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A STATE-CIRCUIT SPLIT: RECONCILING TENNESSEE DAMAGE CAPS AFTER *LINDENBERG* AND *MCCLAY*

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I. INTRODUCTION

A divided panel of jurists on the United States Court of Appeals for the Sixth Circuit invalidated Tennessee's caps on punitive damages in *Lindenberg v. Jackson National Life Insurance Company* on December 21, 2018.¹ The Sixth Circuit, sitting en banc, denied an application to rehear the case.² A year later, the United States Supreme Court denied the petitions for writs of certiorari of both Jackson National Life Insurance Company and

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¹ 912 F.3d 348, 370 (6th Cir. 2018). Only one law review article has even mentioned the *Lindenberg* case thus far. The dissenting jurist on the Sixth Circuit authored the manuscript. See Joan L. Larsen, *State Courts in a Federal System*, 69 CASE W. RES. L. REV. 525, 539 n.56 (2019).

² *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 919 F.3d 992, 993 (6th Cir. 2019).

the State of Tennessee.³ Meanwhile, the Tennessee Supreme Court heard a challenge, via certified question from the Middle District of Tennessee, to the Volunteer State's statutory limits on non-economic damages.⁴ In early 2020, a divided court held the caps did not violate the Tennessee Constitution's protections for litigants' right to a trial by jury, separation of powers, or equal protection.⁵ Accordingly, the law of damage caps in Tennessee remains unsettled. The court of last resort on issues of state law, the state supreme court, has issued a ruling that seemingly conflicts with the Sixth Circuit's interpretation of the state's constitution; however, the Tennessee Supreme Court majority, while acknowledging the Sixth Circuit's opinion in a footnote, explicitly chose not to address any issues of punitive damages.⁶ Therefore, the constitutionality of Tennessee's punitive damage limits is currently unsettled, and this situation presents a rare state-circuit split of authority.

This essay attempts to reconcile the two opinions to determine the law on Tennessee punitive damage caps and the right to a jury, as well as to caution against the ambiguities caused by state-circuit splits. Of course, the Sixth Circuit's opinion is not binding on Tennessee courts.⁷ However, it is persuasive authority that runs contrary to a recent Tennessee Supreme Court decision.⁸ It is, consequently, necessary to detangle this jurisprudence to distill some clarity. This analysis proceeds in five parts: first, this introduction; second, an examination of the Sixth Circuit's *Lindenberg* opinion; third, a brief summary of the Tennessee Supreme Court's decision in *McClay*; fourth, a consideration of the state of the law; and, fifth, a contemplation on the future of Tennessee punitive damage caps, state-circuit splits in the Sixth Circuit, and other conclusions.

³ Jackson Nat'l Life Ins. Co. v. Lindenberg, 140 S. Ct. 624 (2019); Tennessee v. Lindenberg, 140 S. Ct. 635 (2019).

⁴ McClay v. Airport Mgmt. Services, LLC, No. M2019-00511-SC-R23-CV, 2020 WL 915980 (Tenn. Feb. 26, 2020).

⁵ *Id.* at *6.

⁶ *Id.* at *4 n.6.

⁷ See *id.* ("As a preliminary matter, we note that decisions by federal circuit court[s] of appeals are not binding on this [c]ourt.") (citations omitted).

⁸ See *In re All Assessments*, 67 S.W.3d 805, 818–19 (Tenn. Ct. App. 2001).

II. SIXTH CIRCUIT CASE

Plaintiff Tamarin Lindenberg was the beneficiary of her former husband's life insurance policy, which was held by Defendant Jackson National Life Insurance Company (Jackson), for \$350,000.⁹ All premiums were properly paid.¹⁰ Upon her ex-husband's death, Lindenberg filed a claim with the Defendant.¹¹ Jackson refused to relinquish the benefits without signed waivers from all interested parties.¹² Lindenberg subsequently filed the cause of action that was the subject of the instant litigation.¹³ The parties participated in a week-long trial that resulted in the jury awarding Lindenberg compensatory damages worth \$437,500 and punitive damages totaling \$3,000,000.¹⁴ Jackson moved to impose Tennessee's punitive damage caps.¹⁵ The District Court certified two questions as to the constitutionality of the limits to the Tennessee Supreme Court, which declined to answer.¹⁶ Accordingly, the District Court found the caps to be constitutional and imposed the limits, reducing Lindenberg's punitive damages from \$3,000,000 to \$700,000.¹⁷ A divided panel of the Sixth Circuit declared the punitive damage caps in Tennessee Code Annotated § 29-39-104 to violate the Tennessee Constitution's guarantee of the right to a jury.¹⁸ The opinion considered multiple issues, but only the constitutionality of Tennessee's punitive damage limits is explored here.

⁹ *Lindenberg v. Jackson Nat'l Life Ins. Co.*, No. 2:13-cv-02657-JPM-cgc, 2014 WL 11332306, at *1 (W.D. Tenn. Dec. 9, 2014).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at *1–2.

¹³ *Id.* at *2.

¹⁴ *Lindenberg*, 912 F.3d at 354–55.

¹⁵ *Id.* at 355.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 366 (“[W]e find that the General Assembly’s attempt to cap punitive damages

The court reviewed Tennessee common law to determine the scope of the right to a jury. Though the majority noted Tennessee does not guarantee a jury in every case, the right protects access to juries in the same way as that access existed in North Carolina common law at the time of the Tennessee Constitution's adoption in 1796.¹⁹ The right to have a jury determine punitive damages existed during that period, according to the court; thus, the right to a jury in Tennessee encompasses the guaranteed ability to have a jury decide punitive damage awards.²⁰ Moreover, punitive damages have traditionally been issues of fact to be determined by juries, not the court.²¹ On this appeal, Jackson was joined by the Attorney General of Tennessee in defending the statutory punitive damage caps.²² Those parties advanced six arguments for the statute's constitutionality.²³ Of those, only three are relevant to this inquiry. The court addressed each assertion in turn.

The first pertinent argument for our study was that the Tennessee General Assembly has the authority to abrogate or abolish common law remedies.²⁴ The majority concurred in this broad pronouncement, however it noted that this power is not absolute.²⁵ The legislature may only alter the state's common law to the extent that doing so does not infringe upon a constitutional protection.²⁶ The court analogized the state's argument as "[a]kin to arguing that parents may drive as fast as they wish because

. . . constitutes an unconstitutional invasion of the right to trial by jury under the Tennessee Constitution."); see TENN. CONST. art. I, § 6 ("That the right of trial by jury shall remain inviolate . . ."); TENN. CODE ANN. § 29-39-104 (declaring a punitive damage limit of the greater of either two times the compensatory damages awarded or \$500,000).

¹⁹ *Lindenberg*, 912 F.3d at 364 (citing *Young v. City of LaFollette*, 479 S.W.3d 785, 793 (Tenn. 2015)).

²⁰ *Id.*

²¹ *Id.*; see also *Southeastern Greyhound Lines, Inc. v. Freels*, 144 S.W.2d 743, 746 (Tenn. 1940) ("[T]he 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.").

²² See *id.* at 352–53.

²³ *Id.* at 366–69.

²⁴ *Id.* at 367.

²⁵ *Id.*

²⁶ *Id.*

parents make the rules. Each argument ignores a key constraint on the rulemaker's authority."²⁷ The court therefore rejected that the legislature possessed the ability to impose damage caps if those restrictions infringe on the right to a jury, which the majority ruled they did in this case.²⁸

The state and Jackson next contended the damage limits were Tennessee's method of ensuring due process under the United States Supreme Court's decision in *BMW of North America, Inc v. Gore*.²⁹ However, the court summarily rejected this claim because the statute's formula for punitive damages bore no relation to the Supreme Court's method in *Gore*, which rejected a categorical approach.³⁰

Subsequently, the Attorney General offered that the damage caps do not infringe on the jury's role because the jury does not learn of the caps and is free to make its findings of fact, then, as a matter of law, the court imposes the will of the legislature.³¹ Essentially, the court acknowledged, the state was arguing that the punitive damage limits were a regulation on remittitur, a process by which a judge reduces unreasonable jury awards.³² However, Tennessee common law has traditionally rejected the power of the legislature to control remittitur.³³ Consequently, if the state's contention was true and the General Assembly was regulating remittitur, that would also violate the state Constitution as an infringement of the separation of powers.³⁴ Moreover, the majority rebuffed the claim that the jury's ignorance of the caps made them permissible. The court stated that the right to a jury belongs to the litigant, not the jurors, and the panel's lack of knowledge still violates the litigants' right to have the jury decide all factual

²⁷ *Id.* at 376–68.

²⁸ *Id.* at 368.

²⁹ *Id.*; see 517 U.S. 559, 568 (1996).

³⁰ *Id.*; see *Gore*, 517 U.S. at 582–83 (“We 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.*”) (emphasis added).

³¹ *Id.* at 369.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

disputes.³⁵ After addressing these arguments, and three others, the majority held the statutory punitive damage caps to be unconstitutional as a violation of the right to have a jury decide all issues of fact.³⁶

One of the jurists on the panel, Judge Joan L. Larsen, concurred in part and dissented in part, specifically dissenting as to the punitive damage ruling.³⁷ Larson primarily disagreed with the majority's failure to certify this question of state constitutional interpretation to the Tennessee Supreme Court.³⁸ The dissent also questioned whether there was even an issue as to the state jury right in the instant case because it was a diversity matter and Larsen considered the jury right to be procedural, thus making federal procedural rules apply.³⁹ Finally, Larsen contended that there are "ample grounds for doubt" as to the constitutionality of the punitive damage caps, and thus court should defer to the legislature where such doubt exists, as does the Tennessee Supreme Court itself.⁴⁰

The unsuccessful parties, Jackson and the State of Tennessee, petitioned to have the case reheard before the entire Sixth Circuit. However, a majority of members voting in the negative, the court sitting en banc denied that request.⁴¹ Following the Sixth Circuit's decision not to rehear, Jackson and Tennessee filed petitions for a writ of certiorari to the United States Supreme Court seeking a ruling on whether the Sixth Circuit should have certified the question of Tennessee Constitutional interpretation to the Tennessee Supreme Court.⁴² On December 9, 2019, the Court denied both petitions.⁴³

³⁵ *Id.*

³⁶ *Id.* at 370.

³⁷ *Id.* (Larsen, J., dissenting).

³⁸ *Id.* at 371–72.

³⁹ *Id.* at 376–79.

⁴⁰ *Id.* at 371, 386.

⁴¹ *Lindenberg*, 919 F.3d at 993.

⁴² Petition for Writ of Certiorari, *Tennessee v. Lindenberg*, 140 S. Ct. 635 (2019) (19-13); Petition for Writ of Certiorari, *Jackson Nat'l Life Ins. Co. v. Lindenberg*, 140 S. Ct. 624 (2019) (19-4).

⁴³ *Jackson Nat'l Life Ins. Co. v. Lindenberg*, 140 S. Ct. 624 (2019); *Tennessee v. Lindenberg*, 140 S. Ct. 635 (2019).

III. TENNESSEE SUPREME COURT DECISION IN *McCLAY*

In *McClay v. Airport Management Services, LLC*, a sharply divided Tennessee Supreme Court held the state's non-economic damage caps to be constitutional.⁴⁴ The court addressed some of the same arguments considered in the *Lindenberg* appeal. The *McClay* case questioned the non-economic damage caps on three grounds: the right to a jury, separation of powers, and equal protection.⁴⁵ However, because it most closely relates to *Lindenberg*, this essay only examines the court's dispensation of the right to a jury challenge. The majority grounded its conclusion on two contentions.

First, the majority, implicitly disagreeing with the Sixth Circuit, discussed the General Assembly's authority to abridge the state's common law.⁴⁶ While the court concurred with the Sixth Circuit that the right to a jury to decide the amount of non-economic damages as a question of fact.⁴⁷ However, the court saw the legislature's enactment of statutory caps on non-economic damages as either "a limitation on the available remedy for certain causes of action" or "an abrogation of causes of action for claims exceeding the statutory limit."⁴⁸ Under either view, the court held that the legislature was acting within its power.⁴⁹ The court recognized, nevertheless, that the General Assembly's ability to abolish or alter common law actions is limited by the state's constitution.⁵⁰

To reach the conclusion that the legislature's action did not violate the right to a jury, the court focused on the jury's lack of knowledge of the

⁴⁴ *McClay*, 2020 WL 915980, at *6.

⁴⁵ *Id.* at *1.

⁴⁶ *Id.* at *3.

⁴⁷ *Id.* at *2.

⁴⁸ *Id.* at *3.

⁴⁹ *Id.*

⁵⁰ *Id.*

caps when reaching its decision.⁵¹ Unlike the Sixth Circuit, the majority did not find the litigants' right to a jury to be infringed when the jury is allowed to reach its factual conclusions and only then the trial judge imposes the legislature's judgment on the amount of damages as a matter of law.⁵² Finding support from the Supreme Court of Idaho, the Tennessee Supreme Court noted that the jury right only entitles litigants to present their evidence and have the jury decide the facts. It is then for the legislature and the judiciary to determine the consequences of the jury's decision.⁵³ Accordingly, the parties' rights to a jury are satisfied where the jury renders a verdict on the facts and the legislature's judgment is later substituted by the court as a matter of law.⁵⁴ Based on these two findings, the majority upheld the cap on non-economic damages.⁵⁵

Two justices dissented from the decision. Justice Cornelia A. Clark asserted that the General Assembly had unilaterally altered the constitution in its attempt to abridge the common law.⁵⁶ Though Clark agreed the legislature may change the state's common law, it must do so within the bounds of the constitution, and by imposing non-economic damage caps, the legislature infringed on the state's constitution.⁵⁷ Clark likewise found the majority's differentiation between the jury's role as finder of fact being completed upon rendering its verdict and the court imposing the legislature's caps later to be unpersuasive.⁵⁸ Clark specifically noted, "The fact-law dichotomy exalts form over substance. It serves as a means of obfuscating the true effect of statutes capping damages, which is to render a jury's constitutionally protected fact-finding function an exercise in futility—a façade, a sham, and a pretense."⁵⁹ Thus, Clark would find the

⁵¹ *Id.* at *4.

⁵² *Id.*; see *Lindenberg*, 912 F.3d at 369.

⁵³ *McClay*, 2020 WL 915980, at *4 (quoting *Kirkland v. Blaine Cty. Med. Ctr.*, 4 P.3d 1115, 1120 (Idaho 200)).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at *8 (Clark, J., dissenting)

⁵⁷ *Id.*

⁵⁸ *Id.* at *9.

⁵⁹ *Id.*

non-economic damage caps to violate the right to a jury protected by the Tennessee Constitution.⁶⁰

Justice Sharon G. Lee submitted a separate dissent. Like Clark, Lee viewed the legislature's enactment of non-economic damage caps not to be an alteration of the common law, but a de facto constitutional amendment.⁶¹ Lee based her argument on the foundation that the claim in that litigation was one of negligence, which is a common law action. While the legislature could remove the cause of action, it could not prohibit the facts of negligence claims from being heard by a jury.⁶² Hence, the General Assembly did not abridge a common law cause of action by enacting the caps, it altered a constitutional right—a feat it is powerless to do.⁶³ Finally, Lee wholly rejected the majority's contention that the jury's duty is discharged once it issues a verdict and then the court is free to impose the caps as a matter of law.⁶⁴ Lee called this justification “smoke and mirrors” and added of the scheme, “A jury's award of damages that exceeds the damage cap is ignored; the jury might as well have not deliberated and made its award.”⁶⁵ Lee would therefore join Clark in holding the non-economic damage caps unconstitutional.⁶⁶

In sum, the Tennessee Supreme Court upheld the constitutionality of the state's non-economic damage caps.⁶⁷ While the court examined the same issues as the Sixth Circuit had just over a year prior, it reached a strikingly different conclusion. Notably, the Tennessee Supreme Court was considering non-economic damage limits, not punitive damage caps, so the courts were adjudicating two different issues. However, the majority on the Tennessee Supreme Court acknowledged the Sixth Circuit's decision in a footnote, taking some issue with the federal court's failure to certify a

⁶⁰ *Id.* at *10.

⁶¹ *Id.* (Lee, J., dissenting).

⁶² *Id.* at *14.

⁶³ *Id.*

⁶⁴ *Id.* at *15.

⁶⁵ *Id.*

⁶⁶ *Id.* at *16.

⁶⁷ *Id.* at *6.

question of state constitutional law to that state's high court, but otherwise noting that it expressed no opinion on Tennessee's punitive damages.⁶⁸

IV. STATE & FEDERAL COURT CONFLICTS

The disagreement between the Tennessee Supreme Court and the Sixth Circuit on the interpretation of a state constitutional legal issue presents two problems for scholars, practitioners, and other courts who are attempting to understand the state of the law. First, there is a lack of comity between the two courts that are the most binding on the Volunteer State. Second, the right to a jury in Tennessee is uncertain.

The Sixth Circuit's decision not to certify the question of the constitutionality of punitive damages is noteworthy. On the one hand, the court seemingly went against the typical policy of federal courts when faced with such a constitutional challenge.⁶⁹ On the other hand, the District Court had already certified the question to the Tennessee Supreme Court, which denied the request with a note that it might consider a later certification from the circuit court.⁷⁰ Undoubtedly, the decision not to certify led to further litigation for the parties involved, along with some amici curia from interested parties including the State of Ohio, which is a state in the Sixth Circuit, to the United States Supreme Court.⁷¹ The Court, as previously noted, denied certiorari on the issue of certification.⁷² Typically, though not always the rule, the Court's denial of a petition for certiorari indicates tacit support, or at least a grant of deference, for the court below's judgment.⁷³

⁶⁸ *Id.* at *4 n.6.

⁶⁹ *Lindenberg*, 912 F.3d at 371 (Larsen, J., dissenting).

⁷⁰ *Id.* at 355.

⁷¹ Brief of Amici Curiae States of Ohio, et al., in Support of the Petitioners, *Tennessee v. Lindenberg*, 140 S. Ct. 635 (2019) (19-13); Brief of Amici Curiae States of Ohio, et al., in Support of the Petitioners, *Jackson Nat'l Life Ins. Co. v. Lindenberg*, 140 S. Ct. 624 (2019) (19-4).

⁷² *Jackson Nat'l Life Ins. Co. v. Lindenberg*, 140 S. Ct. 624 (2019); *Tennessee v. Lindenberg*, 140 S. Ct. 635 (2019).

⁷³ See Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227,

Even with briefs from two state attorneys general and the parties themselves, the Court turned down the challenge to the Sixth Circuit's procedure of not certifying the state constitutional issue to the Tennessee Supreme Court.⁷⁴ That court, however, did take offense to the Sixth Circuit's opinion on punitive damages without seeking the interpretation of Tennessee's high court.⁷⁵

In a footnote in *McClay*, Tennessee Chief Justice Jeffrey S. Bivins stated, "We simply point out that the procedure for certifying questions of state law to this [c]ourt is designed to promote judicial efficiency and comity, and to protect this [s]tate's sovereignty."⁷⁶ Thus, it is evident that the Tennessee Supreme Court's majority felt that certification was the best route for the Sixth Circuit to take.⁷⁷ Therefore, we see a lack of comity between the Sixth Circuit and the Tennessee Supreme Court that begs the question: why did the federal appellate panel decide not to submit the question to the supreme authority on Tennessee constitutional interpretation? There are multiple possible reasons.

First, as already discussed, perhaps the Sixth Circuit majority felt the Tennessee Supreme Court had already abdicated its decision-making authority in the *Lindenberg* case when it chose not to accept certification from the District Court, as that is the only mention of certification in the Sixth Circuit's opinion.⁷⁸ Second, the appellate court could have believed the answer was so obvious based on the Tennessee Supreme Court's precedent that there was no doubt as to the decision, and certification would simply waste time and put an unnecessary strain on judicial resources.⁷⁹ Or, third, the Sixth Circuit might have felt the Tennessee Supreme Court would make a faulty interpretation of the Tennessee Constitution, so it chose to

1229 (1979). *But see* *United States v. Carver*, 260 U.S. 482, 490 (1923).

⁷⁴ *See* *Jackson Nat'l Life Ins. Co. v. Lindenberg*, 140 S. Ct. 624 (2019); *Tennessee v. Lindenberg*, 140 S. Ct. 635 (2019).

⁷⁵ *See McClay*, 2020 WL 915980, at *4 n.6.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Lindenberg*, 912 F.3d at 355.

⁷⁹ *Id.* at 366.

lead the way on the right to jury jurisprudence in the Volunteer State. Regardless of the underlying justification, the Sixth Circuit's failure to certify leaves scholars, practitioners, and jurists with confusion on the Tennessee jury right, and it has apparently generated some animosity between the federal circuit court with jurisdiction over Tennessee and the state's own court of last resort.

Circuit court splits have received significant attention; however, due to the process of certification, literature on state supreme court and federal circuit court splits on questions of state constitutional law is rare.⁸⁰ Certainly, the state supreme court is the final arbiter of interpretations of a state's constitution, but where a federal circuit court reaches a different conclusion on a similar constitutional provision than the state supreme court does later, and the state supreme court chooses not to overturn or even discuss the federal court's decision, ambiguity as to the correct interpretation abounds. That is what the *Lindenberg* and *McClay* decisions have done to the "inviolable" right to a jury in Tennessee. The Sixth Circuit's opinion is still highly persuasive authority as to punitive damages and the Tennessee Supreme Court's opinion is mandatory authority as to non-economic damage caps.⁸¹ Because the Tennessee Supreme Court's majority chose not to overturn the *Lindenberg* decision's reasoning, the right to a jury is uncertain.⁸²

To recap the specific differences in reasoning between the Sixth Circuit and Tennessee Supreme Court pronouncements of the jury right, there are two fundamental dissimilarities. Those are the scope of the General Assembly's power to alter the state's common law where doing so touches on a constitutional protection and the fact-law dichotomy whereby

⁸⁰ See Ruth A. Moyer, *Disagreement About Disagreement: The Effect of a Circuit Split or "Other Circuit" Authority on the Availability of Federal Habeas Relief for State Convicts*, 82 U. CIN. L. REV. 831 (2014); Julian W. Smith, *Evidence of Ambiguity: The Effect of Circuit Splits on the Interpretation of Federal Criminal Law*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 79 (2011).

⁸¹ See Maureen Straub Kordesh, *Navigating the Dark Morass: A First-Year Student's Guide to the Library*, 19 CAMPBELL L. REV. 115, 118–20 (1996).

⁸² See *McClay*, 2020 WL 915980, at *4 n.6.

the jury renders a verdict and only then the trial court imposes damage caps as a matter of law.⁸³

The Sixth Circuit found the punitive damage limits to exceed the legislature's authority to alter the common law because the caps also implicitly abridged the right to a jury, a task the legislature is powerless to complete.⁸⁴ Meanwhile, the Tennessee Supreme Court held the General Assembly was acting within the bounds of its ability to change or outright abolish common law actions.⁸⁵ The federal court likened the line of reasoning adopted by the Tennessee Supreme Court's majority to "arguing that parents may drive as fast as they wish because parents make the rules."⁸⁶ Thus, there exists a clear state-circuit split on the scope of the legislature's authority to alter Tennessee common law.

The Sixth Circuit also rejected the contention that the jury's function is satisfied when it submits its verdict, which the court may then reduce to conform to the legislature's requirements.⁸⁷ The federal court noted that the right to a jury is held by the litigant themselves, not the jurors.⁸⁸ Thus, a jury's lack of knowledge of the caps while discharging its duties does not save the punitive damage limits from constitutional scrutiny.⁸⁹ However, the Tennessee Supreme Court found that the guarantee of a jury only entitles a litigant to present their evidence and have a jury make the factual determinations, it is then for the courts and the legislature to decide the consequences of those judgments.⁹⁰ Thus, the non-economic damage caps did not violate the jury right because that guarantee ends the moment the jury delivers its verdict.⁹¹

⁸³ *Lindenberg*, 912 F.3d at 367–69; *McClay*, 2020 WL 915980, at *3–4.

⁸⁴ *Lindenberg*, 912 F.3d at 367–68.

⁸⁵ *McClay*, 2020 WL 915980, at *3.

⁸⁶ *Lindenberg*, 912 F.3d at 367–68.

⁸⁷ *Id.* at 369.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *McClay*, 2020 WL 915980, at *4.

⁹¹ *Id.*

These contradictory directives leave litigants in a lurch. As far as non-economic damages are concerned, it is clear that they do not violate the jury right.⁹² Yet, Tennessee litigants have persuasive authority that the punitive damage limits do violate the right to a jury, because the Tennessee Supreme Court failed to clear that issue up when it published its opinion in *McClay*.⁹³ Additionally, other cases involving the right to a jury now have plenty of authority to cite in their motions and briefs, and it will be up to the trial courts hearing these claims to decipher the state of the law. For now, it is likely accurate to claim that punitive damages are still constitutional, albeit resting on shaky ground.

V. CONCLUSION

The divergent opinions of the Sixth Circuit and the Tennessee Supreme Court on the right to a jury in Tennessee demonstrate how state-circuit splits create ambiguity in the law for litigants, scholars, students, and judges. Furthermore, the Sixth Circuit has shown its willingness to disregard comity where it believes there is a clear answer to a state constitutional issue, even where the state supreme court has indicated a willingness to address the question.⁹⁴ This decision, consequently, also has implications for all states in the Sixth Circuit, as evidenced by the Ohio Attorney General, along with other states, filing an amicus brief to the United States Supreme Court in this matter.⁹⁵ Those states' high courts will now need to be more active in ensuring their interpretations of their own constitutions are clear, if they wish for the Sixth Circuit not to offer its analysis.

⁹² *Id.*

⁹³ *Lindenberg*, 912 F.3d at 370; see *McClay*, 2020 WL 915980, at *4 n.6.

⁹⁴ *Lindenberg*, 912 F.3d at 370 (Larsen, J., dissenting).

⁹⁵ Brief of Amici Curiae States of Ohio, et al., in Support of the Petitioners, *Tennessee v. Lindenberg*, 140 S. Ct. 635 (2019) (19-13); Brief of Amici Curiae States of Ohio, et al., in Support of the Petitioners, *Jackson Nat'l Life Ins. Co. v. Lindenberg*, 140 S. Ct. 624 (2019) (19-4).