897 (1997) (per curiam) ("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.") (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)); *Thomas* v. *Am. Home Products, Inc.*, 519 U.S. 913 (1996) (per curiam) (similar). In *Thomas*, Justice Scalia wrote separately, in words that could well have been written for this case, to explain why a GVR is appropriate in such circumstances. First identifying himself as a critic of

what he perceived to be an "excessive use of the GVR mechanism," *id*. at 913 (Scalia, J., concurring), Justice Scalia explained that this situation is at the core of the proper use of the GVR mechanism. When GVRing a case, "we are vacating the decisions below to allow the Court of Appeals to consider an intervening decision of the Court that is the final expositor of a particular body of law—with federal questions, the Supreme Court of the United States, and with questions of [state] law, the Supreme Court of [the relevant state]," *id.* at 915. Put simply, whether federal or state law provides the rule of decision, the GVR process exists to ensure that cases pending before the U.S. Supreme Court get the benefit of the best available understanding of the law from the appropriate authoritative source.

Jackson National cannot know or reliably predict when the Tennessee Supreme Court will rule in *McClay*. But this Court may find it prudent to hold this petition until the Tennessee Supreme Court issues its decision. Jackson National will, of course, keep this Court apprised of any further developments in *McClay*.

CONCLUSION

The petition for a writ of certiorari should be granted or this Court should hold and consider granting, vacating, and remanding in light of *McClay*.

Respectfully submitted.

DANIEL W. VAN HORN
AMY M. PEPKE
ELIZABETH E. CHANCE
GADSON W. PERRY
BUTLER SNOW LLP
6075 Poplar Avenue, Suite 500
Memphis, TN 38119
(901) 680-7200

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
dortiz@law.virginia.edu

ROBERT N. HOCHMAN
SIDLEY AUSTIN LLP
One South Dearborn St.
Chicago, IL 60603
(312) 853-7000

JUNE 2019

APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 18a0280p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TAMARIN LINDENBERG, individually and as natural guardian of her minor children ZTL and SML,

Plaintiff-Appellee/Cross-Appellant,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee,

STATE OF TENNESSEE,

Intervenor-Appellee.

> Nos. 17-6034/6079

Appeal from the United States District Court for the Western District of Tennessee at Memphis.

No. 2:13-cv-02657—Jon Phipps McCalla, District Judge.

Argued: May 3, 2018

Decided and Filed: December 21, 2018

Before: CLAY, STRANCH, and LARSEN, Circuit Judges.

COUNSEL

ARGUED: Gadson W. Perry, BUTLER SNOW LLP, Memphis, Tennessee, for Appellant/Cross-Appellee. Molly A. Glover, BURCH, PORTER & JOHNSON, PLLC, Memphis, Tennessee, for Appellee/Cross-Appellant. Joseph Ahillen, OFFICE OF THE ATTORNEY GENERAL OF TENNESSEE, Nashville, Tennessee, for Intervenor Appellee. **ON BRIEF**: Gadson W. Perry, Daniel W. Van Horn, Michael C. McLaren, BUTLER SNOW LLP, Memphis, Tennessee, for Appellant/Cross-Appellee. Molly A. Glover, Charles S. Higgins, BURCH, PORTER & JOHNSON, PLLC, Memphis, Tennessee, for Appellee/Cross-Appellant. Joseph Ahillen, OFFICE OF THE ATTORNEY GENERAL OF TENNESSEE, Nashville, Tennessee, for Intervenor Appellee.

CLAY, J., delivered the opinion of the court in which STRANCH, J., joined, and LARSEN, J., joined in part. LARSEN, J. (pp. 26–47), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Defendant Jackson National Life Insurance Company ("Defendant") appeals from the district court's judgment enforcing a jury trial verdict of $350,000 in actual damages, $87,500 in bad faith damages, and $3,000,000 in punitive damages in favor of Plaintiff Tamarin Lindenberg ("Plaintiff"), individually and in her capacity as natural guardian of her minor children, ZTL and SML.[1] Plaintiff cross-appeals, challenging a statutory cap that the district court applied to reduce the award of punitive damages to $700,000. The State of Tennessee ("the State") intervened to defend the statute. For the reasons that follow, we **AFFIRM** the district court's judgment on all issues raised in Defendant's appeal, **REVERSE** on the issue raised in Plaintiff's cross-appeal, **VACATE** the judgment as to punitive damages, and **REMAND** with instructions for the district court to recalculate the award of punitive damages in accordance with the jury verdict and with this Court's holding that the statutory cap on punitive damages, T.C.A. § 29-39-104, is unconstitutional.

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[1] During the pendency of this lawsuit, Plaintiff's minor child ZTL joined the suit as co-plaintiff after reaching the age of majority. Because this change was otherwise immaterial to the proceedings, we refer in this opinion to the parties as they were represented in the original complaint.

BACKGROUND

This case arises in diversity and concerns a dispute over a $350,000 life insurance policy issued by Defendant to Thomas A. Lindenberg ("Decedent"). Plaintiff Tamarin Lindenberg, the former wife of Decedent, brought suit individually and in her capacity as the natural guardian of her minor children, ZTL and SML, the two children of Plaintiff and Decedent. Plaintiff's claims included breach of contract and both statutory and common law bad faith.

Plaintiff is the primary beneficiary designated in the life insurance policy at issue (the "Policy") and was to receive 100% of the proceeds of the Policy upon Decedent's death. The contingent beneficiaries of the Policy are Decedent's "surviving children equally." (R. 125 at PageID #1854.) During their marriage, Plaintiff and decedent adopted ZTL and SML. Third- Party Defendant Mary Angela Williams ("Williams") is Decedent's daughter from a prior marriage.

Plaintiff and Decedent executed a Marital Dissolution Agreement ("MDA") in 2005, and a divorce decree was issued in 2006. The MDA required that "Wife shall pay for the Life Insurance premium for the Columbus and [Defendant] policies for so long as she is able to do so and still support the parties[']children." (Trial Ex. 10 at 7.) Additionally, the MDA required "Husband at his expense [to] maintain in full force insurance on his life having death benefits payable to the parties' children as irrevocable primary beneficiaries[.]" (*Id*. at 9.)

Decedent died on January 22, 2013. On February 6, 2013, Plaintiff filed a claim under the Policy for the death benefit. On March 11, 2013, Plaintiff's attorney sent Defendant a letter seeking expedited review of the claim and payment of the death benefit. On March 22, 2013, Defendant responded with a letter requiring further action by Plaintiff, including obtaining "waivers to be signed by the other potential parties" and "court-appointed Guardian(s) for the Estates of the two minor children." (Trial Ex. 23.) Defendant stated that another option would be for Plaintiff to waive her rights to the claim so that Defendant could disburse the proceeds to the minor children. Throughout the month of May 2013, Plaintiff and Defendant were in communication about how to proceed and whether Defendant would interplead the funds with the court. This discussion culminated in Plaintiff filing the instant lawsuit.

With its answer, Defendant included an interpleader complaint that implicated Plaintiff and Williams. Defendant later maintained that its interpleader complaint also implicated the minor children, ZTL and SML.[2] Defendant asserted that it

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[2] When Plaintiff filed her original claim on the Policy, Defendant insisted that Plaintiff must obtain waivers from Decedent's children before the Death Benefit could be distributed. (*See, e.g.*, R. 1-1 at PageID #9–10 (describing March 22, 2013, letter from Defendant to Plaintiff demanding "waivers for the minor children" and "other children").) However, Defendant's interpleader complaint did not clearly implicate the minor children, alleging only that Williams had an "actual or potential claim[]." (R. 4 at PageID #87 ¶ 20.) Defendant later characterized its complaint as implicating the minor children

was "not in a position to determine, factually or legally, who is entitled to the Death Benefit," and requested that the district court "determine to whom said benefits should be paid." (R. 4 at 7.)

Plaintiff and Williams jointly moved to dismiss the interpleader complaint. While the motion was pending, and after several months of litigation, the parties filed a joint motion to appoint *guardians ad litem* for the minor children, which the district court granted. The court then granted the motion to dismiss Defendant's interpleader complaint. The court further ordered Defendant "to disburse life insurance policy benefits to Plaintiff in the amount of $350,000 with interest from January 23, 2013, until the date of payment." (R. 32 at 17.) Plaintiff's claims against Defendant remained.

Defendant filed a motion to dismiss, attacking Plaintiff's claims for punitive damages and bad faith. Through a series of orders, the court granted in part and denied in part Defendant's motion. The court dismissed Plaintiff's claims for common law bad faith. The court allowed Plaintiff to proceed with her claims for common law breach of contract, statutory bad faith, and common law punitive damages predicated on breach of contract.

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when it opposed Plaintiff's motion to dismiss the interpleader complaint. (*See* R. 27 at PageID #195 ("[Defendant] has at all times during the course of this litigation contended that interpleader is appropriate because [Defendant] is or may be exposed to multiple liabilities given the actual or potential claims of [Plaintiff], *her minor children*, and/or Ms. Williams.") (emphasis in original).)

Following discovery, Defendant filed for summary judgment. The district court denied the motion on all claims Plaintiff asserted in her personal capacity but granted the motion on all claims Plaintiff asserted on behalf of the minor children, ZTL and SML. The court held a weeklong trial. Defendant moved for judgment as a matter of law, which the district court denied. The jury returned a verdict finding that (1) Defendant breached its contract with Plaintiff, resulting in actual damages in the amount of $350,000; (2) Defendant's refusal to pay was in bad faith, resulting in additional damages in the amount of $87,500; and (3) Defendant's refusal to pay was either intentional, reckless, malicious, or fraudulent. The jury then returned a special verdict awarding Plaintiff punitive damages in the amount of $3,000,000. Defendant renewed its motion for judgment as a matter of law.

Defendant also argued that the district court must apply T.C.A. § 29-39-104, a Tennessee statute that caps punitive damages at two times the amount of compensatory damages awarded or $500,000, whichever is greater. In response, Plaintiff argued that the statutory punitive damages cap violates the Tennessee Constitution. On this basis, Plaintiff filed a motion to certify the issue of the punitive damages cap's constitutionality to the Tennessee Supreme Court. The State of Tennessee then moved to intervene, which the district court permitted. The district court agreed to certify the following two questions to the Tennessee Supreme Court:

1. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section

> 29-39-104 violate a plaintiff's right to a trial by jury, as guaranteed in Article I, section 6 of the Tennessee Constitution?
>
> 2. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 represent an impermissible encroachment by the legislature on the powers vested exclusively in the judiciary, thereby violating the separation of powers provisions of the Tennessee Constitution?

(R. 188 at PageID # 4270.) The Tennessee Supreme Court recognized that the "certified questions raise issues of first impression not previously addressed by the appellate courts of Tennessee" but declined to provide an opinion on either of the certified questions. (R. 209-1 at PageID #4916.)

The district court then rejected Defendant's renewed motion for judgment as a matter of law, rejected Plaintiff's constitutional challenge to the punitive damages cap, and entered judgment. In doing so, the court applied the statutory punitive damages cap to reduce Defendant's liability for punitive damages from $3,000,000 to $700,000. The parties filed timely cross-appeals.

DISCUSSION

The parties challenge multiple aspects of the proceedings below. Defendant argues that the district court erred by dismissing its interpleader complaint, failing to dismiss Plaintiff's punitive damages claim, and failing to grant its motion for judgment as a matter of law. Meanwhile, Plaintiff argues that the

statutory punitive damages cap, T.C.A. § 29-39-104, violates the Tennessee Constitution. We address Defendant's three arguments before turning to Plaintiff's argument.

A. Dismissal of Defendant's Interpleader Complaint

Defendant first argues that the district court erred when it dismissed Defendant's interpleader complaint. "Interpleader is an equitable proceeding that 'affords a party who fears being exposed to the vexation of defending multiple claims to a limited fund or property that is under his control a procedure to settle the controversy and satisfy his obligation in a single proceeding.'" *United States v. High Tech. Prods., Inc.*, 497 F.3d 637, 641 (6th Cir. 2007) (quoting 7 Charles Alan Wright, et al., Federal Practice and Procedure § 1704 (3d ed. 2001)). Interpleader may be invoked either via Rule 22 of the Federal Rules of Civil Procedure ("rule interpleader") or via 28 U.S.C. § 1335 ("statutory interpleader"). In this case, Defendant attempted to invoke statutory interpleader.

"An interpleader action typically proceeds in two stages." *High Tech. Prods.*, 497 F.3d at 641. "During the first stage, the court determines whether the stakeholder has properly invoked interpleader . . . ." *Id*. In order to properly invoke statutory interpleader, a stakeholder must satisfy the statutory jurisdictional requirements by properly pleading: (1) the existence of actual or potential conflicting claims to a limited fund or property held by the stakeholder, 28 U.S.C.§ 1335(a); *see High Tech. Prods.*, 497 F.3d at 642; (2) an amount in controversy of at least $500, 28 U.S.C. §

1335(a); and (3) minimal diversity among the competing claimants. *Id.*; *see State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967). "During the second stage, the court determines the respective rights of the claimants to the fund or property at stake via normal litigation processes, including pleading, discovery, motions, and trial." *High Tech Prods.*, 497 F.3d at 641.

In this case, Defendant does not challenge the district court's dismissal of its interpleader complaint on the merits. Instead, Defendant asserts that the dismissal must be reversed because the district court improperly relied on extrinsic evidence that "the guardians ad litem of the minor children ha[d] waived any claim the remaining contingent beneficiaries—ZTAL and SML—may have to the benefits." (First Br. at 27.) We need not reach this issue, however, because Defendant did not raise it below. *See United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009) (holding that an argument is preserved if a litigant (1) states "the issue with sufficient clarity to give the court and opposing parties notice that it is asserting the issue" and (2) provides "some minimal level of argumentation in support of it").

In fact, rather than challenging the waivers as extrinsic evidence, Defendant invited the district court to consider the waivers. Defendant discussed the waivers at length in its opposition to Plaintiff's motion to dismiss, arguing that the waivers were inadequate for substantive reasons:

> The Court should likewise reject [Plaintiff]'s contention that [Defendant]'s refusal to

> distribute the benefits is improper in light of the affidavits and waivers that have been submitted on behalf of the minor children. Though the appointed guardians have submitted their own affidavits and waivers on behalf of the minor children, these "reports" have not been approved by the Court as required by statute. Thus, because [Defendant] is not aware of any authority that would confer the guardians with the inherent and independent ability to lawfully waive the minor children's rights to the benefits, [Defendant] cannot disburse the benefits directly to [Plaintiff] without further approval from this Court. Accordingly, [Defendant] respectfully requests permission to interplead the life insurance benefits and that it be relieved from further liability with respect to this matter because [Defendant] has pled sufficient facts evidencing "two or more" potential adverse claims to the benefits.

(R. 27 at PageID #195–96; *see also id*. at PageID #204–06.) Furthermore, Defendant specifically asked the district court to dismiss its interpleader complaint if the court found the waivers to be valid:

> Alternatively, if the Court finds that the best interests of the minor children have been served and that . . . the minor children have lawfully waived any potential claim to the life insurance benefits, [Defendant] requests that the Court exercise its discretion under Tennessee Code Ann. § 34-1-121 to approve [Defendant]'s

> disbursement of the life insurance proceeds to [Plaintiff] and dismiss its action for interpleader because all of the potentially adverse interests have been waived.

(R. 27 at PageID #196.) We decline to consider Defendant's complaints about an analysis and an outcome that Defendant itself requested. *See United States v. Hanna*, 661 F.3d 271, 293 (6th Cir. 2011) (holding that an invited error does not warrant reversal).

B. Plaintiff's Punitive Damages Claim

Defendant next argues that the district court should have dismissed Plaintiff's claim for punitive damages in its entirety rather than allowing the claim to proceed to the extent that it was based on breach of contract. This Court reviews *de novo* the district court's dismissal of a complaint for failure to state a claim. *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007). We must accept the factual allegations in the complaint as true and construe the complaint in the light most favorable to the plaintiff. *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 716 (6th Cir. 2005).

Defendant argues that the district court's denial of its motion to dismiss runs afoul of this Court's decision in *Heil Co. v. Evanston Insurance Co.*, 690 F.3d 722 (6th Cir. 2012). In *Heil*, an insurer refused to defend Heil for the first two years of a wrongful death suit before eventually taking over the defense. *Id.* at 726. Heil then sued for breach of contract due to the failure to pay attorney fees, violation of the bad faith statute,

and bad faith failure to settle. *Id.* A jury found in Heil's favor on the first two of the three claims and awarded punitive damages. *Id.* This court found clear error, holding that the statutory remedy for bad faith is the "exclusive extracontractual remedy for an insurer's bad faith refusal to pay on a policy." *Id.* at 728. Therefore, under *Heil*, punitive damages—whether predicated on bad faith, breach of contract, or any other type of claim—may not be awarded in a case involving an insurer's bad faith refusal to pay. *Id.*

If *Heil* remains good law—which Plaintiff disputes—then the district court should have dismissed Plaintiff's claim for punitive damages in its entirety. Defendant invokes the general rule that, "[a] panel of this Court cannot overrule the decision of another panel." *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). But this rule "is not absolute." *Hampton v. United States*, 191 F.3d 695, 701 (6th Cir. 1999). An inconsistent decision from the Supreme Court or from this Court sitting en banc "overrules the prior decision." *Salmi*, 774 F.2d at 689 (quoting *Gist*, 736 F.2d at 357–58). Similarly, an interpretation of Tennessee law applied by one panel of this Court is not binding on future panels where there has been "an indication from the Tennessee courts that they would have decided [the prior decision] differently." *Hampton*, 191 F.3d at 701 (alteration in original) (quoting *Blaine Constr. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 350–51 (6th Cir. 1999)). In *Hampton*, we found that a single decision of a state court of appeals may abrogate this Court's interpretation of state law, at least in circumstances

where (1) state law treats an appellate court decision as controlling in the absence of a ruling from the state supreme court; (2) there is no indication from the state supreme court that it would reach a different outcome; and (3) the state appellate court's decision is irreconcilable with our own ruling. *See id*. at 702 (quoting *Wieczorek v. Volkswagenwerk, A.G*., 731 F.2d 309, 310 (6th Cir. 1984) and citing *Hicks v. Feiock*, 485 U.S. 624, 630 n. 3 (1988)).

Our review of Tennessee caselaw reveals that the Tennessee Court of Appeals has abrogated *Heil*'s pronouncement that the statutory remedy for bad faith is the "exclusive extracontractual remedy for an insurer's bad faith refusal to pay on a policy." 690 F.3d at 728. In *Riad v. Erie Insurance Exchange*, the defendant relied on *Heil* to argue that the plaintiff "was not entitled to damages beyond those contemplated in" the bad faith statute and so could not recover punitive damages. 436 S.W.3d 256, 275 (Tenn. Ct. App. 2013), *perm. app. denied* (Tenn. 2014). The appellate court rejected this contention, stating:

> we reaffirm our conclusion that Plaintiff was entitled to recover any damages applicable in breach of contract actions and was not statutorily limited to the recovery of the insured loss and the bad faith penalty. Punitive damages, while generally not available in a breach of contract case, may be awarded in a breach of contract action under certain circumstances. To recover punitive damages, the trier of fact must find that a defendant acted either intentionally, fraudulently, maliciously,

> or recklessly. Erie does not argue that the jury was improperly instructed or that the jury failed to consider the applicable factors. Accordingly, we further conclude that the issue of punitive damages was properly submitted to the jury.

Id. at 276 (citations and internal quotation marks omitted). Most relevant for our purposes, *Riad* specifically quoted and disclaimed *Heil*'s statement that the bad faith statute is an exclusive remedy, explaining that it "ignores the *Myint* progeny of cases . . . ." *Id.* Indeed, *Myint*—which *Heil* never mentioned, even though *Myint* was decided before *Heil* and after the unpublished cases that *Heil* relied upon—is irreconcilable with *Heil*'s holding that the bad faith statute provides an exclusive remedy. In *Myint*, the Tennessee Supreme Court held exactly the opposite, concluding that "nothing in . . . the bad faith statute . . . limits an insured's remedies to those provided therein." *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 925 (Tenn. 1998).

A published opinion of the Tennessee Court of Appeals is "controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction." Tenn. Sup. Ct. R. 4(G)(2); *see* Court of Appeals Precedent, Tenn. Op. Att'y Gen. No. 07-98, 2007 WL 2221359 (July 3, 2007) (explaining rule's application to published opinions of Tennessee Court of Appeals). We find no indication that the Tennessee Supreme Court disagrees with

Riad, which is a published case.[3] *See* Tenn. Sup. Ct. R. 4(A)(1) (explaining that a "published" case is one that is published in the Southwestern Reporter). As in *Hampton*, then, a state appellate court in this case has abrogated this Court's interpretation of state law. *See Hampton*, 191 F.3d at 702 ("[T]he Michigan Court of Appeals decision in *Froede* controls and, until or unless the Michigan Supreme Court decides otherwise, or in some other way casts sufficient doubt on that decision, we must abandon our interpretation of Michigan law . . . ."). We find that *Heil* is no longer good law to the extent that it held that the statutory remedy for bad faith is the "exclusive extracontractual remedy for an insurer's bad faith refusal to pay on a policy." 690 F.3d at 728. The law in Tennessee now provides that the statutory remedy for bad faith is the exclusive *statutory* remedy for an insurer's bad faith refusal to pay on a policy, but a plaintiff may freely pursue common law claims and remedies alongside a statutory bad faith claim.[4] *See Riad*, 436 S.W.3d at 276; T.C.A. § 56-8-113. Accordingly, we reject Defendant's argument that *Heil* requires us to reverse the district court's ruling.

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[3] The dissent draws a contrary conclusion, relying on language in the Tennessee Supreme Court's order refusing certification in this case. An unpublished order, however, is not binding or precedential and cannot "reverse[] or modif[y]" a decision in the manner contemplated by Rule 4(G)(2). When the high court disagrees with a decision, the normal procedure is to allow the case to be appealed and then reverse it. In *Riad*, the Tennessee Supreme Court denied permission to appeal. *See Riad v. Erie Ins. Exch.*, No. E2013-00288-SC-R11-CV, 2014 Tenn. LEXIS 196 (Mar. 4, 2014).

[4] This statement of law incorporates the Court's discussion of T.C.A. § 56-8-113, *infra*.

Defendant challenges this conclusion for two reasons, neither of which is persuasive. *First*, Defendant argues that *Riad* and *Myint* are limited to cases involving tortious or quasi-tortious acts because both cases involved claims under the Tennessee Consumer Protection Act ("TCPA"), T.C.A. §§ 47-18-101, *et seq*. But although both cases indeed involved TCPA and breach-of-contract claims, neither court's underlying analysis of the bad faith statute was concerned with the nature of the plaintiff's related claims. The *Myint* court looked to the text of the bad faith statute to conclude that "nothing in . . . the bad faith statute . . . limits an insured's remedies to those provided therein." 970 S.W.2d at 925. Applying this rule to the case before it, the court concluded that the plaintiff could assert a TCPA claim alongside a bad faith claim; only then did the court find that the TCPA claim failed on the merits. *Id*. at 926. Meanwhile, when the *Riad* court discussed punitive damages, it did not link the availability of such damages to the existence of any particular type of claim, such as a TCPA claim; instead, the court merely required that the "defendant acted either intentionally, fraudulently, maliciously, or recklessly." 436 S.W.3d at 276. Accordingly, Defendant is incorrect that *Myint* and *Riad* are limited to cases involving tortious or quasi-tortious acts.

Second, Defendant argues that we should apply *Heil* because the Tennessee General Assembly overruled the *Myint* line of cases with a 2011 statutory amendment, codified as T.C.A. § 56-8-113. The statute provides:

> Notwithstanding any other law, title 50 [employment] and this title shall provide the sole and exclusive statutory remedies and sanctions applicable to an insurer . . . for alleged breach of, or for alleged unfair or deceptive acts or practices in connection with, a contract of insurance . . . . Nothing in this section shall be construed to eliminate or otherwise affect any . . . [r]emedy, cause of action, right to relief or sanction available under common law.

T.C.A. § 56-8-113. We disagree with Defendant's argument, finding that § 56-8-113 overrules *Myint* only in part, and only in a manner not relevant here. Under § 56-8-113, a plaintiff who asserts a bad faith claim may not recover *statutory* damages beyond those set forth in the bad faith statute and the title relating to employment. But § 56-8-113 leaves intact *Myint*'s underlying conclusion that nothing in the bad faith statute itself "limits an insured's remedies to those provided therein[,]" 970 S.W.2d at 925, and the new statute expressly disclaims any effect on the availability of common law remedies like punitive damages: "Nothing in this section shall be construed to eliminate or otherwise affect any . . . [r]emedy, cause of action, right to relief or sanction available under common law[.]" T.C.A. § 56-8-113. Accordingly, the new statute has no effect on *Riad*'s conclusion that "[p]unitive damages, while generally not available in a breach of contract case, may be awarded in a breach of contract action under certain circumstances." 436 S.W.3d at 276 (citations and internal quotation marks omitted). Defendant's argument is incorrect, and we

affirm the district court's denial of Defendant's motion to dismiss Plaintiff's punitive damages claim for breach of contract.

C. Defendant's Motion for Judgment as a Matter of Law

Defendant next challenges the district court's denial of its motion for judgment as a matter of law. "We review *de novo* a district court's denial of a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b)." *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 804 (6th Cir. 2015) (citing *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005)). "In this Circuit, a federal court sitting in diversity must apply the standard for judgments as a matter of law of the state whose substantive law governs." *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 468 (6th Cir. 1996).

> Under Tennessee law, the reviewing court must "take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be draw[n] from the whole evidence."

Stinson v. Crye-Leike, Inc., 198 F. App'x 512, 515 (6th Cir. 2006) (alteration in original) (quoting *Arms v. State Farm Fire & Cas. Co.*, 731 F.2d 1245, 1248 (6th Cir. 1984)). Judgment as a matter of law should be granted "only if reasonable minds could draw but one

conclusion." *Sauls v. Evans*, 635 S.W.2d 377, 379 (Tenn. 1982).

Defendant asserts that the district court should have granted its motion for judgment as a matter of law regarding Plaintiff's claims for (1) statutory bad faith and (2) punitive damages predicated on breach of contract. We address the two issues in turn.

1. Statutory Bad Faith Claim

Tennessee's bad faith statute for insurers states the following:

> The insurance companies of this state, and foreign insurance companies and other persons or corporations doing an insurance or fidelity bonding business in this state, in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest on the bond, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that the failure to pay inflicted additional expense, loss, or injury including attorney fees upon the holder of the policy or fidelity bond[.]

T.C.A. § 56-7-105(a). In order to prevail on a § 56-7-105 bad faith claim, a plaintiff must prove four elements:

> (1) the policy of insurance must, by its terms, have become due and payable, (2) a formal demand for payment must have been made, (3) the insured must have waited 60 days after making his demand before filing suit (unless there was a refusal to pay prior to the expiration of the 60 days), and (4) the refusal to pay must not have been in good faith.

Palmer v. Nationwide Mut. Fire Ins. Co., 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986).

Defendant baldly asserts that it was entitled to judgment as a matter of law on Plaintiff's bad faith claim because of "the lack of evidence in support of [Plaintiff]'s bad-faith . . . claim[]." (First Br. 34.) However, Defendant provides no support for this assertion in its principal brief, which suggests that Defendant waived this issue. *See United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (citation omitted)).

In any event, Defendant's argument fails on the merits. In its reply brief, Defendant is more specific, invoking the uncertainty defense to claims of bad faith. An insurer "is entitled to rely upon available defenses and refuse payment if there [are] substantial legal grounds that the policy does not afford coverage for the alleged loss." *Ginn v. Am. Heritage Life Ins. Co.*, 173 S.W.3d 433, 443 (Tenn. Ct. App. 2004) (citation omitted). Thus, the statute bars the imposition of a bad faith penalty where (1) an insurer's refusal to pay is based on the insurer's uncertainty

about the true beneficiary or beneficiaries of a policy, and (2) the insurer's uncertainty is supported by a substantial legal ground. *See Nelms v. Tenn. Farmers Mut. Ins. Co.*, 613 S.W.2d 481, 484 (Tenn. Ct. App. 1978). This holds true even if a court ultimately finds that the claimant is entitled to the proceeds of the policy. *See id.* A plaintiff who wishes to overcome the uncertainty defense generally "must demonstrate 'there were no legitimate grounds for disagreement about the coverage of the insurance policy.'" *Fulton Bellows, LLC v. Fed. Ins. Co.*, 662 F. Supp. 2d 976, 996 (E.D. Tenn. 2009) (quoting *Zientek v. State Farm Int'l Servs.*, No. 1:05-cv-326, 2006 WL 925063, *4 (E.D. Tenn. Apr. 10, 2006)). As always, a plaintiff may also challenge the factual support for a defendant's proffered affirmative defense. *See Ass'n of Owners of Regency Park Condos. v. Thomasson*, 878 S.W.2d 560, 566 (Tenn. Ct. App. 1994) ("For an affirmative defense, which is affirmatively pleaded, the burden is on the pleader to prove same.") (quoting 11 Tenn. Jur. Evidence § 50 (1984)).

Defendant argues that it was entitled to judgment as a matter of law because it was "concerned about the prospect of multiple liabilities" when it refused to pay Plaintiff's claim. (Third Br. 31.) This concern, Defendant argues, arose from the fact that the MDA between Plaintiff and Decedent rendered the Policy's primary beneficiary "ambiguous and uncertain." (*Id.*) In support of this uncertainty, Defendant cites *Holt v. Holt*, 995 S.W.2d 68, 72 (Tenn. 1999), a case that Defendant characterizes as standing for the proposition that "the MDA . . . vested the children with 'an

equitable interest' in the policy at issue here, . . . and that equitable interest created potential adversity between the children and [Plaintiff]." (Third Br. 31.)

Applying Tennessee's standard of review, however, we find that reasonable minds could reject Defendant's argument because it is not clear that *Holt* was the actual reason that Defendant refused to pay Plaintiff's claim.[5] Indeed, reasonable minds could instead conclude that Defendant raised the uncertainty defense during litigation as a mere *post hoc* explanation for its conduct. When Defendant initially filed its interpleader complaint, the only potential adverse claim it described was that of Williams—not of the minor children. Defendant also did not mention in its complaint its supposed uncertainty about whether the minor children had an equitable interest in the policy. And furthermore, Defendant did not even mention *Holt*—the supposed basis for its uncertainty—in its motion to dismiss Plaintiff's complaint.

Prior to its motion to dismiss, Defendant's refusal to pay had no apparent basis under the law. Indeed, Defendant did not seem to understand—and certainly did not convey—what Plaintiff could do to fulfill Defendant's demand for waivers from other potential claimants. Trial witnesses testified that the guardianship process Defendant suggested for obtaining waivers was complicated, uncommon, and

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[5] Because there is reason to believe that Defendant did not rely on *Holt* in good faith, we need not decide whether good-faith reliance on *Holt* could support a refusal to pay in the future under analogous circumstances.

unnecessary. Defendant's staff admitted that it did not "meticulously review" the letter it sent to Plaintiff in which it demanded the waivers. (R. 184 at PageID #3308.) And immediately after sending the letter, the employee who wrote it closed the file on Plaintiff's complaint. Defendant's purported uncertainty is not consistent with its actions to stymie Plaintiff's claim under the Policy: Defendant initially refused to consider as proposed guardians the very same individuals whom it would later jointly move the district court to appoint to that role, Defendant repeatedly stated that it would send waiver forms but never did, and Defendant refused to consider Plaintiff's proposed alternative solution in the form of a hold harmless and indemnification agreement. In light of this evidence, a reasonable juror could conclude that Defendant did not actually refuse to pay the claim because of the legal uncertainty created by *Holt*.

2. Punitive Damages Claim Predicated on Breach of Contract

Defendant next argues that it was entitled to judgment as a matter of law on Plaintiff's claim for punitive damages arising from breach of contract. "Punitive damages are intended to punish the defendant for wrongful conduct and to deter others from similar conduct in the future." *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984) (citing *Liberty Mut. Ins. Co. v. Stevenson*, 368 S.W.2d 760 (Tenn. 1963)); *see Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 292 (1989) ("Damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the

guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself.") (quoting *Wilkes v. Wood*, Lofft. 1, 18–19, 98 Eng. Rep. 489, 498–499 (K.B. 1763)).

Punitive damages may be awarded in "egregious" cases involving breach of contract where, in addition to showing that the defendant breached a contract, the plaintiff provides "clear and convincing proof that the defendant has acted either 'intentionally, fraudulently, maliciously, or recklessly.'" *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 211 n.14 (Tenn. 2012) (quoting *Goff v. Elmo Greer & Sons Constr. Co.*, 297 S.W.3d 175, 187 (Tenn. 2009)). For proof to be clear and convincing, there must be "no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3. (Tenn. 1992). The Supreme Court of Tennessee summarizes the four levels of intent that are capable of giving rise to punitive damages for a breach of contract as follows:

> A person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result. A person acts fraudulently when (1) the person intentionally misrepresents an existing, material fact or produces a false impression, in order to mislead another or to obtain an undue advantage, and another is injured because of reasonable reliance upon that representation. A person acts maliciously when the person is motivated by ill will, hatred, or personal spite. A person acts recklessly when the person is aware of, but

> consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.

Id. at 901 (citations omitted).

In this case, the jury faced the question of whether Defendant's breach of contract involved egregious conduct. As previously discussed, reasonable minds could find that Defendant's uncertainty defense was merely a *post hoc* explanation for its refusal to pay on the Policy. Based on the following evidence, reasonable minds could go further, finding that clear and convincing evidence demonstrated that Defendant's refusal to pay was at least reckless.

Defendant was aware that its refusal to pay could lead to litigation between multiple parties; indeed, Defendant threatened to pursue such litigation itself through an interpleader action, and ultimately did so. Litigation inflicts substantial costs, both on the public and on the parties involved, and reasonable minds could conclude that Defendant consciously disregarded a risk that its threats—and eventual imposition—of litigation was unjustifiable. The jury learned that Defendant misled Plaintiff about her legal rights, incorrectly asserting that she had "obviously waived her beneficiary status" under the Policy. (R. 185 at PageID #3865.) The jury also learned that Defendant provided no basis for this bald assertion and that Defendant's systems to prevent its personnel from making false and unsupported assertions of law were inadequate. The jury further

learned that when Plaintiff complained about the cost and confusion of Defendant's seemingly unjustified threat of an interpleader action, Defendant told her, "that is not our problem." (R. 182 at PageID #2799.) Indeed, Defendant told the jury that it had no policy or standard operating procedure in place to guide Plaintiff's claim to resolution without litigation, and its staff was merely dedicated to "closing" Plaintiff's complaints. (R. 184 at PageID # 3268; R. 185 at PageID #3873.)

In light of this evidence, reasonable minds could have concluded that clear and convincing evidence showed that Defendant's pursuit of litigation with Plaintiff was at least reckless. *See Hodges*, 833 S.W.2d at 901. We therefore affirm the district court's denial of Defendant's motion for judgment as a matter of law.

D. The Statutory Cap on Punitive Damages

On cross-appeal, Plaintiff argues that the statutory punitive damages cap, T.C.A. § 29-39-104,[6] which the district court applied below, violates two provisions of the Tennessee Constitution: the individual right to a

[6] In relevant part, T.C.A. § 29-39-104(a)(5) provides that punitive damages are limited to the greater of either double "the total amount of compensatory damages awarded" or $500,000. The limitation "shall not be disclosed to the jury, but shall be applied by the court to any punitive damages verdict[.]" *Id.* § 29-39-104(a)(6). The limitation does not apply in any suit involving intent to inflict serious physical injury, intentional falsification or concealment of records, injuries or death caused by an intoxicated defendant, or felonious conduct. *Id.* § 29-39-104(a)(7). The parties do not argue that any of the statutory exceptions apply in this case or that the district court erred in its calculations when applying the cap.

jury trial and the doctrine of separation of powers. This Court reviews *de novo* a district court's interpretation of state law. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991). 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." *In re Dow Corning Corp.*, 419 F.3d 543, 549 (6th Cir. 2005). Where, as here, the state's appellate courts have not addressed the issue presented, "we must predict how the [state's highest] court would rule by looking to all the available data." *Allstate Ins. Co. v. Thrifty Rent–A–Car Sys. Inc.*, 249 F.3d 450, 454 (6th Cir. 2001). Federal courts should be "extremely cautious about adopting 'substantive innovation' in state law." *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 578 (6th Cir. 2004) (citation omitted). When facing state constitutional challenges, Tennessee statutes receive "a strong presumption" of constitutionality. *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (citing *Osborn v. Marr*, 127 S.W.3d 737, 740–41 (Tenn. 2004)); *see also Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009) ("Our charge is to uphold the constitutionality of a statute wherever possible.").

Upon our assessment of Tennessee law, we find that the punitive damages bar set forth in § 29-39-104 violates the individual right to a trial by jury set forth in the Tennessee Constitution. The Declaration of Rights in the Tennessee Constitution provides that "the right of trial by jury shall remain inviolate …." Tenn. Const. art. I, § 6. This broad language does not

guarantee the right to a jury trial in every case. "Rather, it guarantees the right to trial by jury as it existed at common law under the laws and constitution of North Carolina[7] at the time of the adoption of the Tennessee Constitution of 1796." *Young v. City of LaFollette*, 479 S.W.3d 785, 793 (Tenn. 2015) (internal quotation marks, alteration, and citation omitted). "Among the essentials of the right to trial by jury is the right guaranteed to every litigant in jury cases to have the facts involved tried and determined by twelve jurors." *State v. Bobo*, 814 S.W.2d 353, 356 (Tenn. 1991).

Our review of historical evidence from Tennessee and North Carolina demonstrates that punitive damages awards were part of the right to trial by jury at the time the Tennessee Constitution was adopted. The North Carolina Supreme Court discussed the issue of punitive damages in a case it decided the year after the Tennessee Constitution was drafted, *Carruthers v. Tillman*, 2 N.C. (1 Hayw.) 501 (1797). *Carruthers* was a nuisance suit in which the defendant was accused of "overflowing of the Plaintiff's land." *Id.* at 501. The Court seized the opportunity to explain the types of suits in which punitive damages (therein referred to as exemplary damages) were appropriate:

> [I]t is not proper, in the first instance, to give exemplary damages, but such only as will compensate for actual loss, as killing the timber

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[7] North Carolina has special relevance because the land that became Tennessee was originally part of North Carolina, and Tennessee's Constitution draws heavily from North Carolina's. *See In re Estate of Trigg*, 368 S.W.3d 483, 491 (Tenn. 2012).

> or overflowing a field, so as to prevent a crop being made upon it, and the like…. [B]ut if after this the nuisance should be continued, and a new action brought, then the damages should be so exemplary as to compel an abatement of the nuisance.

Id. In *Rhyne v. K-Mart Corp*., the North Carolina Supreme Court cited *Carruthers* as its first case discussing exemplary damages and as support for the established place of punitive damages in North Carolina common law. 594 S.E.2d 1, 6 (N.C. 2004). *Carruthers* fits neatly with *Wilkins v. Gilmore*, an 1840 case in which the Tennessee Supreme Court held that it was "clear" that "the jury are not restrained in their assessment of damages, to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages, in respect of the malicious conduct of the defendant, and the degree of insult with which the trespass has been attended." 21 Tenn. (2 Hum.) 140, 141 (1840). Together, *Carruthers* and *Wilkins* demonstrate that North Carolina juries were awarding punitive damages at the time the Tennessee Constitution was drafted and that the practice continued uninterrupted in Tennessee thereafter. Accordingly, "the right to trial by jury as it existed at common law" in 1796 would have included the right to have the jury award punitive damages in appropriate cases.[8] *Young*, 479 S.W.3d at 793 (citations and internal quotation marks omitted).

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[8] Tennessee's cap on punitive damages applies by its plain terms to all "civil action[s] in which punitive damages are sought[.]" T.C.A. § 29-39-104(a). In attempting to narrow the

Further review shows that the proper measure of punitive damages is historically a "finding of fact" within the exclusive province of the jury. In the 1839 case *Boyers v. Pratt*, a jury awarded the plaintiff the sizable sum of $1,460 in damages for an assault claim. 20 Tenn. (1 Hum.) 90, 90 (1839). The Tennessee Supreme Court summarized the problem of properly assessing damages as follows:

> Here there was a harmless, inoffensive young man of religious habits and a non-combatant, a stranger in a strange land, degraded by the infliction of the most ignominious punishment from the hands of a wealthy, influential and respectable citizen, and without any thing approaching to adequate cause. Who can begin to estimate, in dollars and cents, what would be an adequate compensation for such an injury?

Id. at 93. The Court explained that "the peace of society ought in cases of this kind always to be looked to, and damages given to such an extent as will deter persons from the commission of such offences." *Id*. It therefore concluded that it could not find the damages excessive because "[t]he question is one purely of fact, and we do not think that the jury have abused their trust." *Id.*

One hundred years later, the Tennessee Supreme Court described another punitive damages award in

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scope of the historical inquiry about the availability of punitive damages, the dissent fails to acknowledge that the challenge in this case is to a blanket statutory cap.

similar terms. In *Southeastern Greyhound Lines, Inc. v. Freels*, a passenger was refused the opportunity to board a bus; the jury awarded $500 in punitive damages even though the actual damages amounted to less than two dollars. 144 S.W.2d 743, 744 (Tenn. 1940). Based on its review of the applicable authority, the Court concluded that "the question is always for the jury, as to whether or not there was anything in the conduct of the defendant to aggravate the damages and justify the recovery therefor in addition to the actual damages suffered." *Id.* at 746. It quoted with approval an older case explaining that "punitory damages can not be claimed as a matter of right; but it is always a question for the jury, within its discretion, no matter what the facts are." *Id.* (quoting *Louisville & N.R. Co. v. Satterwhite*, 79 S.W. 106, 112 (Tenn. 1904)). Ultimately, the court concluded that it could not second-guess the jury's verdict merely because it was "unable to find strong support in this case for the allowance of additional damages." *Id.*

Following this line of cases from the Tennessee Supreme Court, we find that the General Assembly's attempt to cap punitive damages pursuant to T.C.A. § 29-39-104 constitutes an unconstitutional invasion of the right to trial by jury under the Tennessee Constitution. *See* Tenn. Const. art. I, § 6. We therefore hold that T.C.A. § 29-39-104 is unenforceable to the extent that it purports to cap punitive damage awards.

Defendant and the State ask this Court to hold otherwise for six reasons. We are not persuaded. *First*, these parties challenge the notion that the amount of punitive damages constitutes a "finding of fact." The

Court recognizes that some jurisdictions do not consider punitive damage awards to be factual in nature. For example, the Indiana Supreme Court upheld a punitive damages cap in large part because "the jury's determination of the amount of punitive damages is not the sort of 'finding of fact' that implicates the right to jury trial under our state constitution." *State v. Doe*, 987 N.E.2d 1066, 1071 (Ind. 2013) (quoting *Stroud v. Lints*, 790 N.E.2d 440, 445 (Ind. 2003)). And the United States Supreme Court has explained that, "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001) (citation omitted) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

But as cases such as *Wilkins*, *Boyers*, and *Southeastern Greyhound* demonstrate, Tennessee law treats punitive damages differently, and it is not alone in doing so. Indeed, the United States Supreme Court acknowledged in *Cooper Industries* that there is a lack of uniformity on this issue, stating:

> Respondent argues that our decision in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), rests upon the assumption that punitive damages awards are findings of fact. In that case, we held that the Oregon Constitution, which prohibits the reexamination of any "fact tried by a jury," violated due process because it did not allow for any review of the constitutionality of punitive

> damages awards. Respondent claims that, because we considered this provision of the Oregon Constitution to cover punitive damages, we implicitly held that punitive damages are a "fact tried by a jury." It was the Oregon Supreme Court's interpretation of that provision, however, and not our own, that compelled the treatment of punitive damages as covered. *See Oberg*, 512 U.S. at 427; *see also Van Lom v. Schneiderman*, 210 P.2d 461, 462 (Or. 1949) (construing the Oregon Constitution).

Id. at 437 n.10 (citations omitted). The Missouri Supreme Court further demonstrated this lack of uniformity when, in a recent case, it struck down a punitive damages cap on the basis that the cap invaded the province of the jury. *See Lewellen v. Franklin*, 441 S.W.3d 136, 145 (Mo. 2014) (en banc). In that case, the Missouri Supreme Court explained that, "[u]nder the common law as it existed at the time the Missouri Constitution was adopted, imposing punitive damages was a peculiar function of the jury." *Id*. at 143. Accordingly, the Court found that the punitive damages cap violated a provision of the Missouri Constitution that is materially identical to the constitutional provision at issue in this case: "the right of trial by jury as heretofore enjoyed shall remain inviolate." Mo. Const. art. 1, § 22(a). Faced with this lack of uniformity, we find that the Tennessee Supreme Court would likely apply its own rule—which is shared by states like Missouri—and would find that § 29-39-104 violates the constitutional right to a trial by jury.

Second, Defendant and the State point out that the North Carolina Supreme Court affirmed a statutory punitive damages cap in *Rhyne*. Given the two states' shared history, Tennessee courts have sometimes followed the lead of the North Carolina Supreme Court. For example, in *Jernigan v. Jackson*, the Tennessee Supreme Court considered whether individuals have a right to a trial by jury in tax cases. 704 S.W.2d 308 (Tenn. 1986). The court based its decision on a 1941 case from the North Carolina Supreme Court, explaining:

> North Carolina's constitutional provision granting trial by jury in civil cases . . . was in 1941 and is today in the same language as the original, and at no time in its history has the North Carolina Legislature authorized jury trials in tax cases. It follows that under the law in force and use in North Carolina in 1789 and in 1796 when Tennessee's first Constitution was adopted, jury trials in tax cases were not authorized.

Id. at 309 (citing *Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop*, 15 S.E.2d 4 (N.C. 1941)). The court therefore adopted the North Carolina Supreme Court's holding that juries were not constitutionally required in tax cases. *Id*.

In this case, however, we are not persuaded that the Tennessee Supreme Court would follow North Carolina's lead. The basis for the North Carolina Supreme Court's decision in *Rhyne* was a provision of the North Carolina Constitution that protects the right to a trial by jury in "all controversies at law

respecting property." *See* 594 S.E.2d at 10 (discussing N.C. Const. art I, § 25). Based on this language, the *Rhyne* court held that because there was "no independent right to, or 'property' interest in, an award of punitive damages," the legislature could dictate the jury's role in making such an award. *See id.* at 13. But the same analysis does not apply in this case because, unlike the North Carolina Constitution, the Tennessee Constitution does not contain any language limiting the right to a trial by jury to "all controversies at law respecting property." Instead, the Tennessee Constitution broadly provides that "the right of trial by jury shall remain inviolate . . . ." Tenn. Const. art. I, § 6.

Third, Defendant and the State argue that the punitive damages cap is constitutional because the Tennessee General Assembly has the power to abrogate or eliminate common law remedies. But this argument merely begs the question because the General Assembly's power to change the common law is subject to "constitutional limits." *Lavin v. Jordon*, 16 S.W.3d 362, 368 (Tenn. 2000) (citing *S. Ry. Co. v. Sanders*, 246 S.W.2d 65, 67 (Tenn. 1952)). To argue that the General Assembly may cap punitive damages based on its power to modify the common law is akin to arguing that parents may drive as fast as they wish because parents make the rules. Each argument ignores a key constraint on the rulemaker's authority. In this case, of course, the preexisting constraint is the constitutional right to submit factual questions for determination by a jury.

The State's related discussion of *Lavin* does not persuade us otherwise. The State cites *Lavin* as support for the proposition that "capping punitive damages was wholly within the legislature's power." (Gov. Br. 24.) In *Lavin*, the Tennessee Supreme Court analyzed a statute that capped a plaintiff's recovery in cases involving "injury or damage by juvenile" to "the actual damages in an amount not to exceed ten thousand dollars ($10,000) in addition to taxable court costs." *See id.* at 365 (quoting T.C.A. §§ 37-10-101, 102). The plaintiffs' only argument was that the $10,000 cap did not apply to their case because it did not qualify as an "injury or damage by juvenile case" within the meaning of the statute and as dictated by binding precedent. *See id.* at 365, 368. In other words, the plaintiffs did not raise any constitutional challenges to the General Assembly's power to cap their recovery at $10,000. *Id.* The Tennessee Supreme Court described the statute as "distasteful" because $10,000 was "plainly inadequate and wholly insufficient to compensate the plaintiffs" for the loss of their son "to a senseless act of malicious violence . . . ." *Id.* at 369. Nevertheless, the Court could only resolve the question before it, which was a matter of statutory interpretation. In the case presently before us, however, there is no statutory interpretation issue; rather, the question is whether a punitive damages cap exceeds constitutional bounds. *Lavin* is therefore unilluminating.

Fourth, citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996), the State argues that "Tennessee's statutory cap on punitive damages is a

way of ensuring that the level of punitive damages will meet the *Gore* due-process standard of normalization and stabilization of awards." (Gov. Br. 17.) But Tennessee's categorical punitive damages cap of "an amount equal to the greater of: (A) Two (2) times the total amount of compensatory damages awarded; or (B) Five hundred thousand dollars ($500,000)," T.C.A. § 29-39-104(a)(5), bears no relationship to *Gore*'s discussion of the federal constitutional limits on punitive damages:

> [W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, we return to what we said in *Haslip*: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that a general concern of reasonableness properly enters into the

> constitutional calculus." In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely raise a suspicious judicial eyebrow.

Gore, 517 U.S. at 582–83 (internal quotation marks, emphasis, citations, and alterations omitted). We therefore reject this argument.

Fifth, the State argues that Plaintiff may not challenge the punitive damages cap because plaintiffs are never entitled to punitive damages. Indeed, Tennessee law recognizes that punitive damages are not compensatory in nature. *See Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 907–08 (Tenn. 1999). But for centuries, the right to a trial by jury in Tennessee has encompassed the right to ask a jury to determine the quantity of damages that "will deter persons from the commission of such offences." *Boyers*, 20 Tenn. at 93. A plaintiff's right to submit that "question . . . purely of fact," *id.*, to a jury is not vitiated merely because the resulting award is non-compensatory. The district court's application of § 29-39-104 to reduce the jury's award of punitive damages undeniably reduced Plaintiff's recovery. Therefore, Plaintiff may challenge the validity of the punitive damages cap.

Sixth, the State argues that the punitive damages cap merely creates "legal consequences of the jury's finding on damages." (Gov. Br. 25.) In other words, § 29-39-104 does not invade the province of the jury, the State argues, because it allows the jury to make the factual finding and only then is the "trial court . . .

required[] to reduce the jury's assessment of punitive damages to comport with the law." (*Id.*) Defendant similarly argues that "there is no encroachment upon the jury's fact-finding role because the jury is never aware of the cap." (Third Br. 14.) Defendant and the State imply that § 29-39-104 is merely a regulation on the process of remittitur, but these parties do not use the word "remittitur"—perhaps because the Tennessee Supreme Court has repeatedly rejected the General Assembly's attempts to regulate the exercise of remittitur. Indeed, the Tennessee Supreme Court has historically treated remittitur as a judicial power that may be influenced—but not controlled—by the General Assembly. *See Borne v. Celadon Trucking Servs., Inc.*, 532 S.W.3d 274, 309–10 (Tenn. 2017) (discussing history of remittitur in Tennessee); *Foster v. Amcon Int'l, Inc.*, 621 S.W.2d 142, 145 (Tenn. 1981) (rejecting "hard and fast rules in reviewing additurs and remittiturs"); *Grant v. Louisville & N.R. Co.*, 165 S.W. 963, 966 (1914) (rejecting statute that barred courts from suggesting remittitur absent a finding that award was "so excessive as to indicate passion, prejudice, corruption, . . . or . . . caprice" on the part of the jury). The parties' attempt to recast the General Assembly's invasion of the province of the jury as akin to a regulation of remittitur therefore fails due to an additional constitutional barrier.

The right to a trial by jury, moreover, is held by a litigant, not the jury members. In this case, the jury informed Plaintiff that Defendant's conduct so violated normal expectations of proper behavior as to entitle her to $3,000,000 in damages. The jury's

ignorance of a subsequent reduction in the award does not change that infringement on Plaintiff's right. Such an infringing reduction is not analogous to permissible legal consequences that impact a jury's verdict. Statutory multipliers, for example, do not undercut a jury's assessment of damages, nor do statutes that recognize the post-verdict authority of the trial court to act as both judge and thirteenth juror. For example, Tennessee's remittitur statute allows a trial court in certain circumstances to propose "remittitur instead of granting a new trial." *Borne*, 532 S.W.3d at 310. But allowing a trial judge, after considering the attendant circumstances and proof in a case, to offer a plaintiff the choice to avoid a new trial is a far cry from legislatively reversing a jury's assessment of the amount of damages necessary to deter a defendant from future wrongful conduct.

We therefore conclude that the statutory cap on punitive damages set forth in T.C.A. § 29-39-104 violates the Tennessee Constitution.[9]

CONCLUSION

We therefore **AFFIRM** the district court's judgment in part, **REVERSE** in part, **VACATE** the judgment as to punitive damages, and **REMAND** with instructions for the district court to recalculate the award of punitive damages in accordance with the jury verdict and with this Court's holding that the

[9] Because we conclude that the punitive damages cap violates the constitutional right to a trial by jury, we need not address Plaintiff's alternate argument that the cap is unconstitutional as a violation of principles of separation of powers.

statutory cap on punitive damages, T.C.A. § 29-39-104, is unconstitutional.

CONCURRING IN PART AND DISSENTING IN PART

LARSEN, Circuit Judge, concurring in part and dissenting in part.[1] State courts are the authority on questions of state law. Federal courts must sometimes decide state law questions, but we are the back-ups. We are to follow, not lead.

This case presents two uncertain and important questions of state law: one concerning the proper construction of a Tennessee statute; the other concerning the conformity of a different Tennessee statute with the Tennessee Constitution. The Tennessee Supreme Court has signaled its willingness to decide both of these state law questions, and we have a mechanism— certification—that allows the Tennessee Supreme Court to decide them. I would take advantage of that mechanism to learn from Tennessee's highest court how it would interpret its statutes and its Constitution.

The majority, however, elects to decide the state law questions on its own. It first decides that Tennessee's bad faith statute, Tenn. Code Ann. § 56-7-105(a), does not bar a plaintiff from recovering punitive damages in addition to the penalties provided

[1] I concur in Section A of the majority's opinion, which properly resolves the interpleader issue.

in the statute. That a prior decision of this court has held to the contrary is no obstacle—the majority overrules this court's published decision in *Heil Co. v. Evanston Insurance Co.*, 690 F.3d 722 (6th Cir. 2012), on the strength of a single, and questionable, decision of Tennessee's intermediate appellate court, *Riad v. Erie Insurance Exchange*, 436 S.W.3d 256 (Tenn. Ct. App. 2013). *Riad* rested entirely on the assumption that a prior decision of the Tennessee Supreme Court had already decided the question that *Heil* answered. But we know that is wrong: The Tennessee Supreme Court has told us so. See *Lindenberg v. Jackson Nat'l Life Ins. Co.*, No. M2015-02349-SC-R23-CV, 2016 Tenn. LEXIS 390, at *2 (Tenn. June 23, 2016) (per curiam). Yet the majority overrules *Heil* anyway. And with *Heil* gone, the majority proceeds to invalidate Tennessee's recently-enacted punitive damages cap, Tenn. Code Ann. § 29-39-104, because the work of the Tennessee General Assembly is at odds with the majority's view of the jury trial right guaranteed by the Tennessee Constitution.

These two holdings are unnecessary. As to the constitutional holding, it is not even clear that Tennessee's jury trial guarantee provides the rule of decision in this federal diversity action under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). If it does not, then we have no occasion to construe the Tennessee Constitution. Putting aside the *Erie* question, the preclusive effect of Tennessee's bad faith statute and the constitutionality of the punitive damages cap are both unsettled questions on which there is no Tennessee Supreme Court authority and

little (and conflicting) state law guidance. As such, both questions are ideally suited for certification. Tennessee's highest court has expressed its receptiveness to certification; the State urges certification; and neither Lindenberg nor Jackson National objects to certification.

But since the majority has declined this prudent path, I will also express my views of the merits. On both questions, I believe the majority errs. I respectfully dissent.

I.

Tennessee Supreme Court Rule 23 provides the court with discretion to accept questions certified to it by the federal courts "when the certifying court determines that . . . there are questions of [Tennessee law] which will be determinative of the cause and as to which it appears . . . there is no controlling precedent in the decisions of the Supreme Court of Tennessee." Here, we have two questions of state law on which "there is no controlling precedent in the decisions of the Supreme Court of Tennessee": (1) whether Tennessee's bad faith statute, § 56-7-105(a), provides the exclusive extracontractual remedy in a breach-of-contract case arising from an insurer's breach of an insurance contract; and (2) whether Tennessee's punitive damages cap, § 29-39-104, violates the Tennessee Constitution. Certification of both questions would, therefore, meet the "no controlling precedent" requirement of Tennessee Supreme Court Rule 23.

U.S. Supreme Court decisions also support certification when there are "[n]ovel, unsettled questions of state law." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). The Court has stressed that certification "save[s] 'time, energy, and resources.'" *Id.* at 77 (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). Most important of all, certification "helps build a cooperative judicial federalism." *Lehman Bros.*, 416 U.S. at 391. Federalism concerns are especially weighty—and certification is especially warranted—"when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English*, 520 U.S. at 79. And, in a passage that feels highly relevant today, the Court called a federal court's "[s]peculation . . . about the meaning of a state statute . . . particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Id.* at 79 (quotations omitted). Here, while the majority's speculation about the meaning of a state statute results in the invalidation of state law on an equally speculative construction of the state constitution, there is no question the Tennessee Supreme Court "stand[s] willing to address" these novel issues.

One might perhaps question this willingness because the district court did certify two questions regarding the constitutionality of the punitive damages cap, and the Tennessee Supreme Court declined to review the questions. But this ignores *why*

that court did so. The Tennessee Supreme Court refused the certified constitutional questions because the district court had failed also to certify the antecedent question concerning the preclusive effect of the bad faith statute. Accordingly, it seems the questions certified might not have been "determinative of the cause" under Tennessee Supreme Court Rule 23. The Tennessee Supreme Court explained:

> The jury determined that the plaintiff was entitled to both the statutory bad faith penalty pursuant to Tennessee Code Annotated section 56-7-105, and punitive damages pursuant to the common law. The issue of the availability of the common law remedy of punitive damages in addition to the statutory remedy of the bad faith penalty is one which has not before been addressed by this Court, was not certified to this Court by the federal trial court in this case, and is not presently before this Court in this case. It appears to this Court that it would be imprudent for it to answer the certified questions concerning the constitutionality of the statutory caps on punitive damages in this case in which the question of the availability of those damages in the first instance has not been and cannot be answered by this Court.

Lindenberg v. Jackson Nat'l Life Ins. Co., No. M2015-02349-SC-R23-CV, 2016 Tenn. LEXIS 390, at *1–2 (Tenn. June 23, 2016) (per curiam). The Tennessee Supreme Court, however, welcomed *this* court to send

it *both* the statutory and the constitutional questions, noting:

> Nothing in the Court's Order is intended to suggest any predisposition by the Court with respect to the United States Court of Appeals for the Sixth Circuit's possible certification to this Court of both the question of the availability of the remedy of common law punitive damages in addition to the remedy of the statutory bad faith penalty and the question of the constitutionality of the statutory caps on punitive damages, in the event of an appeal from the final judgment in this case.

Lindenberg, 2016 Tenn. LEXIS 390, at *2 n.1.

I would accept this invitation; but the majority has declined. And so I proceed to the merits.

II.

This case asks what remedies are available to an insured who believes that her insurer has, in bad faith, breached its obligation to pay on an insurance policy. In 1901, the Tennessee General Assembly enacted the bad faith statute, Tenn. Code Ann. § 56-7-105, which provides a 25% penalty in those circumstances—i.e., "in all cases" where an insurance company refuses, in bad faith, to pay an insurance claim. *See Leverette v. Tenn. Farmers Mut. Ins. Co.*, No. M2011-00264-COA-R3-CV, 2013 WL 817230, at *17 (Tenn. Ct. App. Mar. 4, 2013) (quoting Tenn. Code Ann. § 56-7-105(a)). Tennessee courts have held, and repeatedly affirmed, that the bad faith statute precludes recognition of the common law tort of bad

faith failure to pay an insurance claim. *See Chandler v. Prudential Ins. Co.*, 715 S.W.2d 615, 618–21, 625 (Tenn. Ct. App. 1986); *Leverette*, 2013 WL 817230, at *17–18. The fundamental question in this litigation is whether the bad faith statute likewise precludes a claim for punitive damages arising from a common law breach of an insurance contract—put another way, whether the statute provides the exclusive "punitive" or "extracontractual" remedy for an insurer's bad faith failure to pay.

This court has already answered, "Yes." *See Heil Co. v. Evanston Ins. Co.*, 690 F.3d 722, 728 (6th Cir. 2012). Lindenberg, the district court, and the majority all say, "No." They say that Lindenberg may also recover punitive damages based on Jackson National's bad faith breach of contract. But of course, the breach of contract in this case is the failure to pay on the insurance claim. And to get punitive damages, if they are allowed at all, Lindenberg would have to prove something more than just a breach of contract—she would have to show conduct amounting at least to "bad faith." *See Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 211 n.14 (Tenn. 2012) (explaining that punitive damages are "limited to 'the most egregious cases' and [are] proper only where there is clear and convincing proof that the defendant has acted either 'intentionally, fraudulently, maliciously, or recklessly'" (citation omitted)). Jackson National argues that punitive damages should not be layered on top of the statutory bad faith penalty.

In *Heil*, this court determined that the bad faith statute precludes punitive damages for common law

breach of an insurance contract. *Heil*, 690 F.3d at 728. If *Heil* remains good law, it controls this case. The majority jettisons *Heil* based on one Tennessee intermediate appellate court decision, *Riad v. Erie Insurance Exchange*, 436 S.W.3d 256 (Tenn. Ct. App. 2013). Although an intermediate state appellate decision *may* displace this court's prior interpretation of state law, this rule does not obtain when there are persuasive reasons to believe the state's highest court would disagree. *See Hampton v. United States*, 191 F.3d 695, 701–02 (6th Cir. 1999). Here there are many. *Riad*'s analysis repudiating *Heil* rested entirely on that court's shaky assumption that an earlier Tennessee Supreme Court decision, *Myint v. Allstate Insurance Co.*, 970 S.W.2d 920 (Tenn. 1998), had *already* decided that the bad faith statute does not preclude punitive damages. *See Riad*, 436 S.W.3d at 276 (criticizing *Heil* for "ignor[ing] the *Myint* progeny of cases").[2] But we now know that *Riad*'s assumption was wrong. The Tennessee Supreme Court has told us so: "The issue of the availability of the common law remedy of punitive damages in addition to the statutory remedy of the bad faith penalty is one which has not before been addressed by this Court . . . ." *Lindenberg*, 2016 Tenn. LEXIS 390, at *2. That eviscerates *Riad*'s analysis. But even apart from its order regarding certification, there are reasons to doubt that the Tennessee Supreme Court would adopt *Riad*'s reasoning.

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[2] I remain uncertain just which cases *Riad* was referencing as *Myint*'s supposed "progeny." *Riad* cites none; I have found none.

To begin with, *Myint* did not directly address the question at issue in *Heil*. In *Myint*, the plaintiffs brought claims under both the bad faith statute and the Tennessee Consumer Protection Act (TCPA), Tenn. Code Ann. §§ 47–18–101 *et seq*., as well as a claim for breach of contract. 970 S.W.2d at 923. But *Myint* did not address the breach of contract claim, nor did it mention punitive damages at all. Rather, *Myint* focused on whether the TCPA applied to the insurance industry, given that the industry was already subject to Tennessee's comprehensive insurance code. *See id*. at 922 ("[T]he insur[e]r insists that the acts and practices of an insurance company are never subject to the [TCPA]."). *Myint* held that insurers were not exempt from the TCPA for two reasons. First, the court concluded, the state's insurance statutes, including the bad faith statute, "do not foreclose application of the [TCPA] to insurance companies." *Id*. at 925. Second, the court noted that the TCPA contained "crystal clear" language demonstrating that its remedies are cumulative to all others available under state law. *Id*. at 926.

Although *Myint* focused on the cumulative nature of the TCPA, *Riad* latched onto the high court's statement that it could "find nothing in either the Insurance Trade Practices Act *or the bad faith statute* which limits an insured's remedies to those provided therein." *See* 436 S.W.3d at 274 (emphasis added) (quoting *Myint*, 970 S.W.2d at 925). From this comment, *Riad* inferred that plaintiffs could recover both the statutory bad faith penalty and punitive damages for breach of contract. Although this is a

facially plausible inference, other evidence casts serious doubt on whether the Tennessee Supreme Court would agree.

Pre-*Myint* cases held that the bad faith statute precludes common law claims for damages arising from an insurer's bad faith failure to pay. So *Heil*'s conclusion was not new. *Heil* based its holding on two decisions—one federal, one state—that had construed the bad faith statute as an exclusive remedy. *See Mathis v. Allstate Ins. Co.*, No. 91-5754, 1992 WL 70192, at *4 (6th Cir. Apr. 8, 1992) ("[T]he trial judge correctly noted that the 25 percent penalty provided for in [the bad faith statute] has been deemed the exclusive remedy for losses stemming from an insurer's bad faith refusal to pay a claim."); *Berry v. Home Beneficial Life Ins. Co.*, No. 1150, 1988 WL 86489, at *1 (Tenn. Ct. App. Aug. 19, 1988) ("Moreover, as to the claim for punitive damages, [the bad faith statute] is the exclusive remedy for bad faith refusal to pay claims arising from insurance policies.").

And, although we did not discuss it in *Heil*, the Tennessee Court of Appeals held, over a decade before *Myint*, that the bad faith statute precludes recognition of the common law tort of bad faith failure to pay on an insurance policy. *See Chandler*, 715 S.W.2d at 618–21. *Chandler* is not the work of the Tennessee Supreme Court, but there is no question that its holding regarding the bad faith penalty's preclusion of the common law tort of bad faith survived *Myint*. *See Leverette*, 2013 WL 817230, at *18 ("Neither this court nor the Tennessee Supreme Court has overruled or

even questioned the continuing validity of *Chandler*."); *see also Fred Simmons Trucking, Inc. v. U.S. Fid. & Guar. Co.*, No. E2003-02892-COA-R3-CV, 2004 WL 2709262, at *3 (Tenn. Ct. App. Nov. 29, 2004) (citing C*handler* for Tennessee rule that "there is no tort of bad faith, but an insured can seek the statutory bad faith penalty when an insurance company refuses to pay"); *Watry v. Allstate Prop. & Cas. Ins. Co.*, No. M2011–00243–COA–R3–CV, 2011 WL 6916802, at *4 (Tenn. Ct. App. Dec. 28, 2011) ("Tennessee does not recognize a general common law tort for bad faith by an insurer against an insured; the exclusive remedy for such conduct is statutory, provided by [the bad faith statute]." (quotations omitted)); *6111 Ridgeway Grp. LLC v. Phila. Indem. Ins. Co.*, No. 15-2561-STA-cgc, 2016 WL 1045570, at *4 (W.D. Tenn. Mar. 15, 2016) (noting that "Tennessee courts have followed *Chandler* for thirty years"). Indeed, *Riad* itself acknowledged *Chandler*'s holding "that Tennessee did not recognize the tort of bad faith." *Riad*, 436 S.W.3d at 273. But, said *Riad*, "the court did not address the type of recovery [a] plaintiff could seek if she had brought a breach of contract action." *Id.*

I suppose this *could* be Tennessee's regime: Tennessee's bad faith statute precludes the common law tort of bad faith failure to pay on an insurance policy, per *Chandler*, and punitive damages flowing therefrom, per *Chandler* and *Leverette*, but *permits* punitive damages for the same failure to pay when that failure is cast, not as tort, but as breach of contract, per *Riad*. But *Riad*'s own reasoning would foreclose it. If *Riad* is right about the force of *Myint*'s

statement—"nothing in . . . the bad faith statute . . . limits an insured's remedies to those provided therein," *Myint*, 970 S.W.2d at 925—then that should apply to the tort of bad faith as well as to a claim for punitive damages in contract. But *Chandler* expressly said otherwise, and nothing suggests that *Myint* repudiated *Chandler* in toto, or that all the post-*Myint* cases reaffirming *Chandler* are wrong. It seems far more plausible to me that *Myint* applied only to the TCPA.

No Tennessee state court decision has relied on *Riad*'s *sui generis* reading of *Myint*. One reason for this may be that the General Assembly legislatively reversed *Myint*'s holding in 2011 by enacting Tenn. Code Ann. § 56-8-113. That provision states that "title 50 and [title 56]," which include the bad faith statute, "shall provide the sole and exclusive statutory remedies and sanctions applicable to an insurer." *Id.* § 56-8-113. *Riad* acknowledged *Myint*'s abrogation in a footnote, *see* 436 S.W.3d at 274 n.3, but *Riad* did not need to address § 56-8-113 because it involved a cause of action that accrued well before 2011.[3] Here, however, the cause of action accrued after § 56-8-113's enactment, so *Myint* has limited, if any, bearing on this case.

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[3] In light of this, some federal district courts have construed *Riad* as applying only to pre-§ 56-8-113 actions. *See Spring Place Church of God of Prophecy v. Bhd. Mut. Ins. Co.*, No. 1:13-CV-405, 2015 WL 12531988, at *4 n.4 (E.D. Tenn. Mar. 16, 2015); *Akers v. Allstate Prop. & Cas. Ins. Co.*, No. 2:14-CV-72, 2015 WL 11005023, at *5 (E.D. Tenn. Sept. 28, 2015).

The majority dismisses the significance of *Myint*'s abrogation because § 56-8-113 provides that "[n]othing in this section shall be construed to eliminate or otherwise affect any . . . [r]emedy, cause of action, right to relief or sanction available under common law." According to the majority, this statement "leaves intact *Myint*'s underlying conclusion" regarding the bad faith statute and so does not alter *Riad*'s holding regarding the availability of punitive damages for breach of contract. The problem with the majority's reasoning is that neither *Myint* nor any Tennessee case before *Riad* had affirmed that punitive damages *were* "available under common law" for breach of an insurance contract. As discussed above, when the General Assembly passed § 56-8-113 in 2011, all the caselaw on the subject held the opposite. And *Riad* was decided after § 56-8-113 was passed, so the General Assembly could not have contemplated, and ratified, *Riad*'s broad reading of *Myint*. Therefore, although § 56-8-113 preserved the common-law status quo, there is no indication that it preserved the availability of punitive damages in a case like this.

In sum, there are good reasons to question *Riad*'s interpretation of *Myint*: *Myint*'s focus on the TCPA, the absence of caselaw supporting *Riad*'s interpretation, the discordant *Chandler* line of cases, and *Myint*'s legislative abrogation. And all of this is reason to doubt that the Tennessee Supreme Court would agree with *Riad* and disapprove of this court's reasoning in *Heil*. But most importantly, we need not wonder whether *Myint* controls this case. The Tennessee Supreme Court has told us that *Riad* was

wrong to think that it had settled matters in *Myint*: "The issue of the availability of the common law remedy of punitive damages in addition to the statutory remedy of the bad faith penalty is one which has not before been addressed by [the Tennessee Supreme] Court . . . ." *Lindenberg*, 2016 Tenn. LEXIS 390, at *2. Because we thus have serious reason to doubt whether the Tennessee Supreme Court would agree with *Riad*, I would stick with our own precedent, *Heil*. I would therefore reverse the district court and vacate the punitive damages award.

III.

Deciding whether Tennessee's recently-enacted punitive damages cap comports with the Tennessee Constitution is doubly unnecessary. Certification would place the construction of the Tennessee Constitution in the hands of those entrusted with the document's safekeeping. Adhering to *Heil* would accomplish the same result. But after rejecting the Tennessee Supreme Court's assistance and our own precedent, the majority strikes down § 29-39-104 as infringing the Tennessee Constitution's jury trial guarantee. This doubly unnecessary holding is also doubly dubious: first, because it is not clear that the Tennessee Constitution's jury trial guarantee provides the rule of decision in this *federal* case; second, because any reasonable doubts about whether § 29-39-104 infringes the jury right—and there are many—require us to uphold the statute.

A. The Unanswered *Erie* Question

As a threshold matter, I question whether the contours of Tennessee's constitutional jury trial right are even relevant in this diversity case under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). It was not, after all, a Tennessee jury that assessed Lindenberg's claim for punitive damages. Because we are in federal court, a federal jury did that, and then a federal judge applied Tennessee's punitive damages cap to that jury verdict. "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). Tennessee's punitive damages cap is undoubtedly *substantive*. *See id.* at 428–29. The damages cap would thus provide the rule of decision in federal court unless it were preempted by federal statutory or constitutional law or conflicted with a substantive provision of the state constitution. The question raised here is whether an apparently *procedural* guarantee of the state constitution—the right to jury trial—can provide the rule of decision in federal court.

Lindenberg unquestionably has a Seventh Amendment right to have a *federal* jury "determine the question of liability and the extent of the injury by an assessment of damages" in her breach of contract suit. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). But she abandoned her Seventh Amendment challenge to the Tennessee punitive damages cap in the district court. Had Lindenberg brought such a challenge, it would have failed. Binding caselaw from this circuit

rejected a Seventh Amendment challenge to Michigan's cap on medical malpractice damages on the ground that, in federal court, "the jury's role 'as factfinder [is] to determine the extent of a plaintiff's injuries,' not 'to determine the legal consequences of its factual findings.'" *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005) (alteration in original) (quoting *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989)). Other circuits addressing state damages caps under the Seventh Amendment have reached the same conclusion. *See Schmidt v. Ramsey*, 860 F.3d 1038, 1045 (8th Cir. 2017) (rejecting Seventh Amendment challenge to Nebraska's cap on medical malpractice damages), *cert. denied sub nom. S.S. ex rel. Schmidt v. Bellevue Med. Ctr. L.L.C.*, 138 S. Ct. 506 (2017); *Davis v. Omitowoju*, 883 F.2d 1155, 1165 (3d Cir. 1989) ("Where it is the legislature which has made a rational policy decision in the public interest, as contrasted with a judicial decision which affects only the parties before it, it cannot be said that [a damages cap statute] offends either the terms, the policy or the purpose of the Seventh Amendment."); *Boyd*, 877 F.2d at 1196 (rejecting Seventh Amendment challenge to Virginia's cap on medical malpractice damages). Moreover, as the majority acknowledges, the Supreme Court has held that "[u]nlike the measure of actual damages suffered . . . the level of punitive damages is not really a 'fact' 'tried' by the jury." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001) (quoting *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting)). These cases indicate that a federal court does not violate the Seventh Amendment by applying a cap imposed by

state law to limit a federal jury's award of punitive damages.[4]

Would a federal court violate *Tennessee*'s jury trial right by applying the state's punitive damages cap to limit a *federal* jury's award of punitive damages? That Tennessee's jury trial right could be violated by capping the award of a non-Tennessee jury trial right is certainly counterintuitive. But whether that is indeed the rule would seem to depend, at least in part, on whether the Tennessee jury trial right is substantive or procedural.

On its face, the right to trial by jury seems manifestly procedural. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality) (characterizing a procedural rule as one that "governs only 'the manner and the means' by which the litigants' rights are 'enforced'" (quoting *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 446

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[4] In *Jones v. United Parcel Service, Inc.*, 674 F.3d 1187, 1203 (10th Cir. 2012), the Tenth Circuit refused to apply a Kansas statute requiring the court—and not the jury—to determine the amount of punitive damages to be awarded. *Jones* affirmed "that the Seventh Amendment protects a federal plaintiff's right to have a jury determine the amount of a punitive damages award." *Id.* at 1204. But *Jones* also acknowledged that, under *Cooper*, punitive damages are not a finding of fact for the purposes of the Seventh Amendment's Reexamination Clause. *Id.* at 1205. Thus, *Jones* does not conflict with cases like *Smith*, *Boyd*, or *Schmidt*—or with the application of the damages cap in this case where the jury was allowed the opportunity to determine, in the first instance, the amount of the punitive damages award. Even if *Jones* did conflict with these cases, we would be bound by our own precedent, which has squarely decided the question. *See Smith*, 419 F.3d at 519.

(1946))). The Supreme Court has expressly held that "the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions." *Simler v. Conner*, 372 U.S. 221, 222 (1963) (emphasis added); *see also Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 535–40 (1958) (holding that plaintiff in diversity suit was entitled to jury trial even though negligence claim would have been tried by judge in state court); Fed. R. Civ. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.").

Just as state law cannot shrink federal jury trial rights in federal court, *see Simler*, 372 U.S. at 222, I doubt whether state law could expand those rights. Could a litigant like Lindenberg insist on a jury trial, otherwise unavailable in federal court, on the ground that state statutory or state constitutional law required it? Although there are few cases on point, leading authorities suggest that she could not. *See* James Wm. Moore et al., 8 Moore's Federal Practice – Civil § 38.14[2] (2018) ("When . . . the state would grant a jury trial but the federal law would not, federal courts have held that federal law would also apply, and jury trial would be denied."); 9 Charles Alan Wright et al., Federal Practice and Procedure § 2303 (3d ed. 2018) ("It now also is clear that federal law determines whether there is a right to a jury trial in a case involving state law that has been brought in federal court, and that in such a circumstance, state law is wholly irrelevant."); *Gasperini*, 518 U.S. at 465

(Scalia, J., dissenting) ("[N]o one would argue that *Erie* confers a right to a jury in federal court wherever state courts would provide it; or that, were it not for the Seventh Amendment, *Erie* would require federal courts to dispense with the jury whenever state courts do so."). Before *Erie*, the Supreme Court upheld a federal court's directed verdict on contributory negligence even though the Arizona Constitution required that issue to be left to the jury. *See Herron v. S. Pac. Co.*, 283 U.S. 91, 92–94 (1931). And *Herron* seems to have survived *Erie*. *See Byrd*, 356 U.S. at 538–40 (citing *Herron*); *Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (same); *see also Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 423 (5th Cir. 1982) (noting that federal law "operates not only to require a jury trial when state law would deny one . . . but it also requires trial of certain issues by a judge when state law might allow a jury trial"). I thus have reservations about whether the scope of Tennessee's jury trial guarantee—a facially *procedural* right—provides the rule of decision in the dispute before us.

The majority, however, finds a substantive right—a right to unlimited punitive damages—in the state's procedural guarantee. Because this court has upheld damages caps in the face of a Seventh Amendment challenge, *see Smith*, 419 F.3d at 519, the majority's substantive right must derive from an attribute Tennessee juries do not share with their federal counterparts. The majority claims that Tennessee juries have traditionally possessed the authority to award punitive damages. But that does not seem to distinguish them from federal juries. *See, e.g., Day v.*

Woodworth, 54 U.S. 363, 371 (1851). The only difference the majority identifies is that, in its view, Tennessee treats punitive damages as a "'finding of fact' within the exclusive province of the jury," impervious to judicial or legislative tinkering. In the federal system, by contrast, "the level of punitive damages is not really a 'fact' 'tried' by the jury," *Cooper Indus., Inc.*, 532 U.S. at 437 (quotation omitted), and we have upheld caps on even non-punitive damages on the ground that "the jury's role 'as factfinder is to determine the extent of a plaintiff's injuries,' not 'to determine the legal consequences of its factual findings,'" *Smith*, 419 F.3d at 519 (quotation marks and alteration omitted). Tennessee law, as characterized by the majority, thus differs from federal law in its assignment of decisionmaking authority over punitive damages. But this difference would seem to be procedural, not substantive. *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) ("Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules . . . .") And in federal court, federal procedural rules control. *See, e.g.*, 9 Charles Alan Wright et al., *supra*, § 2303.

Still, I acknowledge that whether a state law is facially procedural may not, under the Supreme Court's *Erie* cases, be the end of the story. The Court has also applied an "'outcome-determination' test" in light of the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468. If the majority is right that Tennessee's procedural jury trial guarantee comprises a substantive right to

unlimited punitive damages, refusing to apply that rule in federal diversity cases would be outcome-determinative as to damages and could certainly encourage forum shopping. Would that require us to apply Tennessee's procedural rule? The authorities cited above suggest that federal procedural rules would apply regardless, though there is some uncertainty over how the Supreme Court would answer the question. *See Shady Grove*, 559 U.S. at 416–17 (Stevens, J., concurring) ("[T]here are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State's definition of substantive rights and remedies."); *but see id.* at 416 (plurality) ("The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to 'disembowel either the Constitution's grant of power over federal procedure' or Congress's exercise of it." (quoting *Hanna*, 380 U.S. at 473–74)).

In sum, though I do not claim to have solved this *Erie* puzzle, I fear there may be no basis in this federal diversity action for adjudicating the constitutionality of Tennessee's punitive damages cap under Tennessee's jury trial guarantee.[5] In fairness to the

[5] Some federal courts *have* adjudicated challenges to state damage cap statutes based on the state constitutions' jury trial guarantees. *See Boyd*, 877 F.2d at 1195 (rejecting challenge based on Virginia Constitution's right to trial by jury); *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 258–59 (5th Cir. 2013) (rejecting challenge to Mississippi damage cap predicated on Mississippi Constitution's jury guarantee after the Mississippi Supreme Court declined to resolve the question via

majority, the parties have not briefed this issue—instead, they assumed that the scope of the Tennessee jury trial right decides this case. But before I would invalidate a state statute on the ground that it violates the state constitution, I would pause to ask whether the state constitutional question is even properly before us.

B. The Tennessee Constitution

Addressing Lindenberg's challenge under the state constitution, the majority concedes that federal courts must be "extremely cautious about adopting 'substantive innovation' in state law," *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 578 (6th Cir. 2004) (citation omitted), and that Tennessee statutes receive "a strong presumption" of constitutionality when facing state constitutional challenges, *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (citation omitted). The Tennessee Supreme Court has even instructed that, "[w]hen addressing the constitutionality of a [state] statute," challenged on the ground that it violates the state jury trial right, a court must "resolve any reasonable doubt in favor of the legislative action." *Helms v. Tenn. Dep't of Safety*, 987 S.W.2d 545, 549 (Tenn. 1999). In other words, for the majority to strike down the punitive damages cap, it must prove *beyond* "any reasonable doubt" that the statute violates the Tennessee Constitution. The majority has not carried its burden.

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certification). But those decisions do not explain *why* a state's jury trial guarantee should apply at all, and both upheld the challenged statutes.

There are ample reasons to doubt the majority's holding. First, § 29-39-104 never prevents the jury from doing what modern civil juries do: finding facts when facts are disputed. Under § 29-39-104, the jury—which is not told about the cap—still performs its factfinding function. It is only after the jury has done its job that the trial court applies state law to limit the punitive damages award. This was essentially our reason for upholding Michigan's cap on medical malpractice damages against a Seventh Amendment challenge, *see Smith*, 419 F.3d at 519, and two state supreme courts have relied on similar reasoning to uphold statutes that limit damage awards. As the Alaska Supreme Court explained, "[t]he decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury." *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002). "[T]he jury has the power to determine the plaintiff's damages, but the legislature may alter the permissible recovery available under the law by placing a cap on the award available to the plaintiff." *Id.* (citation omitted). The Virginia Supreme Court made the same point in upholding a statute limiting recovery in medical malpractice actions. *See Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 529 (Va. 1989) ("Once the jury has ascertained the facts and assessed the damages . . . the constitutional mandate is satisfied . . . [and] it is the duty of the court to apply the law to the facts." (citations omitted)).

In this case, the State's brief makes a similar argument by drawing an analogy to statutes that

provide treble damages. *See, e.g.*, Tenn. Code Ann. § 47-50-109 (providing treble damages for inducing breach of contract). Under § 47-50-109, the jury first determines the plaintiff's actual damages, and then the trial court trebles the jury's finding so that the plaintiff receives the remedy required by law. *See Buddy Lee Attractions, Inc. v. William Morris Agency, Inc.*, 13 S.W.3d 343, 359–60 (Tenn. Ct. App. 1999). But if a statute enlarging damages set by a jury does not violate the jury right, it is hard to see why one reducing damages would do so—in a civil case, the jury right may protect defendants as much as plaintiffs. *See Caudill v. Mrs. Grissom's Salads, Inc.*, 541 S.W.2d 101, 106 (Tenn. 1976) (holding that trial judge abused its discretion by denying a jury trial where, "at the first opportunity, . . . defendants sought to exercise their constitutional right to a jury trial"). Several state supreme courts have cited the existence of damage multipliers as a reason for upholding damages caps. *See Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 432 (Ohio 2007) ("We have never held that the legislative choice to *increase* a jury award as a matter of law infringes upon the right to a trial by jury; the corresponding *decrease* as a matter of law cannot logically violate that right." (emphasis in original)); *Kirkland v. Blaine Cty. Med. Ctr.*, 4 P.3d 1115, 1119–20 (Idaho 2000) (concluding that the historical existence of damage multipliers establishes that "the Framers could not have intended to prohibit in the Constitution all laws modifying jury awards" because "at the time the [Idaho] Constitution was adopted, the legislature had exercised its power to modify the

common law of damages and increase the liability traditionally imposed on certain defendants").

The majority responds that damage multipliers, unlike damages caps, "do not undercut a jury's assessment of damages." This observation is true by definition. But whether a statute undercuts or augments a jury's award, such a statute interferes with the award the jury considered sufficient compensation for the plaintiff in the case of compensatory damages, or sufficient punishment for the defendant in the case of punitive damages. Here, the jury issued an award that it considered enough to punish the defendant's conduct. The majority apparently believes that the General Assembly would not violate the jury trial right by insisting that this figure be doubled, but could not order it halved. I cannot discern the principle underlying the majority's distinction because we know that both civil defendants and civil plaintiffs in Tennessee enjoy the protections of trial by jury. *See Caudill*, 541 S.W.2d at 106.

The majority also, somewhat confusingly, characterizes this line of reasoning as "imply[ing] that § 29-39-104 is merely a regulation on the process of remittitur." The majority asserts that "the Tennessee Supreme Court has repeatedly rejected the General Assembly's attempts to regulate the exercise of remittitur[,] . . . a judicial power that may be influenced—but not controlled—by the General Assembly." But casting a punitive damages cap as remittitur misunderstands the State's and Jackson

National's arguments—arguments that this court and others have found convincing.[6]

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[6] Moreover, the majority misconstrues the Tennessee cases involving remittitur. None of the three cases cited by the majority supports its assertions about the General Assembly's power over remittitur. *Borne v. Celadon Trucking Services, Inc.*, 532 S.W.3d 274, 309–10 (Tenn. 2017), explains that the General Assembly first enacted a remittitur statute in 1911, thereby expressly authorizing remittitur "whenever the Trial Judge is of the opinion that the verdict in favor of a party is so excessive as to indicate passion, prejudice, corruption, partiality, or unaccountable caprice on the part of the jury." Several years later, in *Grant v. Louisville & N.R. Co.*, 165 S.W. 963, 965 (Tenn. 1914), the Tennessee Supreme Court indicated that courts could *also* suggest remittitur when a verdict was merely "excessive." The majority characterizes *Grant* as "rejecting" the 1911 remittitur statute. Far from it. *Grant* states that the remittitur in question "was suggested because of passion and prejudice appearing to the circuit judge, and *under the very terms of the statute* plaintiff below was entitled to accept under protest and appeal. The Court of Civil Appeals affirmed the lower court, and this action was likewise *justified by the very terms of the statute*." *Id.* at 966 (emphasis added). So after suggesting that the statute did not provide the exclusive rationale for suggesting a remittitur, *Grant* did not reject the statute, it applied it.

Nor does *Foster v. Amcon International, Inc.*, 621 S.W.2d 142, 145 (Tenn. 1981), imply some constitutional rejection of "hard and fast rules in reviewing additurs and remittiturs" imposed by the General Assembly, as the majority insinuates. In context, *Foster*'s reference to "hard and fast rules" concerns a prior decision, *Smith v. Shelton*, 569 S.W.2d 421 (Tenn. 1978), which "was written with a view to providing the appellate courts with guidelines, rather than hard and fast rules in reviewing additurs and remittiturs." 621 S.W.2d at 145. *Foster* nowhere purports to reject "hard and fast rules"—i.e., statutes—imposed by the General Assembly. In fact, *Foster* goes on to modify the standard articulated in *Shelton* because "such an interpretation would

The majority gives short shrift as well to the argument that the General Assembly's power to eliminate common law rights and remedies implies the power to limit punitive damages. This too, one would think, could create a "reasonable doubt" as to whether such a limitation violates the state's jury guarantee. But the majority claims that "this argument merely begs the question" because the General Assembly's power is subject to "constitutional limits," so, like suggesting that "parents may drive as fast as they wish because the parents make the rules," this "ignores a key constraint on the rulemaker's authority." But the argument here is not that the General Assembly can do whatever it wants. Rather, it is that the General Assembly's unquestioned ability to *abrogate* a common law remedy[7] suggests that the legislature could also *limit*, under some circumstances, that same remedy. The greater power generally includes the lesser.[8] So if the former does not violate Tennessee's jury right, neither might the

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contradict the clear language and intent of the *statute*." *Id.* at 147 (emphasis added). In other words, none of these cases questions the General Assembly's power to modify remittitur—if anything, they confirm that power.

[7] *See, e.g.*, *Mills v. Wong*, 155 S.W.3d 916, 922 (Tenn. 2005) ("[T]he Tennessee General Assembly has the sovereign power prospectively to limit and even to abrogate common law rights of action in tort as long as the legislation bears a rational relationship to some legitimate governmental purpose.").

[8] A better metaphor would therefore be that parents may determine *how often* their children may borrow the family car because parents determine *whether* their children may borrow the car at all.

latter. The argument at least deserves more response than the majority affords it.

Finally, I wonder whether the majority has asked the wrong question entirely: whether juries had *any* ability to award punitive damages, in any kind of case, at the time the Tennessee Constitution was adopted. As the majority concedes, the Tennessee Constitution's promise that "the right of trial by jury shall remain inviolate," Tenn. Const. art. I, § 6, does not guarantee the right to a jury trial in every case. "Rather, it guarantees the right to trial by jury *as it existed at common law* under the laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution of 1796." *Young v. City of LaFollette*, 479 S.W.3d 785, 793 (Tenn. 2015) (emphasis added) (quotation marks and alteration omitted). Therefore, the relevant question would seem to be whether, in 1796, a North Carolina jury could have awarded punitive damages *in a case like this one*—a common law breach of contract action.[9] There is serious reason to doubt that it could.

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[9] The Tennessee Supreme Court has repeatedly employed a narrow inquiry when assessing whether a state statute infringes the jury right—and it has repeatedly upheld the challenged statutes. *See Marler v. Wear*, 96 S.W. 447, 448 (Tenn. 1906) (finding no right to jury trial because "at common law no jury was impaneled *in mandamus cases*" (emphasis added)); *Jernigan v. Jackson*, 704 S.W.2d 308, 309 (Tenn. 1986) (finding no right to jury trial because "jury trials *in tax cases* were not authorized" in North Carolina in 1789 and 1796 (emphasis added)); *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 88 (Tenn. 1992) ("Although actions to recover possession of real property existed at common law *the particular action of unlawful detainer* resulted from the evolution of the law and did not appear in this State until passage of the first unlawful detainer statute in 1821." (emphasis added)); *Helms*, 987 S.W.2d at 548 ("Our inquiry is

As explained below, punitive damages were not available at common law for breach of contract, with only narrow exceptions, not present here.

The majority looks at this case through a broader lens—asking whether punitive damages were *ever* determined by North Carolina juries in 1796.[10] It does that, perhaps, because that is the way it is used to evaluating such claims. If we were trying to decide the scope of the *federal* jury trial right, our inquiry would focus not on whether the remedy Lindenberg seeks was one "which the common law recognized among its old and settled proceedings," but on whether the remedy she seeks is legal, rather than equitable, in nature. *See Curtis v. Loether*, 415 U.S. 189, 193 (1974). Punitive damages being a "traditional form of relief

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whether at the time of 1796, North Carolina recognized *civil forfeiture proceedings* with the right to jury trials." (emphasis added)); *Young*, 479 S.W.3d at 794 (finding no right to jury trial where statutory remedy for *retaliatory discharge* was "created long after the 1796 Constitution").

[10] The majority suggests that this broader lens is fitting because Lindenberg's "challenge in this case is to a blanket statutory cap" that applies outside the breach-of-contract context. I take the majority to be suggesting that Lindenberg's challenge is facial, rather than as-applied. But assuming the facial nature of this challenge does not help Lindenberg. A facial challenge to a statute is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993). And the Tennessee Supreme Court has stressed that "[t]he presumption of constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009). So if Tennessee's punitive damages cap can be validly applied in a common law breach of contract action—or in any other context—Lindenberg's challenge necessarily fails.

offered in the courts of law," *id.* at 196, Lindenberg would have a right to have a federal jury determine them, though, as discussed above, the Seventh Amendment would not bar application of a statutory damages cap, *see Smith*, 419 F.3d at 519. And, under the Supreme Court's decision in *Curtis*, Lindenberg's right to have a federal jury determine punitive damages would apply even "to new causes of action created by" statute. 415 U.S. at 193. This is basically how the majority opinion proceeds. Because punitive damages were available in *some* kinds of cases in North Carolina in 1796, and because juries awarded those damages, the majority reasons that Lindenberg has a right to have the jury determine punitive damages (and Tennessee may not cap them).[11]

But Tennessee courts seem to apply the rule that *Curtis* rejected. Under *Helms*, when the General Assembly creates new rights or remedies—regardless of whether they are legal or equitable in nature—Tennessee's jury trial guarantee does not apply. *Helms*, 987 S.W.2d at 547. Would the Tennessee Supreme Court apply the rule in *Helms* to new *common law* remedies? *See Young*, 479 S.W.3d at 793–94 (rejecting jury trial guarantee for statutory retaliatory discharge claim and finding it significant

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[11] It is worth noting that only *one* of the North Carolina or Tennessee cases the majority relies on addresses the question at issue here: whether the legislature can limit punitive damages awards. The one case? *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 10–14 (N.C. 2004), which affirmed North Carolina's statutory cap on punitive damages.

that "even the common law tort of retaliatory discharge was only recognized by Tennessee courts in the 1980's"). The court does not seem to have decided this issue—another reason to certify the constitutional question rather than deciding it. But it is worth pausing to ask this question here because, although we have a common law cause of action (breach of contract) and a common law remedy (punitive damages), we have strong reason to believe that a North Carolina jury in 1796 could not have awarded punitive damages for breach of contract.

North Carolina currently adheres to the established common law rule that "punitive damages should not be awarded in a claim for breach of contract" absent an "identifiable tort" that accompanies the breach. *Shore v. Farmer*, 522 S.E.2d 73, 76–77 (N.C. 1999); Restatement (Second) of Contracts § 355 ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."); 24 Williston on Contracts § 65:2 (4th ed.) (explaining that "exemplary or punitive damages are not generally recoverable in breach of contract actions, even where the contract is maliciously or intentionally breached"); 5 Corbin on Contracts § 1077 (1964) ("It can be laid down as a general rule punitive damages are not recoverable for breach of contract . . . ."); William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 Duke L. J. 629, 630 (1999) ("Traditionally, punitive damages

have not been available for breach of contract.").[12] North Carolina recognizes two traditional exceptions to this rule, allowing punitive damages for a "breach of contract to marry," *see Newton v. Standard Fire Ins. Co.*, 229 S.E.2d 297, 301 (N.C. 1976), and "a breach of duty to serve the public by a common carrier or other public utility," *see King v. Ins. Co. of N. Am.*, 159 S.E.2d 891, 893 (N.C. 1968). Beyond these narrow exceptions, juries in North Carolina lack discretion to award punitive damages for breach of contract.

I have uncovered no evidence suggesting that North Carolina juries *ever* possessed this discretion.

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[12] Beginning in California in the 1970s, some courts have allowed punitive damages where, as here, an insurer has refused to pay a claim in bad faith. *See* Dodge, *The Case for Punitive Damages in Contracts*, 48 Duke L. J. at 637–39; Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 Minn. L. Rev. 207, 241 (1977) (discussing "line of cases, originating in California, [that] has sustained the award of punitive damages in actions originating in the alleged breach of an insurance contract"). Since then, other state high courts have followed California in expanding the availability of punitive damages—some by characterizing the breach of an insurance contract as sounding in tort. Dodge, 48 Duke L. J. at 638–42. The North Carolina Supreme Court addressed this issue in *Newton v. Standard Fire Insurance Co.*, 229 S.E.2d 297, 303 (N.C. 1976). But the court declined to decide whether it would follow the new rule because the claim was not properly alleged. *See id*. at 303–04. Nevertheless, several decisions of the North Carolina Court of Appeals allowed punitive damages for the breach of an insurance contract where "plaintiffs had sufficiently alleged a tortious act accompanied by the requisite 'element of aggravation.'" *See, e.g.*, *Von Hagel v. Blue Cross & Blue Shield of N.C.*, 370 S.E.2d 695, 698–99 (N.C. Ct. App. 1988). But these decisions constitute an application of the rule that punitive damages are permissible when a breach of contract is accompanied by an identifiable tort. They do not imply that North Carolina has abandoned its traditional approach to breach of contract claims. And of course, legal developments occurring in the 1970s and 1980s do not help us understand the purview of a North Carolina jury in 1796.

Early decisions of the North Carolina Supreme Court show that the state's courts have long denied juries such discretion in breach of contract actions. In an 1843 decision, the Supreme Court of North Carolina explained that a jury's ability to impose damages was strictly constrained "in matters of contract":

> It will never do in matters of contract to leave the question of damages to the *arbitrary* discretion of a jury.—There must be a rule whereby to assess them, although the application of that rule is with great propriety confided to the jury. And we know of no other that can legally be laid down, where there is no statutory provision on the subject, and the parties have not described any by the terms or nature of their contract, than that the person injured should be re-imbursed what he has lost, and if no loss be shewn by parol, should be re-imbursed to the extent of the loss which the law presumes.

Wood v. Skinner, 25 N.C. 564, 568 (1843) (per curiam) (emphasis in original). A breach of contract action authorized a jury to render compensatory or nominal damages—nothing more.[13] *See, e.g., Richardson v.*

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[13] In *Wood*, the North Carolina Supreme Court acknowledged that compensatory or nominal damages might seem inadequate for particularly egregious breaches of contract. 25 N.C. at 568–69. But the court held that "these considerations are not for the court which tried the cause, nor are they for us. The constitution has provided another department of the government, to whom they may properly be addressed, and with whom they will no doubt have the weight to which they are entitled." *Id.* at 569. In other words, the North Carolina legislature could have

Wilmington & W.R. Co., 35 S.E. 235, 235–36 (N.C. 1900) ("There are many cases where an action for tort may grow out of a breach of contract, but punitive damages are never given for breach of contract (except in cases of promises to marry)."). This has long been the common law rule in England and America.[14]

Carruthers v. Tillman, 2 N.C. (1 Hayw.) 501 (1797), on which the majority principally rests, does not suggest otherwise. *Carruthers* was a nuisance suit—not a breach of contract action. 2 N.C. at 501. The evidence thus suggests that "the right to trial by jury as it existed at common law under the laws and constitution of North Carolina at the time of the

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authorized punitive damages in breach of contract actions, but juries had no inherent, or constitutional, power to award them.

[14] This country's first treatise on the law of damages supports this proposition. *See* Theodore Sedgwick, *A Treatise on the Measure of Damages* 27–28 (New York 1847); *id.* at 36 ("We shall find that in cases of contract, the law takes no notice whatever of the motives of the defaulting party; that whether the engagement be broken through inability or design, the amount of remuneration is the same . . . ."). Likewise, the earliest English treatise on damages mentions no examples of juries awarding exemplary or vindictive damages in contract cases. *See* Joseph Sayer, *The Law of Damages* (London 1770). And although the amount of damages to be given was originally in the discretion of the jury, rules limiting damages for different types of contracts were becoming well-established by the end of the eighteenth century. *See* George T. Washington, *Damages in Contract at Common Law* (pt. 2), 48 L.Q. Rev. 90, 91–93 (1932) (discussing how new trial procedures and writs of inquiry led to development of concrete rules for damages in contract). To the extent there is uncertainty about the authority of colonial juries, the Tennessee Supreme Court has instructed us to resolve the uncertainty in favor of the challenged state law. *Helms*, 987 S.W.2d at 549.

adoption of the Tennessee Constitution of 1796" did not permit juries to award punitive damages *in breach* of *contract actions*.[15] Would the Tennessee Supreme Court hold that legislatively capping a punitive damages award for breach of contract violates the right to trial by jury if a North Carolina jury in 1796 could not have awarded punitive damages for breach of contract at all? I do not know. But in my view, this question raises one more "reasonable doubt" that should prevent us from striking down this statute.

It is telling that the majority 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.[16] The Tennessee Supreme

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[15] The parties seem to agree that modern Tennessee caselaw has diverged from the traditional rule when it comes to awarding punitive damages. *See Rogers*, 367 S.W.3d at 211 n.14. But Tennessee looks to North Carolina law to interpret its constitutional right to a jury trial, *see Helms*, 987 S.W.2d at 549, and there is no evidence that any Tennessee divergence from North Carolina on this issue occurred in 1796. Indeed, one hundred and eighty years later, Tennessee cases squarely proclaimed adherence to the "traditional" rule. *See Hutchison v. Pyburn*, 567 S.W.2d 762, 766 (Tenn. Ct. App. 1977) ("[P]unitive damages may not be recovered in an action for breach of contract."); *Johnson v. Woman's Hosp.*, 527 S.W.2d 133, 141 (Tenn. Ct. App. 1975) ("Under the contract theory of the case punitive damages are not allowable . . . .").

[16] S*ee Marler*, 96 S.W. at 448 (finding no constitutional right to jury trial in mandamus cases); *Jernigan*, 704 S.W.2d at 310 (finding no constitutional right to jury trial in tax cases); *Ballard*, 839 S.W.2d at 89 (finding no constitutional right to jury trial in unlawful detainer actions); *Helms*, 987 S.W.2d at 549 (finding no constitutional right to jury trial in civil forfeiture proceedings);

Court has made it very clear that, even with respect to statutes that are alleged to infringe the right to trial by jury, it "afford[s] considerable discretion to the General Assembly and resolve[s] any reasonable doubt in favor of the legislative action." *Helms*, 987 S.W.2d at 549. Because there are ample grounds for doubt, I would uphold the statute.

* * *

To close,[17] I think there are sound reasons to dispute the majority's conclusion that *Heil* no longer binds us. And the majority's hasty invalidation of Tennessee's punitive damages cap overlooks critical issues. Does Tennessee's constitutional jury trial right even supply the rule of decision in this case concerning a federal jury's ability to award uncapped punitive damages? And, if so, what of the credible counterarguments the majority opinion elides? Any reason to question the majority's opinion on this score is also a reason to certify these questions to a willing Tennessee Supreme Court. If any federal court decision "risks friction-generating error," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997), surely striking down a new state law on novel state-constitutional law grounds would do so. Because the majority does so today at the expense of comity and our cooperative federalism, I respectfully dissent.

Young, 479 S.W.3d at 793–94 (finding no constitutional right to jury trial in retaliatory discharge action).

[17] The majority does not address Lindenberg's claim that § 29-39-104 violates principles of separation of powers under the Tennessee Constitution, so I do not address that claim either.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TAMARIN LINDENBERG, individually and as Natural Guardian of her minor child SML. and Zachery Lindenberg	)	
Plaintiffs,	)	
v.	)	No. 2:13-cv-02657-JPM-cgc
JACKSON NATIONAL LIFE INSURANCE COMPANY	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES

Before the Court is Defendant Jackson National Life Insurance Company's Motion to Dismiss Plaintiffs' Claims for Punitive Damages and Common Law Bad Faith, filed August 21, 2014. (ECF No. 46.) For the reasons stated below, Defendant's Motion to Dismiss as to Plaintiffs' claim for punitive damages is DENIED.

I. BACKGROUND

A. Factual Background

Plaintiffs are residents of Shelby County, Tennessee. (Compl. ¶ 1, ECF No. 1-1.) Plaintiff Tamarin Lindenberg is the former wife of Decedent Thomas A. Lindenberg. (Id. ¶ 5.) Plaintiffs Zachery Lindenberg and Sophie Lindenberg are children of Plaintiff Tamarin Lindenberg and Decedent. (See id. ¶ 3, 6.)

Defendant Jackson National Life Insurance Company is "a foreign corporation duly organized and existing under the laws of Michigan, and authorized by the Tennessee[] Commissioner of Insurance to engage in the business of writing and selling life insurance in this state." (Id. ¶ 2.)

Defendant issued a life insurance policy (hereinafter "Policy") to Decedent effective January 23, 2002, which was renewable to the age of 95. (Id. ¶4.) The Policy insured Decedent's life in the sum of $350,000 and designated Tamarin Lindenberg as the primary beneficiary. (Id.) The Policy stated in relevant part:

> THE COMPANY WILL PAY the face amount shown in the policy specifications, less any premium due, to the designated beneficiary upon proof of the Insured's death and not later than two months after the receipt of such proof.

(Id.)

Tamarin Lindenberg and Decedent divorced in 2005 in Shelby County, Tennessee. (Id. ¶5.) Tamarin Lindenberg remained the primary beneficiary after the

divorce; however, the Marital Dissolution Agreement required that "Wife shall pay for the life insurance premium for Columbus and Jackson National policies for so long as she is able to do so and still support the parties' children." (Id. ¶¶5-6.) Additionally, the Marital Dissolution Agreement (MDA) required "Husband [to] maintain[] 'at his expense' a policy insuring his life in the amount of $450,000 and naming the parties' children" as "irrevocable primary beneficiaries." (Id. ¶ 6.)

Decedent died on January 22, 2013. (Id. ¶ 7.) Leading up to his death, Decedent was disabled and living with Plaintiffs. (Id. ¶ 8.) Decedent had difficulty earning enough income to provide for himself and his children. (Id.) According to Plaintiffs, "[Tamarin Lindenberg] had long provided for him following their divorce and continued to provide for him until his death." (Id.)

The parties do not dispute that premiums for the Policy were duly paid. (Ans. ¶ 9, ECF No. 4.) Insurance forms and the MDA were "sent to Defendant on February 2, 2013 via express mail, next day delivery." (Id. ¶ 10.) On March 11, 2013, Plaintiffs sent Defendant a demand letter explaining the immediate need for funds. (Id. ¶ 11.) On March 22, 2013, Defendant sent Plaintiffs a letter stating there was "insufficient basis to pay the claim." (Id. ¶ 13 (internal quotation marks omitted).) The letter required further action by Plaintiffs:

1. "[W]aivers to be signed by other potential parties in this matter";
2. Plaintiff to "obtain court-appointed

Guardian(s) for the Estates of the two minor children. The Guardians cannot be Tamarin Lindenberg[.]" ["]The Guardians will need to sign waivers for the minor children[;]" and

3. "[A] waiver to be signed by Mr. Lindenberg's other children. We know of one other child, Mary A. Lindenberg. Jackson may also require an affidavit indicating that Mr. Lindenberg has no other children."

(Id. ¶ 13.) Defendant also required "a written waiver from Plaintiff Tamarin Lindenberg before it would tender any funds." (Id. ¶ 14.)

Plaintiffs subsequently filed suit to recover the death benefit and other damages. (ECF No. 1-1.) At the time of filing of the complaint, Defendant had not yet paid benefits to Plaintiffs. (Id. ¶ 10 & 12.)

Plaintiffs alleged that "[d]espite [Tamarin Lindenberg's] repeated requests Defendant [] failed to send Plaintiff documents she has requested that Defendant claims it must have before payment is made on the policy." (Id. ¶ 14.) Tamarin Lindenberg also communicated to Defendant that "she was in New Jersey and could not leave her children to establish guardianships in Tennessee." (Id.)

Defendant responded that Defendant had not paid the death benefit to Plaintiffs at the time the Complaint was filed, "because there [were] competing and/or potentially competing claims to the death benefit." (Ans. ¶ 13, ECF No. 4.) Defendant further asserted "that because Plaintiff would not commit to a course of action,

appropriate waivers could not be drafted or provided." (Id. ¶ 14.)

On May 19, 2014, the Court ordered payment of the death benefit to Tamarin Lindenberg. (ECF No. 32.) Defendant subsequently complied with the order and disbursed payment to Tamarin Lindenberg. (ECF No. 84-1 at PageID 560.)

B. Procedural Background

On July 19, 2013, Plaintiffs filed their Complaint in the Circuit Court of Shelby County Tennessee for the Thirteenth Judicial District at Memphis. (ECF No. 1-1.) On August 23, 2013, Defendant removed the case to the United States District Court for the Western District of Tennessee pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. (ECF No. 1 at 1.)

On August 30, 2013, Defendant filed an Answer to the Complaint. (ECF No. 4.) Defendant included in the filing a Third-Party Complaint for Interpleader against Mary Angela Lindenberg and a Counterclaim against Tamarin Lindenberg. (Id. at 5-8.) With regards to Defendant's Counterclaim and Third-Party Complaint, Defendant asserted it "[was] not in a position to determine, factually or legally, who is entitled to the Death Benefit," and requested the Court to "determine to whom said benefits should be paid." (Id. at 7.) On September 23, 2013, Plaintiff Tamarin Lindenberg and Third-Party Defendant Mary Angela Lindenberg Williams filed a Motion to Dismiss Defendant Jackson National Life Insurance Company's Counterclaim and Third-Party Complaint for Interpleader. (ECF No. 9.) On December 9, 2013, the parties filed a Joint Motion

to Appoint James and Kimberly Griffith as Guardian Ad Litems (ECF No. 19), which was subsequently granted by the Court (ECF No. 20).

On May 19, 2014, the Court granted Plaintiff Tamarin Lindenberg's and Third-Party Defendant Mary Angela Lindenberg Williams' Motion to Dismiss. (ECF No. 32.) The Court further ordered Defendant "to disburse life insurance policy benefits to Plaintiff in the amount of $350,000 with interest from January 23, 2013, until the date of payment." (Id. at 17.)

On August 21, 2014, Defendant filed a Motion to Dismiss Plaintiffs' Claims for Punitive Damages and common Law Bad Faith. (ECF No. 46.) Plaintiffs timely responded in opposition on September 17, 2014. (ECF No. 67.) Defendant filed a Reply on September 26, 2014. (ECF No. 13.) The Court held a telephonic hearing on the Motion to Dismiss on November 25, 2014, at which both parties were represented. (ECF No. 101.) On the same date, the Court entered an Order Granting in Part Defendant's Motion to Dismiss Plaintiffs' Claims for Punitive Damages and Common Law Bad Faith. (ECF No. 102.) In the Order, the Court dismissed Plaintiffs' common law bad faith claim. (Id.)

II. LEGAL STANDARD

Under Rule 12(b)(6), a court can dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2).

> In assessing a complaint for failure to state a claim, [a court] must construe the complaint in the light most favorable to the plaintiff, accept all well-pled factual allegations as true, and determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."

Ouwinga v. Benistar 419 Plan Servs., Inc., 694 F.3d 783, 790 (6th Cir. 2012) (second alteration in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "Plausibility is not the same as probability, but it requires 'more than a sheer possibility that a defendant has acted unlawfully.'" Mik v. Fed. Home Loan Mortg. Corp., 743 F.3d 149, 157 (6th Cir. 2014) (quoting Iqbal, 556 U.S. at 678).

The Court, however, "need not accept as true legal conclusions or unwarranted factual inferences, and [c]onclusory allegations or legal conclusions masquerading as factual allegations will not suffice." In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 903 (6th Cir. 2009) (alteration in original) (citation omitted) (internal quotation marks omitted); see also Mik, 743 F.3d at 157 ("[A] complaint must contain 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007))). "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in [a] skeletal way, leaving the court to put flesh on its bones." El-Moussa v. Holder, 569 F.3d 250, 257 (6th Cir.2009)

(alteration in original) (internal quotation marks omitted).

Regarding the application of state law by federal courts, the United States Court of Appeals for the Sixth Circuit has held:

> In construing questions of state law, the federal court must apply state law in accordance with the controlling decisions of the highest court of the state. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). If the state's highest court has not addressed the issue, the federal court must attempt to ascertain how that court would rule if it were faced with the issue. The Court may use the decisional law of the state's lower courts, other federal courts construing state law, restatements of law, law review commentaries, and other jurisdictions on the "majority" rule in making this determination. Grantham & Mann v. American Safety Prods., 831 F.2d 596, 608 (6th Cir.1987). A federal court should not disregard the decisions of intermediate appellate state courts unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967).

Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1181 (6th Cir. 1999).

III. ANALYSIS

Defendant Jackson National Life Insurance Company "moves to dismiss Plaintiffs' . . . alleged

entitlement to punitive damages because [this] claim[] fail[s] as a matter of law." (ECF No. 46 at 1.)

Defendant argues that punitive damages based on breach of contract by an insurance provider are precluded by statute. Defendant relies on Tenn. Code Ann. § 56-7-105, commonly referred to as the Bad Faith Statute, and Tenn. Code Ann. § 56-8-113, which state in relevant part:

> [I]n all cases when a loss occurs and [insurance companies] refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest on the bond, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that the failure to pay inflicted additional expense, loss, or injury including attorney fees upon the holder of the policy or fidelity bond; and provided, further, that the additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury including attorney fees thus entailed.

Tenn. Code Ann. § 56-7-105.

> Notwithstanding any other law, title 50 and this title shall provide the sole and exclusive statutory remedies and sanctions applicable to an insurer, person, or entity licensed, permitted, or authorized

> to do business under this title for alleged breach of, or for alleged unfair or deceptive acts or practices in connection with, a contract of insurance as such term is defined in § 56-7-101(a).
>
> Nothing in this section shall be construed to eliminate or otherwise affect any:(1) Remedy, cause of action, right to relief or sanction available under common law;(2) Right to declaratory, injunctive or equitable relief, whether provided under title 29 or the Tennessee Rules of Civil Procedure; or (3) Statutory remedy, cause of action, right to relief or sanction referenced in title 50 or this title.

Tenn. Code Ann. § 56-8-113.

Defendant argues that § 105 and § 113 make clear that the Bad Faith Statute comprises the "sole and exclusive remedy for an insurer's bad faith refusal to pay an insurance claim." (ECF No. 46 at 6-7 (citing Rice v. Van Wagoner Co., 738 F. Supp. 252, 255 (M.D. Tenn. 1990)).) It follows then, according to Defendant, that any punitive damages sought by Plaintiffs in the present case are subject to the limitations of the Bad Faith Statute. (See ECF No. 46 at 6.) In support of this conclusion, Defendant cites to several Tennessee state and federal court decisions, where the courts "refused to award punitive damages under a breach of contract theory for an insurer's alleged failure to pay under a policy because such damages are barred by the bad faith statute's exclusive remedy." (Id. at 8 (citing, inter alia, Heil Co. v. Evanston Ins. Co., 690 F.3d 722, 728 (6th Cir. 2012)(holding that though "Tennessee does permit a plaintiff to recover punitive damages for breach of contract . . . [,] Tenn. Code Ann. § 56-7-105 precludes

punitive damages here because it provides the exclusive extracontractual remedy for an insurer's bad faith refusal to pay on a policy"); Westfield Ins. Co. v. RLP Partners, LLC, No. 3:13-00106, 2013 U.S. Dist. LEXIS 75673, at *4-5 (M.D. Tenn. May 30, 2013); Davidoff v. Progressive Hawaii Ins. Co., No. 3:12-00965, 2013 U.S. Dist. LEXIS 3114, at *5-6 (M.D. Tenn. Jan. 9, 2013); Fred Simmons Trucking v. U.S. Fidelity & Guar. Co., No. E2003-02892-COA-R3-CV, 2004 Tenn. App. LEXIS 798, at *5 (Tenn. Ct. App. Nov. 29, 2004)).)

Plaintiffs argue that "[a]lthough in general punitive damages are not recoverable for breach of contract, Tennessee law recognizes that in egregious cases, a jury may assess punitive damages against a defendant for breach of contract." (ECF No. 67 at 4 (citing Rogers v. Louisville Land Co., 367 S.W.3d 196, 211 n.14 (Tenn. 2012) (noting that punitive damages are proper where there is clear and convincing proof a defendant has acted either "intentionally, fraudulent, maliciously, or recklessly" in breaching a contract)).) Plaintiffs further assert three reasons that Plaintiffs' claim for punitive damages are not precluded by the Bad Faith Statute: 1) "Punitive damages serve a different purpose than the damages allowable under Tennessee's bad faith refusal to pay statute;" 2) Tennessee case law allows for both punitive and § 105 damages; and 3) § 113 does not affect claims for punitive damages based on common law relief. (See id. at 5-9.)

A. Case Law Analysis

Prior to the Tennessee Supreme Court's decision in Myint v. Allstate Ins. Co., 970 S.W.2d 920 (Tenn. 1998), several courts held that § 105 was the exclusive

remedy for any claims related to bad faith on the part of an insurance carrier. See, e.g., Rice, 738 F. Supp. at 257 (dismissing a claim for consequential damages because it was precluded by § 105); Berry v. Home Beneficial Life Ins. Co., No. C/A 1150, 1988 WL 86489, at *1 (Tenn. Ct. App. Aug. 19, 1988) ("[A]s to the claim for punitive damages, T.C.A., § 56-7-105 is the exclusive remedy for bad faith refusal to pay claims arising from insurance policies."); Chandler v. Prudential Ins. Co., 715 S.W.2d 615, 621 (Tenn. Ct. App. 1986) (stating that "the phrases 'in all cases' and 'exclusive remedy' denote the same degree of exclusiveness"). In Myint, the Tennessee Supreme Court expressly rejected the assertion that § 105 was the exclusive remedy for bad faith claims arising from breach of an insurance contract. In that case, plaintiffs brought a claim for "'unfair or deceptive act or practice,' in violation of the Consumer Protection Act" against plaintiffs' insurer for refusal to pay compensation pursuant to an insurance policy. Myint, 970 S.W.2d at 922. The defendant insurer argued that "Tenn. Code Ann. § 56-7-105 . . . is the exclusive remedy for the bad faith denial of an insurance claim." Id. The court found "nothing in either the Insurance Trade Practices Act or the bad faith statute which limits an insured's remedies to those provided therein." Id. at 925. Consequently, because the express language of the statute did not limit the remedies available to plaintiffs, the Tennessee Supreme Court held that bad faith claims arising under the Consumer Protection Act could be applied to insurance companies in addition to a bad faith claim under § 105. Id.

The same logic applies to the availability of punitive damages in breach of insurance contract cases. The parties do not dispute and the case law supports the conclusion that punitive damages were available in common law breach of contract actions at the time Myint was decided. See Rogers, 367 S.W.3d at 211 (stating that punitive damages are available in the most egregious breach of contract cases) (citing Se. Greyhound Lines,Inc. v. Freels, 176 Tenn. 502, 144 S.W.2d 743, 746 (1940); Louisville, Nashville & Great S. R.R. v. Guinan, 79 Tenn. 98, 1883 WL 3669, at *2 (1883)). Therefore, because the Bad Faith Statute does not serve as a limitation on remedies external to the Insurance Trade Practices Act, Myint, 970 S.W.2d at 925, common law punitive damages were also available as a remedy separate from § 105. Accordingly, the Court finds that at the time Myint was decided, punitive damages were available to plaintiffs in a breach of contract action against an insurer in addition to the remedies available under the Bad Faith Statute.

The Court recognizes that the facts in Myint are not identical to the facts of the present case. For example, unlike punitive damages, the Consumer Protection Act expressly provided for a private right of action and specifically listed entities and transactions that were exempt from liability. Myint, 970 S.W.2d at 925. The Court finds, however, that on balance, the Tennessee Supreme Court would likely rule that punitive damages were available in addition to claims of bad faith as a result of the Myint holding.

In response to the Myint decision, "[t]he Tennessee General Assembly legislatively reversed the Tennessee

Supreme Court's holding in Myint" with the enactment of Tenn. Code Ann. § 56-8-113 effective April 29, 2011. Riad v. Erie Ins. Exch., 436 S.W.3d 256, 274 n.3 (Tenn. Ct. App. 2013), appeal denied (Mar.4, 2014). The parties strongly disagree on the scope of § 113 and its applicability to the present case. The Court addresses in detail the proper interpretation of § 113 infra Part III.B.

Defendant relies heavily on the Sixth Circuit Court of Appeals' decision in Heil, 690 F.3d 722 to support its argument that punitive damages are not available in breach of insurance contract cases. In Heil, the Court of Appeals held that a claim for breach of an insurance contract "is not a legally sufficient alternate basis for [punitive damages]." 690 F.3d at 728. The Court of Appeals reasoned that "Tenn. Code Ann. § 56-7-105 precludes punitive damages . . . because it provides the exclusive extracontractual remedy for an insurer's bad faith refusal to pay on a policy." Heil, 690 F.3d at 728 (citing Mathis v. Allstate Ins. Co., 959 F.2d 235, 1992 WL 70192, at *4, 1992 U.S. App. LEXIS 7130, at *12 (6th Cir. Apr. 8, 1992), and Berry v. Home Beneficial Life Ins. Co., C/A No. 1150, 1988 WL 86489, at *1 (Tenn. Ct. App. Aug. 19, 1988)). The Court notes that all case law cited in the Heil opinion to support the finding that § 105 precluded punitive damages predated the Tennessee Supreme Court's Myint opinion which issued June 1, 1998. Additionally, the Court of Appeals declined to address the applicability of Myint or § 113 to claims for punitive damages.

The Heil opinion also predates the Tennessee Court of Appeals' decision in Riad, 436 S.W.3d 256. In Riad, the court held that a plaintiff in a breach of insurance

contract claim "was entitled to recover any damages applicable in breach of contract actions and was not statutorily limited to the recovery of the insured loss and the bad faith penalty," including punitive damages. 436 S.W.3d at 276. The Riad court addressed specifically "the Court's statement in Heil that section 56–7–105 'provides the exclusive extra[-]contractual remedy for an insured's bad faith refusal to pay on a policy.'" 436 S.W.3d at 276 (quoting Heil, 690 F.3d at 728) (alteration in original). The Riad court explained, "[The Court of Appeals'] statement ignores the Myint progeny of cases, providing for the application of the TCPA to cases filed prior to the applicability of section 56–8–113." After determining that "any damages applicable in breach of contract actions" were available to the plaintiff, the Riad court further explained that "while generally not available in a breach of contract case, [punitive damages] may be awarded in a breach of contract action under certain circumstances," where the defendant "acted either intentionally, fraudulently, maliciously, or recklessly." 436 S.W.3d at 276. Although Riad is not binding precedent under Erie and its progeny, the Court finds the reasoning in Riad persuasive evidence that the Tennessee Supreme Court would hold that punitive damages were available in breach of insurance contract cases at the time Riad was decided.

Defendant distinguishes the Riad case from the present case in that "the Riad case involved a cause of action that accrued prior to the enactment of § 56-8-113." (ECF No. 79 at 3.) According to Defendant, "the plaintiff in Riad specifically argued that § 56-8-113 did

not apply to his claim because his claim had accrued prior to the enactment of that statute." (Id.) The Court agrees with Defendant that § 113 was effective at the time of accrual of Plaintiffs' claims. The Court differs with Defendant on the scope and applicability of § 113.

B. Statutory Interpretation of § 113

Under Tennessee law, "[t]he role of the Court in construing statutes is to ascertain and give effect to legislative intent." Myint, 970 S.W.2d at 924. "Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language." Id. (citing Carson Creek Vacation Resorts, Inc. v. Department of Revenue, 865 S.W.2d 1, 2 (Tenn. 1993)). "Courts are not authorized 'to alter or amend a statute.'" Mooney v. Sneed, 30 S.W.3d 304, 306 (Tenn. 2000) (quoting Gleaves v. Checker Cab Transit Corp., 15 S.W.3d 799, 803 (Tenn. 2000)). "The reasonableness of a statute may not be questioned by a court, and a court may not substitute its own policy judgments for those of the legislature." Id. "Where the language contained within the four corners of a statute is plain, clear, and unambiguous and the enactment is within legislative competency, 'the duty of the courts is simple and obvious, namely, to say sic lex scripta, and obey it.'" Carson Creek Vacation Resorts, 865 S.W.2d at 2 (quoting Miller v. Childress, 21 Tenn. (2 Hum.) 319, 321-22 (1841)). "Finally, the Legislature is presumed to have knowledge of its prior enactments and to know the state of the law at the time it passes legislation." Wilson v. Johnson Cnty., 879 S.W.2d 807, 810 (Tenn. 1994).

In contrast, "[w]hen courts are attempting to resolve a statutory ambiguity, the rules of statutory construction authorize them to consider matters beyond the text of the statute being construed." Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 527-28 (Tenn. 2010). These include "among other things, public policy, historical facts preceding or contemporaneous with the enactment of the statute being construed, and the background and purpose of the statute." Id. at 528.

> The courts may also consider earlier versions of the statute, the caption of the act, the legislative history of the statute and the entire statutory scheme in which the statute appears. However, no matter how illuminating these non-codified external sources may be, they cannot provide a basis for departing from clear codified statutory provisions.

Id.

A basic grammatical analysis of § 113 reveals its natural and ordinary meaning, which is to limit the scope of § 113 to remedies and sanctions of a statutory nature only. Section 113 states in relevant part, "this title shall provide the sole and exclusive statutory remedies and sanctions . . . under this title for alleged breach of, or for alleged unfair or deceptive acts or practices in connection with, a contract of insurance. . . ." Tenn. Ann. Code § 56-8-113 (emphasis added). Because the terms "remedies" and "sanctions" are not separated by a comma, a plain reading of the phrase "statutory remedies and sanctions" reveals that both "remedies" and "sanctions" are modified by "statutory." The Court therefore finds that the Tennessee General Assembly intended the scope of §

113 to be limited to remedies and sanctions of a statutory nature. Consequently, § 113 did not disturb the availability of common law "remedies and sanctions," which the Myint and Riad decisions affirmed were available prior to the enactment of § 113.

This conclusion is supported by the series-qualifier canon of statutory construction. The series-qualifier canon states that "a modifier at the beginning or end of a series of terms modifies all the terms." United States v. Laraneta, 700 F.3d 983, 989 (7th Cir. 2012) cert. denied, 134 S. Ct. 235 (2013). The series-qualifier canon applies "where the modifying clause 'undeniably applies to at least one [term], and . . . makes sense with all ....'" United States v. Lockhart, 749 F.3d 148, 152 (2d Cir. 2014) (quoting United States v. Bass, 404 U.S. 336, 339–40 (1971)). In the phrase "statutory remedies and sanctions," the modifier "statutory" appears at the beginning of a series of nouns "remedies and sanctions." "Statutory" undeniably applies to the first term "remedies." There is no indication either logically or from the text that application of "statutory" to "sanctions" would be nonsensical. Furthermore, no qualification of the term "sanctions" exists to bring the phrase within the purview of the last-antecedent canon. See United States v. Laraneta, 700 F.3d 983, 989 (7th Cir. 2012) cert. denied, 134 S. Ct. 235 (2013) ("[T]he 'last-antecedent' canon . . . says that a qualification in the last term of a series should be confined to that term.").

Moreover, the text of § 113 states explicitly that "[n]othing in this section shall be construed to eliminate or otherwise affect any . . . [r]emedy, cause of action,

right to relief or sanction available under common law. . . . ." Tenn. Code Ann. § 56-8-113(1) (emphasis added). Consequently, Defendant's argument that "[t]he cases relied upon by Plaintiffs all deal with claims that accrued prior to the enactment of § 56-8-113 and are thus unpersuasive" is of no moment in the present case, where Plaintiffs assert a common law claim that was available at the time of the enactment of § 113. Similarly, the parties' arguments surrounding whether § 105 is penal or compensatory is of limited significance given the broad language of § 113(1) exempting "[r]emed[ies], cause[s] of action, right[s] to relief or sanction[s] available under common law" from the preclusive effects of § 113 as applied to § 105.

Finally, the legislative history provides support to Plaintiffs', rather than to Defendant's position. There is no dispute that § 113 was enacted in order to reverse the Tennessee Supreme Court's holding in Myint. Riad, 436 S.W.3d at 274 n.3. The issue in Myint was whether the Consumer Protection Act provided plaintiffs with a bad faith cause of action in addition to the Bad Faith Statute. See 970 S.W.2d at 922. Because the bad faith cause of action under the Consumer Protection Act was statutory, the legislative intent to reverse Myint is consistent with the explicit language of § 113, which indicates that the Tennessee General Assembly intended only to preclude remedies and sanctions that were statutory in nature.

C. Additional Case Law

In Defendant's memoranda, Defendant relies on Westfield Ins. Co. v. RLP Partners, LLC, No. 3:13-00106, 2013 WL 2383608, at *1 (M.D. Tenn. May 30,

2013) and Jeffers v. Metro. Life Ins. Co., No. 3-13-0065, 2014 WL 347847, at *1 (M.D. Tenn. Jan. 31, 2014) - two recent cases decided by the United States District Court for the Middle District of Tennessee. The primary holding in Westfield is that a common law tort claim for bad faith does not exist and never has existed under Tennessee law. See Westfield, 2013 WL 2383608, at *1-3. In the District Court's opinion, the District Court briefly addressed the issue of punitive damages and concluded that "where the bad faith penalty statute applies punitive damages are not available," Id. at *4. In support of this conclusion, the District Court cited to the Heil opinion. The District Court did not, however, address the effects of the Tennessee Supreme Court's decision in Myint or the enactment of § 113 on the availability of punitive damages. Furthermore, the District Court did not have the benefit of the Riad decision to guide its analysis since Westfield predated Riad.

Defendant asserts that the Riad decision is not the latest holding regarding the availability of punitive damages. According to Defendant, in the Jeffers decision "the United States District Court for the Middle District of Tennessee, applying Tennessee law, held that a defendant insurance company's motion to dismiss plaintiff's punitive damage claim for breach of contract should be granted." (ECF No. 79 at 3-4.) Unlike Westfield, the Jeffers opinion issued after Riad. In Jeffers, the District Court briefly addressed the availability of punitive damages in a breach of insurance contract case. Jeffers, 2014 WL 347847 at *4. Similar to the holding in Westfield, the District Court

relied on the Heil opinion and did not address the effects of Myint, the enactment of § 113, or Riad on the availability of punitive damages. See Jeffers, 2014 WL 347847 at *4. For reasons already set forth, the Court declines to adopt the approach of the District Court for the Middle District of Tennessee.

Accordingly, the Court finds that punitive damages are available in addition to the remedies for bad faith set out in § 105.

D. Sufficiency of Plaintiffs' Pleadings

For Plaintiffs' claim for punitive damages to survive a motion to dismiss challenge, Plaintiffs must plead with sufficient specificity that the defendant "acted either intentionally, fraudulently, maliciously, or recklessly." See Riad, 436 S.W.3d at 276 (internal quotation marks omitted). In the present case, Plaintiffs have alleged sufficient facts to survive a motion to dismiss. In particular, Plaintiffs' have alleged that Defendant delayed for over a year in paying Ms. Lindenberg insurance policy benefits while knowing that Ms. Lindenberg was entitled to said benefits. (Compl. ECF No. 1-1 ¶ 16.) More than merely reciting a label or conclusion, Plaintiffs alleged that the express language of both the Marital Dissolution Agreement and insurance policy confirmed that Ms. Lindenberg was the proper beneficiary. (Id. ¶ 4-6.) Plaintiffs further alleged that Defendant placed "onerous demands on Ms. Lindenberg and her family at a time when they were grieving the loss of Mr. Lindenberg and surviving on limited resources." (ECF No. 67 at 4; see Compl. ECF No. 1-1 ¶ 10, 13-14, 16.) Plaintiffs further assert

> Plaintiffs have pled - and at trial will show - Jackson National was intentional in denying Ms. Lindenberg death benefits to which she was entitled until such time as she alone bore the costs of legal proceedings to protect Jackson National; that it was reckless in its evaluation and interpretation of relevant Tennessee law; and it was even malicious in its treatment of Ms. Lindenberg.

(ECF No. 67 at 4-5.)

Accordingly, the Court finds Plaintiffs have met the pleading standard required for recovery of punitive damages based on common law breach of contract.

IV. CONCLUSION

For the reasons stated above, Defendant Jackson National Life Insurance Company's Motion to Dismiss Plaintiffs' Claims for Punitive Damages and Common Law Bad Faith (ECF No. 46) is DENIED as to Plaintiffs' claim for punitive damages.

IT IS SO ORDERED, this 9th day of December, 2014.

/s/ Jon P. McCalla
JON P. McCALLA
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TAMARIN LINDENBERG, individually and as Natural Guardian of her minor child S.M.L., and Zachary Lindenberg	)	
Plaintiffs,	)	
v.	)	No. 2:13-cv-02657-JPM-cgc
JACKSON NATIONAL LIFE INSURANCE COMPANY,	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION FOR JUDMENT AS A MATTER OF LAW AND GRANTING PLAINTIFF'S MOTION FOR CERTIFICATION OF QUESTIONS TO THE TENNESSEE SUPREME COURT

Before the Court are Defendant Jackson National Life Insurance Company's Motion for Judgment as a Matter of Law, made during trial on December 18, 2014

(see ECF No. 139) and brief filed January 5, 2015 (ECF No. 158), and Plaintiff Tamarin Lindenberg's Motion for Certification of Questions to the Tennessee Supreme Court (ECF No. 167), filed May 19, 2015. For the following reasons, Defendant's Motion is DENIED, and Plaintiff's Motion is GRANTED.

I. PROCEDURAL BACKGROUND

This case concerns a dispute over a life insurance policy issued by Defendant Jackson National Life Insurance Company to Decedent Thomas A. Lindenberg. (See Joint Pretrial Order at 4, ECF No. 125.) Plaintiffs Tamarin Lindenberg, minor child S.M.L., and Zachary Thomas Lindenberg, are the former wife of Decedent and the two children of Thomas and Tamarin Lindenberg. (Id.)

On July 19, 2013, Plaintiffs filed their Complaint in the Circuit Court of Shelby County, Tennessee, for the Thirteenth Judicial District at Memphis. (ECF No. 1-1.) On August 23, 2013, Defendant removed the case to the United States District Court for the Western District of Tennessee pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. (ECF No. 1 at 1.)

On August 30, 2013, Defendant filed an Answer to the Complaint. (ECF No. 4.) Defendant included in the filing a Third-Party Complaint for Interpleader against Mary Angela Lindenberg Williams and a Counterclaim against Tamarin Lindenberg. (Id. at 5-8.) With regard to Defendant's Counterclaim and Third-Party Complaint, Defendant asserted that it "[was] not in a position to determine, factually or legally, who is entitled to the Death Benefit," and

requested the Court to "determine to whom said benefits should be paid." (Id. at 7.) On September 23, 2013, Plaintiff Tamarin Lindenberg and Third-Party Defendant Mary Angela Lindenberg Williams filed a Motion to Dismiss Defendant Jackson National Life Insurance Company's Counterclaim and Third-Party Complaint for Interpleader. (ECF No. 9.) On December 9, 2013, the parties filed a Joint Motion to Appoint James and Kimberly Griffith as Guardians Ad Litem for the minor children. (ECF No. 19.) The Motion was granted on December 10, 2013 (ECF No. 20).

On May 19, 2014, the Court granted Plaintiff Tamarin Lindenberg's and Third-Party Defendant Mary Angela Lindenberg Williams' Motion to Dismiss. (ECF No. 32.) The Court further ordered Defendant "to disburse life insurance policy benefits to Plaintiff in the amount of $350,000 with interest from January 23, 2013, until the date of payment." (Id. at 17.)

On August 21, 2014, Defendant filed a Motion to Dismiss Plaintiffs' Claims for Punitive Damages and Common Law Bad Faith. (ECF No. 46.) Plaintiffs timely responded in opposition on September 17, 2014. (ECF No. 67.) Defendant filed a Reply on September 26, 2014. (ECF No. 79.) The Court held a telephonic hearing on, inter alia, the Motion to Dismiss on November 25, 2014, at which both parties were represented. (ECF No. 101.) On the same date, the Court entered an Order Granting in Part Defendant's Motion to Dismiss Plaintiffs' Claims for Punitive Damages and Common Law Bad Faith. (ECF No. 102.) In the Order, the Court dismissed Plaintiffs' common law bad faith claim. (Id.) On December 9, 2014, the

Court issued a second Order regarding Defendant's Motion to Dismiss, which denied Defendant's motion to dismiss claims for punitive damages. (ECF No. 124.)

On October 15, 2014, Defendant filed a Motion for Summary Judgment. (ECF No. 87.) Plaintiffs responded in opposition on November 17, 2014. (ECF No. 93.) Defendant filed a reply to Plaintiffs' response on November 21, 2014. (ECF No. 99.) On December 11, 2014, the Court granted Defendant's Motion for Summary Judgment as to the claims brought by Zachary Lindenberg and minor child S.M.L. and denied Defendant's Motion as to all other claims. (ECF No. 129.)

A jury trial was held from December 15, 2014, to December 22, 2014. (ECF Nos. 133, 136, 138-39, 141, 146.) On December 18, Defendant made the instant Motion for Judgment as a Matter of Law. (See ECF No. 139.) On December 22, 2014, the jury returned its verdict with the following findings:

1. The preponderance of the evidence demonstrated that Defendant breached the terms of its contract with Plaintiff Tamarin Lindenberg. (Verdict Form, ECF No. 151 at PageID 2015.) Plaintiffs were awarded actual damages in the amount of $350,000.00. (Id.)
2. The preponderance of the evidence demonstrated that Defendant's refusal to pay Plaintiff Tamarin Lindenberg the death benefit was not in good faith. (Id. at PageID 2016.) Moreover, the preponderance of the evidence demonstrated that the refusal to pay resulted in additional expense, loss, or injury including attorney fees. (Id.)

Plaintiffs were awarded bad faith damages of $87,500.00. (Id. at PageID 2017.)

3. Clear and convincing evidence demonstrated that Defendant acted either intentionally, recklessly, maliciously, or fraudulently. (Id. at PageID 2018.)
4. Plaintiffs were awarded punitive damages in the amount of $3,000,000.00. (ECF No. 152.)

On January 5, 2015, Defendant filed a brief in support of its Motion for Judgment as a Matter of Law. (ECF No. 158.) On January 12, 2015, Plaintiffs timely filed their Response in Opposition. (ECF No. 159.) On May 19, 2015, Plaintiffs filed a Supplemental Brief. (ECF No. 168.) On May 26, 2015, Defendant filed a Reply Brief. (ECF No. 172.)

Plaintiff filed a Motion for Certification of Questions to the Tennessee Supreme Court on May 19, 2015. (ECF No. 167.) Defendant filed a response on June 5, 2015. (ECF No. 174.) The State of Tennessee filed a Motion to Intervene and Memorandum in Support of the Motion to Intervene on June 12, 2015. (ECF Nos.175-76.) The Court granted the Motion to Intervene on June 16, 2015. (ECF No. 177.) On July 7, 2015, the State filed a Response in Opposition to the Motion for Certification of Questions (ECF No. 178) and a Response to Defendant's Motion for Judgment as a Matter of Law (ECF No. 179).

II. FACTUAL BACKGROUND

Defendant issued a life insurance policy to Decedent Thomas Lindenberg, effective January 23, 2002. (Stipulation No. 6(a), Joint Pretrial Order at 4.) The

policy designated Plaintiff Tamarin Lindenberg as the primary beneficiary who was to receive 100% of the policy proceeds upon Decedent's death. (Stipulation No. 6(b), id.) The policy stated in relevant part: "THE COMPANY WILL PAY the face amount shown in the policy specifications, less any premium due, to the designated beneficiary upon due proof of the Insured's death and not later than two months after the receipt of such proof." (Lindenberg Policy, Trial Ex. 3, ECF No. 142.)

Plaintiff Tamarin Lindenberg and Decedent executed a Marital Dissolution Agreement ("MDA") in 2005, and a divorce decree was issued in 2006. (Stipulation No. 6(d), Joint Pretrial Order at 4; see also Trial Exs. 10, 11.) The MDA required that "Wife shall pay the Life Insurance premium for Columbus and Jackson National policies for so long as she is able to do so and still support the children." (Trial Ex. 10 at 7.) Additionally, the MDA required "Husband at his expense [to] maintain in full force insurance on his life having death benefits payable to the parties' children as irrevocable primary beneficiaries . . . ." (Id. at 9.)

Decedent died on January 22, 2013. (See Certificate of Death for Thomas Arthur Lindenberg, Trial Ex. 35.) On February 6, 2013, Defendant received from Plaintiff Tamarin Lindenberg a claim for the death benefit. (See Trial Ex. 22 at 1.) The instructions on the claim form required submission of Decedent's death certificate, as well as the MDA and the divorce decree because Plaintiff was an ex-spouse. (See id. at 1-2.) On March 11, 2013, Plaintiffs' attorney sent Defendant a letter seeking expedited review of the claim and payment of

the death benefit. (Trial Ex. 21.) On March 22, 2013, Defendant sent a letter in response requiring further action by Plaintiffs, including "waivers to be signed by the other potential parties"; and the obtaining of "court-appointed Guardian(s) for the Estates of the two minor children." (Trial Ex. 23.) Defendant stated that another option would be for Plaintiff Tamarin Lindenberg to waive her rights to the claim so that Defendant could disburse the proceeds to the minor children. (Id. at 2.)

Throughout the month of May 2013, Plaintiff Tamarin Lindenberg and Defendant were in communication about how to proceed and whether Defendant would interplead the funds with the Court. (See Trial Exs. 24, 25, 32.) On July 19, 2013, Plaintiffs filed suit for breach of contract and bad faith. (ECF No. 1-1.)

On May 29, 2014, by Order of the Court, Defendant disbursed payment of $366,363.22, the face amount of the policy plus interest, to Plaintiff. (Stipulation No. 6(k), Joint Pretrial Order at 4.)

III. STANDARDS OF REVIEW

A. Judgment as a Matter of Law

"In [the Sixth Circuit], a federal court sitting in diversity must apply the standard for judgments as a matter of law of the state whose substantive law governs." DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 468 & n.4 (6th Cir. 1996) (explaining that "a motion for directed verdict is now referred to as a motion for judgment as a matter of law"); see also J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co., 936 F.2d 1474, 1482 (6th Cir. 1991) (holding that "[i]n federal court diversity

cases, . . . state law governs the standard for granting motions for directed verdicts and judgments notwithstanding the verdict.")

> Under Tennessee law, the reviewing court must "take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be draw[n] from the whole evidence."

Stinson v. Crye-Leike, Inc., 198 F. App'x 512, 515 (6th Cir. 2006) (alteration in original) (quoting Arms v. State Farm Fire & Cas. Co., 731 F.2d 1245, 1248 (6th Cir. 1984)). Judgment as a matter of law should be granted "only if reasonable minds could draw but one conclusion." Sauls v. Evans, 635 S.W.2d 377, 379 (Tenn. 1982).

B. Certification of Questions of Law to the Tennessee Supreme Court

The Tennessee Supreme Court Rules permit the Tennessee Supreme Court to, "at its discretion, answer questions of law certified to it by . . . a District Court of the United States in Tennessee." Tenn. Sup. Ct. R. 23, § 1. The Tennessee Supreme Court may do so "when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee." Id. A question of law is "determinative of the cause" if it is claim-dispositive. Becker v. Ford Motor

Co., No. 1:13-cv-276-SKL, 2013 WL 6046080, at *2 (E.D. Tenn. Nov. 13, 2013).

The certification of questions "is most appropriate when the question is new and state law is unsettled." BKB Props., LLC v. SunTrust Bank, 453 F. App'x 582, 588 (6th Cir. 2011) (quoting Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370, 372 (6th Cir. 1995)). "When [the certifying court] see[s] a reasonably clear and principled course," it will forgo certification and address the issue itself. Id. (quoting Pennington v. State Farm Mut. Auto. Ins. Co., 553 F.3d 447, 450 (6th Cir. 2009)).

IV. ANALYSIS

Defendant argues that it is entitled to judgment as a matter of law on the basis that Plaintiff did not offer a "legally sufficient evidentiary basis" for claims of statutory bad faith and punitive damages at trial. (ECF No. 158 at 1-2.) The Court addresses each of these claims in turn.

A. Statutory Bad Faith

Defendant asserts that "Plaintiff failed to establish that each of [Defendant]'s grounds for questioning her entitlement to the Policy proceeds was unreasonable." (Id. at 1.) Plaintiff argues that "the trial was replete with evidence of [Defendant]'s inaction and indifference . . . in refusing to pay her the death benefit." (ECF No. 159 at 11.) The Court agrees with Plaintiff that the evidence of Defendant's actions during the course of its dealings with Plaintiff involving Decedent's life insurance proceeds creates doubt as to whether Defendant acted in good faith.

The Tennessee Code provides that the statutory penalty for bad faith by an insurer refusing to pay is, "in addition to the loss and interest on the bond, a sum not exceeding twenty-five percent (25%) on the liability for the loss." Tenn. Code Ann. § 56-7-105(a). There are four elements a plaintiff must satisfy to prevail on a claim for statutory bad faith.[1] The parties dispute only whether Defendant's refusal to pay was not in good faith. (See Joint Pretrial Order at 5.) To show bad faith, a plaintiff must prove "facts that tend to show 'a willingness on the part of the insurer to gamble with the insured's money in an attempt to save its own money or any intentional disregard of the financial interests of the plaintiff in the hope of escaping full liability.'" Johnson v. Tenn. Farmers Mut. Ins. Co., 205 S.W.3d 365, 370 (Tenn. 2006) (quoting Goings v. Aetna Cas. & Sur. Co., 491 S.W.2d 847, 849 (Tenn. Ct. App. 1972)). An insurer's duty to act in good faith is discharged when it "exercise[s] ordinary care and diligence in investigating the claim." Id. The insurer "is entitled to rely upon available defenses and refuse payment if

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[1] To prevail on a claim for statutory bad faith, the Plaintiff must show:

> (1) the policy of insurance must, by its terms, have become due and payable, (2) a formal demand for payment must have been made, (3) the insured must have waited 60 days after making his demand before filing suit (unless there was a refusal to pay prior to the expiration of the 60 days), and (4) the refusal to pay must not have been in good faith.

Palmer v. Nationwide Mut. Fire Ins. Co., 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986).

there [are] substantial legal grounds that the policy does not afford coverage for the alleged loss. Ginn v. Am. Heritage Life Ins. Co., 173 S.W.3d 433, 443 (Tenn. Ct. App. 2004) (quoting Sisk v. Valley Forge Ins. Co., 640 S.W.2d 844, 852 (Tenn. Ct. App. 1982)). "The jury's verdict awarding a bad faith penalty can be set aside only if there is no material evidence to support it." Id.

In this case, Defendant asserts that it considered two bases for questioning Plaintiff's entitlement to the proceeds: "(1) the waiver provision in the martial [sic] dissolution agreement, and (2) the insurance provision of the marital dissolution agreement by which Mr. Lindenberg agreed to provide insurance coverage for his children as irrevocable beneficiaries." (ECF No. 158 at 3.) Defendant asserts that "[i]f either of these bases is valid or was asserted in good faith," then its motion for judgment as a matter of law must be granted. (Id.) The Court evaluates each of these bases as if it had been asserted independently. "[I]f an insurer asserts a defense in good faith, the bad faith penalty may not be imposed even if the defense is unsuccessful." Fulton Bellows, LLC v. Fed. Ins. Co., 662 F. Supp. 2d 976, 996 (E.D. Tenn. 2009) (quoting Sowards v. Grange Mut. Ins. Cas. Co., No. 3:07-cv-0354, 2008 WL 3164523, at *8 (M.D. Tenn. Aug. 4, 2008)); see also State Auto. Mut. Ins. Co. v. R.H.L., Inc., No. 07-1197, 2010 WL 909073, at *16 (W.D. Tenn. Mar. 12, 2010).

1. Waiver Provision of the MDA

Defendant asserts that the waiver provision of the marital dissolution agreement called into question Plaintiff's entitlement to the proceeds. The waiver provision, however, states that "[e]xcept for the terms

and provisions of this Marital Dissolution Agreement, both parties waive and repudiate all right, title, and interest . . . in and to the property and estate of the other including . . . insurance." (Trial Ex. 10 at 2 (emphasis added).) Defendant's reliance on the waiver provision as a grounds for questioning who should be paid the proceeds is not valid because the waiver provision itself stated that it was secondary to other terms and provisions of the agreement. Since the agreement also contained a life insurance provision (see id. at 9-11), the parties' waiver of rights did not govern who Decedent's beneficiaries were in light of the divorce.

Jennifer Trumpie, Defendant's customer relations representative, despite being a non-lawyer, concluded that it was unclear whether "the [Defendant's] policy is the policy Mr. Lindenberg was required to maintain with the children as beneficiaries." (Trial Ex. 23 at 1; see also Trial Tr. 13:3-6, Dec. 17, 2014.) Trumpie also concluded that, if Defendant's policy was not the one Decedent was required to maintain and Plaintiff Tamarin Lindenberg was indeed the designated beneficiary, then Plaintiff had waived her status as beneficiary in the MDA. (Trial Ex. 23 at 1.) Even if this had been accurate, Defendant did not then proceed with ordinary care and diligence in investigating other potential claims, particularly that of Decedent's adult daughter Mary Angela Lindenberg Williams, who was an alleged potentially adverse claimant. (Trial Tr. vol. 1, 222:17-19, Dec. 16, 2014; Trial Tr., 42:16-23, Dec. 17, 2014.) Defendant's own insurance industry opinion witness, Robert Adams, testified that it was routine to

contact potentially adverse claimants during an initial claim investigation. (Trial Tr. afternoon, 424:4-11, Dec. 18, 2014.) Accordingly, the Court does not find that the only conclusion to be drawn from the evidence is that the waiver provision constituted a "substantial legal ground" for refusing payment and that Defendant acted in good faith when it believed that the provision did. Defendant is not entitled to judgment as a matter of law on this basis.

2. Life Insurance Provision of the MDA

Defendant's other asserted basis for questioning to whom the proceeds should be paid is the life insurance provision of the MDA. While Defendant does not dispute that Plaintiff was the primary beneficiary of the policy at issue, Defendant argues that its refusal to pay was based on the possibility of multiple liabilities on the policy, which would have required Defendant to pay the policy proceeds to both Plaintiff and her children. (ECF No. 158 at 8.) The question of whether Defendant acted in good faith in withholding payment of the death benefit to Plaintiff was submitted to the jury, which decided in Plaintiff's favor. (See Verdict Form at PageID 2016, ECF No. 151.) Defendant argues that the jury verdict should be reversed because the jury failed to separate a defense to the breach of contract claim from the motivation for asserting that defense when it considered the bad faith claim. (ECF No. 158 at 8.)

The Court finds that the proof offered at trial does not support Defendant's assertion that it acted in good faith when it refused to pay Decedent's death benefit. Plaintiff's opinion witness, Aubrey Brown, a Tennessee family law attorney, testified that there was no risk to

Defendant of multiple liabilities because Defendant was obligated to pay only the designated primary beneficiary of the policy – Plaintiff – and any cause of action based on the children's entitlement to the proceeds would have been against Decedent's estate or Plaintiff, not Defendant. (Trial Tr., 293:21-294:6, 303:21-304:12, Dec. 17, 2014.) Defendant did not present testimony to contradict these assertions. Plaintiff's former attorney, Tom Maschmayer, also testified that although Defendant was offered a hold harmless and indemnification agreement to further shield Defendant from the liability it feared, Defendant's in-house counsel, Nathan Maas, rejected the agreement. (Id. at 229:3-230:6.)

Defendant asserted at trial that it had specific concerns about the children's claims and thus, required waivers of the children's rights before paying the death benefit. (See, e.g., id. at 174:6-175:1.) Defendant's insistence on receiving waivers from the children, however, is inconsistent with its own actions. First, Plaintiff testified that approximately two months after Decedent's death, she offered to have two guardians act on behalf of her minor children, yet Trumpie rejected the offer. (Trial Tr. afternoon, 232:20-233:6, Dec. 18, 2014.) Defendant also stipulated that it had no standard company policy pertaining to requiring guardianships and decides claims where guardianships may be implicated on a case-by-case basis. (Stipulation No. 6(i), Joint Pretrial Order at 4.) Second, in October 2013, after Plaintiff filed suit, Defendant agreed to the appointment of the same guardians it had rejected approximately seven months earlier and filed a joint

motion with Plaintiff to appoint the guardians in December 2013. (Trial Tr. afternoon, 233:9-17, Dec. 18, 2014; Joint Mot. to Appoint James and Kimberly Griffith As Guardians Ad Litem, Trial Ex. 13.) Third, Defendant was willing to pay Decedent's adult daughter part of the death benefit even though she had not asserted a claim to it. (See Trial Ex. 23 at 2 (indicating that Defendant would pay "contingent beneficiaries [who] are 'Surviving Children Equally'" if Plaintiff waived her rights).) These actions suggest that Defendant's concern about multiple liabilities and the children's interests, which it asserts justified its refusal to pay, was pretextual.

There is further evidence that Defendant acted in bad faith because it did not exercise ordinary care and diligence in handling Plaintiff's claim. Defendant stipulated "that there were not a manager in its claims department that was specifically tasked with managing and overseeing the day-to-day activities of [Plaintiff's] claim." (Stipulation No. 6(j), Joint Pretrial Order at 4.) Plaintiff's file was closed on the same day Trumpie wrote a letter to Plaintiff explaining why Defendant was refusing to pay the death benefit. (Trial Tr. vol. 1, 298:4-6, Dec. 16, 2014.) Plaintiff's claim was then handled by Maas who never sent the waivers requested by Plaintiff and her counsel (Trial Tr., 95:1-4, Dec. 17, 2014); and was out of the office on work days between February and August 2013 because of his ongoing personal bankruptcy case (id. at 112:1-5; see generally id. at 95-100).

In addition, Plaintiff presented evidence at trial that Defendant intentionally ignored Plaintiff's interests to

avoid full liability. Over the course of Plaintiff's phone calls to Defendant in February and March 2013, Defendant was made aware of Plaintiff's limited finances (see, e.g., Trial Tr. afternoon, 206:20-22, Dec. 18, 2014; Trial Tr. 61:23-25, Dec. 22, 2014; see generally Trial Ex. 38), yet still required her to engage in the guardianship process detailed in the letter to Plaintiff before it would pay proceeds to her (Trial Ex. 23; see also Trial Tr. 54:13-21, Dec. 22, 2014; Trial Exs. 25, 26, 32). Scott Peatross, a probate attorney and the public administrator of Shelby County, was called by Defendant and testified that the process would have likely entailed hiring two attorneys, one to file a petition in court to establish guardianships for the minor children, and another to serve as guardian. (Trial Tr. vol. 1, 22:15-23:7, Dec. 19, 2014.) Trumpie and Maas admitted, however, that no contract terms required Plaintiff to take such action (Trial Tr., 54:13-18, 188:24-189:3, Dec. 17, 2014;), and Maschmeyer and Brown testified that the process would not have been viable anyway as a mechanism for Plaintiff to receive the death benefit (Trial Tr., 232:7-13, 305:10-308:2, Dec. 17, 2014). Although the significant cost to a plaintiff is not alone grounds for a finding of bad faith, Sisk, 640 S.W.2d at 852, requiring Plaintiff to participate in an unnecessary process while having knowledge of the financial burden on her demonstrates Defendant's intentional disregard of Plaintiff's interests and, therefore, its bad faith in refusing to pay.

Accordingly, the Court does not find that the only conclusion to be drawn from the evidence is that the life insurance provision constituted a "substantial legal

ground" for refusing payment and that Defendant acted in good faith when it believed that the provision did. Defendant is not entitled to judgment as a matter of law on this basis.

As there is doubt as to Defendant's conclusion that it acted in good faith in light of the waiver and life insurance provisions of the MDA, the Court DENIES Defendant's motion for judgment as a matter of law with regards to the statutory bad faith claim.

B. Damages

Defendant also seeks judgment as a matter of law on the issue of punitive damages. Defendant asserts that Plaintiff cannot recover the $3,000,000 in punitive damages awarded by the jury because Plaintiff failed to prove actual damages. (ECF No. 158 at 10-14; see Special Verdict Form, ECF No. 152.) In the alternative, Defendant argues that the Tennessee punitive damages cap applies in this case and would entitle Plaintiff a maximum of $500,000. (ECF No. 158 at 15-19.) Plaintiff argues that actual damages were proven; the punitive damages award is not subject to the statutory cap; and even if the cap were applicable and constitutional, Plaintiff would be entitled to $700,000. (ECF No. 159 at 2-6, 20 & n.11.) Plaintiff also seeks to certify questions of law to the Tennessee Supreme Court regarding the constitutionality of the statutory damages cap. (See ECF No. 167.)

It is undisputed that actual damages must first be established before punitive damages can be awarded. (See ECF No. 158 at 11; ECF No. 159 at 4.) The Court

addresses the actual damages and punitive damages questions in turn.

1. Actual Damages

Defendant argues that no actual damages arise from Plaintiff's breach of contract claim because Defendant paid the death benefit "in full prior to trial." (ECF No. 158 at 13.) Plaintiff argues that the damages must be measured at time of breach, not time of trial. (ECF No. 159 at 3.) The Court finds that damages are measured at time of breach and that the predicate of actual damages in this case satisfies the initial requirement for punitive damages.

"The purpose of assessing damages in breach of contract cases is to place the plaintiff as nearly as possible in the same position she would have been in had the contract been performed . . . ." BVT Lebanon Shopping Ctr., Ltd. v. Wal-Mart Stores, Inc., 48 S.W.3d 132, 136 (Tenn. 2001) (quoting Lamons v. Chamberlain, 909 S.W.2d 795, 801 (Tenn. Ct. App. 1993)). In Tennessee, "[t]he recovery in an action at law for the breach of the contract in failing to deliver the policy, would be its money value at the time of breach, with interest, if the jury see proper to give interest." Nashville Life Ins. Co. v. Mathews, 76 Tenn. 499, 507 (1881) (emphasis added); see also BancorpSouth Bank, Inc. v. Hatchel, 223 S.W.3d 223, 231 (Tenn. Ct. App. 2006) (holding that damages for breach of contract for real estate depend on value at the time of breach); First Tenn. Bank Nat. Ass'n v. Hurd Lock & Mfg. Co., 816 S.W.2d 38, 42 (Tenn. Ct App. 1991) (recognizing principle of measuring damages at time of breach of contract for goods). Other circuits applying other states'

laws have also held that "contract damages are measured at the time of breach." Merrill Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171, 185 (2d Cir. 2007); Gen. Universal Sys., Inc. v. Lee, 379 F.3d 131, 154 (5th Cir. 2004).

The case law Defendant cites to assert that damages are measured at the time of trial is unpersuasive. While the Supreme Court of Tennessee held in Whittington v. Grand Valley Lakes, Inc. that the respondent had already compensated the petitioner for losses stemming from the respondent's trespass, thereby eliminating the petitioner's actual damages, the court still found that there was a predicate of actual damages that supported an award for punitive damages. 547 S.W.2d 241, 242-43 (Tenn. 1977). Indeed, the court negated the jury verdict for actual damages but upheld the jury verdict for punitive damages. Id. The court reasoned that the

> [respondent] recognized its liability and pre-paid it . . . Surely, had [the respondent] not [done so] and the landowner had restored [the land] at her own expense, there would be a predicate of actual damages and an award of punitive damages would be soundly based. In legal effect, we see no difference.

Id. at 243.

In this case, had Defendant not paid Plaintiff the death benefit before trial – which it did only after the Court ordered it to do so (see Stipulation No. 6(k), Joint Pretrial Order at 4) – the benefit would have been the predicate of actual damages Plaintiff sought, and Plaintiff would be entitled to punitive damages. Should

Defendant succeed on this issue, Plaintiff would be placed in a worse position simply because Defendant ultimately acquiesced to the Court's order after over a year of delaying its payment obligation.

Although Defendant uses Whittington to support its argument that actual damages should be calculated at the time of trial, Defendant must also distinguish the instant matter from Whittington on the issue of allowing punitive damages in light of complete compensation to a plaintiff before trial. Defendant argues that the defendant in Whittington did not have a valid defense for its tortious acts while Defendant in this case acted in good faith when questioning to whom the proceeds should be paid. (ECF No. 158 at 13-14.) Defendant also argues that Whittington is a case that predates statutory punitive damages caps in Tennessee and only involved a small amount of damages. (Id. at 14.) Plaintiff argues that Whittington is still binding: "[Defendant's] arguments . . . [render] the doctrines of stare decisis and nominal damages . . . nullities." (ECF No. 159 at 5 n.3.) The Court first disagrees that Defendant has a valid defense for its refusal to pay the death benefit, see supra Part IV.A, and also disagrees that Whittington is no longer good law. Defendant cannot logically use the case to support one of its assertions and then reject the same case as irrelevant in light of statutory changes.

Defendant relies additionally on Custom Built Homes v. G.S. Hinsen Co., a case in which the defendant's breach of contract did not cause the plaintiff actual injury because a third-party had already satisfied its contract with the plaintiff, making the

plaintiff whole and ineligible for actual damages. (ECF No. 158 at 12-13 (citing No. 01A01-9511-CV-00513, 1998 WL 960287 (Tenn. Ct. App. Feb. 6, 1998)).) The Court agrees with Plaintiff that this case is merely persuasive and not precedential, and also that it is distinguishable from the instant matter because Plaintiff was not made whole by a third-party before trial in spite of Defendant's breach. (See ECF No. 159 at 5.) Although Defendant argues that Plaintiff has been made whole because it has paid Plaintiff the value of the contract plus interest, the Court does not find Plaintiff ineligible for actual damages. To hold that a defendant may escape punitive damages liability for a breach of contract as long as it performs wholly before trial not only goes against the rule of measuring damages at the time of breach but would also contravene the deterrent and retributory effect of punitive damages. Since the Court finds that Plaintiff's actual damages are calculated at the time of breach, and thus, the then-unpaid proceeds of the life insurance policy were the actual damages, Plaintiff is eligible for punitive damages.

2. Punitive Damages

Defendant argues that punitive damages are inappropriate because (1) Plaintiff failed to prove statutory bad faith at trial; (2) Plaintiff failed to establish Defendant acted intentionally, fraudulently, maliciously or recklessly; and (3) Plaintiff did not suffer actual damages from breach of contract. (ECF No. 158 at 15.) The Court is not persuaded by Defendant's arguments and finds that Plaintiff is entitled to punitive damages.

First, the Court finds that Plaintiff sufficiently proved the elements of statutory bad faith at trial. See supra Part IV.A. Second, the Court finds that while Plaintiff did not establish at trial that Defendant acted fraudulently, Plaintiff did establish at trial that Defendant acted at least recklessly when it failed to pay the death benefit to Plaintiff.

> A person acts fraudulently when (1) the person intentionally misrepresents an existing, material fact or produces a false impression, in order to mislead another or to obtain an undue advantage, and (2) another is injured because of reasonable reliance upon that representation. A person acts maliciously when the person is motivated by ill will, hatred, or personal spite. A person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the [ordinary] standard of care . . . .

Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) (citation omitted). To succeed on a claim for fraud, Plaintiff must prove fraud with particularity. Fed. R. Civ. P. 9(b).

Plaintiff did not properly plead fraud at trial, and even if she had done so, she failed to present evidence at trial that Defendant intentionally made misrepresentations to Plaintiff in order to mislead her and benefit itself. Plaintiff, however, established recklessness on the part of Defendant: Plaintiff presented evidence that Defendant was aware of Plaintiff's financial situation, yet consciously disregarded it by inadequately investigating her claim

and requiring her to undertake unnecessary actions like the appointment of guardians for her minor children before paying out the proceeds. See supra Part IV.A.2. Third, there exists a predicate for actual damages, which enables Plaintiff to recover punitive damages. See supra Part IV.B.1. For these reasons, the Court DENIES Defendant's motion for judgment as a matter of law with regards to the punitive damages claim.

3. Tennessee Statutory Damages Cap

The Court defers ruling on the amount of punitive damages to which Plaintiff is entitled because there is an outstanding issue of whether the Tennessee statutory damages cap is constitutional. Plaintiff submits that the Court should certify two questions of law to the Tennessee Supreme Court:

> (1) Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated § 29-39-104[2] violate a plaintiff's right to a trial by jury, as guaranteed in Article I, section 6 of the Tennessee Constitution?
>
> (2) Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated § 29-39-104 represent an impermissible encroachment by the legislature on the powers vested exclusively in the judiciary, thereby violating

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[2] Section 29-39-104 of the Tennessee Code imposes a cap on punitive damages: they "shall not exceed an amount equal to the greater of: (A) Two (2) times the total amount of compensatory damages awarded; or (B) Five hundred thousand dollars ($500,000)." Tenn. Code Ann. § 29-39-104(a)(5).

> the separation of powers provisions of the Tennessee Constitution?

(ECF No. 167 at 2.)

The certification of these questions is appropriate at this stage because they are determinative of the cause and because there are no Tennessee Supreme Court decisions that control. See Tenn. Sup. Ct. R. 23, § 1. Both Defendant and the State of Tennessee opposed Plaintiff's Motion to Certify Questions because it was not yet clear whether the punitive damages cap would need to be applied. See ECF No. 174 at 4-6; ECF No. 178 at 4. Now that the Court has decided that punitive damages are warranted, see supra Part IV.B.2, the issue is ripe for certification. The State acknowledges that "[n]either the Tennessee Supreme Court nor any other court in Tennessee has ruled on the constitutionality of" the statutory damages cap.[3] (ECF No. 178 at 5.) Thus, the questions are new and state law on the particular statute at issue is unsettled. "The constitutional questions are significant and will ultimately need to be decided by the Tennessee Supreme Court." (Id.)

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[3] Plaintiff cites a Tennessee trial court opinion, Clark v. Cain, in which the Hamilton County Circuit Court held that the statutory cap on non-economic damages is unconstitutional. (ECF No. 168 at 3 (citing No. 12-C1147 (Cir. Ct. Hamilton Cnty. Mar. 9, 2015) (mem. op.), ECF No. 168-1).) Clark, however, addresses the statutory cap under section 29-39-102 of the Tennessee Code, not the section at issue in this case, section 29-39-104. (See Clark, No. 12-C1147, at 2.)

The Court is unpersuaded by Defendant's argument that certification is not warranted because there is a "'clear and principled' course" for the Court to follow. (ECF No. 174 at 6 (quoting Pennington, 553 F.3d at 450).) For example, Defendant analogizes to a North Carolina Supreme Court case that supports the constitutionality of a cap on punitive damages. (Id. at 10-12 (citing Rhyne v. K-Mart Corp., 594 S.E. 2d 1 (N.C. 2004)).) The North Carolina Supreme Court held that the state's statutory punitive damages cap did not violate the state constitutional right to a jury trial "because plaintiffs lacked a fundamental right to a judgment that was consistent with the jury's punitive award." (Id. at 12.) Plaintiff points to rulings from the Missouri and Ohio Supreme Courts, however, which have held that statutory punitive damages caps do violate a plaintiff's fundamental right to a jury trial. (ECF No. 168 at 6 (citing Lewellen v. Franklin, 441 S.W.3d 136, 143 (Mo. 2014) (en banc); State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1091 (Ohio 1999) ("a statute that allows the jury to determine the amount of punitive damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance")).) It does not appear, then, that there is a clear and principled course for the Court to follow in rejecting Plaintiff's constitutional challenges that would justify a denial of certification to the Tennessee Supreme Court.

Accordingly, the Court GRANTS Plaintiff's Motion for Certification of Questions to the Tennessee Supreme Court.

V. CONCLUSION

The Court applies the standard for granting motions for judgment as a matter of law under Tennessee law and finds that, taking the evidence in the strongest view in favor of Plaintiff, the non-movant, there is doubt as to the conclusions drawn by Defendant. Thus, Defendant's Motion for Judgment as a Matter of Law is DENIED. The Court also finds that the constitutionality of the Tennessee statutory damages cap is an issue now ripe and appropriate for review and GRANTS Plaintiff's motion to certify questions regarding the constitutionality of the cap to the Tennessee Supreme Court. The Court will enter a separate order of certification.

IT IS SO ORDERED, this 24th day of November, 2015.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TAMARIN LINDENBERG, individually and as Natural Guardian of her minor child S.M.L., and ZACHARY THOMAS LINDENBERG,	)	
Plaintiffs,	)	
v.	)	No. 2:13-cv-02657-JPM-cgc
JACKSON NATIONAL LIFE INSURANCE COMPANY,	)	
Defendant.	)	

ORDER CERTIFYING QUESTIONS OF STATE LAW TO THE SUPREME COURT OF TENNESSEE

This case concerns a dispute over a life insurance policy issued by Defendant Jackson National Life Insurance Company to Decedent Thomas A. Lindenberg. (See Joint Pretrial Order at 4, ECF No. 125.) Plaintiffs Tamarin Lindenberg, minor child S.M.L., and Zachary Thomas Lindenberg, are the

former wife of Decedent and the two children of Thomas and Tamarin Lindenberg. (Id.) On July 19, 2013, Plaintiffs filed a complaint against Defendant in the Circuit Court of Shelby County, Tennessee, for the Thirteen Judicial District at Memphis, alleging breach of contract and bad faith. (ECF No. 1-1.)

Defendant sought judgment as a matter of law, arguing that Plaintiff did not offer a "legally sufficient evidentiary basis" for claims of statutory bad faith and punitive damages at trial. (ECF No. 158 at 1-2.) The Court denied the motion. (ECF No. 187). Since the Court found that Plaintiff is entitled to punitive damages, the issue of the Tennessee statutory cap on punitive damages will be determinative of the cause, and the decisions of the Tennessee Supreme Court do not provide any precedents specific to the issue of a punitive damages cap.

STATEMENT OF FACTS

Defendant issued a life insurance policy to Decedent Thomas Lindenberg, effective January 23, 2002. (Stipulation No. 6(a), Joint Pretrial Order at 4.) The policy designated Plaintiff Tamarin Lindenberg as the primary beneficiary who was to receive 100% of the policy proceeds upon Decedent's death. (Stipulation No. 6(b), id.)

Plaintiff Tamarin Lindenberg and Decedent executed a Marital Dissolution Agreement ("MDA") in 2005, and a divorce decree was issued in 2006. (Stipulation No. 6(d), Joint Pretrial Order at 4; see also Trial Exs. 10, 11.) The MDA required that "Wife shall

pay the Life Insurance premium for Columbus and Jackson National policies for so long as she is able to do so and still support the children." (Trial Ex. 10 at 7.) Additionally, the MDA required "Husband at his expense [to] maintain in full force insurance on his life having death benefits payable to the parties' children as irrevocable primary beneficiaries . . . ." (Id. at 9.)

Decedent died on January 22, 2013. (See Certificate of Death for Thomas Arthur Lindenberg, Trial Ex. 35.) On February 6, 2013, Defendant received from Plaintiff Tamarin Lindenberg a claim for the death benefit. (See Trial Ex. 22 at 1.) On March 11, 2013, Plaintiffs' attorney sent Defendant a letter seeking expedited review of the claim and payment of the death benefit. (Trial Ex. 21.) On March 22, 2013, Defendant sent a letter in response requiring further action by Plaintiffs, including "waivers to be signed by the other potential parties"; and the obtaining of "court-appointed Guardian(s) for the Estates of the two minor children." (Trial Ex. 23.) Defendant stated that another option would be for Plaintiff Tamarin Lindenberg to waive her rights to the claim so that Defendant could disburse the proceeds to the minor children. (Id. at 2.)

Throughout the month of May 2013, Plaintiff Tamarin Lindenberg and Defendant were in communication about how to proceed and whether Defendant would interplead the funds with the Court. (See Trial Exs. 24, 25, 32.) On July 19, 2013, Plaintiffs filed suit for breach of contract and bad faith. (ECF No. 1-1.)

On May 29, 2014, by Order of the Court, Defendant disbursed payment of $366,363.22, the face amount of the policy plus interest, to Plaintiff. (Stipulation No. 6(k), Joint Pretrial Order at 4.)

A jury trial was held from December 15, 2014, to December 22, 2014. (ECF Nos. 133, 136, 138-39, 141, 146.) Plaintiffs were awarded punitive damages in the amount of $3,000,000.00. (Special Jury Verdict Form, ECF No. 152.) Defendant argues that the punitive damages cap under section 29-39-104 of the Tennessee Code applies in this case and would entitle Plaintiff a maximum of $500,000. (ECF No. 158 at 15-19.) Section 29-39-104 states that punitive damages "shall not exceed an amount equal to the greater of: (A) Two (2) times the total amount of compensatory damages awarded; or (B) Five hundred thousand dollars ($500,000)." Tenn. Code Ann. § 29-39-104(a)(5). Plaintiff argues that even if the cap were applicable and constitutional, Plaintiff would be entitled to $700,000, twice the amount of the compensatory damages awarded by the jury. (ECF No. 159 at 20 n.11.)

In Clark v. Cain, a Tennessee trial court held that the statutory cap on non-economic damages is unconstitutional. (No. 12-C1147 (Cir. Ct. Hamilton Cnty. Mar. 9, 2015) (mem. op.), ECF No. 168-1.) Clark, however, addresses the statutory cap under section 29-39-102 of the Tennessee Code, not section 29-39-104. (See id. at 2.)

QUESTIONS OF LAW

Pursuant to Tennessee Supreme Court Rule 23, the following questions of state law are hereby certified to the Supreme Court of Tennessee:

1. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 violate a plaintiff's right to a trial by jury, as guaranteed in Article I, section 6 of the Tennessee Constitution?

2. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 represent an impermissible encroachment by the legislature on the powers vested exclusively in the judiciary, thereby violating the separation of powers provisions of the Tennessee Constitution?

Pursuant to Tennessee Supreme Court Rule 23, section 4, the Clerk of Court is hereby directed to serve copies of this Certification Order upon all counsel of record in this cause and file with the Clerk of the Supreme Court of Tennessee in Nashville this Certification Order under the seal of this Court along with proof of service.

The Court hereby designates Tamarin Lindenberg as the moving party for purposes of certification. The parties and their counsel of record appear below:

For Tamarin Lindenberg, individually and as natural guardian of her minor child S.M.L., and Zachary Thomas Lindenberg

Molly A. Glover
Charles Silvestri Higgins
BURCH PORTER & JOHNSON
130 N. Court Avenue
Memphis, Tennessee 38103

For Jackson National Life Insurance Company

Daniel Warren Van Horn
Michael C. McLaren
Robert Campbell Hillyer
BUTLER SNOW LLP
Crescent Center
6075 Poplar Avenue 5th Floor
Memphis, Tennessee 38119

IT IS SO ORDERED, this 24th day of November, 2015.

/s/ Jon P. McCalla
JON P. McCALLA
U.S. DISTRICT JUDGE

FILED
June 23, 2016
Clerk of the Courts
Rec'd By

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

**TAMARIN LINDENBERG, ET AL. v.
JACKSON NATIONAL LIFE INSURANCE
COMPANY**

**Rule 23 Certified Question of Law
from the United States District Court
for the Western District of Tennessee**

No.213cv02657JPMcgc

No. M2015-02349-SC-R23-CV

ORDER

Pursuant to Tennessee Supreme Court Rule 23, a certification order was filed in this Court on December 8, 2015, by the United States District Court for the Western District of Tennessee. Briefs have now been filed pursuant to Section 7, and, upon consideration of the certification order and the briefs filed by the parties and by the amici curiae, this Court declines to answer the following certified questions:

1. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 violate a plaintiffs right to a trial by jury, as guaranteed in Article I, section 6 of the Tennessee Constitution?

2. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 represent an impermissible encroachment by the legislature on the powers vested exclusively in the judiciary, thereby violating the separation of powers provisions of the Tennessee Constitution?

Upon thorough review, it appears to this Court that although the certified questions raise issues of first impression not previously addressed by the appellate courts of Tennessee, the context of this case renders it an unsuitable venue within which to provide answers. This case involves a jury's finding of a bad faith refusal to pay pursuant to the terms of a policy of life insurance. The jury determined that the plaintiff was entitled to both the statutory bad faith penalty pursuant to Tennessee Code Annotated section 56-7-105, and punitive damages pursuant to the common law. The issue of the availability of the common law remedy of punitive damages in addition to the statutory remedy of the bad

faith penalty is one which has not before been addressed by this Court, was not certified to this Court by the federal trial court in this case, and is not presently before this Court in this case. It appears to this Court that it would be imprudent for it to answer the certified questions concerning the constitutionality of the statutory caps on punitive damages in this case in which the question of the availability of those damages in the first instance has not been and cannot be answered by this Court.

For these reasons, the Court denies the certification.[1]

PER CURIAM

[1] Nothing in the Court's Order is intended to suggest any predisposition by the Court with respect to the United States Court of Appeals for the Sixth Circuit's possible certification to this Court of both the question of the availability of the remedy of common law punitive damages in addition to the remedy of the statutory bad faith penalty and the question of the constitutionality of the statutory caps on punitive damages, in the event of an appeal from the final judgment in this case.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

TAMARIN LINDENBERG, individually and as Natural Guardian of her minor child SML and ZACHARY THOMAS LINDENBERG,	)	
Plaintiffs,	)	
v.	)	No. 2:13-cv-02657-JPM-cgc
JACKSON NATIONAL LIFE INSURANCE COMPANY,	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION FOR JUDMENT AS A MATTER OF LAW AS TO PUNITIVE DAMAGES

The Tennessee Supreme Court having denied certification of two questions regarding the constitutionality of the Tennessee punitive damages caps by Order docketed in this cause on June 27, 2016 (ECF No. 200), the case was remanded to this Court for determination of whether punitive damages are

appropriate in the instant case and, if so, the proper amount of said damages.

For the following reasons, the Court finds that punitive damages are appropriate, that the Tennessee punitive damages cap is constitutional, and that the punitive damages to be awarded in the instant case are $700,000.

I. BACKGROUND[1]

On December 22, 2014, the jury in the instant case rendered its verdict, awarding $350,000 in actual damages and $87,500 in bad faith damages to Plaintiff Tamarin Lindenberg ("Plaintiff") and her children. (ECF No. 151.) The jury also awarded $3,000,000 in punitive damages. (ECF No. 152.)

On December 18, 2014, during the jury trial in the instant case, Defendant Jackson National Life Insurance Company ("Defendant") moved for judgment as a matter of law. (Min. Entry, ECF No. 139.) Defendant filed a brief in support of its motion on January 5, 2015. (ECF No. 156.) Plaintiff responded in opposition on January 12, 2015. (ECF No. 159.) The Court denied the motion on November 24, 2015. (ECF No. 187.) In the order denying Defendant's motion for judgment as a matter of law, the Court deferred ruling on the amount of punitive damages to which Plaintiff is

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[1] A more comprehensive procedural history and factual background up to and including November 24, 2015, is provided in the Court's order denying Defendant's motion for judgment as a matter of law and granting Plaintiff's motion for certification of questions to the Tennessee Supreme Court. (*See* ECF No. 187 at 1-8.)

entitled because the constitutionality of the Tennessee statutory damages cap was an unresolved issue. (Id. at 26-29.) Also on November 24, 2015, the Court certified two questions to the Tennessee Supreme Court:

1. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 violate a plaintiff's right to a trial by jury, as guaranteed in Article I, section 6 of the Tennessee Constitution?

2. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 represent an impermissible encroachment by the legislature on the powers vested exclusively in the judiciary, thereby violating the separation of powers provisions of the Tennessee Constitution?

(ECF No. 188 at 5.)

On June 23, 2016, the Tennessee Supreme Court denied certification. (ECF No. 200-1.) The Court held a telephonic status conference on July 1, 2016. (Min. Entry, ECF No. 202.) In the conference it was determined that Plaintiff, Defendant, and Intervenor State of Tennessee ("the State") would submit and rely on in the instant case their briefing before the Tennessee Supreme Court and the supporting amicus briefs. The Court would then resolve the remaining issues in this case. (See ECF Nos. 203-208.)

The mandate of the Tennessee Supreme Court issued on June 23, 2016 and was docketed in this Court on July 11, 2016. (ECF No. 209 (remanding "for further proceedings and final determination ... as shall

effectuate the objects of this order to remand, and attain the ends of justice.").)

II. LEGAL STANDARD

"It is well-settled in Tennessee that 'courts do not decide constitutional questions unless resolution is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties.'" Waters v. Farr, 291 S.W.3d 873, 881 (Tenn. 2009) (quoting State v. Taylor, 70 S.W.3d 717, 720 (Tenn. 2002)). When facing state constitutional challenges, Tennessee statutes receive "a strong presumption" of constitutionality. Lynch v. City of Jellico, 205 S.W.3d 384, 390 (Tenn. 2006) (citing Osborn v. Marr, 127 S.W.3d 737, 740-41 (Tenn. 2004)); see also Waters, 291 S.W.3d at 881 ("Our charge is to uphold the constitutionality of a statute wherever possible."). Tennessee courts must construe statutes in a way that "sustain[s] the statute and avoid[s] constitutional conflict if at all possible, and ... indulge every presumption and … resolve every doubt in favor of the statute's constitutionality." Howell v. State, 151 S.W.3d 450, 470 (Tenn. 2004) (citing Taylor, 70 S.W.3d at 721); see also In re Schafer, 689 F.3d 601, 605 (6th Cir. 2012) ("Where ... a [state] statute is challenged as unconstitutional, [federal courts] construe the statute to avoid constitutional infirmity when 'fairly possible.'" (quoting Eubanks v. Wilkinson, 937 F.2d 1118, 1122 (6th Cir. 1991))). The presumption of constitutionality is especially burdensome in facial challenges to a statute, where "the challenger must establish that no set of circumstances exist under which [a challenged act

of the legislature] … would be valid." Lynch, 205 S.W.3d at 389.

III. ANALYSIS

A. Availability of Punitive Damages

The Tennessee Supreme Court stated in its order declining certification that "it would be imprudent for it to answer the certified questions concerning the constitutionality of the statutory caps on punitive damages in this case in which the question of the availability of those damages in the first instance has not been and cannot be answered by [it]." (ECF No. 200-1 at 2.) It is correct that "[t]he issue of the availability of the common law remedy of punitive damages in addition to the statutory remedy of the bad faith penalty … was not certified [by this Court] …."(Id.) This Court, like another court in this district, "sees no persuasive data that the Tennessee Supreme Court would rule contrary to Riad [v. Erie Ins. Exchange, 436 S.W.3d 256 (Tenn. Ct. App. 2013)]." Carroll v. Nationwide Prop. & Cas. Co., No. 2:14-cv-02902-STA, 2015 WL 3607654, at *5 (W.D. Tenn. June 8, 2015). The court in Riad found that a plaintiff's damages were "not statutorily limited to the recovery of the insured loss and the bad faith penalty." Id. at *4 (quoting Riad, 436 S.W.3d at 276). Further, this Court has previously determined that Plaintiff was both eligible for punitive damages (ECF No. 187 at 20-25) and entitled to punitive damages (id. at 25-26).[2] Thus, the Court must

[2] The Court also discussed in detail the availability of punitive damages in addition to the statutory bad faith penalty in its December 9, 2014 order denying Defendant's motion to dismiss

next determine the proper amount of punitive damages Plaintiff may recover.[3]

B. Amount of Punitive Damages

1. The Tennessee Punitive Damages Cap

The jury awarded Plaintiff $3,000,000 in punitive damages. (ECF No. 152.) There exist, however, punitive damages caps in Tennessee; section 29-39-104(a)(5) of the Tennessee Code provides that: "Punitive or exemplary damages shall not exceed an amount equal to the greater of: (A) Two (2) times the total amount of compensatory damages awarded; or (B)

Plaintiff's claim for punitive damages. (See ECF No. 124 at 9-23.) The Court does not find that intervening law has changed its analysis. See, e.g., Carroll, 2015 WL 3607654, at *5 (finding that the statute setting forth the bad-faith penalty does not preclude punitive damages in breach-of-insurance-contract cases).

[3] Defendant argued in its briefing before the Tennessee Supreme Court that this Court needed to address first "whether the punitive award [by the jury] was impermissibly excessive under state and federal due process standards" before the constitutional question could be answered by the Tennessee Supreme Court. (Def.'s Br. at PageID 4338, ECF No. 203-1.) Defendant argued that this Court needed "to apply the factors pronounced in Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992) to assess whether the jury's punitive award contravenes Jackson National's state due process rights." (Id. at PageID 4339, ECF No. 203-1.) This Court rejected Defendant's arguments in its February 1, 2016, order denying Defendant's motion to revise. (See ECF No. 198 at 4-9 (finding that the Court is not required to follow state procedural rules and analyzing the punitive damages award in light of federal due process considerations).)

Five hundred thousand dollars ($500,000) ...."[4] The Tennessee punitive damages statute does not prevent a

[4] The Tennessee General Assembly enacted statutory caps on punitive damages awards as part of a broader tort reform package, the Tennessee Civil Justice Act of 2011 ("TCJA"). See Tenn. Code Ann. § 29-39-104; 2011 Tenn. Pub. Acts 510. Governor Haslam's administration and Tennessee House and Senate sought to boost the local economy and reduce unemployment by providing predictability in the state's tort liability regime that would allow Tennessee to more rigorously compete with other southern states in attracting companies looking to relocate their operations. See, e.g., Regular Calendar: Hearing on H.B. 2008 Before the Tennessee House Comm. on Judiciary, 2011 Leg., 107th Sess. at 29:55-30:10, (Tenn. 2011), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4078 (statements of Reps. Mike Stewart and Vance Dennis, Members, H. Comm. on Judiciary); see also Office of the Governor, Haslam Applauds Final Passage of Tennessee Civil Justice Act!, State of Tennessee Website (May 20, 2011, 5:45 AM), https://www.tn.gov/governor/news/30892 ("The legislation revises the state's civil justice system to make Tennessee more competitive for new jobs with surrounding states by bringing predictability and certainty to businesses calculating potential litigation risk and cost."). Some lawmakers in the Tennessee House expressed concern during floor debates that the TCJA would encroach on Tennesseans' state constitutional right to a trial by jury, but it is unclear to which specific provisions of TCJA, if any, they objected—the caps on noneconomic damages awards, punitive damages awards, or both—or whether they thought the entire bill was unconstitutional. See House Session – 32nd Legislative Day: Consideration of H.B. 2008 Before the Tennessee House, 2011 Leg., 107th Sess. at 43:45-45:21, 1:08:06-1:15:35 (Tenn. 2011), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4236 (statements of Reps. Craig Fitzhugh and Mike Stewart, Members). In the Tennessee Senate, lawmakers objected to caps on punitive damages awards, albeit on policy grounds instead of constitutional grounds, fearing that the then-prospective caps would incentivize multi-billion dollar corporations from foreign countries seeking cover from civil liability to relocate to Tennessee,

jury, such as the jury in the instant case, from awarding punitive damages greater than the statutory limit because the punitive damages caps cannot be disclosed to a jury. Tenn. Code Ann. § 29-39-104(a)(6). Rather, a court is to apply the caps "to any punitive damages verdict." Id. The punitive damages statute also states:

> Nothing in this section shall be construed as creating a right to an award of punitive damages or to limit the duty of the court … to scrutinize all punitive damage awards, ensure that all punitive damage awards comply with applicable procedural, evidentiary and constitutional requirements, and to order remittitur when appropriate.

Id. § 29-39-104(b) (emphasis added).[5]

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who would in turn ostensibly harm Tennessee citizens with relative impunity thereafter. Senate Session – 34th Legislative Day: Consideration of S.B. 1522 Before the Tennessee Senate, 2011 Leg., 107th Sess. at 1:30:47-1:44:42 (Tenn. 2011), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4266 (statements of Sens. Roy Herron, Andy Berke, and Jim Kyle, Members of the Tennessee legislature). Nevertheless, the bills passed in both houses. See House Session – 32nd Legislative Day: Consideration of H.B. 2008 Before the Tennessee House, 2011 Leg., 107th Sess. at 1:49:07-1:49:50 (Tenn. 2011), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4236; Senate Session – 34th Legislative Day: Consideration of S.B. 1522 Before the Tennessee Senate, 2011 Leg., 107th Sess. at 3:55:13-3:55:47 (Tenn. 2011), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=4266.

[5] The statute also provides that: "Nothing contained in this chapter shall be construed to limit a court's authority to enter judgment as a matter of law prior to or during a trial on a claim for punitive damages." Tenn. Code Ann. § 29-39-104(f).

2. Punitive Damages and the Right to Trial by Jury

Plaintiff argues that the Tennessee Constitution guarantees Plaintiff's right to trial by jury and that "[b]ecause a limitation on punitive damages did not exist at the time of the creation of the Tennessee Constitution, the punitive damages cap … infringes on the fundamental right to a trial by jury." (Pl.'s Br. at PageID 4617, ECF No. 205-1.) Defendant argues that there has never been a constitutional right in Tennessee to a jury's punitive damages award such that the right to trial by jury would be infringed by the cap. (Def.'s Br. at PageID 4341, ECF No. 203-1.) While the Court agrees with Plaintiff that the right to trial by jury is guaranteed by the Tennessee Constitution, the Court agrees with Defendant that the punitive damages caps do not violate such a right.

a. Right to Trial by Jury Guaranteed by Tennessee Constitution

The Tennessee Constitution's Declaration of Rights secures a number of individual rights, including the right to a trial by jury. Tenn. Const. art. I, § 6. The Tennessee Constitution has always guaranteed "[t]hat the Right of trial by Jury shall remain inviolate." Tenn. Const. of 1796, art. XI, § 6 (amended 1870), http://share.tn.gov/tsla/founding_docs/33633_Transcript.pdf.[6] In its guarantee of a right to trial by jury in civil

[6] The Tennessee Constitution has been amended several times since 1796, see Tre Hargett, Tenn. Sec'y of State, Tennessee Blue Book 641 (2015-2016), and the provision guaranteeing a right to a jury trial was amended in 1870, see Tenn. Const. of 1870, art. I, §

cases, the Tennessee Constitution preserves all the features of a jury trial "as [they] existed at common law . . . 'under the laws and constitution of North Carolina[7] at the time of the adoption of the Tennessee Constitution of 1796.'" Young v. City of LaFollette, 479 S.W.3d 785, 793 (Tenn. 2015) (quoting Helms v. Tenn. Dep't of Safety, 987 S.W.2d 545, 547 (Tenn. 1999)).

The Tennessee Constitution's guarantee of a right to trial by jury includes "the right to have the factual

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6 ("That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors" (emphasis added)), but such amendments have never disturbed the right to a trial by jury.

7 Before Tennessee was admitted to the Union, the lands largely comprising it today were subject to the laws of North Carolina, which had adopted its Constitution in 1776, following a brokered "private 'treaty'" between a North Carolina land speculator and the Cherokee tribe. See Cumberland Capital Corp. v. Patty, 556 S.W.2d 516, 519 (Tenn. 1977) (noting that North Carolina's 1776 Constitution was the precursor to Tennessee's 1796 Constitution, and that North Carolina law "basically was the organic law of the territory of Tennessee" prior to Tennessee's first Constitutional Convention at Knoxville in 1796); see also In re Estate of Trigg, 368 S.W.3d 483, 491 (Tenn. 2012) ("When Tennessee drafted its constitution and became a state in 1796, it inherited the 'legal and political institutions' created by North Carolina." (quoting Robert Pritchard, A Treatise on the Law of Wills and Administration § 34, at 38-39 (2d ed. 1928))); Hargett, supra note 6, at 503, 506-12 (describing how the territories known as Kentucky and Middle Tennessee originally came under North Carolinian jurisdiction, as opposed to Virginian jurisdiction, and how Tennessee emerged as an independent state following North Carolina's ratification of the United States Constitution in 1789 and cessation of certain of its western territories to the federal government).

issues in the case determined by a fair and unbiased jury." Ricketts v. Carter, 918 S.W.2d 419, 421 (Tenn. 1996). The assessment of damages is "a question [of fact] peculiarly within the province of the jury." Thompson v. French, 18 Tenn. 452, 459 (1837); see also Bonner v. Deyo, No. W2014-00763-COA-R3-CV, 2014 WL 6873058, at *4 (Tenn. Ct. App. Dec. 5, 2014) ("The Tennessee Constitution entrusts the responsibility of resolving questions of disputed fact, including a litigant's damages, to the jury.").

While the Tennessee Constitution guarantees the right to trial by jury, it does not guarantee that any plaintiff has a vested right to any particular legal remedy. See, e.g., Dowlen v. Fitch, 264 S.W.2d 824, 825 (Tenn. 1954) ("The cases which hold that a person has no vested right in any particular remedy are abundant."). As such, "there is no underlying statutory or constitutional right to punitive damages" in Tennessee. Univ. of Tenn. Chattanooga v. Farrow, No. E2000-02386-COA-R9-CV, 2001 WL 935467, at *6 (Tenn. Ct. App. Aug. 16, 2001); see also Tenn. Code Ann. § 29-39-104(b). Since punitive damages are not meant to be compensatory, see, e.g., Hodges v. S.C. Toof & Co, 833 S.W.2d 896, 900 (Tenn. 1992),[8] they amount to a

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[8] Former Tennessee Supreme Court Justice Drowota's majority opinion in Hodges provides an instructive history of the development of common-law punitive damages in Tennessee that is relevant to the instant case:

> As early as 1840, this Court stated: "In an action of trespass the jury are not restrained, in their assessment of damages, to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect of the malicious

> conduct of the defendant, and the degree of insult with which the trespass had been attended." Wilkins v. Gilmore, 21 Tenn. 140, 141 (1840). Shortly thereafter we explained that these damages should operate to punish the defendant and deter others from like offenses. Now termed punit[ive], vindictive, or exemplary damages, they were legally appropriate "in cases of fraud, malice, gross negligence, or oppression." Exemplary damage awards became proper in two instances: first, if the wrongdoer acted with fraudulent, malicious, or oppressive intent; and second, if the act, while not done with malicious intent, was done "in a rude, insulting or reckless manner, in disregard of social obligations, or with such gross negligence as to amount to positive misconduct." More recently we stated that punitive damages are available in cases involving fraud, malice, gross negligence, oppression, wrongful acts done with bad motive or so recklessly as to imply a disregard of social obligations, or where willful misconduct or an entire want of care raises a presumption of conscious indifference to the consequences. The contemporary purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future.

833 S.W.2d 896, 900 (Tenn. 1992) (emphasis added) (citations omitted). The phrase "[a]s early as 1840" is legally significant and determinative in the instant case, in that it suggests that there are no binding Tennessee precedents predating Wilkins that provide for the kind of damages awards in Tennessee that we call punitive damages today. The Wilkins court, writing in 1840, cited to an English treatise, published in 1830, for the proposition that:

> In an action of trespass the jury are not restrained, in their assessment of damages, to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages, in respect of the malicious conduct of the defendant, and the degree of insult with which the trespass has been attended.

"windfall for the plaintiff" to which a plaintiff specifically has no vested right, because punitive damages have "no relationship to the actual injury to the plaintiff." Vaughn v. Park Healthcare Co., 1994 WL 684485, at *8 (Tenn. Ct. App. Dec. 7, 1994).

To have a vested right in a punitive damages award, a court must first enter judgment in a plaintiff's favor, see Dowlen, 264 S.W.2d at 825; prior to that point, any jury findings as to an amount of punitive damages are not final and are subject to review by a court. See, e.g., Coppinger Color Lab, Inc. v. Nixon, 698 S.W.2d 72, 74 (Tenn. 1985) ("the discretion of the jury in fixing the amount of punitive damages is not beyond supervision by the Court"); Keith v. Murfreesboro Livestock Mkt., Inc., 780 S.W.2d 751, 755 (Tenn. Ct. App. 1989) ("While awarding punitive damages is the jury's prerogative, the jury's decision is not beyond judicial review." (citation omitted)).

b. No Violation of Right to Trial by Jury

Plaintiff asserts that the determination of punitive damages awards is included within the state constitutional right to trial by jury. (Pl.'s Br. at PageID 4617-18, ECF No. 205-1 (citing four Tennessee cases).) Defendant argues that "Plaintiff's argument is fundamentally flawed, however, because she fails to distinguish the state constitutional right to have a jury resolve questions of liability with the legislature's

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21 Tenn. at 141 (citing 3 Thomas Starkie, A Practical Treatise on the Law of Evidence: And Digest of Proofs, in Civil and Criminal Proceedings 1450-51 (1830)).

authority to limit the remedy for a particular cause of action." (Def.'s Br. at PageID 4346, ECF No. 203-1.) Plaintiff has the burden to establish that the challenged statute is invalid. Lynch, 205 S.W.3d at 390. The Court finds that the right to trial by jury does not encompass the right to punitive damages as awarded by the jury.

Plaintiff relies on inapposite case law because the damages at issue in three cases she cites, Tenn. Coach & R.R. Co. v. Roddy, 5 S.W. 286, 289 (Tenn. 1887); Thompson v. French, 18 Tenn. 452, 459 (1837); and Grace v. Curley, 3 Tenn. App. 1 (1926), were economic/compensatory damages, not punitive damages. A fourth case cited by Plaintiff, Wilkins v. Gilmore, offers some support for the proposition that juries have the authority to "award damages in respect of the malicious conduct of the defendant, and the degree of insult with which trespass had been attended." 21 Tenn. 140, 141 (1840). Wilkins, however, relied on a British treatise that cited only to British cases for the proposition. See supra p. 10 and note 8. While Plaintiff notes that "Tennessee, 'through North Carolina, adopted the common law of England as it existed in 1776,'" and the English cases that Plaintiff cites offer persuasive evidence that punitive damages existed at common law during the colonial period (Pl.'s Reply Br. at 7, ECF No. 205-2 (citing Dunn v. Palermo, 522 S.W.2d 679, 682 (Tenn. 1975)), the Tennessee constitutional right to trial by jury encompasses only a right to the trial, not a right to the specific remedy of punitive damages, as it existed at common law. (See State's Br. at 8, ECF No. 208-1 (citing Garner v. State, 13 Tenn. 160, 176 (1833) (Whyte, J., concurring) ("What

right of trial by jury is thus sanctioned and secured by the constitution? The answer is, 'the trial by jury as it then existed in force and use at the time of the adoption of the constitution.'" (emphasis added))).) Plaintiff appears to concede in effect that the right does not exist[9] but maintains that a statute capping punitive damages nevertheless encroaches on the judicial power. (Pl.'s Reply Br. at 3, ECF No. 205-2; see also infra Part III.B.3.)

In addition to failing to establish a state constitutional right to punitive damages, Plaintiff also fails to establish that punitive damages awards existed in North Carolina or in what is today Tennessee between 1776 and 1796.[10] As former Tennessee Justice Drowota noted in Hodges, there does not appear to be controlling authority in Tennessee prior to Wilkins that provides for an award of punitive damages in a jury trial. See Hodges, 833 S.W.2d at 900; supra p. 10 and note 8.

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[9] Plaintiff acknowledges that the right to trial by jury is limited insofar "as it existed at the formation of the [Tennessee] Constitution." (Pl.'s Reply Br. at 2, ECF No. 205-2 (quoting Trigally v. City of Memphis, 46 Tenn. 382, 385 (1869)).)

[10] In those decades, Tennessee was "a rough frontier state with what no one would consider to be a robust and well developed legal practice" because "[b]y 1800, the state still only had approximately a population of 105,602, with a majority of its 13,893 black residents enslaved," and civil litigation was thus ostensibly infrequent. (Br. for Beacon Center as Amicus Curiae Supporting Def. at PageID 4510 & n.4, ECF No. 204-1 (emphasis added).)

Furthermore, "the constitutional right to trial by jury does not apply to statutory rights and remedies created after the adoption of the 1796 Constitution." Young, 479 S.W.3d at 793 (emphasis added) (citing Helms, 987 S.W.2d at 547). "For such statutory rights and remedies, the Legislature is free to either dispense with the right of trial by jury, or provide for it." Id. at 793-94 (citations omitted). The Tennessee General Assembly likewise has the power "to abrogate the common law by statute." Guy v. Mut. of Omaha Ins. Co., 79 S.W.3d 528, 536 (Tenn. 2002); see also Nichols v. Benco Plastics, Inc., 469 S.W.2d 135, 137 (Tenn. 1971) ("The legislature may abolish remedies recognized at common law and create new ones to attain permissible legislative object."); Alamo Dev. Corp. v. Thomas, 212 S.W.2d 606, 610 (Tenn. 1948) ("[The state] may change the common law and the statutes so as to create duties and liabilities which never existed before." (quoting Cavender v. Hewitt, 239 S.W. 767, 770 (Tenn. 1922))); Nance v. O.K. Houck Piano Co., 155 S.W. 1172, 1174 (Tenn. 1913) (recognizing the General Assembly's power to change the common law and rejecting the proposition that adoption of the Tennessee Constitution froze the common law in time). The General Assembly's power is broad enough that it also extends to altering or abolishing common law defenses, in addition to altering or abolishing remedies. See, e.g., Scott v. Nashville Bridge Co., 223 S.W. 844, 848 (Tenn. 1919). The United States Supreme Court has recognized that "legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards." Cooper Indus.,

Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433 (2001).[11]

1. Comparison with Other States

Plaintiff offers case law from Missouri and Ohio[12] to support her assertion that statutory punitive damages

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[11] The Supreme Court noted that punitive damages serve functions similar to criminal offense punishments. Cooper Indus., 532 U.S. at 432-33. Notably, the Tennessee General Assembly also has the power to enact laws defining criminal offenses and punishments. See Woods v. State, 169 S.W. 558, 559 (Tenn. 1914). The General Assembly has enacted statutes that establish sentencing ranges for felony conduct, in direct contrast to the traditional criminal practice of jury determinations of criminal sentences, and courts had "virtually no authority to alter" a sentence, but "simply [to] impose[] the sentence." (Br. for Beacon Center as Amicus Curiae Supporting Def. at PageID 4528, ECF No. 204-1.)

[12] Plaintiff quotes a 1999 decision of the Ohio Supreme Court, which found that statutory limits on punitive damages violated the right to trial by jury. (Pl.'s Br. at PageID 4620, ECF No. 205-1 (quoting State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1091 (1999)).) Plaintiff also acknowledges, however, in a footnote, that "[t]he Ohio Supreme Court later upheld punitive damages caps passed by the Ohio legislature following Sheward." (Id. at PageID 4620 n.5 (citing Arbino v. Johnson & Johnson, 880 N.E.2d 420 (2007)).) The current status of Ohio law is that the punitive damages awards caps contained in section 2315.21 of the Ohio Revised Code are facially constitutional. Arbino, 880 N.E.2d at 441 ("regulation of punitive damages is discretionary and … states may regulate and limit them as a matter of law without violating the right to a trial by jury"); see also Bell v. Zurich Am. Ins. Co., 156 F.Supp.3d 884, 891 (N.D. Ohio 2015) (applying Ohio statutory punitive damages cap to a default judgment resulting from a bad faith insurance claim). But see Roginski v. Shelly Co., 31 N.E.3d 724, 762-63

caps violate the fundamental right to trial by jury. (Pl.'s Br. at PageID 4619-20, ECF No. 205-1.) In Lewellen v. Franklin, the Supreme Court of Missouri invalidated Missouri's statutory punitive damages caps, Mo. Rev. Stat. § 510.265, stating that, "[u]nder the common law as it existed at the time the Missouri Constitution was adopted, imposing punitive damages was a peculiar function of the jury," and the statute unconstitutionally "changes the right to a jury determination of punitive damages as it existed in 1820." 441 S.W.3d 136, 143-44 (2014) (en banc). The Missouri Constitution, similar to the Tennessee Constitution, provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate," Mo. Const. art. I, § 22(a), but unlike in Tennessee, courts in Missouri have historically awarded punitive damages, even prior to the adoption of the state's constitution. See Lewellen, 441 S.W.3d at 143-44 (collecting cases). Missouri's statutory law is also distinguishable from Tennessee's in that it also does not disavow that any statutory provisions may create a right to punitive damages. Compare Mo. Rev. Stat. § 510.270 (codifying the common-law practice of leaving the determination of money damages, including exemplary and punitive damages, to a jury) with Tenn. Code Ann. § 29-39-104(b) ("Nothing in this section shall be construed as creating a right to an award of punitive damages . . . .").

(Ohio Ct. Com. Pl. 2014) (invalidating Ohio statute as a violation of the Ohio Constitution's due process and equal protection guarantees, as applied).

More persuasive, however, is North Carolina law, to which Defendant cites (see Def.'s Br. at PageIDs 4350-52, ECF No. 203-1), since the Tennessee Constitution derives from the North Carolina Constitution. The Supreme Court of the State of North Carolina has upheld the state's statutory punitive damages caps against a challenge that the statute violates the right to trial by jury. See Rhyne v. K-Mart Corp., 594 S.E.2d 1 (N.C. 2004). In Rhyne, the jury awarded the plaintiffs $11.5 million each in punitive damages, and the trial court reduced the award to $250,000 for each plaintiff, per North Carolina General Statute section 1D-25,[13] a judgment the state appellate and state supreme courts found proper. See id. at 6, 21. Like the Tennessee Constitution, the North Carolina Constitution

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[13] The North Carolina statute provides that:

(a) In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.

(b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

(c) The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury.

N.C. Gen. Stat. § 1D-25(a)-(c) (emphasis added).

guarantees a right to trial by jury in civil matters. See N.C. Const. art. I, § 25 ("In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."). The "respecting property" language is significant. The Supreme Court of the State of North Carolina has construed article I, section 25 "to apply only to actions respecting property in which the right to a jury trial existed either at common law or by statute before the 1868 Constitution became operative and for actions created since then the right to a jury depends upon statutory authority ...." State ex rel. Rhodes v. Simpson, 372 S.E.2d 312, 314 (N.C. App. 1988) (citing The Chowan & Southern R.R. Co. v. Parker, 11 S.E. 328 (1890)), rev'd on other grounds, 385 S.E.2d 329 (1989). Thus, since the Rhyne plaintiffs' action for punitive damages was not a controversy "respecting property," their argument that juries had awarded punitive damages prior to the adoption of the North Carolina Constitution of 1868, was not persuasive.[14] See 594 S.E.2d at 10-11. Additionally, a federal court in North Carolina has indicated that North Carolina's statutory punitive damages caps could be applied in a case against an

[14] Alternatively, the Rhyne plaintiffs argued that "property" should be construed broadly so as to include a right to punitive damages. 594 S.E.2d at 11. Their argument, however, was unsuccessful. See id. at 12 ("[A]n entitlement to an award of punitive damages does not represent a right vested in a plaintiff. A plaintiff's recovery of punitive damages is fortuitous, as such damages are assessed solely as a means to punish the willful and wanton actions of defendants . . . ." (citing Overnite Transp. Co. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 125 S.E.2d 277, 286 (N.C. 1962))).

insurance provider in which the plaintiff raised a bad faith claim. See Guessford v. Pa. Nat. Mut. Cas. Ins. Co., 983 F. Supp. 2d 652, 670 (M.D.N.C. 2013) (denying the defendant's request to limit the scope of punitive damages at the summary judgment stage while noting that punitive damages caps already exist in North Carolina).

Plaintiff attempts to distinguish several states – but not North Carolina – that have upheld statutory punitive damages caps from Tennessee (Pl.'s Br. at PageIDs 4621-25, ECF No. 205-1), but the Court does not find these distinctions persuasive. For example, Plaintiff argues that the Alaska Supreme Court's holding in Evans ex rel. Kutch v. State, 56 P.3d 1046 (2002) that the state statutory punitive damages cap was constitutional relied on an equal protection challenge and not a challenge to the right to trial by jury. (Id. at PageIDs 4622-23.) Plaintiff asserts that "[b]ecause Tennessee's constitutional language guaranteeing the right to a jury trial is even stronger than Alaska's," the Court should find the dissent in Evans persuasive. (Id. at PageID 4623.) Plaintiff omits in her quoting of the dissent, however, a noticeable distinction between the damages to which the dissent refers and the punitive damages at issue in the instant case; the quoted language, in full, reads: "Construing constitutional provisions that are textually and historically similar to Alaska's, courts in Kansas, Oregon, Washington, and Alabama have held that non[] economic damages caps violate a plaintiff's right a jury trial." Evans, 56 P.3d at 1071 (Bryner, J., dissenting). The word "non-economic," which Plaintiff failed to include in her brief,

is crucial to this analysis: non-economic damages are a form of compensation related to actual injury, while punitive damages are designed to punish and deter wrongdoing.[15]

2. Comparison with Other Punitive Damages Prohibitions

Defendant asserts that outright federal and state statutory prohibitions on punitive damages in civil suits in which a municipality is a defendant are constitutional, and thus this Court should also find section 29-39-104 constitutional. (See Def.'s Br. at PageIDs 4352-53 & n.10, ECF No. 203-1 (citing Alexander v. Beale St. Blues Co., 108 F. Supp. 2d 934, 951 (W.D. Tenn. 1999)).) Such prohibitions on punitive damages recovery from municipal or local governments are a matter of public policy. See, e.g., Tipton Cty. Bd. of Educ. v. Dennis, 561 S.W.2d 148, 152 (Tenn. 1978). The Court's role is not to inquire into the relative wisdom of the legislature's policy priorities or its pronouncements but rather to interpret and apply the law. Richardson v. Young, 125 S.W. 664, 668 (Tenn. 1909) ("[T]he legislative power is the authority to make, order, and repeal, the executive, that to administer and

[15] A Tennessee trial court has similarly held that the Tennessee statutory non-economic damages cap under section 29-39-102 of the Tennessee Code is unconstitutional. (See Clark v. Cain, No. 12-C1147 (Cir. Ct. Hamilton Cnty. Mar. 9, 2015) (mem. op.), ECF No. 168-1.) On appeal, the Tennessee Supreme Court found that "the issue of the constitutionality of that cap [was] not ripe for determination . . . . Clark v. Cain, 479 S.W.3d 830, 832 (Tenn. 2015).

enforce, and the judicial, that to interpret and apply, laws."); see also infra Part III.B.3. As such, the Court recognizes and considers the fact that other laws constitutionally prevent recovery of punitive damages in Tennessee.

c. Conclusion

Tennessee authority and authority from other states demonstrate that the Tennessee statutory punitive damages caps are valid. They do not inhibit a jury's fact-finding role, as guaranteed by the state constitution, nor do they inhibit the jury's ability to determine an appropriate amount of punitive damages in light of the facts of the given case. Rather, the statutory punitive damages caps, applied after any jury determination has concluded, are independent of the right to trial by jury in Tennessee. Further, there exists no right to any specific remedy, including punitive damages. Thus, the Court finds that the statutory punitive damages caps do not violate Plaintiff's right to trial by jury.

3. Punitive Damages and the Separation of Powers

Plaintiff also asserts that the punitive damages caps "violate[] the separation-of-powers principles contained in the Tennessee Constitution." (Pl.'s Br. at PageID 4620, ECF No. 205-1.) Defendant argues that "a legislative limitation on the amount of a punitive award does not unconstitutionally invade the judicial domain." (Def.'s Br. at PageID 4341, ECF No. 203- 1.) The Court agrees with Defendant.

a. Separation of Powers in the Tennessee Constitution

The original Tennessee Constitution of 1796 gave the General Assembly what some thought to be outsized power, relative to the other branches, so a subsequent constitutional convention amended the framing document to include, inter alia, an express provision dividing governmental powers across three branches, the text of which has since remained undisturbed. See Hargett, supra note 6, at 641; see also Tenn. Const. of 1834, art. II, § 1 (amended 1870) ("The powers of the government shall be divided into three distinct departments; the Legislative, Executive and Judicial."), http://share.tn.gov/tsla/founding_docs/33662_Transcript.pdf; Tenn. Const. art. II, § 1 (same). A separate section provides that: "No 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; Tenn. Const. of 1834, art. II, § 2 (amended 1870) (same). Aside from these provisions that expressly compartmentalize governing authority, the Tennessee Constitution has always separately vested all legislative authority in a bicameral General Assembly, and all judicial power in the state's courts. See Tenn. Const. art. II, § 3 ("The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people."); Tenn. Const. of 1796, art. I, § 1 (amended 1870) (same); cf. Tenn. Const. art. VI, § 1 ("The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other

inferior Courts as the Legislature shall from time to time ordain and establish . . . ."); Tenn. Const. of 1796, art. V, § 1 (amended 1870) (same).

Thus, the state constitution expressly limits the General Assembly's influence over the judicial branch's power and jurisdiction to the establishment or dissolution of inferior courts. The General Assembly has "no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power." State v. Mallard, 40 S.W.3d 473, 483 (2001). The judicial power in Tennessee includes "the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved." Id. "[A]ny legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand." Id.

Within the system of courts, the Tennessee Constitution has always restrained judges' authority to restating testimony and instructing juries on the law, leaving the resolution of questions of fact exclusively to juries. See Tenn. Const. art. VI, § 9; Tenn. Const. of 1796, art. V, § 5 (amended 1870). As discussed above, however, the Tennessee Constitution does not prohibit the legislature from codifying, altering, or abrogating common-law causes of action and remedies. See infra Part III.B.2.b; see also, e.g., Tenn. Code Ann. § 56-7-105 (reducing available damages in a bad-faith refusal to pay an insurance claim case to twenty-five percent of the plaintiff's loss). "It is within the province of the

General Assembly, not the judiciary, to establish and control the remedies that are available to persons seeking judicial relief." Caudill v. Foley, 21 S.W.3d 203, 210 (Tenn. Ct. App. 1999) (emphasis added).

b. No Violation of Separation of Powers

Plaintiff asserts that, because juries are "the judges of damages awards," they have a "constitutional [judicial] function to independently decide controversies," and the statutory punitive damages caps thus infringe upon judicial power. (Pl.'s Br. at PageID 4621, ECF No. 205-1 (citing Mallard, 40 S.W.3d at 483).) Defendant argues that a legislature has the authority "to alter a litigant's common law legal remedy" without violating the Tennessee Constitution. (Def.'s Br. at PageID 4359, ECF No. 203-1.) The Court finds that the statutory punitive damages caps expressly preserve judicial review of punitive damages awards and do not encroach upon judicial power.

Tennessee juries find as to facts; Tennessee courts instruct juries as to applicable laws, and have authority in certain contexts to withdraw certain questions from laymen that are otherwise "[t]he province of the jury." 2 Lawrence A. Pivnick, Tenn. Cir. Ct. Practice § 25:1 (2016).[16] The text of the Tennessee Constitution vests

[16] Pivnick's civil practice guide distinguishes the jury function from the function of the court, describing the jury function as thus:

> A jury is a group of laymen chosen to determine questions of fact and so-called "mixed questions of law and fact," which involve the jury's application of law to the facts. It is the court, however, that determines and instructs the jury on the applicable law in all cases. The province of the jury is to weigh

judicial power in the courts, not in juries. Tenn. Const. art. VI, § 1 ("The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish ...." (emphasis added)). It does not follow, as Plaintiff argues,[17] that a statutory law encroaches on constitutional judicial power merely because a court applies the law to the "undisputed" facts as found by a jury during a trial and formally established in its verdict.[18] The Tennessee punitive damages statute

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> the evidence, pass on the credibility of witnesses, and to accept or reject testimony legally admitted in evidence by the court. The jury functions in cases in which what has happened is not agreed upon or admitted by the pleadings, and testimony is disputed and contradictory so that more than one factual conclusion can be drawn by reasonable men. Factual questions may be withdrawn from the jury and decided by the court, however, in cases where the facts are established by the evidence free from conflict, and the inferences from the facts are so certain that all reasonable men in the exercise of a free and impartial judgment must agree upon the facts. In the latter case, the court determines the action by applying the law to the undisputed facts.

Pivnick, supra page 26, § 25:1 (emphasis added).

[17] Plaintiff relies on the Washington State Supreme Court's holding in Sofie v. Fibreboard Corp., arguing "that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment [because of a statutory cap]. Such an argument pays lip service to the form of the jury, but robs the institution of its function." (Pl.'s Reply Br. at 8, ECF No. 205-2 (citing 771 P.2d 711, 721 (Wash. 1989)).).

[18] Furthermore, Plaintiff misquotes Mallard, which refers to "a 'court's constitutional function,'" not a jury's function.

expressly provides that a court has authority to review punitive damages awards and to grant "judgment as a matter of law prior to or during a trial on a claim for punitive damages." Tenn. Code Ann. §§ 29-39-104(b), (f). Where the legislature does not intend or attempt to usurp the judicial power, a statute should survive constitutional scrutiny. Mallard, 40 S.W.3d at 485 ("because the legislature did not intend to remove the discretion of the trial judge to determine the logical or legal relevance of such evidence, the statute . . . should be permitted to operate to the fullest extent allowed . . . ."); cf. State v. McKaughan, No. W2013-00676-CCA-R3-CD, 2014 WL 2547768, at *6 (Tenn. Crim. App. June 2, 2014) (upholding a criminal evidence statute from a separation of powers challenge "because it neither attempts to remove the trial court's discretion to determine what evidence is logically or legally relevant to an ultimate fact of consequence nor completely usurps the court's preliminary 'gatekeeper' function and dictate 'the ultimate judicial determination.'").[19]

1. Remittitur

Plaintiff argues that section 29-39-104 of the Tennessee Code unconstitutionally encroaches on a court's power of remittitur, a power that is constitutional because it operates "on a case-by-case basis," as compared with statutory caps, which are

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(Compare Pl.'s Br. at PageID 4621, ECF No. 205-1 with 40 S.W.3d at 483 (emphasis added).)

[19] Other states, too, have found that statutory punitive damages caps are constitutional and do not violate the separation of powers doctrine. See, e.g., Arbino, 880 N.E.2d at 443; Rhyne, 594 S.E.2d at 10.

"blanket rule[s]" and "arbitrary." (Pl.'s Br. at PageIDs 4625-26, ECF No. 205-1 (citing, inter alia, Webb v. Canada, No. E2006-01701-COA-R3-CV, 2007 WL 1519536, at *2 (Tenn. Ct. App. May 25, 2007) (discussing Tenn. Code Ann. § 20-10-102)), ECF No. 205-1.) Plaintiff also argues that "a [statutory] cap does not permit a trial court to exercise its discretion on a case-by-case basis." (Pl.'s Reply Br. at 4, ECF No. 205-2.)

Nothing in the text of the statute prevents a court from remitting a punitive damages award after applying the cap, alternatively ordering a new trial if a plaintiff does not want to accept a remitted award, or entering judgment as a matter of law; the statute merely prohibits the entry of judgment for a punitive damages award in excess of the greater of two times the compensatory damages award in a case or $500,000. See generally Tenn. Code Ann. § 29-39-104. Remittitur has roots in Tennessee common law, but was codified and modified by the General Assembly in 1911.[20] See Tenn. Code Ann. § 20-10-102; Smith v. Shelton, 569 S.W.2d 421, 423-425 (Tenn. 1978) (citing Lambert Bros. v. Larkins, 296 S.W.2d 353, 355-56 (Tenn. 1955) (Swepston, J., dissenting)) (observing that, although Tennessee courts had ordered remittitur "long before the [20th century]," the legislation codifying the common law of remittitur also modified it to grant plaintiffs and defendants a right of appeal, which did not previously exist, when they did not want to accept a judicially altered damages award). Thus, even if section 29-39-104 does encroach on remittitur, notwithstanding

[20] 1911 Tenn. Pub. Acts 29.

that its text expressly disavows any construction of it as so doing,[21] it would be encroaching on a statutory power, and not on a constitutional investiture of judicial power.

2. Public Policy Considerations

Plaintiff also argues that the caps "undercut[] one of the central purposes of punitive damages awards, namely, deterrence," and asks the Court to invalidate the statute because "[t]he punishment must fit the crime, and Tennessee's caps frustrate this longstanding principle of justice." (Pl.'s Br. at PageIDs 4626-27, ECF No. 205-1 (citing Amelia J. Troy, Comment, Statutory Punitive Damages Caps and the Profit Motive: An Economic Perspective, 40 Emory L.J. 303, 304 (1991) (arguing that punitive damages are more effective when defendants cannot predict what the amount will be)).) Tennessee's statutory punitive damages caps permit awards of the greater of twice the amount of compensatory damages, or $500,000. See Tenn. Code Ann. § 29-39-104(a)(5). The statute removes any cap in instances of intentional torts, extreme recklessness, or felonious conduct. See generally Tenn. Code Ann. § 29-39-104(a)(7); cf. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (setting forth a standard to ensure that punitive damages awards do not violate a defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution). With respect to the statute's purported arbitrariness, the reasoning employed by the Ohio

[21] The Alaska Supreme Court has held that statutory damages caps "cannot violate the separation of powers, because the caps do not constitute a form of remittitur." Evans, 56 P.3d at 1055.

Supreme Court in Arbino is instructive here. "Setting the limitation at double the amount of compensatory damages received by the plaintiff ensures that the defendant may still be punished . . . . This careful compromise represents a level of thought and attention to detail not seen in arbitrary or unreasonable statutes." 880 N.E.2d at 442-43.

Plaintiff's amicus also argues that "[t]he caps produce a situation where a jury renders a verdict, only to have it deemed meaningless and instead, categorically adjudicated by the legislature . . . . These caps effectively rob affected claimants of the reimbursement they are owed for the harms they have suffered." (Br. for United Policyholders Supporting Pl. at 13, ECF No. 207-1.) The legislature does not adjudicate claims under section 29-39-104. The jury finds general liability in one proceeding, the propriety and level of punitive damages in another proceeding, and enters a separate verdict for each proceeding. In both proceedings, the court adjudicates by entering judgment, after making a determination regarding remittitur or judgment as a matter of law. In the second proceeding, the court must apply a statutory edict to the jury verdict before entering final judgment. See generally Tenn. Code Ann. § 29-39-104. Furthermore, capping punitive damages does not, as Plaintiff's amicus contends, "rob affected claimants of the reimbursement they are owed." Punitive damages are not compensatory in nature, and are, as discussed above, a windfall for plaintiffs. See supra pp. 10-11. Thus, the Court finds that invalidating the statutory

punitive damages cap as a matter of public policy is unfounded in the law.

c. Conclusion

The Tennessee statutory punitive damages caps provide for judicial review of a punitive damages award; the statute does not unduly usurp judicial power and, therefore, survives constitutional scrutiny. The Court finds that the statutory punitive damages caps do not violate the separation of powers doctrine.

4. Application of the Punitive Damages Cap

Having found that the Tennessee punitive damages caps imposed by section 29-39-104(a)(5) are constitutional, the Court must determine whether subsection (A) or (B) applies in the instant case. Plaintiff may receive "an amount equal to the greater of: (A) Two (2) times the total amount of compensatory damages awarded; or (B) Five hundred thousand dollars ($500,000)." Tenn. Code Ann. § 29-39-104(a)(5). Since the jury awarded Plaintiff compensatory damages of $350,000 (see ECF No. 151 at 1),[22] Plaintiff would receive $700,000 under subsection (A), which is greater than the $500,000 designated by subsection

[22] Although Defendant argued that no actual damages existed because Plaintiff had "received the full benefit of her bargain" by the commencement of trial (see, e.g., ECF No. 172 at 4 n.4), the Court did not disturb the jury's award of $350,000 in actual damages (see generally ECF No. 187 at 20- 25).

(B). Thus, the Court finds that Plaintiff is entitled to $700,000 in punitive damages.[23]

C. CONCLUSION

For the foregoing reasons, the Court finds that the Tennessee statutory punitive damages caps are constitutional. The caps neither violate Plaintiff's right to trial by jury nor the separation of powers doctrine.[24] The Court further applies the relevant cap and finds that Plaintiff is entitled to punitive damages in the amount of $700,000.

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[23] Defendant concedes that "if the Court accepts Plaintiff's argument that she sustained $350,000 in actual damages, the Court should ... apply the cap to reduce the jury's excessive punitive award to $700,000." (ECF No. 172 at 4 n.4.)

[24] The Court notes that the only two issues before the Court and briefed by the parties before the Tennessee Supreme Court concerned the constitutionality of the statutory punitive damages caps with respect to the right to trial by jury and the separation of powers. Other state cases have addressed statutory punitive damages caps as being void for vagueness, see, e.g., Rhyne, 594 S.E.2d at 19, or a textual constraint of legislative power, see, e.g., Bayer CropScience v. Schafer, 385 S.W.3d 822, 831 (Ark. 2011). Other states have also addressed the caps under theories of violations of equal protection, see, e.g., Arbino, 880 N.E.2d at 443; due process, see, e.g., Evans, 56 P.3d 1046 at 1055; takings, see, e.g., Rhyne, 594 S.E.2d at 14; the right of access to courts, see, e.g., id. at 18; and "one-subject" rules, see, e.g., Evans, 56 P.3d at 1069-70. While Plaintiff argued that the Tennessee statutory damages caps violate substantive due process (Pl.'s Br. At PageID 4618-19, ECF No. 205-1), she failed to establish first that there exists a fundamental right to a punitive damages award. Thus, because the aforementioned issues were not before the Court, the Court has not considered them in this order.

IT IS SO ORDERED, this 28th day of September, 2016.

/s/ Jon P. McCalla
JON P. McCALLA
U.S. DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TAMARIN LINDENBERG, individually and as natural guardian of her minor children ZTL and SML,

Plaintiff-Appellee/Cross-Appellant,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee,

STATE OF TENNESSEE,

Intervenor-Appellee.

> Nos. 17-6034/6079

Appeal from the United States District Court for the Western District of Tennessee at Memphis.

No. 2:13-cv-02657—Jon Phipps McCalla, District Judge.

Decided and Filed: March 28, 2019

Before: CLAY, STRANCH, and LARSEN, Circuit Judges.

COUNSEL

ON PETITIONS FOR REHEARING EN BANC: Joseph Ahillen, OFFICE OF THE ATTORNEY GENERAL OF TENNESSEE, Nashville, Tennessee, for Intervenor Appellee. Daniel W. Van Horn, Gadson W. Perry, BUTLER SNOW LLP, Memphis, Tennessee, for Appellant/Cross-Appellee. **ON RESPONSE IN OPPOSITION:** Molly Glover, Charles S. Higgins, BURCH, PORTER & JOHNSON, PLLC, Memphis, Tennessee, for Appellee/Cross-Appellant. **ON BRIEF:** Cary Silverman, SHOOK, HARDY & BACON L.L.P., Washington, D.C., for Amicus Curiae.

CLAY, J. (pp. 3–5), delivered a separate opinion concurring in the denial of rehearing en banc in which STRANCH, J., joined. BUSH, J. (pp. 6–15), delivered a separate opinion dissenting from the denial of rehearing en banc. NALBANDIAN, J. (pp. 16–18), delivered a separate statement regarding the denial of rehearing en banc in which THAPAR, BUSH, and LARSEN, JJ., joined.

ORDER

The court received petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision. The petitions then were circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petitions are denied.

CONCURRENCE

CLAY, Circuit Judge, concurring in the denial of rehearing en banc. It is incredulous that some of my colleagues would have this Court establish rigid, mechanical, and unflinching criteria for certification to state courts in lieu of our established practice of trusting panels to exercise their experience, discretion, and best judgment to determine when certification is appropriate.

The Supreme Court has recognized that the decision of whether to certify "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). This approach recognizes that federal courts weigh numerous competing considerations when determining whether to certify. Of course, certification "is most appropriate when the question is new and state law is unsettled." *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995). But federal courts may also consider factors such as comity, cooperative federalism, and judicial economy. *See Rutherford v. Columbia Gas*, 575 F.3d 616, 628 (6th Cir. 2009) (Clay, J., dissenting). These multifarious considerations cannot be reduced to a checklist or simple mathematical formula, as my colleagues would have us believe.

Certainly, the decision concerning whether to certify is not always straightforward. Resolving requests for certification often entails a difficult analysis of several competing considerations. But the mere fact that ceding our discretion would be easier, and perhaps even more expedient, is not an adequate reason for us to shirk from our judicial obligations. Rather than adopt a rigid formula that answers the question for us of when to certify, we should trust ourselves and our own judgment, and that of our capable colleagues on this Court, to exercise our discretion wisely after considering the unique circumstances and considerations that may be present in a given case.

On the surface, my colleagues purport to take issue with this Court's procedure for certification. But, on a more fundamental level, they appear to challenge this Court's very jurisdiction to decide matters of state law in diversity cases, a power that emanates from Article III and which Congress has codified in 28 U.S.C. § 1332. It is an "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989). Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), and "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," *Cohens v. Virginia*, 19 U.S.

(6 Wheat.) 264, 404 (1821). Thus, when diversity jurisdiction is properly invoked, federal courts have a "duty . . . to decide questions of state law whenever necessary to the rendition of a judgment." *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943); *see Burgess v. Seligman*, 107 U.S. 20, 33 (1883) (explaining that "[t]he federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts"). And "it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State." *Fid. Union Tr. Co. v. Field*, 311 U.S. 169, 177 (1940) (call number omitted).

To the extent that my colleagues wish to circumvent Congress's directive that we decide state law issues in diversity cases, they ignore their constitutional obligation to exercise the jurisdiction conferred by Congress. To the extent that they would create new rules to infringe upon jurisdictional prerequisites for referral of cases to state courts, they engage in judicial activism in contravention of Congress's prerogative to define the jurisdiction of federal courts. Even if they doubt the wisdom of the scope of federal court jurisdiction as it currently stands, that does not justify their oblique attempt to circumscribe federal jurisdiction by impeding or eliminating our discretion to decide when certification is appropriate.

Moreover, my colleagues' concerns are unfounded. When this Court sits in diversity, we apply state law,

see Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), and therefore act as "only another court of the State." *Guar. Tr. Co. v. York*, 326 U.S. 99, 108 (1945). When required to do so, we predict state law, but we do not devise it. In many instances, federal courts are more than capable of correctly deciding state law issues without certifying them to the state's highest court. In those cases, certification would serve little purpose other than to needlessly delay resolution of the ultimate issues in the case. Some state courts frequently take an extended period of time to decide whether to address certified questions, only to ultimately reject the certification request and refuse to answer the questions for which we have sought guidance. I am personally aware of multiple instances in which state courts in our circuit have sat on certification requests for up to a year or more, only to deny the requests without taking any action. Of course, certification may be warranted in some cases. But we should not create a mechanical rule that would require us to certify issues in circumstances where our sound discretion and judicial experience would not direct us to seek certification.

Finally, in arguing for certification here, my colleagues have taken my statements from *Rutherford*, 575 F.3d 616, out of context. In *Rutherford*, this Court faced the question of whether the equitable doctrines of estoppel, laches, and waiver applied to an express easement under Ohio law. *Id.* at 618. The majority declined to certify the question, holding that the outcome was "largely controlled," *id.*, by our recent decision in *Andrews v.*

Columbia Gas Transmission Corp., 544 F.3d 618 (6th Cir. 2008). I dissented, arguing that *stare decisis* did not preclude certification because *Andrews* "relied almost exclusively" on a single intermediate court case that was likely wrongly decided, and because *Andrews* failed to discuss, much less distinguish, several cases from the Ohio Supreme Court that indicated that body would likely reach the opposite conclusion as the *Andrews* panel. *Rutherford*, 575 F.3d at 620–21. (Clay, J., dissenting). *Rutherford* is the inverse of this case. There, the panel privileged federal precedent over state decisions. Here, the panel stands accused of doing the opposite.

Ultimately, this panel properly considered the circumstances of the case. A jury found in Plaintiff's favor in December 2014. Three and a half years later, when this appeal was briefed and argued, neither party moved for certification. The State as intervenor did so only in a footnote, and only with regard to "the constitutional questions." But of course, the district court had already certified the constitutional questions to the Tennessee Supreme Court. That body, after waiting approximately seven months, declined to answer. Under these circumstances, it was well within our discretion to elect against a second certification attempt.

Accordingly, I concur in the denial of rehearing en banc.

DISSENT

JOHN K. BUSH, Circuit Judge, dissenting from the denial of rehearing en banc. This case presents an unusually strong set of reasons for certification to the Tennessee Supreme Court of state-law questions. It also highlights the need for our circuit to clarify and define certification standards to address the constitutional federalism considerations that underlie *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). I therefore respectfully dissent from the denial of rehearing.

To explain the reasons for my dissent, some history first is in order. The "judicial Power" of Article III extends to, among other categories, "Controversies . . . between Citizens of different States" and between state citizens and foreign citizens or subjects. U.S. Const. art. III, § 2. A common Antifederalist criticism of the United States Constitution was that it granted too much power to federal courts at the expense of states generally and state judiciaries in particular.[1] Responding to

[1] *See, e.g.*, Address by a Plebian (1788), *reprinted in The Essential Antifederalist* 63, 71 (W.B. Allen & Gordon Lloyd eds., 2d ed. 2002) ("The opposers to the constitution have said that it is dangerous because the judicial power may extend to many cases which ought to be reserved to the decision of the State courts . . . ."); George Mason, Objections (1787), *reprinted in The Essential Antifederalist*, *supra*, at 16, 17 ("The judiciary of the

Antifederalist criticism, Federalists defended federal-court authority to hear such cases—what would be called diversity jurisdiction—as a way to give out-of-state or foreign litigants a fair shake in court. Federal courts were thought to have less bias than state courts in favor of in-state parties, and diversity jurisdiction was designed to address the perceived unfairness of state courts.[2] Diversity

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United States is so constructed and extended as to absorb and destroy the judiciaries of the several states . . . ."); Centinel Letter 1 (1787), *reprinted in The Essential Antifederalist*, *supra*, at 96, 101 (expressing concern that "it is more than probable that the state judicatories would be wholly superseded"); Brutus, Essay XI, *reprinted in The Essential Antifederalist*, *supra*, at 185, 188 ("The judicial power will operate to effect in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution: an entire subversion of the legislative, executive and judicial powers of the individual states."); Brutus, Essay XV, *reprinted in The Essential Antifederalist*, *supra*, at 196, 199 ("Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial.").

[2] *See, e.g.*, *Guar. Tr. Co. v. York*, 326 U.S. 99, 111 (1945) ("The Framers of the Constitution, according to [Chief Justice John] Marshall, entertained 'apprehensions' lest distant suitors be subjected to local bias in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors." (quoting *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 87 (1809))); *Erie*, 304 U.S. at 74 ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."); Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations and the United States Constitution* 25–26 (2017) (noting that "James Madison argued strongly in favor of diversity jurisdiction at the Virginia ratifying convention on the ground that 'foreigners cannot get justice done them in [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us'" (quoting 3 *The*

jurisdiction did not violate federalism principles because it did not deputize federal courts to apply a different law than would have applied in the case had it been decided in state court.[3]

This understanding underlay Section 34 of the Judiciary Act of 1789, enacted by the First Congress, which provided that "the *laws of the several states*, except where the [C]onstitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (emphasis added).

In the *Erie* decision, the Supreme Court confirmed that "laws of the several states" includes the decisions of the state courts as well as enacted statutes and other sources of state law. *See Erie*, 304 U.S. at 78. This holding is derived from constitutional principles of federalism. *See id.* at 77–78; *Boyle v. United Techs. Corp.*, 487 U.S. 500, 517 (1988) ("*Erie* was deeply rooted in notions of federalism."). Therefore, under *Erie*, federal courts sitting in diversity must make an

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Debates in the Several State Conventions on the Adoption of the Federal Constitution 583 (Jonathan Elliot ed., 2d ed. 1901))).

[3] *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1514 (1984); *see generally* Bellia & Clark, *supra* note 2, at 28 (noting that in early cases involving general commercial law, called the "law merchant," "both federal and state courts deciding commercial cases 'considered themselves to be deciding questions under a general law merchant that was neither distinctively state nor federal'" (quoting Fletcher, *supra*, at 1554)).

informed assessment of what state law is by looking to state courts' decisions as well as to state statutes and state constitutions.[4]

However, a federal judge's assessment of state law "cannot escape being a forecast rather than a determination" if the state courts have not yet definitively resolved an issue. *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941). A federal court might make an inaccurate forecast and later be proved wrong if the state supreme court decides the issue the other way.

Probably in response to the problem of inaccurate federal-court guesses, Florida in 1945 was the first state to enact a certification procedure, whereby the state high court could accept and decide questions of state law necessary to the decision of lawsuits pending in federal courts of appeal. *See* Clark, *supra* note 4, at 1545. The Supreme Court recognized the procedure for the first time in *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207, 212 (1960). Today, all of the states except North Carolina have certification

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[4] *See, e.g.*, *Carnation Co. v. T.U. Parks Constr. Co.*, 816 F.2d 1099, 1100 (6th Cir. 1987) ("In *Erie Railroad*, the Court held that the federal district court was required, under a proper interpretation of the Judiciary Act of 1789 and, indeed, by the Constitution, to apply the law of the state in which it sits in resolving questions of substantive law."); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459, 1551 (1997) (noting that "the principles of judicial federalism recognized in [the *Erie* decision] preclude federal courts from 'declar[ing] substantive rules of common law applicable in a State'" and that diversity jurisdiction under *Erie* is not intended "to provide an alternative source of law" (quoting *Erie*, 304 U.S. at 78)).

procedures.[5] As certification became mainstream, the Supreme Court repeatedly commented favorably on the procedure and sometimes instructed lower courts to consider certification on remand. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997); *Lehman Bros. v. Schein*, 416 U.S. 386, 391–92 (1974); *see also Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1893 (2018) (Sotomayor, J., dissenting).

Because the Supreme Court has not announced concrete rules to govern lower federal courts in deciding whether to certify questions, those lower federal courts have had to make their own guidelines. Our circuit standards do nothing to narrow the discretion left to each district judge and Sixth Circuit panel. *See Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (stating only that certification may be appropriate where a question of state law is "new" and "unsettled"). This lack of direction creates the potential for intra-circuit conflict as to when certification is appropriate and reduces predictability. The lack of predictability convinces me that this circuit should have more concrete standards to guide its decisionmaking in these recurring situations; what is more, this was the ideal case in which to begin delineating those standards. Specifically, we should seriously consider establishing a presumption in favor of certification where, as here, the state supreme court has not settled the issue; a prior published panel decision has

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[5] *See* Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 Penn St. L. Rev. 377, 384–85 (2010).

addressed the issue but the current panel is inclined to disagree with the prior decision; and neither party objects to certification.

Sixth Circuit case law states that certification is appropriate if the question of state law is "new" and "unsettled," but that case law unfortunately fails to provide guidance in a recurring set of cases. *Transamerica*, 50 F.3d at 372. Those are the cases in which the question may not be new in the sense that no court has addressed it, but a decision from a federal court has the foreseeable potential to create a different state-law rule than what the state supreme court would have produced.

This is such a case. A previous decision of this circuit held that punitive damages were unavailable on a claim for bad-faith breach of an insurance contract. *Heil Co. v. Evanston Ins. Co.*, 690 F.3d 722, 728 (6th Cir. 2012). A later Tennessee Court of Appeals decision, by contrast, held that punitive damages were available. *See Riad v. Erie Ins. Exch.*, 436 S.W.3d 256, 275–76 (Tenn. Ct. App. 2013). Finding that *Riad* had discredited *Heil*, the panel majority here departed from circuit precedent. *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 357–59 (6th Cir. 2018). As a result, the panel majority reached a decision that is not opposed by any controlling Tennessee authority but that nonetheless presents a significant danger of being wrong, for reasons discussed thoroughly by the dissent. *See id.* at 372–76 (Larsen, J., dissenting in part). If and when the Tennessee Supreme Court reaches the issue, it may well hold that punitive damages are not

available on a bad-faith claim. As to the state constitutional question, there is also substantial reason to doubt that the Tennessee Supreme Court will invalidate the punitive-damages cap under the Tennessee constitution. *See id.* at 379–86 (Larsen, J., dissenting in part); *see generally* Br. Amici Curiae Chamber of Commerce of the United States of America, American Tort Reform Association, National Association of Manufacturers, National Federation of Independent Business, Small Business Legal Center, and American Property Casualty Insurance Association. In the meantime, plaintiffs who want punitive damages but seek to avoid the cap will be likely to file in federal district court.

This is exactly the sort of forum-shopping that the *Erie* decision was meant to reduce. *See Erie*, 304 U.S. at 74–75 (stating that federal courts' application of a general common law "made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court" and "rendered impossible equal protection of the law"); *see also McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) (Calabresi, J., dissenting); *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (en banc) (certifying two questions of state tort law where "the panel's analysis had substantial propensity to attract all future cases of this kind into federal court").

Indeed, dissenting from a Second Circuit panel's decision to decide a state tort-law issue instead of certifying, Judge Guido Calabresi wrote:

> [F]ederal courts . . . have tended to be far too reluctant to certify questions to the state courts . . . . Specifically, federal courts have all too often refused to certify when they can rely on state lower court opinions to define state law. I view this reluctance as both wrong and unjust.
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> Reluctance to certify is wrong because it leads to precisely the kind of forum shopping that *Erie* . . . was intended to prevent. *See Hanna v. Plumer*, 380 U.S. 460, 468 . . . (1965) (noting that one of the aims of the *Erie* decision was "discouragement of forum-shopping"). *This is especially so in situations where there is some law in the intermediate state courts, but no definitive holding by the state's highest tribunal*. In such cases, and in the absence of certification, the party that is favored by the lower court decisions will almost invariably seek federal jurisdiction. It will do this in order to prevent the state's highest court from reaching the issue, in the expectation that the federal court—unlike the state's highest court—will feel virtually bound to follow the decisions of the intermediate state courts . . . .
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> When federal courts, in effect, prevent state courts from deciding unsettled issues of state law, they violate fundamental principles of federalism and comity . . . . Federal courts that refuse to certify end up "mak[ing] important state policy, in contravention of basic federalism principles." *Hakimoglu v. Trump*

> *Taj Mahal Assocs.*, 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting) . . . .
>
> Reluctance to certify is unjust because, as has happened with some frequency, the federal court, having refused to certify, may decide an issue of state law one way, only to discover that the state's highest court, when presented with the issue in a later case, reaches the opposite result . . . .

McCarthy, 119 F.3d at 157–59 (Calabresi, J., dissenting) (emphasis added) (footnotes and some citations omitted).

Judge Frank Easterbrook of the Seventh Circuit sounded the same theme in his opinion for the en banc court in a tort case that raised unsettled state-law questions:

> In a case such as [this tort case] . . . . any substantial divergence between the federal court's estimate of state law and the state's view of its own law will funnel all similar litigation to federal court . . . . If the federal court treats the plaintiff more favorably than the state tribunal would, then the plaintiff always files in federal court; similarly[,] any departure in the [defendant's] favor leads the defendant to remove any suit filed in state court. In either case, the state loses the ability to develop or restate the principles that it believes should govern the category of cases. Certification then ensures that the law we apply is genuinely *state* law.

Todd, 9 F.3d at 1222 (citation omitted). If Calabresi and Easterbrook—two prominent federal judges of sometimes differing perspectives—have voiced identical worries about incentivizing forum-shopping through reluctance to certify, we in the Sixth Circuit should consider taking a definite step toward remediating those worries.

Despite these forum-shopping concerns, one objection to certification is that state courts, and the Tennessee Supreme Court in particular, often decline to answer certified questions. Although undoubtedly a true statement, that objection did not counsel against certification here for three reasons.

First, even if the state court declined to answer, this court would still have done the Tennessee Supreme Court the courtesy—requested by the Tennessee attorney general—of giving it the opportunity to speak authoritatively on its own law. *See* En Banc Pet. of State of Tenn. as Intervenor-Def./Cross-Appellee at 6. If that court declined to do so, then responsibility for any "friction-generating error" produced by a decision of this court would not lie at our door alone. *Arizonans*, 520 U.S. at 79.

Second, the Tennessee Supreme Court has made clear that it views certification as a valuable mechanism for preserving the sovereignty of state courts:

> More importantly, the certification procedure protects states' sovereignty. To the extent that a federal court applies different legal rules than the state court would have, the

> state's sovereignty is diminished [because] the federal court has made state law. Such an impact on state sovereignty is no small matter, especially since a federal court's error may perpetuate itself in state courts until the state's highest court corrects it.

Haley v. Univ. of Tenn.-Knoxville, 188 S.W.3d 518, 521 (Tenn. 2006) (citations and internal quotation marks omitted). Thus, the Tennessee judiciary has a favorable view of certification as a general matter, although, of course, the Tennessee Supreme Court is under no obligation to answer certified questions.

Third, in this case specifically, the Tennessee Supreme Court expressly stated in its denial of the district court's certified constitutional questions that it was making no comment on what it might do if the Sixth Circuit later certified the question of constitutionality and that question had become determinative because the predicate question of punitive damages' availability was also presented and certified. *See Lindenberg*, 912 F.3d at 372 (Larsen, J., dissenting in part). So the danger that the court would decline to answer certified questions was no greater than usual here and quite possibly less than usual, given the importance of the state constitutional question.

Speaking of the constitutional question, it is unusual for the panel to have invalidated a state statute on state constitutional grounds. This decision is in tension, in two respects, with the approach that the Supreme Court of the United States and our court have counseled in similar cases.

First, the Supreme Court and our court have indicated that abstention or certification is appropriate where a decision on state law may allow the federal court to avoid a *federal* constitutional question. *See, e.g.*, *Bellotti v. Baird*, 428 U.S. 132, 146–47 (1976); *Planned Parenthood Cincinnati Region v. Strickland*, 531 F.3d 406, 410–11 (6th Cir. 2008). Because federalism concerns as well as avoidance concerns appear in a case like this one, where a *state* constitutional question lurks behind a predicate state-law question, certification seems doubly wise. Indeed, the Eleventh Circuit has noted that "[c]ertification . . . is especially appropriate in a case . . . where the decisional task involves interpreting the state constitution." *LeFrere v. Quezada*, 582 F.3d 1260, 1268 (11th Cir. 2009) (citation omitted).[6] Second, and relatedly, the Supreme Court has indicated that the possibility of making an *Erie* guess that results in invalidating a state law should be avoided where certification

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[6] *See also Estate of McCall ex rel. McCall v. United States*, 642 F.3d 944, 946 (11th Cir. 2011) (certifying question whether cap on noneconomic medical malpractice damages violated provisions of Florida constitution on which there was no Florida Supreme Court guidance); *Int'l Soc'y for Krishna Consciousness of Cal. Inc. v. City of L.A.*, 530 F.3d 768, 773–76 (9th Cir. 2008) (certifying question whether airport was "public forum" under California constitution); *Parcell v. Governmental Ethics Comm'n*, 626 F.2d 160, 161 (10th Cir. 1980) (certifying question whether method of appointing Ethics Commission members violated "the doctrine of separation of powers as the same is recognized as a part of the Kansas State Constitution").

makes avoidance possible. *See Arizonans*, 520 U.S. at 79.

Also important to note is that, although neither Ms. Lindenberg nor Jackson National moved our court to certify the particular questions at issue here, our court can and does certify questions sua sponte. *See, e.g.*, *Am. Booksellers Found. for Free Expression v. Strickland*, 560 F.3d 443, 444 (6th Cir. 2009) (order). This would not be quite a sua sponte certification, anyway: Ms. Lindenberg already moved for certification of the state constitutional question in the district court, at which point the Tennessee attorney general intervened in the action. *See Lindenberg*, 912 F.3d at 355. The district court did certify the constitutional question (and one other constitutional question, not at issue here), but the Tennessee Supreme Court declined to answer it because it would not have been determinative of the litigation. *Id.*; *see id.* at 371–72 (Larsen, J., dissenting in part). On appeal, the Tennessee attorney general asked our court to certify the state constitutional questions in the event we found punitive damages were available. Br. of State of Tenn. as Intervenor-Def./Cross-Appellee at 9 n.2. Then, when asked at oral argument before our court if they had any objection to certification of the now determinative questions regarding the availability of punitive damages and the constitutionality of the punitive-damages cap, both sides agreed that certification would be appropriate.

Thus, all factors seem to point toward certification here. But because our circuit has no guidelines for

certification beyond suggesting that it is appropriate for novel and unsettled questions of state law, the panel could disregard the availability of the certification procedure.

To clarify our standards is the primary reason we should have granted rehearing in this case. The case is appropriate for en banc reconsideration in other ways as well, however. The Federal Rules of Appellate Procedure state that one ground for en banc rehearing is a split in circuit precedent. *See* Fed. R. App. P. 35(a)(1). We have that here. Furthermore, our circuit rules state that a panel decision may not be overruled except by the en banc court.[7] 6th Cir. R. 32.1(b). The panel decision here not only departs from precedent but also creates a major risk of horizontal forum-shopping, in contravention of fundamental federalism principles. Thus, it involves an issue of great importance. *See* Fed. R. App. P. 35(a)(2) (providing for en banc rehearing in cases of "exceptional importance").

In addition, to the extent our internal operating procedures counsel against rehearing solely state-law

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[7] The *Lindenberg* majority noted that "a single decision of a state court of appeals may abrogate this Court's interpretation of state law, at least in circumstances where (1) state law treats an appellate court decision as controlling in the absence of a ruling from the state supreme court; (2) there is no indication from the state supreme court that it would reach a different outcome; and (3) the state appellate court's decision is irreconcilable with our own ruling." 912 F.3d at 357 (citations omitted). However, here, as the dissent persuasively argued, there is reason to believe the Tennessee Supreme Court would reach a different outcome. *See id.* at 370, 373, 375 (Larsen, J., dissenting in part).

issues, *see* 6th Cir. I.O.P. 35(a), we would not be reconsidering such issues en banc here. As for the state-law issues, we would not be deciding them: we would simply be asking the state court to do that. And this would not be the first time that we have, while sitting en banc, certified issues to a state supreme court. *See Duffy v. Foltz*, 804 F.2d 50, 53–54 (6th Cir. 1986) (applying state court's answer to certified question after en banc court certified the question); *cf. Todd*, 9 F.3d at 1222 (Seventh Circuit certifying two questions of state tort law, which had become relevant as a result of the en banc court's vacating the panel decision, and observing that "[l]ittle would be served by substituting the guess of eleven judges for that of three; far better to pose the questions to the only judges who can give definitive answers"). But, in any event, if we had reheard this case en banc, we could have considered a very important *federal* question: what certification standard should apply in our circuit to implement the constitutional federalism principles articulated by *Erie* and its progeny.

In other words, we should have used this case to articulate more meaningful standards to guide certification decisions. At the very least, there should be a presumption in favor of certification where, as here, a state supreme court has not decided an issue; neither party objects to certification; and a prior precedential panel decision of this court stands between the current panel and the decision it wishes to reach on state law. *See* Clark, *supra* note 4, at 1553–54 (arguing for "a presumption in favor of certification in cases presenting" unsettled questions

of state law whose "resolution entail[s] the exercise of significant policymaking discretion"); *cf. McCarthy*, 119 F.3d at 161 (Calabresi, J., dissenting) (stating that certification is "appropriate" in "virtually any case in which 1) a significant and dispositive issue of state law is in genuine doubt . . . and 2) certification is specifically requested by the party that did not invoke federal court jurisdiction"). There should likewise be a presumption in favor of certification where the panel is facing an unclear issue of state constitutional law. *See LeFrere*, 582 F.3d at 1268.

Such a presumption would not upend the way we currently decide cases in the Sixth Circuit. I am not advocating for certifying questions in a vast set of new situations or for requiring every panel to certify if a certain group of boxes is checked. However, I do think we should make it easier for litigants to predict when this court will certify questions and easier for the en banc court to determine whether a panel has made a grave error in deciding a question of unsettled state law itself instead of certifying.

In sum, we have missed an opportunity to address a significant issue that is likely to recur. Assuming the Supreme Court provides no further guidance (but perhaps it will, which I would welcome), the burden falls on each circuit to define standards for certifying questions, and at some point we should examine our standards more carefully. Otherwise, we risk validating the prediction of the Antifederalists: that an encroaching federal judiciary would use federal judicial power to diminish the power of state judiciaries. To minimize the risk of unnecessary

interference with the autonomy and independence of the states, we should more frequently accept state courts' open invitations to pose to them certified questions regarding their own law.

STATEMENT

NALBANDIAN, Circuit Judge. Today's decision marks a missed opportunity for our court to more firmly establish its commitment to a "cooperative judicial federalism." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997). I would have granted rehearing en banc to certify the state-law questions to the Tennessee Supreme Court, rather than risk the kind of "friction-generating error" that arises when federal courts invalidate state statutes. *Id*. at 79. But the panel's decision not to certify the questions is not the last word on the matter. Nothing prevents future courts—whether another panel from this circuit or one of our district court colleagues—from certifying the same questions to the Tennessee Supreme Court should they arise again.

At first blush, it may seem inconsistent with stare decisis for a district court or a later panel of this court to certify a question after one panel has already made an *Erie* prediction about state law. But we have endorsed using the certification process to clarify state law in this exact situation. *See Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060–61 (6th Cir. 1994). Rather than allow federal courts to "authoritatively determin[e] unresolved state law," the better practice is to send those questions to the state judiciary for resolution. *Id*. at 1061 (quoting *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960)). The state court,

of course, can turn us down. *See, e.g., Geib v. Amoco Oil Co.*, 163 F.3d 329, 330 (6th Cir. 1995). And in that case we must keep following the dictates of stare decisis. *Id.* But until the state judiciary speaks on an unsettled issue of state law, no amount of decisions from this court prevents the *next* court from certifying the question.

Years after *Geib*, another panel in our circuit faced this same dilemma. The majority opted not to exercise its discretion to certify because, among other reasons, "it would arguably be inconsistent with" the court's precedent. *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009). But in a thoughtful dissent, Judge Clay cast serious doubt on that proposition. "[C]ertifying a question to a state court does not implicate, much less contradict, our obligations under *stare decisis*." *Id.* at 623 (Clay, J., dissenting). That's because asking the state court to weigh in does not modify or overturn prior precedent. *Id*. It's an exercise of deference to the judicial body that actually holds the power to resolve unsettled questions of state law.

And, more importantly, the majority's decision in *Rutherford* was not inconsistent with what we said in *Geib*. The majority in *Rutherford* only exercised its discretion not to certify that particular question, did not cite the prior panel decision in *Geib*, and did not discuss the question of whether certification would have been inconsistent with stare decisis.

To be sure, not every circuit agrees. The Fifth Circuit, for example, adopts a more restrictive view of stare decisis. Courts there must continue applying

suspect precedent rather than certify the issue to the state court. *See Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 425 (5th Cir. 2001); *Lee v. Frozen Food Express, Inc.*, 592 F.2d 271, 272 (5th Cir. 1979). But the Fifth Circuit also permits rehearing en banc to correct panel decisions that misapply state law. *See* I.O.P. following 5th Cir. R. 35; *see also Sturgeon v. Strachan Shipping Co.*, 731 F.2d 255, 256 (5th Cir. 1984); *Hudson v. R. J. Reynolds Tobacco Co.*, 427 F.2d 541, 542 (5th Cir. 1970) ("We are bound by the [precedent] on this issue . . . until, if ever, the Court en banc redecides the question or the Louisiana courts hold differently."). We, on the other hand, have no such luxury. Our internal rules preclude rehearing en banc for alleged errors of state law. *See* 6 Cir. I.O.P. 35(a). Adopting the Fifth Circuit rule while maintaining our own rules for rehearing en banc would turn a randomly selected, three-judge panel into the court of last resort for many state-law issues. *See Geib*, 29 F.3d at 1060 (explaining the "very real danger that Michigan's courts will be denied any meaningful participation in the interpretation of" their own law for issues that almost always involve diverse parties). But we have avoided that predicament by establishing a narrower view of stare decisis.

Federal courts have a duty to properly decide questions of state law. It's a duty "from which we may not shrink." *Rutherford*, 575 F.3d at 624 (Clay, J., dissenting). Certification is one tool to assist us in this endeavor. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974). And it makes no difference

whether one panel has already spoken on the issue. *See Geib*, 29 F.3d at 1060–61. *See also Eads v. Morgan*, 298 F. Supp. 2d 698, 707 (N.D. Ohio 2003). We are, after all, merely predictors of state law. *See Stryker Corp. v. XL Ins. Am.*, 735 F.3d 349, 358 (6th Cir. 2012). We speculate about how the state judiciary might answer these unsettled questions.

But stare decisis does not turn unsettled questions of state law into settled ones. And federal courts must always be free to seek answers from the only judicial body capable of providing them.

ENTERED BY ORDER OF
THE COURT

/s/ Deborah S. Hunt, Clerk