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Tennessee Supreme Court Accepts Certification of Non-Economic Damages Cap Question

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On June 19, 2019, the Supreme Court of Tennessee accepted certification of three questions of law relating to Tennessee's statutory non-economic damages cap. The certification follows on the heels of a decision from a divided panel of the U.S. Court of Appeals for the Sixth Circuit holding that Tennessee's separate statutory cap on punitive damages violates the right to trial by jury under the Tennessee Constitution. Litigants hoping for additional clarity following the Sixth Circuit's decision should anticipate a ruling from the Supreme Court within the next six to nine months directly addressing the constitutionality of Tennessee's non-economic damages cap.

The Supreme Court's June 19, 2019 Order accepted certification of three questions from the United States District Court for the Middle District of Tennessee in *Jodi McClay v. Airport Management Services, LLC*, No. 3:17-cv-00705. The plaintiff in *McClay* filed suit against the defendant, an operator of a retail store in the Nashville Airport, after a wooden panel in the store fell and struck the plaintiff's foot. Following a trial, the jury returned a verdict awarding the plaintiff \$444,500.00 in economic damages and \$930,000.00 in non-economic damages.

The defendant asked the court to apply Tennessee's non-economic damages cap, which limits non-economic damages to \$750,000.00. See Tenn. Code Ann. §§ 29-39-102(a)-(e). The plaintiff objected, arguing that the damages cap violated the right to a trial by jury, amounted to an impermissible exercise of judicial powers by the Tennessee legislature, and, in an unusual argument, disproportionately discriminated against women, all in violation of the Tennessee Constitution. The plaintiff's objection cited the Sixth Circuit's recent decision in *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348 (6th Cir. 2018), which held that Tennessee's statutory cap on punitive damages violated the state constitutional right to trial by jury. The *Lindenberg* court's analysis of the punitive cap applied with equal force to Tennessee's separate non-economic damages cap, argued the plaintiff. (For our previous analysis of the *Lindenberg* decision, see [here](#), [here](#), and [here](#).)

U.S. District Judge Eli J. Richardson, a 2018 appointee to the bench, certified the three issues raised by plaintiff's objection to the Supreme Court of Tennessee on March 18, 2019. In his certification order, Judge Richardson recognized the *Lindenberg* decision on the punitive damages cap, but observed that neither the Tennessee Supreme Court nor the Sixth Circuit had rendered opinions on the state constitutionality of the non-economic damages cap.

The Tennessee Supreme Court's acceptance of the certification on June 19, based on recent history involving certification issues, means that litigants should anticipate an opinion within the next six to nine months. The Court has requested briefing and oral argument from the parties and the State of Tennessee, and granted a request from the Center for Urological Treatment to file an amicus brief. The Center for Urological Treatment is a defendant in a separate case pending before the Tennessee Court of Appeals in which the constitutionality of the non-economic damages cap is at issue. See *Yebuah, et al. v. Center for Urological Treatment, PLC*, No. M2018-01652-COA-R3-CV. The Center had previously filed an unsuccessful motion asking the Supreme Court to "reach down" to assume jurisdiction of the appeal to address the issue.

With the Court of Appeals for the Sixth Circuit denying rehearing en banc in the *Lindenberg* decision, it remains to be seen whether the Tennessee Supreme Court will accept certification of questions regarding the constitutionality of the punitive damages cap in a future case, as it has done with the non-economic damages cap in *McClay*. Litigants should stay tuned for further developments.

For questions about the *Lindenberg* or *McClay* decisions, contact [Buck Wellford](#), [Buck Lewis](#), or [Matt Mulqueen](#).