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WHY LEARMONTH V. SEARS, ROEBUCK & CO. IS WRONG

*John G. Corlew**

I. INTRODUCTION

In *Learmonth v. Sears, Roebuck and Co.* (*Learmonth II*), the United States Court of Appeals for the Fifth Circuit considered the constitutionality of a Mississippi statute, not as a matter of federal constitutional law, but based on its own erroneous interpretation of the Mississippi Constitution.[1]

Learmonth obtained a $4 million jury verdict in the United States District Court for the Southern District of Mississippi.[2] The District Court interpreted the award to include $1,781,095.00 in economic damages and $2,218,905.00 in non-economic damages.[3] The Court reduced the verdict to include only $1 million in non-economic damages based on Mississippi's cap statute, Mississippi Code § 11-1-60(2)(b).[4]

On appeal, Sears challenged the amount of the verdict as excessive, and Plaintiff challenged the constitutionality of the cap statute.[5] The Fifth Circuit refused to find the verdict excessive:

> The extent of Learmonth's pain and suffering is a factual question on which the jury heard multiple witnesses and received conflicting evidence. Upon reviewing the evidence ourselves, we are unable to say that the jury's verdict as to non-economic damages was "contrary to the overwhelming weight of credible evidence."[6]

The Court also considered its own maximum recovery rule: "[T]he maximum recovery rule is not implicated and we refuse to substitute our judgment for that of the jury."[7]

Instead of addressing interpretation of the Mississippi Constitution, the Fifth Circuit certified the question of whether the Miss. Code § 11-1-60(2)(b) limit of non-economic damages to $1 million is constitutional.[8] The Court stated that it "disclaims any intention or desire that the Supreme Court of Mississippi confine its reply to the precise form or scope of the question certified."[9]

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1. 710 F.3d 249 (5th Cir. 2013).
2. *Id.* at 253.
3. *Id.* at 254.
4. Learmonth v. Sears, Roebuck and Co. (*Learmonth I*), 631 F.3d 724, 730 (5th Cir. 2011).
5. *Id.* at 734, 739.
6. *Id.* at 737.
7. *Id.* at 739.
8. *Id.* at 740.
9. *Id.*

The Mississippi Supreme Court refused to address the constitutionality of the cap statute.[10] In an 8-1 decision, it determined that the jury's general verdict was binding on the parties.[11] The Supreme Court noted that Sears had not objected to the form of the verdict and had not requested a jury instruction, which would separate economic damages from non-economic damages.[12] In the absence of such an instruction, the Court found that any division of the verdict into categories would be speculation and conjecture.[13] Because it would not speculate to determine the constitutionality of a statute, the Mississippi Supreme Court declined to do so for the Fifth Circuit.[14]

The Court made several cogent observations:

> (1) there was no record proof that the parties had stipulated to a separation of economic from non-economic damages;[15]
>
> (2) the pretrial order defined contested issues of fact to include the "nature, extent, duration and cause of [Learmonth's] alleged injuries";[16]
>
> (3) "facts in a jury trial are determined by juries, not courts (federal or otherwise)";[17]
>
> (4) "[a]bsent knowledge of the jury's finding, we lack the omniscient power to ascertain what we consider an essential, contested, requisite fact."[18]

When the case returned to the Fifth Circuit for consideration, it is inexplicable why that Court saw fit to make itself the arbiter of Mississippi constitutional law.[19] The Fifth Circuit belied its statement in *Learmonth I* that it "disclaims any intention or desire that the Supreme Court of Mississippi confine its reply to the precise form or scope of the question certified."[20] Instead it rejected the Supreme Court's refusal to speculate as to

10. Sears, Roebuck and Co. v. Learmonth, 95 So. 3d 633 (Miss. 2012).
11. *Id.* at 637-39.
12. *Id.* at 637, 639.
13. *Id.* at 637.
14. *Id.* at 637-38.
15. *Id.* at 637.
16. *Id.* at 636.
17. *Id.* at 636 n.5.
18. *Id.* at 639.
19. Learmonth v. Sears, Roebuck & Co. (*Learmonth II*), 710 F.3d 249 (5th Cir. 2013); In a different context, Fifth Circuit Judge Patrick Higginbotham wrote: "[I]t is not in the constitutive order of things for three Texas judges even as well-intentioned and able as my colleagues, to decide for the State of Mississippi. At the least we should be most hesitant to trim the role of the jury without much clearer direction from the state . . . . [T]o conclude as a matter of law [as in this case] writes a powerful new policy for the State of Mississippi—painless tort reform by decree, not ballot." Huss v. Gayden, 465 F.3d 201, 211 (5th Cir. 2006) (dissent).
20. Learmonth v. Sears, Roebuck & Co. (*Learmonth I*), 631 F.3d 724, 740 (5th. Cir. 2011).

the components of a general verdict.[21] The Fifth Circuit could hardly question the Mississippi Court's reason for doing so. It follows the same general verdict rule as Mississippi: "When a jury renders a general award that contains numerous components of damages, however, we cannot invade the province of the jury by awarding an amount for each separate component."[22]

Whenever a general award that includes numerous elements of damages is greater than the legal maximum recoverable for any one element, it is impossible to determine on appeal whether the award is excessive or not because the jury may have awarded an excessive amount for that one item and nothing at all for the remaining elements.[23]

The Fifth Circuit, however, went behind the jury's general verdict. It excused its refusal to defer to the Mississippi Supreme Court by stating that "Although the Mississippi Supreme Court is privileged to make its own rules concerning the propriety of considering an issue on appeal, we are bound by federal procedural rules, including those of issue preservation."[24] The Court held that Learmonth had not properly preserved the "general verdict" argument for appeal, although it acknowledged that Fifth Circuit jurisprudence would allow a "waived" argument to be considered under "extraordinary circumstances."[25] Interpretation of the Mississippi Constitution is an "extraordinary circumstance." The Mississippi Supreme Court's determination that it would not go behind a general verdict to determine the constitutionality of a statute should present an "extraordinary circumstance" to any court with a sense of comity.

Having overreached to interpret Mississippi's Constitution, the Fifth Circuit ignored 200 years of Mississippi jurisprudence in doing so.

II. THE RIGHT TO TRIAL BY JURY UNDER THE MISSISSIPPI CONSTITUTION[26]

Mississippi became a state in 1817 and its first Constitution provided

21. *Learmonth II*, 710 F.3d 249.

22. Gautreaux v. Insurance Co. of North America, 811 F.2d 908, 916 (5th Cir. 1987) (Jones Act).

23. In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1235 (5th Cir. 1986) (diversity of citizenship).

24. *Learmonth II*, 710 F.3d at 256.

25. *Id.* at 257.

26. Opponents of cap legislation, and Learmonth in this case, raise other state and federal constitutional arguments. This paper addresses only the guarantee of right to trial by jury as at common law under Section 31 of the Mississippi Constitution, and the Seventh Amendment of the United States Constitution. The right to trial by jury has a clear history of judicial interpretation by the Mississippi Supreme Court; a clear history of the reason for its inclusion in the Bill of Rights of the United States Constitution; and a clear history at common law from the Magna Carta in 1215 until inclusion in the Bill of Rights in 1791 and in Mississippi's first Constitution in 1817. This paper does not address arguments based on separation of powers, MISS. CONST. §§ 1 and 2; due process, MISS. CONST. § 14; or the open courts/remedy for injury clause, MISS. CONST. § 24. *Learmonth II* held that the due process and open courts/remedy for injury arguments had been waived. It rejected the separation of powers argument without a citation to *Newell v. State*, the most important decision in the history of Mississippi jurisprudence regarding the constitutional rights of the judiciary versus the constitutional rights of the legislature. *See infra* Newell v. State, 308 So. 2d 71 (Miss. 1975).

that "[t]he right of trial by jury shall remain inviolate."[27] This provision was part of a "Declaration of Rights": "To guard against transgressions of the high powers, herein delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void."[28] This Declaration of Rights was made in the name of the people to preserve rights against encroachment by the government. As with the Bill of Rights in the United States Constitution, it proclaimed protection for citizens against actions by the government, against actions by the Legislature, against "all laws contrary thereto."

Mississippi has had three other Constitutions. The 1832 Constitution repeated verbatim that "The right of trial by jury shall remain inviolate."[29] So did the Constitution of 1869.[30] The protection is the same in Mississippi's present Constitution adopted in 1890.[31]

Not once in 200 years of Mississippi jurisprudence has a Court failed to observe that the right to jury trial is inviolable.

In 1834, the state's highest court said:

> If the legislature can say in any given case, that a party may recover by motion to the court, without the privilege of an issue, they may, as to all matters of contract at least, say the same thing, and thus destroy the right of trial by jury . . . . The right of trial by jury, as it exists here, is derived from the common law, and it is so highly valuable to the citizen, so essential to liberty, that it is secured as a constitutional right, and must, in a government like ours, be understood to extend at least as far as it did at the common law, and if alterations are made, policy would dictate an extension rather than a restriction of a privilege invaluable in itself, and so highly prized by the citizen.[32]

In 1841, the Court said: "The right it [trial by jury] secures to the citizen is one which is justly regarded as one of the strongest bulwarks of human rights, and is held dear by the people of this country."[33]

In 1858, the Court stated:

> The spirit and policy of our institutions, *are at war with the doctrine of legislative omnipotence.* Ours is a government

27. MISS. CONST. art. I, §28 (1817).

28. MISS CONST. art. I (1817).

29. MISS. CONST. art. I, § 28 (1832).

30. MISS. CONST. art. I, § 12 (1869).

31. MISS. CONST. art. III, § 31(1890); In 1914, an amendment to Section 31 was submitted to and adopted by the people to allow nine jurors in a civil case to return a verdict. The common law required 12 person juries and a unanimous verdict. GEORGE H. ETHRIDGE, MISSISSIPPI CONSTITUTIONS (1928).

32. Smith's Adm'r v. Smith, 2 Miss. 102 (Miss. Err. & App. 1834).

33. Lewis v. Garrett's Adm'rs, 6 Miss. 434 (Miss. Err. & App. 1841).

> founded upon an express, written compact, reduced to exactitude and certainty, expressive of the sovereign will of the people, fixing the limits and marking the bounds of legislative, executive, and judicial powers; our constitutions all originated in a spirit of distrust of governmental power, and from a conviction that, unrestrained, its tendency was to despotism (emphasis added).
>
> For the legislature to provide for the assessment of damages by a jury, and then to require of the jury to extinguish the amount of the claim for damages found by them . . . would be a mockery of "trial by jury," and a "compensation" wholly unauthorized by the constitution.[34]

In 1907 the Supreme Court struck down as unconstitutional a statute, which operated only for the benefit of plaintiffs and against a defendant litigant.[35] The Court said, "Our own Constitution provides (section 31) that 'the right of trial by jury shall remain inviolate.'"[36] Justice Whitfield, specially concurring, stated that he wished to say that the law invalidated was "nonsense written therein by legislative blundering."[37]

This "inviolate" right to trial by jury "to guard against transgressions of the high powers" and "all laws contrary thereto," a right "at war with the doctrine of legislative omnipotence," and to protect against "legislative blundering" is the right to have a trial whereby the jury determines facts and the Court determines the law.

In *McAlexander v. Puryear*, 48 Miss. 420 (Miss. 1873), the Court described the common law trial:

> The judge responds to the law, and the jury to the facts; and where the evidence is conflicting, it is for the jury to weigh it, and give credit to those facts and circumstances which, in their judgment, are entitled to the greatest consideration, and it is not for the courts in such cases to interfere with their determinations.[38]

Among the facts to be determined by the jury at common law are the facts of damage, including specifically non-economic damage. In *Mississippi Cent. R. Co. v. Hardy*, 41 So. 505, 510 (Miss. 1906), the Court concluded: "This court has no scale delicate enough to weigh physical and

34. Isom v. The Mississippi Central R.R. Co., 36 Miss. 300 (Miss. Err. & App. 1858) (emphasis added).

35. Yazoo & M.V.R. Co. v. Wallace, 43 So. 469, 471 (Miss. 1907).

36. *Id.* at 470.

37. *Id.* at 471 (Whitfield, C.J., specially concurring).

38. McAlexander v. Puryear, 48 Miss. 420 (Miss. 1873).

mental anguish. At best it is an extremely difficult task. The law has committed this delicate task to the unbiased judgment of the 12 plain, practical, everyday men who compose the jury."[39]

For 200 years the Mississippi courts have observed that the right to trial by jury is "inviolate;" that the right includes a jury that determines facts; that damages are a question of fact to be determined by the jury; and that the Mississippi Constitution protects the citizen against the intrusion by the government itself – by the Legislature. *Learmonth II* turns this 200 year history on its head. Rights guaranteed by the Mississippi Constitution are guarantees to its citizens against encroachment by the Legislature. The Legislature's attempt to curtail the right to have a jury determine damages violates what the Mississippi Constitution guaranteed in Section 31.

Learmonth II, however, states that the cap statute does not alter a jury's "factual damages determination."[40] The cap is applied after verdict and because a jury is unaware of the $1 million limit, the statute "does not invade the jury's fact finding process."[41] But the Mississippi Supreme Court has held exactly the opposite:

> The right of trial by jury in common-law cases is a right granted and guaranteed by the Constitution. It cannot be denied directly, and for that reason cannot be denied indirectly. And neither can it be denied in part, for if so it could with equal authority be denied in toto; and to say that it cannot be denied in part is the same as to say that it cannot be abridged. If this court should assume to consider that the verdict of a jury in a common-law case is no more than advisory to the trial court or to this court, and is to be approved or set aside according to whether it corresponds with what the court would have found on the facts, then there would be an abridgement of the constitutional right of trial by jury;

39. Mississippi Cent. R.R. Co. v. Hardy, 41 So. 505, 510 (Miss. 1906); *See also* Louisville & N. R.R. Co. v. Jones, 98 So. 230, 231 (Miss. 1923) ("The jury was the sole judge of the facts."); Biedenharn Candy Co. v. Moore, 186 So. 628, 630 (Miss. 1939) ("There is no exact standard by which to determine the amount of damages to be awarded for pain and suffering, the only standard therefor being what a reasonable man would consider as fair compensation therefor – what the jury, as reasonable men, so consider and a jury's verdict so determining will not be disturbed unless it evidences passion, prejudice or corruption."); Sandifer Oil Co. v. Dew, 71 So. 2d 752, 758 (Miss. 1954) ("We know of no basis whereby we could substitute our judgment for that of the jury on the quantum of damages."); Raspberry v. Calhoun County, 94 So. 2d 612, 614 (Miss. 1957) ("Neither the trial court nor this Court can substitute its judgment for that of the jury in awarding damages."); City of Jackson v. Locklar, 431 So. 2d 475, 481 (Miss. 1983) ("The jury's verdict is a finding of fact."); Edwards v. Ellis, 478 So. 2d 282, 289 (Miss. 1985) ("The amount of damages to be awarded to an injured litigant is primarily a question of fact for the jury."); Samuels v. Mladineo, 608 So. 2d 1170, 1180 (Miss. 1992) ("A jury verdict is absolutely binding on all factual disputes, and concludes all factual controversy."); Causey v. Sanders, 998 So. 2d 393, 409 (Miss. 2008) ("The determination of damages is within the province of the jury."); Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198, 206 (Miss. 2008) ("The assessment of damages is a finding of fact.").

40. Learmonth v. Sears, Roebuck & Co *(Learmonth II)*, 710 F.3d. 249, 260 (5th Cir. 2013).

41. *Id.*

> the form of the jury trial would be preserved, but its substance would be gone.[42]

This opinion by one of Mississippi's most respected jurists—V. A. Griffith—states clearly that right to trial by jury cannot be denied directly or indirectly.[43] The cap statute is nothing more than an indirect attempt to deny the constitutional right to a jury's determination of damages. Justice Griffith writes straightforwardly for the Mississippi Supreme Court that the right to trial by jury may not be denied in part.[44] The cap statute is an attempt to deny the right to a jury's determination of damages in part, to limit that right to $1 million of non-economic damages. The verdict of a common-law jury cannot be considered as "no more than advisory." The cap statute attempts to convert a jury's binding determination of the amount of non-economic damages to advisory if it exceeds $1 million.

To allow a legislative act to alter a verdict after "the jury's fact finding process" does precisely what Justice Griffith warned against: "the form of the jury trial would be preserved, but it's substance would be gone."[45]

On at least two occasions *Learmonth II* references Mississippi's remittitur statute as an example presumably of legislative encroachment on the right to jury trial.[46] The Court says that if the Legislature could not limit a remedy, *i.e.*, the cap on non-economic damages, in this manner then it "could not codify common law remittitur procedures, which it has done uncontroversially."[47] Remittitur, however, and its mirror motion, additur, can only be applied when the trial court first determines that a jury verdict is against the overwhelming weight of the evidence, or results from bias, passion or prejudice. The right of the trial court to do so existed at common law: "This power of the court to review the evidence and set aside the verdict on the ground that the evidence [sic] is against the overwhelming weight of the testimony is very ancient, and has been the law of this state for the whole period of its history, and existed at the common law."[48]

More importantly, the lack of controversy about a legislative enactment means nothing in the absence of a constitutional challenge. The two most important constitutional cases with respect to Mississippi's form of government came in 1975 and 1983, after dozens of years of legislature abuse.

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42. Williams Yellow Pine Co. v. Henley, 125 So. 552, 553 (Miss. 1930).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Learmonth II*, 710 F.3d at 266.

47. *Id.*

48. Universal Truck Loading Co. v. Taylor, 172 So. 756, 757 (Miss. 1937); The Fifth Circuit acknowledges that without the choice of a new trial, remittitur would violate the federal Seventh Amendment right to trial by jury as "at common law." U.S. CONST. amend. VII; *see* Foradori v. Harris, 523 F.3d 477, 503 (5th Cir. 2008).

A. Newell v. State[49]

The landmark decision establishing proper roles between the legislative and judicial branches of government is *Newell v. State*.[50] At that time, judicial rulemaking was largely a legislative function. There were no Mississippi Rules of Civil Procedure. Likewise, many rules of evidence were enacted by statute. There were no Mississippi Rules of Evidence. The occasion for an assertion of judicial independence by a unanimous Mississippi Supreme Court was a statute which had been in effect since 1857 and restricted a trial judge's ability to address jury instructions.[51] The statute had been interpreted to prohibit a trial judge from authoring a jury instruction[52] and from initiating an instruction—even where a party had submitted no instructions at all.[53] In *Newell*, no party submitted an instruction on the elements of the crime involved.[54] Although the restriction had been repeatedly criticized,[55] the law remained on the books. The *Newell* Court reacted:

> [J]uries have been left uninstructed due to the oversight, omission or ineptness of attorneys . . . . [J]uries are at times left groping blindly . . . for the law of a case to aid them in arriving at a verdict . . . . The vantage point afforded by 118 years of legal history characterizes the limiting terms of the legislation directing that instructions emanate only from the parties to have been a mistake of such magnitude that we now consider it of our own motion.[56]

The Court held the legislative restriction on jury instructions unconstitutional.[57]

B. Alexander v. Allain

The landmark decision of *Alexander v. Allain*, 441 So. 2d 1329 (Miss. 1983), addressed the rights and prerogatives of the executive and legislative

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49. This discussion of *Newell v. State* and *Alexander v. Allain* is adapted from John G. Corlew, *The Separation of Powers and an Independent Judiciary*, THE MISSISSIPPI LAWYER 26 (January-February 2010).

50. 308 So. 2d 71 (Miss. 1975).

51. *See* Miss. Code of 1857, ch. 61, sec. 12, art. 161.

52. Watkins v. State, 60 Miss. 323, 324-25 (1882).

53. J. C. Penney Co. v. Evans, 160 So. 779, 781 (Miss. 1935).

54. *Newell*, 308 So. 2d at 74, 76.

55. Pringle v. State, 67 So. 455, 458-59 (Miss. 1915) ("[T]he theory of our law seems to be that the presiding judge is incapable of instructing the jury."); Dement v. Summer, 165 So. 791, 793-794 (Miss. 1936) ("statute [goes] to the extreme limit of legislative power in the regulation of instructions to the jury"); Griffith, *Charging the Jury*, 8 Miss. L.J. 182, 189 (1935) (statute should be amended "for the better administration of justice").

56. *Newell*, 308 So. 2d at 71.

57. *Newell* has impacted far beyond the issue of jury instructions. The case is cited as the basis for the Court's declaration of "inherent authority" to adopt the Mississippi Rules of Civil Procedure, 395 So. 2d 1 (Miss 1981), and for its adoption of the Mississippi Rules of Evidence, 474 So. 2d XXVII (Miss. 1985).

branches of government.[58] Through legislative enactment over a broad span of years, the legislature usurped executive powers which it arrogated unto itself. Principal among those powers addressed in *Alexander v. Allain* were budget-making, legislator service on executive boards, and the power of appointment within the executive branch of government.[59]

The legislature, by statute, had created the Commission of Budget and Accounting which consisted of 11 members—ten legislators and the Governor as *ex officio* chairman.[60] The Court declared the Commission unconstitutional.[61] It acknowledged that budget-making is primarily a legislative prerogative, but that the Governor, as a member of the executive branch of government, is constitutionally empowered to submit for legislative consideration an executive budget and that "the governor is entitled to establish within the executive department such committee as may be appropriate to assist him in this budget proposal/recommendation function" and that such a structure should not and could not be staffed by members of the legislative branch of government.[62]

The Court examined several state agencies where legislators served on governing boards and commissions, including the Board of Economic Development, the Board of Trustees of the Public Employees Retirement System, the Central Data Processing Authority, the State Personnel Board, the Medicaid Commission, the Capitol Commission, the Wildlife Heritage Committee and the Board of Corrections.[63] In each instance, the Court described the functions of those state agencies as executive and that the presence of legislators on their respective governing boards was a violation of separation of powers and unconstitutional.[64] Moreover, the power to appoint persons to assist executive officers in the discharge of executive duties was vested by the Constitution exclusively within the executive branch of government.[65] Accordingly, the statutes which authorized legislative appointments to executive offices were unconstitutional.[66]

The jury instruction statute was on the books 118 years before the Supreme Court held it unconstitutional. The legislative usurpation of executive authority took its inspiration from the Constitution of 1890.[67] The legislature steadily enhanced its power at the expense of the executive until *Alexander v. Allain* called its hand.

58. Alexander v. Allain, 441 So. 2d 1329, 1332 (Miss. 1983).

59. *Id.* at 1339.

60. *Id.* at 1338.

61. *Id.* at 1343.

62. *Id.* at 1340.

63. *Id.* at 1342-43.

64. *Id.* at 1343.

65. *Id.* at 1344.

66. *Id.* at 1345.

67. The Constitution set forth a "weak executive" plan for government. Vaughan, The Executive, in Yesterday's Constitution Today (Bureau of Public Administration, Univ. of Miss. 1960).

III. The Right to Trial by Jury under the United States Constitution

The Seventh Amendment to the United States Constitution is the federal parallel to Miss. Const. Sec. 31.[68] The United States Supreme Court has recognized that the right to trial by jury includes the right of the jury to determine the fact of damages.[69] In *Feltner*, the Court stated:

> The right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to the copyright owner. It has long been recognized that "by the law the jury are judges of the damages." [quoting a 1677 English Court decision] . . . . "the common law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain [1] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it" (internal citation omitted).[70]

Likewise, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the United States Supreme Court held that: "In actions at law, issues that are proper for the jury must be submitted to it "to preserve the right to a jury's resolution of the ultimate dispute," as guaranteed by the Seventh Amendment."[71] The United States Supreme Court accepts that the federal constitution's right to trial by jury guarantees the jury's resolution of the ultimate dispute, not the jury's resolution of a dispute modified by Congress or any other legislative body.[72]

The Seventh Amendment protects the right to trial by jury where the amount in controversy exceeds twenty dollars.[73] *Learmonth II* amends the Mississippi Constitution to limit the right to trial by jury where the amount of non-economic damages exceeds $1 million.

IV. The Constitution and the Bill of Rights

As originally formulated in 1787, the United States Constitution did not include the Bill of Rights.[74] The debate over adoption of the Constitution by the states precipitated vigorous opposition, almost all of that opposition centered on the failure of the Constitution to protect citizen rights

68. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ." U.S. Const. amend. VII.

69. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998).

70. *Id.*

71. 526 U.S. 687, 718 (1999).

72. Justice Rehinquist has written that the "founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign . . . ." Parklane Hosiery Co. v. Shore, 439 U. S. 322, 343 (1979).

73. U.S. Const. amend. VII.

74. U.S. Const. (1787).

from the government.[75] Only the commitment to the adoption of a Bill of Rights after ratification, including right to trial by jury, assured adoption.[76] By the era of the American Revolution, trial by jury was probably the most common right in all the colonies. Americans saw it as a basic guarantor of individual freedom.[77]

Absence of a guaranteed right to trial by jury was "the concern that precipitated the maelstrom over the need for a bill of rights in the United States Constitution."[78] John Adams said that "representative government and trial by jury are the heart and lungs of liberty."[79] Thomas Jefferson said: "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its Constitution."[80]

Patrick Henry was a vocal opponent of ratification and zealous advocate for the right to trial by jury:

> Why do we love this trial by jury? Because it prevents the hand of oppression from cutting yours off. They may call anything rebellion and deprive you of a fair trial by an impartial jury of your neighbors . . . Shall Americans give up that which nothing could induce the English people to relinquish? The idea is abhorrent to my mind.[81]

The Founders did not parse the right to jury trial into what the English Parliament might amend that right to be, nor into what Congress might amend that right to be. The right was guaranteed as it existed at common law.

V. THE COMMON LAW

The English common law developed over a period of several hundred years, and much of that history involved curbing the autocratic rule of the King and guaranteeing rights to his subjects.[82] The principal document in this evolution was the Magna Carta, a charter forced by English barons on

75. John P. Kaminski, *Restoring the Grand Security: The Debate over A Federal Bill of Rights, 1787-1792*, 33 SANTA CLARA L. REV. 887, 891 (1993).

76. *Id.*

77. LEONARD W. LEVY, THE PALLADIUM OF JUSTICE, ORIGINS OF TRIAL BY JURY, 85 (1999); United States v. Wonson, 28 F. Cas. 745, 750 (Cir. Ct. D. Mass 1812) ("one of the most powerful objections urged against [adoption of the Constitution] was, that in civil causes it did not secure the trial of facts by a jury.").

78. Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 581 (1990) (Brennan, J., concurring).

79. Thomas J. Methvin, *Alabama the Arbitration State*, 62 Ala. Law. 48, 49 (2001).

80. Eric J. Day, *An Evidentiary Quandary: Exploring the Efficiency of the Exclusionary Rule*, 11 GEO. J.L. & PUB. POL'Y 139, 153 (2013).

81. UNGER, LION OF LIBERTY: PATRICK HENRY AND THE CALL TO A NEW NATION 217 (2010).

82. The original text in 1215 read almost the same in Ch. 39 and 40. *Id.* at 394. While 1215 is the celebrated date for Magna Carta, it was the 1225 version that became incorporated into British statute law. Bryan Garner, *A Magna Carta Style Guide*, ABA JOURNAL, Jan. 2015, at 26.

King John in 1215.[83] The "Great Charter" guaranteed that no free man would be proceeded against "except by the lawful judgment of his peers or by the law of the land" and that "to no one will we refuse or delay, right or justice."[84]

Sir Edward Coke was a principal influence on the development of the common law in opposition to absolutist theories of the Stuart Kings in the seventeenth century.[85] As noted by Robert Shapiro, "Coke [was] perhaps the greatest exponent and explainer of the common law."[86]

Coke's rendition of Magna Carta Chapter 29 was that no subject would be passed upon or condemned "but by lawful judgment of his Peers" and that every subject "for injury done to him *in bonis, in terris, vel persona*, by any other subject . . . may take his remedy by the course of the law, and have justice and right for the injury done to him."[87] Coke's interpretation linked together the right to jury trial, to due process of law and to open court and a remedy for every injury.[88]

The lawyers who participated in the American Revolution and helped draft and adopt the constitutions of the colonies, the United States Constitution, and the Bill of Rights understood this English history. There were no law schools in America. Almost all who became lawyers did so by studying texts such as Coke's First Part of the Institutes of the Lawes of England, or, A Commentarie upon Littleton (Coke on Littleton) and Sir William Blackstone's Commentaries on the Law of England.[89] That was Patrick Henry's legal education.[90]

Sections 14, 24 and 31 of the Mississippi Constitution have their genesis in Magna Carta and the English common law:

> Section 14 ("No person shall be deprived of life, liberty, or property except by due process of law");[91]
>
> Section 24 ("All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and

83. *Id.*

84. Chapter 29, 1225 MAGNA CARTA, MAGNA CARTA AND THE RULE OF LAW, Appendix 1, 429, (DANIEL B. MAGRAW, ANDREA MARTINEZ & ROY E. BROWNELL EDS., 2014). The original text in 1215 read almost the same in Ch. 39 and 40. *Id.*, Appendix at 394. While 1215 is the celebrated date for Magna Carta, it was the 1225 version that became incorporated into British statute law. Bryan Garner, *A Magna Carta Style Guide*, ABA JOURNAL, Jan. 2015, at 26.

85. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 532 (2005).

86. Robert E. Shapiro, *Know Your Political Theory*, 41 ABA JOURNAL 59, 61 (2014).

87. Goldberg, *supra* note 90 at 534-35 n.35, 551.

88. *Id.* at 561 n.182.

89. Only a few wealthy young men could afford to travel to London to study at the Inns of Court. Unger, *supra* note 86 at 17.

90. Unger *supra* note 86 at 15, 17. Thomas Jefferson wrote that when he studied law "Coke Lyttleton was the universal elementary book of law students." Magraw *supra* note 87 at 130.

91. Miss. Const. art. III, § 14.

> justice shall be administered without sale, denial, or delay");[92]
>
> Section 31 ("The right of trial by jury shall remain inviolate. . . .") (emphasis added).[93]

These related guarantees constitute an 800-year history born of assertion of rights of English barons against the aristocracy of the King; the protection of the rights of British subjects against the King; of American citizen rights against the United States Government; and protection of the rights of Mississippi citizens against their own Government, including the Mississippi Legislature.

There were no caps on compensatory damages at common law. At common law juries decided facts and juries assessed damages. The *Learmonth* Court quotes Blackstone in support of its statement that a verdict is law which can be altered by the Legislature.[94] But Blackstone said: "Every new tribunal, erected for the decisions of facts, without the intervention of a jury . . . is a step towards establishing aristocracy, the most oppressive of absolute governments."[95] Blackstone would surely have viewed legislative caps as a variant of a "new tribunal" to replace a jury's fact determination of damages.

Blackstone also said that "when once the fact is ascertained [in a trial by jury] the law must of course redress it."[96] The common law did not include a limitation on the jury's redress by a legislative tribunal. Instead, Blackstone said that when a jury returned a verdict "for the plaintiff, they assess the damages also sustained by the plaintiff, in consequence of the injury upon which the action is brought."[97]

If the Legislature can alter a jury's verdict of damages because a verdict is "law," the Legislature can also alter a jury's verdict as to liability because that finding of liability is also "law." District Judge William Young recognized as much when he wrote:

> The American jury makes a profound contribution to the very structure and fabric of American law, (internal citation omitted), and so it is here. Indeed, this particular case would be of little interest to anyone other than the litigants were it not for the remarkable role of the American jury. According to this federal jury, a broker-dealer who fails to disclose his poor forex trading record to clients, where knowledge of such a record may influence whether they

92. *Id.* at § 24.
93. *Id.* at § 31.
94. Learmonth v. Sears, Roebuck and Co. (*Learmonth II*), 710 F.3d 249, 260 (5th Cir. 2013).
95. III BLACKSTONE, COMMENTAIRES ON THE LAWS OF ENGLAND § 505 (1768).
96. *Id.* at § 505.
97. *Id.* at § 501.

> choose to invest in forex with him managing that investment, violates his fiduciary duties and the Exchange Act. Since this jury determined that a broker-dealer who fraudulently has failed to disclose his poor forex trading record has violated the Exchange Act, other broker-dealers should now be on notice that such a failure by them could lead to the same finding. This important jury finding is as much "the law" as it would be were this Court to have made the same finding in a jury-waived case. No longer can the securities industry simply advance the SEC's equivocation or its own internal procedures as the standard against which its conduct should be measured. Why? An American jury has said so.[98]

VI. WHY TRIAL BY JURY TODAY REMAINS "THE HEART AND LUNGS OF LIBERTY" AND THE "ANCHOR" OF OUR CONSTITUTION

At the ground level—in the federal court system—one current and one former United States District Judge have clearly articulated the critical importance of the jury in our democracy. The Founders fought a revolution to preserve citizen rights from encroachment by the King, by Parliament, and by the very Government the new county established. Central to these rights was trial by jury. Its importance has not diminished.

United States District Judge William Young of Massachusetts stated:

> No other legal institution sheds greater insight into the character of American justice. Indeed, as an instrument of justice, the civil jury is, quite simply, the best we have . . . . The acceptability and moral authority of the justice provided in our courts rests in large part on the presence of the jury. It is through this process, where rules formulated in light of common experience are applied by the jury itself to the facts of each case, that we deliver the very best justice we, as a society, know how to provide . . . . Yet there can be no universal respect for law unless all Americans feel that it is *their* law. Through the jury, the citizenry takes part in the execution of the nation's laws, and, in that way, each citizen can rightly claim that the law belongs partly to him or her.[99]

Former United States District Judge Royal Furgeson of Texas declared:

> When a jury renders a verdict, it is the only time in America's governmental structure that our people make the

98. Securities and Exchange Comm'n v. Eagleeye Asset Mangement, LLC, 957 F. Supp. 2d 151, 161 (D. Mass. 2013).

99. William G. Young, *An Open Letter to U. S. District Judges*, 50-JUL FED. LAW. 30, 31 (2003).

> final decision . . . . Juries are the great levelers of our courts. They treat every litigant, from the most powerful to the most humble, with even-handed respect. Better than judges, they bring the fact-finding talents of our citizens to bear on court deliberations. They represent a cross-section of our communities. They are fair, conscientious, and clear-headed. They have no agenda. Juries have made justice work in America for centuries, and our people know it. Indeed, jury verdicts, even controversial ones, have far more acceptance among our people than single-judge decisions ever would.[100]

VII. CONCLUSION

Learmonth trivializes the right to trial by jury. It ignores that its very purpose—in the Magna Carta, at common law, in the Bill of Rights, and the Mississippi Constitution—is to protect citizen rights from encroachment by the Government, by the King, or by the Legislature. *Learmonth* rejects 200 years of Mississippi jurisprudence, which declares over and over that juries determine facts, that damages are a fact determination, and that only bias, passion, and prejudice or fraud can vitiate that determination. Trial by jury replaced the older means of dispute resolution—trial by ordeal, trial by battle, trial with oath-helpers (professionals who would swear for the litigant). "When a legal formula serves fifteen or twenty generations, it has not been unsuccessful."[101]

100. Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?*, VOIR DIRE, Fall/Winter 2009 at 7. (Voir Dire is published by the American Board of Trial Advocates.) 4,7 (Fall/Winter 2009).

101. FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 641 (1895).