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SC99700

IN THE SUPREME COURT OF MISSOURI

SUSAN BRIDEGAN,

Plaintiff-Appellant,

vs.

GARY L. TURNTINE,

Defendant-Respondent.

Appeal from the Circuit Court of Jackson County
Honorable John M. Torrence, Circuit Judge
Case No. 1916-CV28429

BRIEF OF *AMICI CURIAE* AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, MISSOURI INSURANCE COALITION, AND MISSOURI ORGANIZATION OF DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent nearly 65% of the U.S. property-casualty insurance market and write more than $9 billion in premiums in the State of Missouri, including more than $3 billion in automobile insurance premiums. On issues of importance to that marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before state and federal courts, including this Court.

The National Association of Mutual Insurance Companies ("NAMIC") consists of more than 1,500 member companies, including seven of the top 10 property/casualty insurers in the United States. The association supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC member companies write $357 billion in annual premiums and represent 69 percent of homeowners, 56 percent of automobile, and 31 percent of the business insurance markets.

Through its advocacy programs NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve and fosters greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

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The Missouri Insurance Coalition ("MIC") is a not-for-profit state trade association providing governmental and public relations representation for insurance companies and affiliated entities operating in the State of Missouri. Its members write approximately 90% of the property and casualty insurance policies in this State. MIC represents the insurance industry on insurance-related matters before the legislative, executive and judicial branches of government.

The Missouri Organization of Defense Lawyers ("MODL") is a professional organization of over 1,300 attorneys involved in defending civil litigation. MODL's goals include ensuring that parties in our civil justice system receive fair and impartial treatment by juries, the judiciary, and the legislature. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients, so as to maintain the integrity and fairness of litigation for both plaintiffs and defendants.

Many members of APCIA, NAMIC and MIC, who comprise a significant portion of MODL's client base, have issued automobile liability policies both in Missouri and nationwide. These organizations are therefore vitally interested in this appeal, which involves an important determination regarding the scope of damages recoverable by uninsured motorists under those policies. This appeal turns on this Court's interpretation of whether Missouri Revised Statute § 303.390 (hereinafter, the "Statute"), enacted in 2013, is constitutional. The Statute provides that a motorist who does not procure statutorily required liability insurance "shall waive the ability to have a cause of action or

otherwise collect for noneconomic loss" against an insured motorist, subject to several exceptions. RSMo. § 303.390.1.

Public policy considerations, in addition to well-settled Missouri constitutional, statutory and common law construction principles, support enforcement of the Statute. Specifically, the Statute's waiver of noneconomic damages recovery on the part of a motorist who has illegally failed to procure the required coverage is a constitutionally sound effort to encourage Missouri citizens to comply with the critically important statutory automobile insurance requirements. Such compliance benefits all Missouri citizens who travel Missouri roads.

The insurance organizations participating in this brief, as well as MODL (hereinafter, "Amici"), have appeared as *amicus curiae* in numerous complex insurance coverage and constitutional law cases throughout the country, including before this Court.[1] Due to their members' extensive experience with automobile liability policies and uninsured motorists' claims, Amici have a unique perspective on the issues presented in this appeal. As such, Amici respectfully submit that their participation may assist the Court in deciding this appeal.

[1] For example, AIA (one of APCIA's predecessor organizations) appeared as *amicus curiae* in *The Doe Run Resources Corp. v. American Guarantee & Liability Ins.,* 531 S.W.3d 508 (Mo. banc 2017) and with NAMIC and MIC in *Watts v. Lester E. Cox Medical Centers,* 376 S.W.3d 633 (Mo. banc 2012). MIC filed an *amicus* brief in several insurance coverage cases including *Karscig v. McConville,* 303 S.W.3d 499 (Mo. banc 2010), together with NAMIC in *Dutton v. American Family Mutual Insurance Company,* 454 S.W.3d 319 (Mo. banc 2015), and with APCIA in *Hegger v. Valley Farm Dairy Co.,* 596 S.W.3d 128 (Mo. banc 2020).

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STATEMENT OF FACTS

Amici adopt and incorporate herein by reference the statement of facts set forth in Respondent's brief.

CONSENT OF THE PARTIES

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), Amici certify that both parties have consented to the filing of this brief.

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ARGUMENT

I. THE CIRCUIT COURT'S JUDGMENT ENFORCING RSMO. § 303.390's WAIVER OF RECOVERY OF NONECONOMIC DAMAGES BY AN UNINSURED MOTORIST SHOULD BE AFFIRMED BECAUSE THE STATUTE IS A VALID EXERCISE OF LEGISLATIVE DISCRETION THAT DOES NOT VIOLATE ARTICLE 1, SECTION 22(a) OF THE MISSOURI CONSTITUTION.

A. Standard of Review

This Court's review of the constitutional validity of a statute is *de novo. Ordinola v. University Physician Assoc.,* 625 S.W.3d 445, 448 (Mo. banc 2021). A statute is presumed to be constitutional and will not be invalidated unless it clearly contravenes a constitutional provision. *Id.* "'The person challenging the validity of the statute has the burden of proving the [statute] clearly and undoubtedly violates the constitutional limitations.'" *Id.* (quoting *Impey v. Mo. Ethics Comm'n,* 442 S.W.3d 42, 44 (Mo. banc 2014)).

A statute may modify or abolish a cause of action that has been recognized by Missouri common law or statute without running afoul of the constitution. *Kilmer v. Mun,* 17 S.W.3d 545, 550 (Mo. banc 2000) (cited in *Ordinola,* 625 S.W.3d at 450). Absent a valid constitutional challenge, "[i]t is not [this] Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." *Blaske v. Smith & Entzeroth,* 821 S.W.2d 822, 828-29 (Mo. banc 1991) (internal quotations omitted).

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B. Uninsured Motorist Coverage In Missouri and the Passage of Section 303.390

Like most states, Missouri requires that motorists possess a certain minimum level of insurance. *See* RSMo. §§ 303.010 *et seq.* (the "Missouri Motor Vehicle Financial Responsibility Law") ("MVFRL"). That minimum is $25,000 per person for bodily injury, $25,000 per accident for property damage, and uninsured motorist coverage of $25,000 for bodily injury. *Id.* "The purpose of the [MVFRL] is to protect persons who are injured in motor vehicle accidents by allowing them to collect at least minimal damage awards against negligent motor vehicle operators." *Rodgers-Ward v. Am. Standard Ins. Co. of Wisconsin,* 182 S.W.3d 589, 592 (Mo. App. E.D. 2005).

Uninsured motorist coverage requires an insurer to pay its own insured damages for bodily injury resulting from a motor vehicle accident in which the insured would have been entitled to recover those damages from the owner or operator of an uninsured vehicle. 30 MISSOURI PRACTICE, *Insurance Law and Practice,* § 10:1 (2d ed. 2009). "The purpose of uninsured motorist coverage is to provide a source of damages for one injured in a motor vehicle accident caused by a driver who had no liability insurance." *Id.* (2022 Supp.). Essentially, uninsured motorist coverage is intended to give the person injured by an uninsured motorist the same protection through their own insurance policy that they would have had if injured in an accident caused by a motorist with a standard liability policy. *Id.* Obviously, the inclusion of uninsured motorist coverage in an automobile liability policy increases the costs of that policy for the insured motorist.

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It is illegal to drive in the State of Missouri without the statutorily-mandated automobile liability insurance. *See* RSMo. § 303.025 (owner or operator of vehicle operated in violation of financial responsibility requirements guilty of a Class D misdemeanor). Failure to comply with the MVFRL may also subject the violator to other penalties, including suspension of the violator's vehicle registration and driver's license. *See Safley v. Director of Revenue, State of Missouri*, 766 S.W.2d 99, 102 (Mo. App. W.D. 1989).

In an effort to encourage compliance with the MVFRL, the Missouri legislature enacted Section 303.390 RSMo. effective October 11, 2013. The Statute provides:

> **303.390. Uninsured motorist, waiver of ability to collect noneconomic damages, when — inapplicability, when**. — 1. An uninsured motorist shall waive the ability to have a cause of action or otherwise collect for noneconomic loss against a person who is in compliance with the financial responsibility laws of this chapter due to a motor vehicle accident in which the insured driver is alleged to be at fault. For purposes of this section, the term "**uninsured motorist**" shall include:
>
> (1) An uninsured driver who is the owner of the vehicle;
>
> (2) An uninsured permissive driver of the vehicle; and
>
> (3) Any uninsured nonpermissive driver.
>
> Such waiver shall not apply if it can be proven that the accident was caused, in whole or in part, by a tort-feasor who operated a motor vehicle under the influence of drugs or alcohol, or who is convicted of involuntary manslaughter under subdivision (2) of subsection 1 of section 565.024, or assault in the second degree under subdivision (4) of subsection 1 of section 565.060.
>
> 2. The provisions of this section shall not apply to an uninsured motorist whose immediately previous insurance policy meeting the requirements of section 303.190 was terminated or nonrenewed for failure to pay the premium, unless notice of termination or nonrenewal for failure to pay such premium was provided by such insurer at least six months prior to the time of the accident.

3. In an action against a person who is in compliance with the financial responsibility laws prescribed by this chapter by a person deemed to have waived recovery under subsection 1 of this section:

(1) Any award in favor of such person shall be reduced by an amount equal to the portion of the award representing compensation for noneconomic losses;

(2) The trier of fact shall not be informed, directly or indirectly, of such waiver or of its effect on the total amount of such person's recovery.

4. Nothing in this section shall be construed to preclude recovery against an alleged tort-feasor of benefits provided or economic loss coverage.

5. Passengers in the uninsured motor vehicle are not subject to such recovery limitation.

(L. 2013 H.B. 339)

The Bill Summary issued when the legislation was introduced explained the purpose of the bill:

HB 339 – LIMITATION ON CAUSE OF ACTION FOR UNINSURED MOTORISTS

This bill prohibits an uninsured driver who is the owner of the vehicle or a driver operating a vehicle with or without permission who is uninsured from collecting for noneconomic damages in a civil action against an insured motorist alleged to be at fault for an accident. The provisions must not apply to an uninsured driver who has lost his or her insurance coverage for failure to pay unless the notification of termination or nonrenewal was provided at least six months prior to the accident. Reductions in damage awards based on the provisions of the bill will not be disclosed to the trier of fact.

The limitation does not apply to passengers in an uninsured driver's vehicle and does not limit the recovery of benefits provided or economic losses. Recovery of noneconomic damages in instances where an insured driver who is at fault because of operating a vehicle while under the influence of drugs or alcohol or who is convicted of involuntary manslaughter or second degree assault will be allowed.

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As set out in the Statute, a motorist who has violated Missouri law by failing to obtain insurance waives the right to collect non-economic damages from a motorist who is in compliance with the insurance requirements. The injured motorist may still recover economic damages in the form of medical expenses, property damage, and cost of repair. The uninsured motorist is simply deemed to have forfeited a right to seek pain and suffering compensation due to his or her failure to comply with the MVFRL. Notably, the Statute is not a wholesale ban but rather provides for a number of exceptions where noneconomic damages would still be available to an uninsured plaintiff. For example, the waiver does not apply if the insured motorist was under the influence of alcohol or drugs, or was criminally convicted for causing the accident. The Statute also avoids penalizing motorists for late payments of premiums by being triggered only after the motorist has been uninsured for six months or more. In addition, the waiver does not apply to passengers in the uninsured motorist's vehicle. RSMo. § 303.390.

C. Section 303.390 Does Not Violate the Constitutional Right to a Jury Trial

Appellant challenges the validity of the Statute as infringing on her right to a jury trial under Article 1, Section 22(a) of the Missouri Constitution. A number of Missouri state and federal courts have addressed the constitutionality of this Statute at the trial court level. Many have enforced the Statute in the face of arguments like those made by Appellant in this case. In *Miller v. McClellan,* St. Louis County Circuit Court No. 17SL-CC02989 (Order 4/14/18), for example, Judge Mary Ott denied plaintiff's motion to strike an affirmative defense relying on Section 303.390. *See* 4/14/18 Order attached in

the Appendix to this brief, at A-1. Judge Ott noted that the Statute was enacted to further the purpose of the MVFRL, which is "to ensure that persons injured on Missouri's highways . . . may collect at least minimal damage awards against negligent motor vehicle operators." *Miller, slip op.* at 2. The MVFRL requires owners of motor vehicles to maintain financial responsibility conforming to Missouri law. *Id.* Judge Ott construed Section 303.390 as a legislatively mandated waiver of certain rights by potential litigants who operate motor vehicles in violation of the MVFRL. *Id.* Judge Ott explained:

> To the extent that the waiver set out in 303.390 of these articulated rights may also implicate the right to a trial by jury as suggested by the application of the cases above, it is still a waiver. Individuals may waive their rights as guaranteed by the United States and Missouri Constitutions even when those rights are inviolate.

Id. at 2-3.

Judge Ott rejected the plaintiff's argument that the Statute was required to be struck down as in violation of the right to a jury trial under the reasoning of *Watts v. Lester E. Cox Med. Ctrs.,* 376 S.W.3d 633 (Mo. banc 2012) and *Lewellen v. Franklin,* 441 S.W.3d 136 (Mo. banc 2014). *Id.* Judge Ott found the terms and impact of the Statute to be distinguishable from the caps on amounts of damages at issue in *Watts* and *Lewellen.* As she explained, because the provisions of Section 303.390 do not act as a general cap on damages applicable to all litigants, but set out specific conditions under which a motorist, by his or her own voluntary conduct, may forfeit access to claims for a certain category of damages, it would not be held unconstitutional. *Id.* at 3. *See also Simmons v. Anderson,* Jackson County Circuit Court No. 1716-CV10127, Order entered 2/20/18 (denying motion to strike affirmative defense asserting Section 303.390)

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(attached in the Appendix to this brief, at A-4); *Mays v. Williams,* Jackson County Circuit Court No. 1516-CV14915, Order entered 1/21/16 (same) (attached in the Appendix to this brief, at A-6).

The *amicus* brief of the Missouri Association of Trial Attorneys relies heavily on the decision of a federal district judge in *Jiles v. Schuster Co.,* 357 F. Supp. 3d 908 (W.D. Mo. 2018), holding that enforcement of Section 303.390 would violate the plaintiff's right to a jury trial. However, more recently, the Chief Judge for the Western District of Missouri, Beth Phillips, reached the opposite conclusion. *Hassell v. Howard,* 2021 WL 7081111 (W.D. Mo. 8/12/21). In a suit for personal injuries brought by an uninsured motorist against an insured motorist, the defendant moved for partial summary judgment under Section 303.390 with respect to plaintiff's request for non-economic damages. Judge Phillips granted the motion, stating that she "respectfully disagrees" with *Jiles*. *Hassell,* 2021 WL 7081111 at *3.

Judge Phillips first noted that the Missouri legislature has "broad power" to alter the rights and liabilities that existed at common law. *Id.* at *1 (citing Missouri Constitution Art. XII, § 2, providing that the common law shall remain in force "until amended or repealed by the general assembly."); *see also Ordinola,* 625 S.W.3d at 450. In exercising that broad power, "the Missouri legislature retains the power to '[p]lac[e] reasonable limitations on common law causes of action,' including by limiting the types of damages a plaintiff may recover." *Hassell,* 2021 WL 708111 at *1 (quoting *Fust v. Attorney General,* 947 S.W.2d 424, 430-31 (Mo. banc 1997) (statute diverting 50% of any punitive damages judgment to the State held constitutional)). With this context, the

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Hassell court turned to the plaintiff's constitutional challenge to Section 303.390 as violating Article I, Section 22(a)'s right of trial by jury. *Id.* at *2.

Judge Phillips applied this Court's two-part test for ascertaining whether a statute violates the right of trial by jury. According to *Watts v. Lester E. Cox Med. Ctrs.,* 376 S.W.3d 633, 638 (Mo. banc 2012), the plaintiff must first show that the cause of action at issue was "'the same type of case that was recognized at common law when the constitution was adopted in 1820' and would have been decided by a jury at that time." *Hassell,* 2021 WL 7081111 at *2 (citations omitted). The second part of the test requires a determination whether the right to a trial by jury remains inviolate in light of the challenged law. *Id.* Judge Phillips noted that the defendant in *Hassell* did not contest that the first part of the test was satisfied, *i.e.,* that causes of action for negligence existed at common law in 1820.[2] *Id.*

The *Hassell* court found, however, that the Statute did not violate the second part of the two-part test. Unlike in *Watts,* where this Court emphasized that the damages cap at issue "operates wholly independent of the facts of the case," *Watts,* 376 S.W.3d at 640, Judge Phillips emphasized that Section 303.390 applies only under certain specified

[2] Arguably, however, this precise cause of action for injuries caused in a motor vehicle accident did not, and could not, exist in 1820, since automobiles did not yet exist. Nor is there evidence that plaintiffs who traveled the roads in 1820 in violation of then-existing law (for example, laws that prohibited Sunday travel) would have been allowed to sue a law-abiding citizen for damages, including noneconomic damages. *See* Lesley Lawrence-Hammer, *Red, White, but Mostly Blue: the Validity of Modern Sunday Closing Laws Under the Establishment Clause*, 60 Vand. L. Rev. 1273, 1276 n.17 (2007) (enforcement of Sunday travel bans was so common in early America that "newly elected President George Washington was stopped when traveling from Connecticut to New York for violating Connecticut's ban on Sunday travel").

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circumstances, "namely, in an automobile accident where the plaintiff was uninsured and the defendant was insured." *Hassell,* 2021 WL 7081111 at *2. The determination of the legal consequences of those facts are matters for the court, rather than a jury, to decide. *Id.* Judge Phillips analogized the application of Section 303.390 to the well-established power of a court to rule that a tort victim may not recover damages for pure economic loss, or that a breach of contract plaintiff may not recover punitive damages. *Id.* (citing *Captiva Lake Invs., LLC v. Ameristructure, Inc.,* 436 S.W.3d 619, 628 (Mo. App. E.D. 2014) (affirming summary judgment on negligence claim because a plaintiff cannot recover in tort for economic losses that are contractual in nature) and *Wallick v. First State Bank of Farmington,* 532 S.W.2d 520, 524 (Mo. App. St.L. 1976) (reversing award of punitive damages in breach of contract claim)).

The *Hassell* Court found that Section 303.390, unlike the damages cap in *Watts,* does not interfere with the jury's determination of the *amount* of damages, but provides that under specific factual circumstances a plaintiff may not legally recover *any* of a certain category of damages. 2021 WL 7081111 at *2 (emphasis in original). As Judge Phillips explained:

> There is a fundamental difference between capping a certain type of damages at an amount less than that found by the jury and barring a plaintiff from recovering a certain type of damages. A breach of contract plaintiff simply cannot recover punitive damages, not because the plaintiff's punitive damages are 'capped' at zero dollars, but because the law does not permit *any* of that sort of damages to be recovered under those circumstances.

Id. at n.*.

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Based on the above reasoning, the *Hassell* court concluded that imposing a reasonable limitation on a common law right of action to prevent certain plaintiffs, as a consequence of their own actions, from recovering certain types of damages was well within the legislature's power under RSMo. § 1.010 and this Court's decision in *Fust. Id.* at *2. The fact that the conclusion in *Hassell* is at odds with *Jiles* merely highlighted for Judge Phillips "that reasonable minds could differ" over the constitutionality of the Statute and therefore it could not be held to "'clearly and undoubtedly violate'" the Missouri Constitution. *Id.* at *3 (quoting *Hammerschmidt v. Boone County,* 877 S.W.2d 98, 102 (Mo. banc 1994)).

The enactment of Section 303.390 effectively abolished a common law cause of action for noneconomic damages by an uninsured motorist. The authority of the legislature to take such action, as noted in *Hassell*, is well-established and was reaffirmed by this Court as recently as the *Ordinola* decision. 625 S.W.3d at 450 ("It is undisputed that the General Assembly possesses the authority to abolish common law causes of action.").

The Statute's procedure for a determination of noneconomic damages as part of the jury verdict in the uninsured motorist's suit does not undercut this result. There is ample precedent for having a jury determine damages and then leaving it to the trial court to impose legal consequences to adjust the damages award thereafter. This method has been utilized in other contexts, including: (1) remitting 50% of any punitive damages award to the State after the total amount of punitive damages has been determined by a jury, *see* RSMo. § 537.675; (2) capping noneconomic damages in medical negligence

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cases after the total amount of noneconomic damages has been determined by a jury, *see* RSMo. § 538.210.6; and (3) in the long-established practice of remittitur, *see* RSMo. § 537.068. The common sense rationale for this procedure is to avoid improperly influencing the jury's verdict. Jurors who know in advance that a category of damages will be reduced or eliminated may, consciously or subconsciously, increase another category of damages in an amount unsupported by the evidence to adjust for that knowledge.

The foregoing lower court opinions provide clear and cogent analyses of the Statute under applicable constitutional principles. This Court should likewise hold that Section 303.390 is constitutional and does not violate Article 1, Section 22(a)'s right to a jury trial.

II. AFFIRMING THE CONSTITUTIONALITY OF SECTION 303.390 WILL PROMOTE THE VALID PUBLIC POLICY GOAL OF ENCOURAGING UNINSURED MOTORISTS TO COMPLY WITH THE FINANCIAL RESPONSIBILITY LAW AND THEREBY LOWER INSURANCE COSTS FOR THE STATE AS A WHOLE, WHILE STILL PRESERVING COMPENSATION FOR UNINSURED MOTORISTS FOR OUT-OF-POCKET DAMAGES RESULTING FROM MOTOR VEHICLE ACCIDENTS.

The commonly-recognized purpose of statutes like Section 303.390 is to incentivize motorists to maintain the statutorily-required liability insurance. Compulsory insurance laws reflect a constructive and worthy effort by the legislature to keep insurance premiums lower for everyone.[3]

[3] As of the time the Statute was passed in 2013, the most recent Insurance Information Institute figures from 2009 estimated that 13.7 percent of Missouri motorists

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Missouri is not the only state to have enacted legislation intended to incentivize motorists to maintain the required automobile insurance. There are at least ten other states with some form of what is widely (if colloquially) referred to as "no pay, no play" legislation.[4] The courts that have considered and upheld such legislation have noted that it does not impose a hard cap on damages without regard to the underlying facts. The limitation imposed by the legislation only applies to certain plaintiffs who have violated the law, and it is "**entirely within th[e] plaintiff's control to be fully qualified to be awarded all damages**" by becoming compliant with the financial responsibility laws. *See Lawson v. Hoke,* 119 P.3d 210, 214 (Or. 2005) (emphasis added) (rejecting challenge to constitutionality of statute prohibiting recovery of non-economic damages by uninsured motorist).

In *Lawson*, the Oregon Supreme Court also observed that the legislation at issue did not infringe on any common law rights of the uninsured plaintiff that would have been in existence at the time the state constitution was enacted. *Id.* at 217 ("[N]o

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were uninsured. *Insurance Journal,* Missouri Lawmakers Eye Uninsured Motorist Bill for Override (https://www.insurancejournal.com/news/midwest/2013/09/03/303724.htm). A subsequent study found that in 2017 alone, more than $107 million was paid out by insurance companies in Missouri due to injuries caused by uninsured motorists. Private Passenger Automobile Insurance: A Review of the Market in Missouri, MISSOURI DEPARTMENT OF INSURANCE, FINANCIAL INSTITUTIONS & PROFESSIONAL REGISTRATION (July 2018) (https://insurance.mo.gov/reports/documents/PrivatePassengerAutomobileInsuranceInMOrev7-11-2017.pdf) (p. 10 of 35).

[4] *See, e.g.,* Alaska Stat. § 09.65.320; Cal. Civ. Code § 3333.4; Ind. Code §§ 27-7-5.1, 34-30-29.2; Iowa Code § 613.20; Kan. Rev. Stat. § 40-3130; La. RS 32:866; Mich. Compiled Laws § 500.3135; N.J. Statutes § 39:6A-4.5; Okla. Statutes § 47-7-116; Or. Statutes § 31.715.

'absolute common-law right' that existed when the Oregon Constitution was drafted in 1857 would have guaranteed a person in plaintiff's position (as violator of a law requiring drivers to have insurance) a remedy for her injuries."). Here, as well, there is no evidence that Missouri common law in 1820 would have extended a non-economic damages remedy to a plaintiff who was in violation of the law regulating how plaintiff could lawfully travel the state roads.

Other courts that have upheld similar statutes have also recognized the legitimate state interest promoted by the statutes. In *Progressive Sec. Ins. Co. v. Foster,* 711 So.2d 675 (La. 1998), for example, the Louisiana Supreme Court sustained the state's "no pay, no play" statute against equal protection and due process challenges where the statute barred uninsured motorists from recovering damages for the first $10,000 of property damage or bodily injury. The court relied in part on the legislative purpose of the statute, including concern for: (1) the lack of compliance with the Motor Vehicle Safety Responsibility Law; (2) the high incidence of motor vehicle accident claims in the state's courts; (3) reduction of the high cost of motor vehicle insurance through reform of the civil justice system; (4) an evident imbalance in the state's motor vehicle insurance system that had engendered abuse within the system; and (5) the need for insurance cost savings to the citizens of the state through a reduction of premium rates for motor vehicle insurance. 711 So. 2d at 687-688. The Louisiana Supreme Court found that the statute at issue promoted the state's interests by reducing the number of uninsured motorists on the highways and lowering automobile rates by vesting ownership of the costs of liability insurance on the insured and uninsured alike. *Id; see also Caviglia v. Royal Tours of*

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America, 842 A.2d 125, 134 (N.J. 2004) (upholding constitutionality of statute restricting ability of uninsured plaintiff to recover noneconomic damages in face of equal protection and due process arguments and noting that the legislature "is empowered to pass enactments that create incentives to coerce compliance with the law.").

Like the above courts, this Court should defer to the well-established principle that legislatures are entitled to experiment and explore means through which to advance public policy. Under this principle, courts should decline to second-guess the legislature's "common-sense reasoning that [a no pay, no play statute] has the potential to produce greater compliance with compulsory insurance laws and, in turn, reduce litigation, and result in savings to insurance carriers and ultimately the consuming public." *Caviglia,* 842 A.2d at 135.

A 2012 Insurance Research Council study published before the Missouri General Assembly enacted the Statute noted that, while limited research had been conducted to measure the impact of these laws, the research that had been published suggested that the laws can reduce the costs of auto insurance. Insurance Research Council, *The Potential Effects of No Pay, No Play Laws,* Executive Summary (2012) (citing The Rand Organization's 2012 study, *The Effects of a No-Pay/No-Play Plan on the Costs of Auto Insurance in Texas*, www.rand.org/pubs/issue_papers/IP174.html) ("IRC Study") (copy attached in the Appendix to this brief, at A-8). The IRC Study noted the following rationale for enactment of these statutes:

> Uninsured motorists create problems for regulators, insurers, and insured drivers. . . . Insured drivers are affected through the premiums they pay for UM coverage and because insurers will pass on a portion of the costs incurred by the

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> actions of uninsured motorists. All parties would benefit from a decline in the number of uninsured motorists.
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> . . . .
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> The intention of no pay, no play laws is to relieve at-fault drivers who comply with state insurance requirements from having to compensate uninsured drivers for noneconomic damages. No pay, no play laws may also help reduce insurers' losses and the premiums charged to policyholders. With such laws in place, it is also believed that fewer motorists will operate without policies.

The IRC Study concluded that the percentage of uninsured motorists declines by a statistically significant amount after a "no pay, no play" law's enactment. IRC Study, Executive Summary, Key Findings and at p. 13 (A-16, 17, 28). "The findings suggest that not only would a properly enforced no pay, no play law result in a moderate decrease in the number of uninsured motorists, it may also reduce auto insurance costs." *Id.* at 2 (A-17). At the time the IRC Study was published, and before the Statute was passed, the IRC found that 14% of Missouri motorists were uninsured[5] and that over $12 million per year was being paid out by Missouri insured motorists' policies for noneconomic losses to uninsured plaintiffs. *See id.* at 21 (A-36).

In sum, the Missouri General Assembly has followed the lead of a number of other states in enacting legislation that will promote the state welfare by reducing the number of uninsured motorists and consequently reducing insurance costs for all motorists. The method employed is not only constitutional but fair. It imposes a limited but proportional penalty on a motorist who chooses to disregard the MVFRL by abolishing the ability to

[5] Insurance Research Council, *Recession Marked by Bump in Uninsured Motorists* (April 21, 2011), https://www.insurance-research.org/sites/default/files/downloads/IRCUM2011_042111.pdf.

collect noneconomic damages when such motorist would not be in a position to pay such damages himself or herself to an injured insured motorist. Fairness dictates that motorists who refuse to follow the rules should not be granted the full benefit of the rules. But the Statute is not draconian—uninsured motorists are not left without a remedy. They may still recover their actual out-of-pocket damages for medical expenses and property damage and will not be penalized for late payment of a premium, or if the insured motorist is intoxicated or commits a felony. Moreover, the waiver does not extend to an uninsured motorist's passengers. These salutary goals and the targeted method used to achieve them are clearly rational and a valid exercise of legislative discretion. *See Dodson v. Ferrara,* 491 S.W.3d 542, 561 (Mo. banc 2016) (legislative creation of damages cap in effort to reduce perceived rising insurance premiums was rationally related to a legitimate state interest and entitled to deference by the Court); *Redel v. Capital Region Medical Center,* 165 S.W.3d 168, 177 (Mo. App. E.D. 2005) (enforcing statute allowing judgments for future damages to be paid in installment payments "to help reduce costs to insurance companies and reduce insurance premiums").

CONCLUSION

For the foregoing reasons, *amici curiae* American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Missouri Insurance Coalition, and Missouri Organization of Defense Lawyers respectfully request that the Judgment of the Circuit Court of Jackson County, Missouri in this case be affirmed and that the constitutional challenge to RSMo. § 303.390 be rejected.

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Dated: January 6, 2023

Respectfully submitted,

By: /s/ Lisa A. Pake

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RULE 84.06 CERTIFICATION

The undersigned hereby certifies as counsel of record for *Amici Curiae* that: (1) I signed the original Brief, which is being maintained at Haar & Woods, LLP; (2) the brief complies with the limitations contained in Rule 84.06(b); and (3) the word count for this brief, excluding the cover, this certificate, and the signature block, is 6,193 words per Microsoft Word for Windows.

/s/ Lisa A. Pake

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CERTIFICATE OF SERVICE

It is hereby certified that on this 6th day of January, 2023, a copy of the foregoing **Brief of Amici Curiae American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Missouri Insurance Coalition and Missouri Organization of Defense Lawyers** was filed electronically with the Clerk of the Court to be served pursuant to Supreme Court Rule 103.08 by operation of the Court's Electronic Filing System on all counsel of record

/s/ Lisa A. Pake

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