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IN THE SUPREME COURT OF MISSOURI

SC93816

LINDA S. LABRAYERE, et al., Plaintiffs,

v.

BOHR FARMS, LLC, et al., Defendants.

APPEAL FROM THE BOONE COUNTY CIRCUIT COURT

The Honorable Jodie Asel

BRIEF OF MISSOURI ATTORNEY GENERAL AS AMICUS CURIAE

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INTRODUCTION

As of the 2012 Census of Agriculture there were 99,171 Missouri farms covering 28,266,137 acres. This represents over half of the State.[1] In 2012, Missouri farmers combined to sell over nine billion dollars of agricultural products, split almost evenly between livestock and crop production. *Id.*

In this appeal, Appellants/Plaintiffs challenge hog production, an important part of Missouri's agriculture economy. In 2012, hog production in Missouri brought in $975,685,000 in farm receipts, and over $278,000,000 in exports. This made Missouri the nation's sixth leading exporter of pork.[2]

Given the importance of agriculture to the Missouri economy, the Missouri General Assembly naturally promotes and protects agricultural production, and seeks to ensure the continued profitability and expansion of

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[1] 2012 USDA Census of Agriculture, *available at* http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Missouri/

[2] USDA State Fact Sheet, *available at http://ers.usda.gov/data-products/state-fact-sheets/state-data.aspx?StateFIPS=29&StateName=Missouri#P2fcbf15fbbcb4fc299a486e3065a1632_3_509iT18C0x0*

the industry within its borders. But farming cannot be conducted in a sterile laboratory, nor an idyllic postcard setting. The Missouri legislature has even gone so far as to codify what those reared on Missouri farms understand to be the truth: "living in a rural environment does not mean you will live in an environment free of conditions you find irritating, dangerous, or unpleasant." § 262.805 RSMo (noting that agricultural operations "may include but are not limited to the following: breeding and rearing of livestock, weaning and treating of livestock, raising and harvesting of crops, application of fertilizers and pesticides, dust noise, odors, gunfire, burning, extended hours of operation, seasonal operations . . . .").

In this case, Plaintiffs challenge the validity of one statute through which the General Assembly has fulfilled its desire to promote and protect agriculture, § 537.296 RSMo. That statute recognizes that due to the nature of farming, and especially as cities push out into rural areas, farmers face increased economic pressure through nuisance suits brought by neighbors related to their farming operations. Section 537.296 is designed to promote agriculture by "protecting farmers from continually being served with nuisance lawsuits." Nuisance Actions: Hearing Minutes on HCS SB 187 Before the H. Comm. on Agribusiness, 2011 Reg. Session (Mo. May 3, 2011). Specifically, the statute codifies the categories of damages and remedies available, and defines who may bring a nuisance cause of action where the

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"alleged nuisance emanates from property primarily used for crop or animal production." Section 537.296.2-5 RSMo.

This case presents the exact type of situation § 537.296 was designed to address—a nuisance lawsuit brought against a neighboring hog farm operation, related to odors emanating from the property. At the trial court, Defendants raised the limitation of damages imposed by § 537.296.2 as a defense to Plaintiffs' nuisance claim, and were awarded summary judgment. On appeal, Plaintiffs renew the assertion that § 537.296 is unconstitutional.

Plaintiffs overlook—or at least minimize—a fundamental premise that undermines Plaintiffs' constitutional attack on § 537.296: The Missouri legislature has the authority to modify, or even abolish the common law. This includes limiting damages, defining who may bring a lawsuit, and this is exactly what § 537.296 accomplishes.

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ARGUMENT

THE MISSOURI LEGISLATURE HAS THE CONSTITUTIONAL AUTHORITY TO MODIFY THE COMMON LAW OF NUISANCE IN SECTION 537.296.

In the face of a constitutional challenge, "[a] statute is presumed to be constitutional." *Blaske v. Smith & Enteroth, Inc.,* 821 S.W. 2d 822, 827 (Mo. banc 1991)(citing *Winston v. Reorganized School District R-2, Lawrence County,*636 S.W.2d 324, 327 (Mo. banc 1982.) "One claiming otherwise has a heavy burden." *Harrell v. Total Health Care, Inc.,*781 S.W.2d 58, 63-64 (Mo. banc 1989.) Therefore, section 537.296 "must be enforced by the courts unless it *plainly and palpably* affronts the fundamental law embodied in the constitution." *Blaske,* 821 S.W. 2d at 828 (emphasis added.) But § 537.296 does not affront the "fundamental law embodied in the constitution" at all.

Section 537.296 modifies the common law of nuisance in several ways. If the "alleged nuisance emanates from property primarily used for crop or animal production," Section 537.296 defines what type of damages and remedies are available for both permanent and temporary nuisance claims (Section 537.296.2-4). The statute also defines who is entitled to bring nuisance actions. Section 537.296.5 RSMo ("Concerning a private nuisance where the alleged nuisance emanates from property primarily used for crop or animal production purposes, no person shall have standing to bring an

action for private nuisance unless the person has an ownership interest in the property alleged to be affected by the nuisance."). But § 537.296 does not completely abolish common-law nuisance causes of action against farmers.

On appeal, Plaintiffs argue in their opening brief that the legislature's alteration of the common law of nuisance by defining the categories of available damages, remedies, and codifying what individuals are entitled to bring suit represents an unconstitutional violation of the "open courts," "separation of powers," and other provisions of the Missouri Constitution. Plaintiffs' argument overlooks that the Missouri General Assembly generally has the authority to modify—or even to abolish—common law actions, including nuisance.

That legislative authority to modify the common law is broad—though not unlimited. As this Court recently recognized in *Watts v. Lester E. Cox Medical Centers,* 376 S.W. 3d 633, 642 (Mo. 2012), the legislature cannot modify the common law in a way that infringes upon a constitutional right. Here we address five constitutional provisions that have been cited elsewhere, or are being cited by Plaintiffs here, that limit the General Assembly's ability to modify the common law. As discussed below, none of them bar the legislative action taken in § 537.296.

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A. Jury Trial.

We begin by comparing § 573.296 with the damage cap discussed in *Watts*. In *Watts,* the Court found a hard cap on non-economic damages imposed in § 538.210 on medical malpractice cases to be unconstitutional. *Watts,* 376 S.W.3d at 637-639. But the Court did not reach that conclusion based on its interpretation of the legislature's general authority to modify the common law; it was based on a conflict with a specific constitutional provision: The Court held that the cap violated the right to have a jury determine damages, found in Art. I, § 22(a). Under *Watts,* then, to the extent the substantive law continues to recognize a category of damages that would traditionally be determined by a jury, the legislature cannot interfere with a litigant's right to have a jury determine such damages.

But in *Watts*, the Court did not alter the legislature's right to modify, or even abolish the substance of the common law, as long as the modification does not interfere with a constitutional right. *See also Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 142 (Mo. 2005) ("Though, in general, the legislature is free to establish the substance of a claim, as, for instance, to allow or disallow punitive damages, it is not free to establish a procedure for adjudicating that substantive claim if the procedure contravenes the constitution. In short, a statute is not valid that provides for punitive damages but precludes a jury trial to determine those damages."). And here,

Plaintiffs do not make a jury trial right claim parallel to the one made in *Watts.*

B. Open Courts.

Plaintiffs do invoke another potential constitutional limit on the legislature's power: the "open courts" provision of the Missouri Constitution. Article I, Section 14 of the Missouri Constitution, prohibits "any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action." *Kilmer v. Mun,* 17 S.W 3d 545, 550 (Mo. banc 2000). But this "open courts" provision does not alter the legislature's power to modify, or even abolish common law causes of action. *Blaske,* 821 S.W.2d at 833 ("Insofar as the open courts provision is concerned, the legislature could totally eliminate a cause of action for personal injury or wrongful death . . . ."); *Harrell,* 781 S.W. 2d at 62 ("Our legislature has frequently enacted immunity statutes, limiting rights of action which the common law recognizes.") And a legislative modification of the common law of the sort accomplished by § 537.296 does not violate the "open courts" provision.

The "open courts" provision may be violated if a statute imposes a procedural barrier to enforce a substantive right. *See e.g. Kilmur,* 17 S.W.3d at 550 (finding a statute that only allowed a civil dram shop cause of action **if** the liquor licensee was first charged and convicted of providing liquor to an

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intoxicated person to be an "open courts" violation.). *See also State ex rel. Cardinal Glennon Memorial Hosp. for Children v. Gaertner,* 583 S.W. 2d 107 (Mo. 1979)(finding that a statute that required medical malpractice cases to first be reviewed by a professional board prior to filing to be an impermissible procedural bar in violation of the "open courts" provision.) But § 537.296 does not impose any procedural hurdles—there are no pre-filing review boards, nor unreasonable pre-conditions to filing a nuisance claim. Instead, § 537.296 represents a modification to the substantive common law of nuisance, defining the available categories of damages, and who may bring suit. Therefore, there is no "open courts" violation. *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. 2006)("Whether the Act arbitrarily eliminates a cause of action is not relevant to the open courts analysis. The open courts clause does not curtail the legislature's authority to abolish or modify common law or statutory claims.")

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C. Separation of Powers.

Plaintiffs' "separation of powers" challenge to § 537.296 similarly involves the legislature's authority to redefine the substantive law. Specifically, Plaintiffs argue that § 537.296.5 impermissibly establishes who has *standing* to bring a nuisance action arising from crop or animal production, a question reserved for the judiciary. § 537.296.5 ("no person shall have standing to bring an action for private nuisance unless the person has an ownership interest in the property alleged to be affected by the nuisance.")

Again, the legislature has the authority to define which individuals may bring suit in response to a particular injury. The judiciary then determines whether an individual has judicial standing under the framework established by the legislature. *See e.g. Goerlitz v. City of Maryville,* 333 S.W. 3d 450, 456 (Mo. 2011) (finding that a plaintiff's cause of action was barred by a statute banning nuisance and trespass suits against shooting ranges: "This Court did not make the law, but is obligated to enforce the law as duly enacted by the legislature. Therefore, this Court must defer to the plain language of the statute, the time-honored principle of separation of powers and the recognition that policy decisions such as presented in this case are within the providence of the legislature."). *See also* § 537.080 RSMo (defining the classes of individuals entitled to bring a suit for wrongful death.) Section

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537.296 represents a policy decision made by the legislature to promote agricultural production within the state, in part, by defining who may file suit for nuisance. As both a policy decision, and a substantive modification to the common law of nuisance, principles of separation of powers should lead the Court to uphold § 537.296.

D. Takings.

Plaintiffs' argument that § 537.296 amounts to a taking again misunderstands the authority of the legislature to modify the common law. While § 537.296 does limit the type of damages recoverable in nuisance actions as compared to the common law, and may result in certain individuals not being able to assert nuisance causes of action against farmers,[3] this is within the authority of the legislature. As noted in *Blaske:*

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[3] Plaintiffs' argument that § 537.296 prohibits lessees from bringing nuisance claims does not comport with the plain meaning of the statute. *Goerlitz v. City of Maryville,* 333 S.W.3d 450, 455 (Mo. 2011) ("This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue."). Pursuant to § 573.296.5 only individuals with an "ownership interest" may maintain nuisance actions where the nuisance emanates from agricultural production. But "ownership interest" is defined to include those holding "legal or equitable title to

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> If the constitution places a limitation on the legislature that prohibits it from eliminating a potential cause of action before it arises, such a provision would prohibit the legislature from changing the substantive law in any way that adversely affects any potential litigant. *It is obvious that neither the United States Constitution nor the Missouri Constitution purports to contain any such limitation.*

Blaske, 821 S.W. 2d at 834 (emphasis added).

Put another way, because the legislature has the authority to modify, or even eliminate the common law of nuisance, "a litigant does not have a vested property right in a cause of action before it accrues." *Id.* (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 88 n.32 (1978)("Our cases have clearly established that a person has no property, no vested interest, in any rule of the common law.")).

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property in fee or, in a life, or in a *leasehold interest*." § 537.296.1(4) (emphasis added).

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Here, it appears that Plaintiffs' alleged nuisance action did not accrue until after § 537.296 became effective.[4] If so, Plaintiffs would not have a vested property right to maintain a common law cause of action for nuisance unaltered by § 537.296. Fundamentally, a taking of private property cannot occur without the existence of a property right. *See* MO. CONST. art. I, § 28 ("That *private property* shall not be taken for private use . . . ."); MO. CONST. art. I, § 26 ("That *private property* shall not be taken or damaged for public use . . . .")(emphasis added). Section 537.296 does not result in a taking of private property.

[4] Section 573.296 became effective August 28, 2011. Pigs were placed in Defendants' facility after this date. (LF154-155, Mo. DNR CAFO Annual Report.)

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E. Rational Basis Review:

Plaintiffs' remaining challenges to § 537.296—"special laws," equal protection, and substantive due process—represent additional potential checks on the legislature's ability to modify the common law. But as § 537.296 neither involves a fundamental right, suspect class, nor creates a closed classification, such claims are subject to rational basis review. *See Doe v. Phillips,*194 S.W. 3d 833, 845 (Mo. banc 2006); *Roe v. Raplogle,*408 S.W 3d 759, 767 (Mo. banc 2013)(defining fundamental liberty interests); *Mahoney v. Doerhoff Surgical Services*, 807 S.W. 2d 503, 512 (Mo. banc 1991)(defining suspect classifications); *Glossip v. Missouri Dept. of Transp. and Highway Patrol Employee's Retirement System,* 411 S.W. 3d 796, 808 (Mo. banc 2013)(finding that statutes that create "open-ended" classifications are subject to rational basis review under a "Special Laws" challenge). And "rational basis standard prevents the courts from over-writing the legislature's judgment with its own regarding the wisdom, social desirability or economic policy underlying a statute." *City of St. Louis v. State*, 382 S.W.3d 905, 913 (Mo. 2012).

Given the importance of agriculture to the State of Missouri, § 537.296 easily passes rational basis review: Reducing the potential for costly litigation is rationally related to the State's interest in promoting agriculture as an industry.

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* * *

Section 537.296 does not interfere with Plaintiffs' constitutional rights, or result in any type of unconstitutional procedural bar to pursuing their claim within the substantive law defined by the General Assembly. While Plaintiffs may not agree with the policy decision made by the legislature in enacting § 537.296, the policy or purpose is not one for the Court to evaluate. *Hudson v. State,*190 S.W.3d 434, 441 (Mo. Ct. App. W.D. 2006) ("In other words, he asks us to decide his case based on what the law should be in his eyes, not what it actually is. Of course, the appellant's belief as to what the law should be is of no consequence. It is the General Assembly's prerogative as to what the law should be."). Plaintiffs do not have a constitutional right to bring a nuisance claim unaltered by § 537.296. The modifications to the common law of nuisance set forth in § 537.296 are within the authority of the Missouri General Assembly.

CONCLUSION

For the reasons set forth above, § 537.296 should be upheld.

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Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet e-filing system on June 25, 2014, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 3,002 words.

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