

STATE OF INDIANA)
)ss:
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION 10
CAUSE NO. 49D10-0402-CT-0443

JOHN DOE,)
)
Plaintiff,)
)
vs.)
)
FATHER JONATHAN)
LOVILL STEWART,)
)
Defendant.)

**ORDER DENYING DEFENDANT’S MOTION TO REDUCE
PUNITIVE DAMAGES AWARD¹**

Statement of Case

The jury awarded Plaintiff John Doe (“Doe”) \$5,000.00 compensatory damages and \$150,000.00 punitive damages. Citing Indiana Code §34-51-3-4 and §34-51-3-5 (the “Statute”), Defendant Father Jonathon Lovill Stewart (“Stewart”) moves to reduce punitive damages to \$50,000. Doe argues that the Statute cannot be “retroactive,” and is further unconstitutional.

The Court finds the Statute is not “retroactive,” but finds the Statute violates the Indiana Constitution with respect to separation of powers and right to trial by jury. Therefore, the Defendant’s motion is denied, and the judgment shall stand as entered.

Issues

Does the Statute limit the jury’s verdict?

Is the Statute constitutional?

¹ The Court also denies Defendant’s Motion to Correct Errors accordingly.

Background

In 1993 and 1997, acts of sexual abuse were allegedly committed by Stewart against Doe, a minor.

On July 1, 1995, the Statute was enacted and states:

A punitive damage award may not be more than the greater of:

(1) three (3) times the amount of compensatory damages awarded in the action; or

(2) fifty thousand dollars (\$50,000).

I.C. 34-51-3-4

If a trier of fact awards punitive damages that exceed the limitation under section 4 of this chapter, the court shall reduce the punitive damage award to not more than the greater of:

(1) three (3) times the amount of compensatory damages awarded in the action; or

(2) fifty thousand dollars (\$50,000).

I.C. 34-51-3-5

On February 27, 2004, Doe timely filed this action.

On April 24, 2008, a jury awarded Doe \$5,000.00 in compensatory damages and \$150,000.00 in punitive damages for the acts of sexual abuse committed by Stewart that occurred in 1993 and 1997. The Court entered judgment the same day for these amounts. Stewart subsequently filed a Motion to Reduce Excessive Punitive Damage Award, citing the limitations of the Statute above, and argues punitive damages must be reduced to \$50,000. Doe argues (1) the Statute does not apply as the tortious acts began before the statute came into effect and (2) the Statute, if applicable, violates the Indiana Constitution

under Article III, Section.1 regarding separation of powers, and Article I, Section. 20 regarding right to trial by jury. Doe’s argument includes the Statute’s related provision to withhold this information from the jury:

A jury in a case subject to this chapter may not be advised of:

(1) the limitation on the amount of a punitive damage award under section 4 of this chapter; or

(2) the requirement under section 6 of this chapter concerning allocation of money received in payment of a punitive damage award.²

I.C. 34-51-3-3

Applicable Law and Analysis

*A Change of Remedy Affects Subsequent Awards –
The Statute Applies to Doe’s Verdict*

A general rule of statutory construction is that statutes will apply “prospectively.” Martin v. State (2002), Ind., 774 N.E.2d 43, 44. Unless the legislature unequivocally and unambiguously intended retrospective application, statutes are to be given prospective effect only. Board of Dental Examiners v. Judd (1990), Ind.App., 554 N.E.2d 829, 832. However, statutes intended to cure a defect that existed in a prior statute may be accorded retrospective application. Bourbon Mini-Mart, Inc. v. Gast Fuel & Servs. (2003), Ind., 783 N.E.2d 253, 260 (citing Martin, *supra*. at 44).

But a new statute may apply to all cases pending at, and subsequent to, its effective date if it:

1. only changes a mode of procedure or remedy;
2. still provides a remedy substantially similar to the existing one; and

² Doe also argues I.C. 34-51-3-6(c) is unconstitutional since it requires 75% of punitive damage awards be paid to the State. Such argument is unavailing since the provision was upheld by Cheatham v. Pohle (2003), 789 N.E.2d 467.

3. does not create or take away vested rights.

See generally Deasy-Leas v. Leas (1998), Ind.App., 693 N.E.2d 90; Samm v. Great Dane Trailers (1999), Ind.App., 715 N.E.2d 420. In McGill v. Muddy Fork of Silver Creek Watershed Conservancy Dist. (1977), Ind.App., 370 N.E.2d 365, the court explains the practical application of such a statute:

Unless an intent to the contrary is expressed, a statute providing, or merely affecting, the remedy may apply to, and operate on, causes of action which had accrued and were existing at the time of the enactment of the statute, as well as causes of action thereafter to accrue, and to all actions, whether commenced before or after its enactment; and also, unless an intent to the contrary is expressed, such enactments as do not affect the nature of the remedy, but relate solely to incidents of procedure, are applicable to all proceedings taken in pending actions from the time they take effect.

370 N.E.2d at 370 [citing 82 C.J.S. Statutes § 422 (1953); 2 Sutherland, *Statutory Construction* 281 (4th Ed. 1973)].

The Statute here only affects the procedure and remedy of Indiana punitive damages. Furthermore, it does not substantially change the remedy – some punitive damages verdicts may not be affected at all. In addition, it does not take away any vested rights because Indiana citizens do not have vested rights in Indiana punitive damage awards. Cheatham v. Pohle, *supra*. at 473-475. Overall, the Statute applies to Doe’s punitive damage award (regardless when the tortious acts occurred or when the action was filed) because the Statute was enacted before the verdict was entered.

But The Statute Violates The Indiana Constitution

The Indiana Constitution protects each branch of government from interference with each other, and further guarantees Indiana citizens will have their civil cases decided

by a jury. The Statute's two provisions above (Sections 4 and 5) interpose the will of the General Assembly to supersede otherwise valid jury verdicts. Accordingly, it contradicts the Indiana Constitution and should not interfere with Doe's punitive damage award.

A. Indiana Constitutional Analysis

1. Questions arising under the Indiana Constitution are to be resolved by “examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions.” Boehm v. Town of St. John (1996), Ind., 675 N.E.2d 318 (citing Indiana Gaming Commission v. Moseley (1994), Ind., 643 N.E.2d 296, 298).³ In construing the constitution “a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy.” Bayh v. Sonnenburg, *supra.* at 412 [citing State v. Gibson, 36 Ind. 389, 391 (1871)]. Because the “intent of the framers of the Constitution is paramount in determining the meaning of a provision,” Indiana courts should consider “the purpose which induced [its] adoption.” Eakin v. State ex rel. Capital (1985), Ind., 474 N.E.2d 62, 64-65. Consequently, the court may then “ascertain what the particular constitutional provision was designed to prevent.” Northern Ind. Bank and Trust Co. v. State Bd. of Finance (1983), Ind., 457 N.E.2d 527, 529.⁴

³ See also Collins v. Day (1994), Ind., 644 N.E.2d 72, 76; Bayh v. Sonnenburg (1991), Ind., 573 N.E.2d 398, 412 [*cert. denied*, 502 U.S. 1094 (1992)]; State Election Bd. v. Bayh (1988), Ind., 521 N.E.2d 1313.

⁴ Prudent constitutional methodology is cogently discussed in Randall T. Shepard. *The Renaissance in State Constitutional Law: There Are A Few Dangers, But What's The Alternative?* 61 Alb. L. Rev. 1529, 1536 (1997).

2. The Indiana Constitution is a decidedly Jacksonian document. As Chief

Justice Shepard explains in Price v. State (1993), Ind., 622 N.E.2d 954:

Indiana's drive towards statehood saw its territorial leadership, comprised predominately of southern planters, pitted against comparatively poor frontiersmen. The former group generally considered the “common citizen” to be “unworthy ... of presuming to criticize the conduct of officials.” John D. Barnhart, *Valley of Democracy* 195 (1953). The frontiersmen agitated for greater popular participation, holding that “even the poorest had a right to a voice in the determination of the policies which affected his life as well as the career of the richest.” *Id.* The frontier democrats who dominated the first Constitutional Convention countered the risk that reactionary elements might fashion a non-majoritarian government by adopting measures to guarantee popular participation and protect scrutiny of public affairs.

622 N.E.2d 961-962 [citing C.A. Byers, *Growth of the Constitution of Indiana* in 6 *The Indianian* 279-80 (1890)].

So by the second Constitutional Convention in 1850, the delegates sought, like other Midwestern constitutions, to “reflect a view that power should come from the bottom up,” that is, inclusive of all people. Patrick L. Baude, *Indiana’s Constitution in a Nation of Constitutions* in David J. Bodenhamer and Randall T. Shepard, eds., *The History of Indiana Law* 25 (Ohio University Press, 2006). Convention delegate Phineas M. Kent explained that Hoosiers “. . . are a progressive people; this is a progressive nation, and this too is an age of great and rapid advancement of all those reforms of government . . .” *Report of the Debates and Proceedings of the Convention of the Revision of the Constitution of the State of Indiana 1850* (Indiana Historical Bureau, 1935) 2: 1381. The Constitution was accordingly “written to meet a Jacksonian demand for more power to the people.” John Bartlow Morton, *Indiana: An Interpretation* 55 (Alfred A. Knopf, 1947). The drafters were “willing to incorporate tenets of Jacksonian Democracy into the

state's basic charter.” John D. Barnhart and Donald F. Carmony, *Indiana's Century-Old Constitution* 6 (Indiana State Constitutional Centennial Commission, 1951). In fact, “The spirit of Jackson controlled the Convention.” Logan Esarey, *History of Indiana From Its Exploration to 1922*, 516 (Dayton Historical Publishing Co., 1974).

As a result, Indiana constitutional analysis must favor the Jacksonian values of the framers. The analysis also includes the presumption that “within each provision of our Bill of Rights [like the right to trial by jury], there is a cluster of essential values which the legislature may qualify but not alienate. A right is impermissibly alienated when the State **materially burdens one of the core values** which it embodies.” (emphasis supplied) *Price v. State*, *supra.* at 960 [citing Robert C. Palmer, *Liberties as Constitutional Provisions in Constitution and Rights in the Early American Republic* 55 (William E. Nelson & Robert C. Palmer eds., 1987) at 65-66]. What core values animate a particular guarantee is a judicial question. In deciding it, the courts look to the purpose for which the guarantee was adopted and the history of Indiana's constitutional scheme. *Id.* at 961. These general core values necessarily include, therefore, Jacksonian principles: greater rights for the “common man” against government interference, and favoring inclusive egalitarian structures over aristocratic measures. Daniel Feller, *The Jacksonian Promise* 172-175 (The Johns Hopkins University Press, 1995).⁵

3. When a statute is challenged as an alleged violation of the Indiana Constitution, the standard of review is well settled. A statute is presumed constitutional until the party challenging its constitutionality clearly overcomes the presumption by a contrary showing. *Boehm v. Town of St. John*, *supra.* at 321. If a statute has two

⁵ See also Joseph L. Blau, ed. *Social Theories of Jacksonian Democracy* (The Liberal Arts Press, 1954) for writings from Jackson's contemporaries.

reasonable interpretations, one constitutional and the other not, the court should favor the interpretation that will uphold the constitutionality of the statute. Id. There is no presumption that the General Assembly violated the constitution unless the unambiguous language of the statute so mandates. Id. The court should “nullify a statute on constitutional grounds only where such result is clearly rational and necessary.” Bd. of Comm'rs of the County of Howard v. Kokomo City Plan Comm'n (1975), Ind., 330 N.E.2d 92, 95.

B. Separation of Powers, Article III, and Punitive Damages

The powers of the Government are divided into three separate departments, the Legislative, the Executive, including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another . . .

1. Purpose and History. Distribution of powers is present in the earliest democracies to the present day. Although ancient Greeks separated their branches of government, the modern maxim is attributed to the Enlightenment philosopher Montesquieu. As James Madison explains in Federalist No. 47, Montesquieu was the “oracle” who wrote, “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” Madison argues such principle is practically self-evident for a free republic: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” This unfettered principle is the basis of the federal constitution - it is accordingly inferred in Indiana constitutional law and our own explicit provisions are

seemingly considered superfluous by our own case law. *Baude, supra.* at 45.⁶ The 1816 Indiana Constitution and 1851 Constitution are almost identical regarding separation of powers. Both dedicate the entirety of a brief separate Article to delineate three branches of government and ensure that “no person . . . shall exercise any power properly attached to either of the others” (1816 Constitution, Article II), or “no person . . . shall exercise any of the functions of another” (1851 Constitution, Article III). The broader context of the 1851 Constitution clearly shows us the larger purpose of separation of powers that must be honored here. Democratic institutions were expanding, and the balance of powers was becoming increasingly crucial to the growing United States in its westward expansion. Under Jacksonian principles, such separation is not intended to be taken for granted, or to be allowed to lessen the rights of individual citizens.

2. **Cases Interpreting.** Generally, Article. III is strictly construed. Rush v. Carter (1984), Ind.App., 468 N.E.2d 236; Book v. State Office Building Commission (1958), Ind., 149 N.E.2d 273, 293. This separation of powers provision is “the keystone of our form of government.” Id. The independence of the judiciary “is essential to an effective running of the government.” Board of Commissioners v. Stout (1893), Ind., 35 N.E.683, 685. Indeed, the legislature cannot promulgate how a court discharges its duties, control judicial functions, or otherwise dictate how the judiciary conducts its order of business. State v. Monfort (2000), Ind., 723 N.E.2d 407, 411; Thorpe v. King (1967), Ind., 227 N.E.2d 169, 171; State ex.rel. Kostas v. Johnson (1946), Ind., 69 N.E.2d 592, 596.

⁶ Baude cites Barco Beverage Corp. v. Indiana Alcoholic Beverage Comm. (1992), Ind., 595 N.E.2d 250, 254 as such an example.

Plaintiff relies on Illinois's Best v. Taylor Machine Works (1997), Ill., 689 N.E.2d 1057 to argue Article III should preclude the Indiana punitive damage Statute, and with good reason – its 74-page opinion is well-written and persuasive. Best compares state constitutional separation of powers with the common law rule of *remittitur* to resolve a challenge to the Illinois statutory cap on “non-economic” damages. After a century of federal and state authority establishing *remittitur*, Best concludes, this “traditional and inherent power of the judicial branch” Id. at 1079 cannot be abrogated by legislative action:

. . . we conclude that section 2-1115.1 undercuts the power, and obligation, of the judiciary to reduce excessive verdicts. In our view, section 2-1115.1 functions as a “legislative *remittitur*.” Unlike the traditional *remittitur* power of the judiciary, the legislative *remittitur* of section 2-1115.1 disregards the jury's careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their causes of action. The cap on damages is mandatory and operates wholly apart from the specific circumstances of a particular plaintiff's noneconomic injuries. Therefore, section 2-1115.1 unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law.

Id. at 1080.

Similarly, Indiana cases have shown the principle and power of *remittitur* to be so deeply sown into the roots of the judicial branch that virtually any attempted limitation must be suspect. *See* Tipmont Rural Elec. Membership Corp. v. Fischer (1999), Ind., 716 N.E.2d 357; Borowski v. Rupert (1972), Ind.App., 281 N.E.2d 502; Dahlin v. Amoco Oil Corp. (1991), Ind.App., 567 N.E.2d 806, 812. As Judge Staton eloquently shows:

. . . control and revision of excessive verdicts . . . was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,-a power exercised in pursuance of a sound judicial

discretion, without which the jury system would be a capricious and intolerable tyranny, which no people could long endure.

Borowski v. Rupert, *supra*. at 503, note 2 [citing Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350, 352 (4th Cir. 1941)].

But the historical primacy of *remittitur* was never discussed in Johnson v. St. Vincent Hospital (1980), Ind., 404 N.E.2d 585⁷ when it rejected an Article III challenge to the Indiana medical malpractice damages cap statute – because the court was only asked to decide whether the automatic admission of medical review panel opinions interfered with the judicial power to generally admit evidence. *Remittitur* was likewise never mentioned in Indiana Dept. of Revenue Inheritance Tax Division v. Callaway (1953), Ind., 110 N.E.2d 903 when it **sustained** an Article III challenge to a statute providing administrative setting aside of court decisions about inheritance tax. The Indiana Supreme Court simply found such decisions are “judgments,” and therefore cannot be disturbed under Article III: “The Legislature, in attempting to permit the mandatory setting aside of the judgment of the probate court . . . violated Article 3, Section 1, of the Constitution of Indiana.” *Id.* at 907. So, the primacy of “judgments,” like *remittitur*, repels any invasion of any other branch, and deflects any attempt to alter a court’s own constitutional power.

3. The Statute Violates Article III. First, the historical context and purpose of Article III shows separation of powers is deeply rooted in our democracy and vitally necessary to the integrity of judicial branch. Second, strict construction does not allow the Statute to compel “legislative remittiturs” and direct mandatory setting aside of judgments after otherwise valid jury verdicts. But the Statute does so because it purports to directly compel a court to reduce punitive damage awards according to the Statute’s

⁷ Johnson is the only case about damage caps and the Indiana Constitution.

own limits, and enter a judgment contravening a jury verdict. Article III simply does not allow the General Assembly to disturb the Court's entry of judgment here. Therefore, nullification of the Statute is both rational and necessary.

C. Right to Trial by Jury, Article I, § 20, and Punitive Damages

In all civil cases, the right to trial by jury shall remain inviolate.

1. **Purpose and History.**⁸ From the Sanhedrin of Judea and the trial of Socrates in ancient Greece to the Roman Republic and the English courts, the principle of trial by jury is as old as civilization itself. After the 1066 Norman Conquest, Roman Catholic bishops and local civil sheriffs jointly administered courts of justice, and some form of trial by local citizens (despite Norman notions of trial by ordeal). The Catholic Encyclopedia (The Encyclopedia Press, Inc., 1913) 5: 432 et.seq.; The New Catholic Encyclopedia, Second Ed. (Catholic University Press/Gale, 2003) 5: 240. Under Henry II, the Constitution of Clarendon and Assize of Clarendon in 1164 provided juries in some cases, and laid an institutional foundation for the jury. Leonard W. Levy, *The Palladium of Justice: Origins of Trial By Jury* 11 (I.R. Dee, 1999). When the Magna Carta in 1215 protected citizens' rights during adverse legal proceedings by a "lawful judgment of his peers," trial by jury became the dominant method of trial in thirteenth-century England. William L. Dwyer, *In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy* 35 (Thomas Dunne Books, 2002).

⁸ The definitive research is found in Jordan ex rel. Jordan v. Deery (2002), Ind., 778 N.E.2d 1264, 1268-69, and is incorporated herein by reference. See also Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 Val.U.L.Rev. 449, 455-59 (1999) regarding Indiana constitutional history.

In the American colonies (English common law outposts), jury rights were so sacrosanct that the Declaration of Independence complained King George “deprives us, in many cases, of the benefit of trial by jury.” Indeed, one of the first rights recognized by the Philadelphia Constitutional Convention of 1787 was trial by jury. *Levy, supra.* at 91. But the original Constitution of the United States omitted mention of *civil* jury trials, so the Founders became enmeshed in an ensuing debate about excessive “Star Chamber” power with judges – the people, it was argued, should also rule such disputes. *Id.* at 91-105. Hence, the Seventh Amendment, in the Bill of Rights of 1791, solely provided for jury trial in civil cases, but only “where the value in controversy shall exceed twenty dollars.”⁹ The Northwest Ordinance of 1787, enacted by Congress to expand westward, had included trial by jury (and other civil rights), and continued to be the fundamental instrument of government in the original Indiana Territory. Charles Kettleborough, *Constitution Making in Indiana: A Source Book of Constitutional Documents with Historical Introduction and Critical Notes* (Indiana Historical Commission, 1916; repr., Indiana Historical Bureau, 1971) I: 31.

Later, the 1816 Indiana Constitution repeated the Seventh Amendment twenty-dollar limitation in its Article I, Section 5. But the second Indiana Constitutional Convention of 1850 intentionally expanded the right to trial by jury. Robert Dale Owen, the influential Posey County legislator, garnered the energy of the 1850 Constitutional Convention, and led the drafting of the 1851 Constitution. *See* Barnhart and Carmony,

⁹ The United States Department of Labor, Bureau of Labor Statistics (BLS) calculates only since 1913. It adjusts \$20.00 to \$494.14 in 2009, about twenty-one times the original amount. *See* <http://data.bls.gov/cgi-bin/cpicalc.pl>. Assuming only the same multiplier from 1791 to 1913, and using the same BLS calculator to the present, the 2009 value becomes \$10,602.80. So even assuming reasonable reductions from the 19th century’s different inflation factors, the 1791 \$20.00 limitation probably precluded juries from most civil actions. This is consistent with the ongoing tension between Federalists and anti-elitists regarding jury preeminence. *Levy, supra.* at 92-94; David Millon, *Juries, Judges, and Democracy* 18 *Law & Soc. Inquiry* 135, 147 (1993); William Forsyth, *History of Trial By Jury* 340-343 (Oxford: John W. Parker 1854)

supra. at 12 [citing Richard William Leopold, *Robert Dale Owen: A Biography* (Harvard University Press, 1940; reprinted by Octagon Books, 1969)]. Owen was a devout pluralist and “freethinker.” He long sought the abolition of slavery, and even helped draft the Fourteenth Amendment. Id. On October 26, 1850, Owen introduced the jury trial provision as chair of the Convention’s “committee on rights and privileges,” *Journal of the Convention of the People of the State of Indiana to Amend The Constitution* (Indianapolis, 1851, repr. Indiana Historical Bureau 1936) 868, and the twenty-dollar limitation language was struck by motion from the convention floor. Id. at 204; *Reports of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1850* (Indianapolis: 1850; repr., Indianapolis: Indiana Historical Bureau 1935) I: 352-353. Most importantly, on February 8, 1851, Owen again specifically reported to the Convention, as “a particular point of pride,” that the constitutional guarantee of trial by jury was now ensured in all civil cases by the new draft Constitution, and the twenty-dollar limit was removed. *Journal of the Convention*, supra. at 964-5; *Report of the Debates*, supra. at II: 1381; Susan K. Carpenter “*Conspicuously Enlightened Policy*”: *Criminal Justice in Indiana* in Bodenhamer and Shepard, eds., supra. at 132; The Jacksonian drive to expand individual rights is readily apparent here. An unlimited Indiana constitutional right to trial by jury is an *intentional* guarantee derived from a people proud of its adoption in Article I, Section 20 of the 1851 Constitution.

2. **Cases interpreting.** The Indiana constitutional right of trial by jury in civil cases is a “fundamental right in our democratic judicial system,” and is “scrupulously” guarded by the courts against encroachment. Kettner v. Jay (1940),

Ind.App., 26 N.E.2d 546; Levinson v. Citizens Nat. Bank of Evansville (1994), Ind.App., 644 N.E.2d 1264, 1267. The word “inviolable” in Article I, Section 20 is held to mean “freedom from substantial impairment,” but not from reasonable regulations which do not affect the substance of the right. Hayworth v. Bromwell (1959), Ind., 158 N.E.2d 285, 287.

Plaintiff cites Ohio’s State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), Ohio, 715 N.E.2d 1062, to argue Article I, Section 20 should preclude the Indiana punitive damage Statute, and with good reason – its 65-page opinion is well-written and persuasive.¹⁰ Ohio Academy examined an Ohio statute which, like Indiana, set limits on punitive damages regardless of the jury’s determination. The substance and meaning of trial by jury precludes such legislative action, Ohio Academy found, because the Ohio law:

. . . create[s] the illusion of [constitutional] compliance by permitting the jury to assess the amount of punitive damages to be awarded, but requiring the court to nullify the jury's determination and substitute the will of the General Assembly in any case where a jury awards punitive damages in excess of the amounts specified . . . *This is a Constitution we are dealing with.* “The right to a trial by jury is a fundamental constitutional right which derives from the Magna Carta.” Zoppo, 71 Ohio St.3d at 556, 644 N.E.2d at 401 The right belongs to the litigant, not the jury, and 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. (emphasis supplied)

Id. at 1090.

In Johnson v. St. Vincent Hospital, *supra.*, the Court offered only a one-paragraph discussion of an Article I, Section 20 challenge to Indiana’s medical malpractice damage

¹⁰ This was not the first attempt to limit punitive damages in Ohio. A statute directing punitive damages only be decided by a judge, not a jury, was previously struck down in Zoppo v. Homestead Ins. Co. (1994), Ohio, 644 N.E.2d 397.

cap. The 1980 ruling failed to conduct the 109-year old Indiana constitutional analysis previously prescribed by State v. Gibson, *supra.* and since underscored by Town of St. John v. Boehm, *supra.*, Indiana Gaming Commission v. Moseleys, *supra.*, and others. Instead, it analogized the legislative cap to *procedural* limitations, such as the statute of limitations and failure to timely request trial by jury. Johnson further observes that the “proper manner of apportioning the total damages among health care providers, their insurers, and the patient's compensation fund” does not violate the right to trial by jury “in this context.” This narrow finding simply does not address a legislative damage cap outside of medical malpractice claims, nor forms any precedent for historical critique.

3. The Statute Violates Article I, Section 20. Ohio Academy's analysis is applicable to the Statute here. As shown above, the Statute (with I.C. 34-51-3-3) constructs a court of law in which a jury is deliberately uninformed and unaffected, but its verdict is. On one hand, the Indiana Constitution requires the parties get what the jury gives. On the other hand, the Statute can take it away under its own arbitrary limitation. Article I, Section 20 is our trial by jury alone, not *jury and legislature*. It is an historical monolith that cannot be casually changed by legislative preference.

History clearly shows that Indiana's “inviolable” right to trial by jury – a right guaranteed with “particular pride” – is embedded with *core values* of power to ordinary citizens and less government interference – favoring what Hoosiers want over schemes of the state. The Statute is an inadequate substitute and, therefore, a “substantial impairment.” Accordingly, it “materially burdens” these core values. Our scrupulous guard against encroachment only allows one finding: the Statute impermissibly alienates Indiana's guarantee to trial by jury, and its nullification is rational and necessary.

D. Common Law Punitive Damages and Legislative Modification

Punitive, or “exemplary” damages, have been a creature of Indiana common law since at least the time of our 1851 Constitution. *See* Taber v. Hutson, 5 Ind. 322, 324-25 (1854). The General Assembly has the authority to modify or abrogate common law rights provided that such change does not interfere with constitutional rights. Martin v. Richey (1999), Ind., 711 N.E.2d 1273, 1283. State v. Rendleman (1992), Ind., 603 N.E.2d 1333, 1336. Moreover, “Indiana's Constitution does not forbid abolition of old rights recognized by the common law in order to attain permissible legislative [objectives].” State v. Rendleman, *supra*. at 1336; *see also* Sims v. United States Fidelity & Guar. Co. (2003), Ind., 782 N.E.2d 345, 352.

But the Statute’s limit on the Court’s entry of judgment, and Doe’s jury determination, clearly interferes with our Constitution. Our Founders’ principle of separation of powers is breached when the Court’s common-law power of remittitur is also breached. The inclusive right to trial by jury is materially burdened when a verdict is arbitrarily altered, contrary to its historic roots.

Moreover, the balance of permissible legislative objectives does not apply to our Bill of Rights, including trial by jury. Price v. State, *supra*. explains:

“Material burden” analysis involves no such weighing nor is it influenced by the social utility of the state action at issue. Instead, we look only at the magnitude of the impairment. If the right, as impaired, would no longer serve the purpose for which it was designed, it has been materially impaired.

Id. at 961, note 7.

To the extent there are discernible legislative objectives in the Statute,¹¹ they have therefore no bearing on the constitutional impairment of trial by jury shown above, and are also outweighed by the integral necessity and independence of judicial branch judgments.

The General Assembly can always abolish punitive damages if it wants - or perhaps modify them in a different way. Cheatham v. Pohle, *supra.* at 471. But in doing so, it may not interfere with the courts' role, or litigants' rights. These clear constitutional limits are not mere technical complaints, nor "distinctions without a difference." It is necessary to protect the precedent of time-honored Indiana law, and allowing the Statute to stand invites the prospect of further interference.

E. Other States and Damage Caps¹²

Many states beyond Indiana have addressed the constitutional complaints that Doe makes. Some have found the arguments are well-founded and vacated caps for punitive damages or other damage awards. State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), *supra.*; Best v. Taylor Machine Works (1997), *supra.*; Knowles v. United States (1996), S.D., 544 N.W. 2d 183; Lakin v. Senco Prods., Inc.(1993), Or., 987 P.2d 463, 468-75; Sofie v. Fibreboard Corp. (1989), Wash., 771 P.2d 711; Kansas Malpractice Victims Coalition v. Bell (1988), Kan., 757 P.2d 251; Smith v. Department of Ins.(1987), Fla., 507 So.2d 1080.

But states that uphold cap statutes against Doe's challenges are distinguished by different constitutional language, context, or other reasoning that is not applicable or

¹¹ There is no stated underlying policy, purpose, or substantive legislative history of the Statute.

¹² See generally Kevin J. Gfell, *The Constitutional And Economic Implications Of A National Cap On Non-Economic Damages In Medical Malpractice Actions*, 37 Ind. L. Rev. 773 (2004).

persuasive today. For example, Kirkland v. Blaine County Medical Center (2000), Idaho, 4 P.3d 1115 analogizes, like Johnson v. St. Vincent Hospital, *supra.*, substantive common law to legislative procedural limitations. Citing Idaho’s specific constitutional language allowing legislative modification of common law, Kirkland distinguishes between a jury’s verdict (letting the jury do what it wants) and its “legal consequences” (letting the legislature do what it wants). Our core Jacksonian values do not permit such a non-majoritarian distinction, or allow the jury’s finding to be modified by such an authoritarian procedure.¹³ Likewise, Adams v. Children’s Mercy Hospital (1992), Mo., 832 S.W.2d 898 argues about the federal Seventh Amendment’s scope and federal case law. Here, we only apply the Indiana Constitution and Indiana law.

Overall, the Statute cannot survive *Indiana* constitutional analysis.

Conclusion

The Statute changes only the procedure and remedy of punitive damages without substantial modification. Therefore, it applies to all punitive damage awards occurring after its enactment, and is not precluded as “retrospective.”

But the Indiana Constitution does not allow the Statute to direct a trial judge to change a judgment after a proper jury verdict, nor to deny a litigant the benefit of the jury’s determination. Therefore, the Statute is unconstitutional under Article III and Article I, Section 20.

¹³ Several states upholding caps also find the jury’s “fact-finding” role, including damages, remains “inviolable” since the jury is allowed to fully determine any amount by itself. But the “remedy,” it is argued, is an issue of “law” determined or modified by the legislature or court. *See e.g. Etheridge v. Medical Ctr Hosp.* (1989), Va. 376 S.E.2d 525. This semantical distinction between factual damages and legal remedies is illogical, and finds no place among Indiana’s strong historical basis for jury protection (including Article I, Section 19’s prescribed right for criminal juries to decide “the law and the facts.”)

Order

Defendant's Motion To Reduce Excessive Punitive Damages Award is denied.

Dated this 27th day of February 2009.

David J. Dreyer, Judge