IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

JAMES KAKOS, DDS and HELEN KAKOS, Plaintiffs, v. JESSE BUTLER, M.D.; SPINE CONSULTANTS, LLC, an Illinois limited liability company; JERRY BAUER, M.D.; JERRY BAUER, M.D., S.C. d/b/a CENTER OF BRAIN AND SPINE SURGERY, S.C., an Illinois corporation; STEVEN M. MARDJETKO, M.D.; ILLINOIS BONE AND JOINT INSTITUTE, LLC, an Illinois limited liability company; OLIVIA WANG, M.D.; AUSTIN CHEN, M.D.; and ADVOCATE HEALTH AND HOSPITALS CORPORATION, an Illinois not-for-profit corporation d/b/a ADVOCATE LUTHERAN GENERAL HOSPITAL, Defendants.	)	No. 2015 L 6691

MEMORANDUM ORDER AND OPINION

INTRODUCTION

This matter comes for ruling on Defendants Jerry Bauer, M.D. and Jerry Bauer, M.D., S.C., d/b/a/ Center of Brain and Spine Surgery, S.C.'s motion for leave to file a twelve-person jury demand and to declare Public Act 98-1132 unconstitutional as an infringement of the right to a trial by jury under Article I, Section 13 of the Bill of Rights to the 1970 Constitution of the State of Illinois.

For the reasons detailed below, this court finds that PA 98-1132, as it amends 735 ILCS 5/2-1105, is unconstitutional on its face and cannot reasonably be construed in a manner that would preserve its validity. The court's finding of unconstitutionality is necessary to its decision on this matter, and this decision cannot rest upon an alternative ground. Notice pursuant to Illinois Supreme Court Rule 19 has been served on all parties, and those served have been given adequate time and opportunity to respond in defense of the challenged Act.

BACKGROUND

The present issue concerns a June 2015 legislative statutory amendment that mandatorily restricts the number of jurors available in a civil jury trial in Illinois from twelve to six. Public Act 98-1132, signed into law as Senate Bill 3075 on December 19, 2014, amended 735 ILCS 5/2-1105(b) to read as follows:

> All jury cases shall be tried by a jury of 6. If alternate jurors are requested, an additional fee established by the county shall be charged for each alternate juror requested. For all cases filed prior to the effective date of this amendatory Act of the 98th General Assembly, if a party has paid for a jury of 12, that party may demand a jury of 12 upon proof of payment.
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> 735 ILCS 5/2-1105(b) (2015).

Prior to this change, the provision read:

> All jury cases where the claim for damages is $50,000 or less shall be tried by a jury of 6, unless either party demands a jury of 12. If a fee in connection with a jury demand is required by statute or rule of court, the fee for a jury of 6 shall be 1/2 the fee for a jury of 12. A party demanding a jury of 12 after another party has paid the applicable fee for a jury of 6 shall pay the remaining 1/2 of the fee applicable to a jury of 12.
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> 735 ILCS 5/2-1105(b) (2014).

The amendment went into effect on June 1, 2015. Plaintiffs filed their complaint on June 30, 2015. The moving defendants sought to file an appearance and twelve-person jury demand on August 27, 2015. They claim that the Clerk of the Court refused to accept their payment of the requisite fee for a jury of twelve.

Prior to PA 98-1132 taking effect, a defendant in a civil action in the state of Illinois had the optional right to demand and pay for a twelve-person jury if the amount of damages claimed was less than $50,000, and an absolute right to a twelve-person jury if the alleged damages exceeded $50,000. However, the current version of 735 ILCS 5/2-1105 no longer provides for any such right to a twelve-person jury, removing this option and exclusively limiting the size of a civil jury to six members. Defendants argue that this amendment brings the new version of the jury demand statute in direct conflict with the Bill of Rights to the Illinois Constitution, which in Article I, section 13 reads: "The right of trial by jury as heretofore enjoyed shall remain inviolate." Ill. Const. 1970, art. I, § 13. A look at the history of the Illinois Constitution and the civil jury trial right in Illinois reveals that the right "as heretofore enjoyed" included a right to a jury of twelve. Since PA 98-1132 changes the composition of the civil jury by reducing the maximum number of jurors to six, this amendment is fundamentally at odds with the Illinois Constitution, and is therefore unconstitutional.

COURT'S ANALYSIS

There is a strong presumption that legislative enactments are constitutional, and the party alleging unconstitutionality bears the burden of clearly establishing

this violation. *People ex rel. Chicago Bar Ass'n v. State Bd. of Elections*, 136 Ill. 2d 513, 524 (1990); *Bernier v. Burris*, 113 Ill. 2d 219, 227 (1986). If a statute conflicts with a constitutional provision, the constitution will prevail. *People ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 532 (1958).

In construing a statute, the primary aim is to ascertain and give effect to the true intent of the legislature. *Nelson v. Kendall County*, 2014 IL 116303 *P23. The best evidence of legislative intent is the language of the text itself, which must be given its plain and ordinary meaning. *Id.* Here, there can be no doubt that on its face, the current version of 735 ILCS 5/2-1105 provides that civil cases in which a jury is requested will be tried by a jury of six members. The language in the previous version that allowed for either side to demand a twelve-person jury has been removed. Therefore, this court next turns to the text of the constitutional provision guaranteeing the right to a jury trial to determine whether there is a conflict between the statute and the Illinois Constitution apparent from the face of the texts.

I. The Language of Article I, Section 13

The general principles of statutory interpretation apply to interpreting constitutional provisions as well. The aim in ascertaining the meaning of a constitutional provision is to effectuate the intent of the drafters, and that intent is best understood by giving the words of the text their common meaning. *Committee for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 13 (1996). Where the language is unambiguous, other tools of interpretation are not necessary, but if there is any

doubt as to its meaning, it is appropriate to turn to the record of the constitutional convention to discern the delegates' intent in drafting the provision. *Id.* Here, the relevant constitutional provision reads, "The right to a trial by jury as heretofore enjoyed shall remain inviolate." Ill. Const. 1970, art. I, § 13. The only ambiguity that cannot be resolved through giving the language its plain and ordinary meaning is the matter of what, exactly, has been "heretofore enjoyed." Accordingly, it is necessary to turn to the history of the jury trial as heretofore enjoyed in this state, as well as the discussion of this provision by the drafters of the 1970 constitution.

II. The Record of the Sixth Illinois Constitutional Convention

The first constitution for this state was adopted in 1818. Article VIII, section 6 of the 1818 Illinois Constitution read, "[T]he right of the trial by jury shall remain inviolate." Ill. Const. 1818, art. VIII, § 6. A succeeding constitution was ratified thirty years later. Article XIII, section 6 to the 1848 Illinois Constitution read, "[T]he right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy." Ill. Const. 1848, art. XIII, § 6. Finally, Article II, section 5 of the Bill of Rights of the 1870 Illinois Constitution read, "The right of trial by jury as heretofore enjoyed, shall remain inviolate but the trial of civil cases before justices of the peace by a jury of less than 12 men, may be authorized by law." Ill. Const. 1870, art. II, § 5. At the time, a jury consisted of twelve members. *See Liska v. Chicago R. Co.*, 318 Ill. 570, 583 (1925); *Sinopoli v. Chicago R. Co.*, 316 Ill. 609, 617 (1925). During the 1870 constructional debates, there was a proposal to allow the General Assembly to authorize juries of less than

twelve in civil trials, but it was defeated. In the words of one delegate, it was "revolutionary to propose to insert in the Constitution a number less than twelve." Ill. Const. Convention, Debates and Proceedings, April 29, 1870, at 1567 (statements of Delegate Church). The delegate who proposed the amendment even acknowledged that trial by jury meant a jury "in the common law sense—that is by twelve jurors." *Id* at 1567 (statements of Delegate Skinner).

The drafters of the current version of our constitution, meeting at the Sixth Illinois Constitutional Convention ("the Constitutional Convention") in 1970, retained the first portion of the former Article II, section 5, but removed the provision regarding civil cases before justices of the peace because justices of the peace were abolished by the 1962 Judicial Article to the 1870 constitution. *See* 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1428 (hereinafter "Record"). This was a result of the restructuring of the judiciary branch into circuit, appellate, and supreme courts under Judicial Article VI in 1964. Otherwise, the right to a trial by jury in Illinois has been a continuous, unbroken right spanning well over a century of this state's history.

A look at the record of the 1970 Constitutional Convention reveals that the delegates gave great consideration to the historic jury trial right during the discussions on the floor, discussing at length the various proposals for amending the jury trial provision in the constitution. On the first vote of the Illinois Constitution Study Commission ("the Committee"), the Committee decided to allow the General Assembly to modify the jury trial right in civil cases involving death or injury to

persons or property as an attempt to ameliorate the issue of backlog and trial delay. 3 Record 1427. However, on the final vote, the Committee reversed itself, deciding that it would be discriminatory to single out this category of cases as undeserving of the full jury trial right guaranteed by the constitution. *Id.* Thus, the Committee chose not to authorize any exception to the right to a jury trial as had been enjoyed up to that point.

The convention delegates recognized that the Committee made this decision after giving careful consideration to the option of allowing the legislature to reduce the number of jurors from twelve to six. *Id* at 1428. This was only one of the proposals made by the Committee to address the goals of reducing backlog and trial delay. The Committee also considered allowing non-unanimous jury verdicts, ranging from a majority verdict to a decision agreed to by three-fourths of the jurors. *Id.* There was also a proposal to limit juries of less than twelve to lesser civil cases and petty criminal offenses. *Id.* The Constitutional Convention delegates also discussed other state constitutions that allowed for smaller juries and non-unanimous verdicts, as well as the provision in Article II, section 5 of the 1870 Illinois Constitution that allowed for the empaneling of a smaller jury in certain cases if the parties agreed. 3 Record 1429. While this was noted as an example of Illinois allowing for six-member juries in the past, it was treated as a waiver of the constitutional jury trial right, even where there was a financial incentive for agreeing to a smaller jury in the form of a lower jury fee. *Id.* This was far different from removing the option of a twelve-person jury entirely, changing the nature of

the jury trial right rather than merely allowing parties to agree to alternatives. The delegates discussed this difference with regards to worker's compensation claims, which were removed from the civil court system entirely and placed before an administrative tribunal. Delegate Weisberg differentiated the worker's compensation claim as a statutorily-created right that did not exist at common law; therefore, it would not violate the former Article II, section 5 as would a hypothetical similar law that imposed administrative tribunals for all accident claims. *Id* at 1430.

Following this discussion, Delegate Wilson proposed an amendment that would have added the following language to the end of Article II, section 5: "except that the General Assembly may provide in civil cases for juries of not less than six nor more than twelve and for verdicts by not less than three-fourths of the jurors." *Id.* The Wilson amendment was based on the recommendation of then-Chief Justice Underwood of the Illinois Supreme Court, who submitted a letter stating that the Court believed it to be sound policy to authorize the General Assembly to limit or restrict the right to jury trials in civil cases. 3 Record 1430. Delegate Wilson argued that this amendment would afford the legislature greater flexibility to provide for smaller juries or non-unanimous verdicts, while the previous constitutional provision tied the legislature's hands entirely. *Id.*

Delegate A. Lennon opposed the amendment, arguing that allowing for a six-member jury would not result in fewer hung juries or shorter deliberation, would decrease the likelihood of trying cases before an accurate cross-section of the public,

and would treat civil cases as less important than criminal ones (for which the twelve-person jury was not under debate.) *Id.* On the subject of allowing for non-unanimous jury verdicts, Delegate Weisenberg noted that while there was evidence suggesting that this led to shorter deliberations and fewer hung juries, this may not necessarily be desirable, and in any case, the differences were minor and insignificant. *Id* at 1432.

The Wilson amendment passed by a vote of fifty-eight to twenty-three. 3 Record 1432. However, it was never adopted—instead, it was amended by Delegate A. Lennon's amendment removing the language added by the Wilson amendment. 4 Record 3637. This meant that the language of the jury trial provision reverted back to the Committee's final proposal, which left the twelve-person jury right from the 1870 version of the constitution intact. The delegates extensively debated the Lennon amendment before voting to adopt it and revert back to the twelve-person jury and unanimous verdict, without the language authorizing the General Assembly to alter it. Delegate Lennon reprised his earlier arguments from the Wilson amendment debates, stating that a higher number of jurors lowers the risk of one "bad apple" juror having significant influence over the deliberations. He also noted that hung juries were a minor threat to the judicial system, comprising a small portion of civil cases tried before a jury, and where a hung jury did occur, it was more likely to be an even split which reducing the number of jurors would not affect.[1] As such, the aim of reducing hung juries did not justify altering the twelve-juror system. *Id.* Other arguments presented during the debate included the

[1] See Section III for further discussion of whether statistics on hung juries accurately reflect the impact of jury size.

relative weight given to resolving case backlog over protecting the age-old jury system, whether jury size or verdict unanimity were even the greatest contributing factors to this backlog, and concerns over ensuring that the jury system served the interests of justice. *Id* at 3637-39. Ultimately, the Lennon amendment passed, and the 1970 Illinois Constitution came to read: "The right of trial by jury as heretofore enjoyed shall remain inviolate." Ill. Const. 1970, art. I, § 13. Summarizing this provision, one delegate later stated, "So far as the constitution is concerned, the jury must be one of twelve members in criminal or civil cases unless the parties otherwise agree." 5 Record 4241.

Plaintiffs respond to this analysis of the historical definition of jury in this state by arguing that the interpretation of what constituted a jury has in fact changed over time without a formal constitutional amendment. They note that the original definition and understanding of the civil jury was not only one comprised of twelve members, but specifically of twelve men. Today, we interpret this to include women as well. *See People ex rel. Denny v. Traeger*, 372 Ill. 11 (1939). Plaintiffs argue that in allowing women to serve on juries, the Illinois Supreme Court recognizes the General Assembly's authority to prescribe juror qualifications as long as it did not impair the essential elements of the constitutionally-guaranteed jury trial. *Id* at 15-16. However, reading "men" to mean "persons" is far removed from reading "twelve" to mean "six, and no more." One involves the application of present-day norms of equality and fairness, while the other is simply factually incorrect. Furthermore, Defendants note that the Court in *Traeger* merely

recognized that gender was not a factor that would compromise the jury trial right in any way, therefore validating the Legislature's ability to act in this area. *Id* at 14-16. This does not suggest that cutting the maximum allowable jury size in half would also not impair the essential elements of the jury trial right.

The history of the Illinois Constitution, as discussed and considered by the Sixth Illinois Constitutional Convention, provides convincing evidence that if the current Article I, section 13 is to be given effect as guaranteeing the right to a jury trial "as heretofore enjoyed," then the General Assembly cannot pass a law that decreases the number of jurors from the amount previously provided, which—for almost 200 years—was twelve. As explicitly decided by the drafters of our current constitution, the Legislature does not have the authority to make such a change. While the delegates considered allowing such flexibility in the composition of civil juries in this state, the record makes abundantly apparent their intentions of preserving the jury trial right as it had been historically enjoyed.

III. Supreme Court Interpretation of the Jury Trial Right

Having discussed the history of the jury trial right in Illinois, as well as the debates of the delegates to the Sixth Illinois Constitutional Convention, this court now looks to the Illinois Supreme Court's analysis of the right to trial by jury.

Our highest court has long interpreted this right to mean a jury comprised of twelve impartial members. *See George v. People*, 167 Ill. 447, 455 (1897); *see also Hartgraves v. Don Cartage Co.*, 63 Ill. 2d 425 (1976). The Court in *George v. People* outlined the jury trial right provisions of the 1818, 1848, and 1870 constitutions,

explaining that "The right of trial by jury was the same under one constitution as under the other. The right protected by each constitution was the right of trial by jury as it existed at common law." 167 Ill. at 455. The Court echoed this opinion in its decision in *Liska v. Chicago R. Co.*, where the Court defined the jury trial right as "the right to have the facts in controversy determined, under the direction and superintendence of a judge, by twelve impartial jurors who possess the qualifications and are selected in the manner prescribed by law." 318 Ill. 570, 583 (1925); *see also Sinopoli v. Chicago R. Co.*, 316 Ill. 609, 617 (1925) ("The essential thing in the right of trial by jury is the right to have the facts in controversy determined under the direction and superintendence of a judge by twelve impartial jurors.") The Court again construed the right of trial by jury "as heretofore enjoyed" to mean "the right of trial by jury as it existed at common law, and as enjoyed at the adoption of the respective constitutions" in *Reese v. Laymon*. 2 Ill. 2d 614, 618 (1954).

The civil jury trial right provided by past versions of our constitution has carried over to the current version, adopted in 1970. The Illinois Supreme Court has continued to adhere to the same interpretation of what this right entails. In *Hartgraves v. Don Cartage Co.*, the Court discussed the importance of having a clear written record of the parties consenting in open court to accepting a unanimous verdict from a jury of less than twelve, because the constitution guarantees the right to a trial by jury and "this court has long determined that a jury is comprised of 12 members." 63 Ill. 2d at 427 (where a juror was unable to continue serving on

the jury during trial, leaving eleven jurors). In 2001, the Appellate Court reiterated that the Illinois Constitution "guarantees the right to trial by a jury of 12 members." *Barton v. Chicago & N. W. Transp. Co.*, 325 Ill. App. 3d 1005, 1026 (1st Dist. 2001) (citing *Hartgraves*, 63 Ill. 2d at 427).

Most instructively, the Illinois Supreme Court looked at the proceedings of the Sixth Illinois Constitutional Convention and explained the meaning of "heretofore enjoyed:"

> It is clear from the committee proposals, the floor debates, and the explanation to the voters that "[t]his section is the same as Article II, Section 5 of the 1870 Constitution, except that it deletes an outdated reference to the office of justice of the peace, which has been abolished" (7 Proceedings 2686), that there was no intent to change trial by jury as that right was enjoyed in this State at the time of the 1970 constitutional convention.
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> *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 215 (1988) (discussing the history of the civil jury trial right, after noting that the 1970 delegates recommended no change to the right to trial by jury in criminal cases.)

The Court also stated that it had previously interpreted Article II, section 5 of the 1870 constitution that "the right of trial by jury as heretofore enjoyed, shall remain inviolate" to mean "the right of a trial by jury as it existed under the common law and as enjoyed at the time of the adoption of the respective Illinois constitutions." *Id*, quoting *People v. Lobb*, 17 Ill. 2d 287, 298 (1969). Thus, the Court concluded, the intention of the drafters of the 1970 constitution was to preserve the jury trial right as it existed at the time of the adoption of the 1970 constitution. *Id.*

The issue in *Joyce* was not about the size of a civil jury, but about whether a law that restricted certain criminal defendants from waiving a jury trial was an unconstitutional limitation of their right to a jury. *Id* at 211-12. However, the

principle highlighted in this opinion remains relevant to the present issue. It also reflects decades of decisions indicating that were the present amendment to Article I, section 13 to appear before the Illinois Supreme Court, it would not survive a constitutional challenge because it fundamentally alters the jury trial right from the one that existed at the time of the adoption of our current constitution. A mandated six-member jury not only goes against what the drafters had in mind at the 1970 Constitutional Convention—it is explicitly a choice that they discussed, voted on, and ultimately rejected in their adoption of the Lennon amendment, as previously discussed.

Plaintiffs distinguish the above cases from the *People v. Williams* decision, in which the Appellate Court addressed whether a criminal defendant was denied his right to a fair trial when the trial court ordered *sua sponte* a six-person jury to determine his fitness to stand trial. 205 Ill. App. 3d 715 (1st Dist. 1990). On appeal, the defendant specifically argued that the trial court's order that the jury consist of six members denied him his constitutional right to a twelve-person jury in a criminal trial. *Id* at 720. The Court held that he was neither denied his right to a fair and impartial trial, nor was he precluded from presenting his insanity defense. *Id* at 728. Plaintiffs here argue that, unlike the cases discussed above, this is the only state case that addresses a direct challenge to a six-person jury in a civil proceeding, and the Court relied on the U.S. Supreme Court's analysis in *Williams v. Florida* (399 U.S. 78 (1970)) and *Colgrove v. Battin* (413 U.S. 149 (1973)) to find that a six-person jury was sufficient to obtain a representative cross-section of the

community and ensure a fair and equitable resolution to factual issues. *See Williams*, 205 Ill. App. 3d at 721-22. Furthermore, Plaintiffs note that the *Williams* Court applied the U.S. Supreme Court's finding that a jury of twelve is a substantive aspect of the jury trial right to make its determination that a jury of six satisfied the constitutional guarantees of both civil and criminal trials by jury. *Id.*

While the Court did opine that a six-person jury preserved the constitutional guarantees underlying the jury trial right, it also distinguished the defendant's pretrial fitness hearing from the actual criminal trial in which the defendant was entitled to a twelve-person jury. *Id* at 720-21 ("[A] fitness hearing is not part of the trial on the criminal charges against the defendant.") Plaintiff's position is that a preliminary civil proceeding such as the competency hearing in *Williams* is comparable to a civil trial for the purposes of implicating the constitutional jury trial right. However, this goes beyond the holding in *Williams*. The Court there did not discuss the Article I, Section 13 of the Illinois Constitution, nor was this provision implicated in a case involving a preliminary hearing that occurred separate from and prior to the actual trial. The Illinois Supreme Court has, as previously cited, stated on several occasions that our constitution guarantees a twelve-person jury, and the Appellate Court's decision in *Williams* neither negates, nor even attempts to negate, that conclusion. Furthermore, the twelve-person jury has been recognized as a substantive element of our state jury trial right, essential to the meaning of a trial by jury in Illinois. *See Traeger*, 372 Ill. at 14 (defining the essential elements as "(1) twelve (2) impartial (3) qualified jurors who should (4)

unanimously decide the facts in controversy (5) under the direction and superintendence of a judge") (citing *People v. Kelly*, 347 Ill. 221, 232 (1931)).

The jury trial provision of our state constitution differs from the Sixth Amendment right to trial by jury in criminal prosecutions under the federal Constitution. In *Ballew v. Georgia*, the U.S. Supreme Court held that while a jury of five deprives the accused of the right to trial by jury under the Sixth and Fourteenth Amendments, the Constitution did not mandate a twelve-person jury. 435 U.S. 223, 243-44 (1978). The Court held that the Sixth Amendment only mandates a jury of sufficient size to promote group deliberation, insulate members from outside intimidation, and provide a representative cross-section of the community. *Id* at 230. The Court had previously also held that a federal civil jury of fewer than twelve members was constitutional. *Colgrove*, 413 U.S. at 159-60. Furthermore, the Court had also described the great importance placed on the specific number of twelve jurors as a matter of historical accident, possibly based on nothing more than "mystical or superstitious insights into the significance of "12."" *Williams*, 399 U.S. at 88-89. Even so, the opinion in *Ballew* contains a thorough discussion of the available data on the effects of jury size, noting that the data suggests that smaller juries are less likely to foster effective group deliberation, to reach accurate results, and to reflect the diversity within a community and allow minority viewpoints to be heard. 435 U.S. at 232-37.

However, our state jury trial right is substantively different from the one afforded by the federal Constitution, and our supreme court has found the state

protections to be broader. *See People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 77 (2009); *see also Joyce*, 126 Ill. 2d at 213-14. Where the language, convention debates, or committee reports of our state constitution indicate that a provision of the state constitution was intended to be construed differently from the U.S. Constitution, our courts will not be bound by the construction of the corresponding federal provision. *Joyce*, 126 Ill. 2d at 213. It is clear from the record of the Constitutional Convention that the delegates intended to create a right that differed from the federal right to trial by jury—the delegates voted to preserve the twelve-person jury as a substantive part of the jury trial right. This state's highest court has consistently interpreted the jury trial right under the state constitution in this way, and accordingly, our legislature has no authority to curtail this right, short of amending the language of the constitution. While it is very possible that there is no special significance to or basis for the number twelve as the ideal number of fact finders and decision makers, this is what our constitution currently provides, and it may not be altered by statute as our legislature has done here.

Finally, just as this court is aware that the federal Constitution differs from our own, it recognizes that six other states—Connecticut, Florida, Maryland, New York, Rhode Island, and Washington—also currently provide for juries of six members, and disallow a greater number. However, the present issue concerns whether an Illinois statute violates a provision of the Illinois state constitution. Even though, as plaintiffs note, other states use similar language in their constitutional provisions regarding trial by jury, it goes beyond the scope of this

decision to analyze each of these states' constitutional histories and compare them to Illinois' in order to determine whether the rights spoken of in the text are in fact the same across state lines. This court does not take any position on the language, historical record, or judicial interpretation of any other state's constitutional jury trial right.

IV. Separation of Powers

Having discussed the historical basis for finding 735 ILCS 5/2-1105 unconstitutional, this court now turns to a separate argument for the amendment's unconstitutionality. Section 1 of Article II of the Illinois Constitution states that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. II, § 1. The constitution further provides that "[g]eneral administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules." Ill. Const. 1970, art. VI, § 16. Therefore, even if this court were to assume that the Illinois Constitution does not provide the right to a twelve-person jury, the amendment would nevertheless be unconstitutional by allowing the legislature to exercise power that exclusively belongs to the judiciary. *See Best v. Taylor Machine Works*, 179 Ill. 2d 367, 411 (1997) ("In furtherance of the authority of the judiciary to carry out its constitutional obligations, the legislature is prohibited from enacting laws that unduly infringe upon the inherent powers of judges.")

By enacting PA 98-1132, the Legislature unconstitutionally infringed on the power of the judiciary to regulate conduct at trials. The supreme court regulates various aspects of juries and the jury selection process through the Illinois Supreme Court Rules, including the determination of which causes of action can be tried by jury, the procedure of impaneling a jury, the conducting of *voir dire*, and the provision of six-person juries for small claims, unless either party requests twelve. *See, respectively,* Ill. Sup. Ct. R. 232, 434, 234, 285; *see also People v. Jackson*, 69 Ill. 2d 252, 258-59 ("This court had powers to regulate the trial of cases, and its rules had the effect of law.") Specifically, by disallowing juries of more than six members, PA 98-1132 is in direct conflict with Rule 285, which expressly states that for small claims cases, while a jury demand starts at six, parties are allowed to demand a twelve-member jury upon payment of an additional fee. Small claims are included in the category of civil cases, and PA 98-1132 impacts jury trials for all civil cases. Plaintiffs argue that this amendment does not fundamentally change 735 ILCS 5/2-1105(b) because it previously allowed for juries of six in cases under $50,000. However, this misstates the issue. Juries of six were previously allowed, but if the parties wanted a jury of twelve, they had the right to demand one. That possibility has now been taken away, contrary to the jury trial right articulated in the Illinois Constitution. Where a statute conflicts with a rule of the court, the rule prevails. *See O'Connell v. St. Francis Hospital*, 112 Ill. 2d 273, 281 (1986). If this amendment is permitted to stand, this allows the Legislature to step into the sphere

of the judiciary and mandate how many jurors may be on a jury, a power that the constitution reserved for the supreme court.

Plaintiffs also note that the principle of separation of powers is not meant to create rigid separations between the functions of each branch of government, and that the legislature may enact laws that govern judicial practices, so long as it does not unduly infringe upon the powers of the judiciary or directly conflict with a rule of the court. *See People v. Warren*, 173 Ill. 2d 348, 367 (1996); *People v. Bainter*, 126 Ill. 2d 292, 303 (1989). Furthermore, plaintiffs cite instances where the Illinois Supreme Court has upheld the constitutionality of legislative enactments that regulate or restrict certain aspects of the jury trial, citing cases where the Court found various time limits for when a party had to make a jury demand to be reasonable. *See Reese v. Laymon*, 2 Ill. 2d 614 (1954); *Roszell v. Gniadek*, 348 Ill. App. 341 (1952); *Stephens v. Kasten*, 383 Ill. 127 (1943); and *Morrison Hotel and Restaurant Co. v. Kirsner*, 245 Ill. 431 (1910).

However, the Legislature's authority to regulate certain procedural aspects of the jury trial does not trump the Supreme Court's inherent power over court procedure where the Legislature enacts a statute that is inconsistent with a rule of the Court. *See Kunkel v. Walton*, 179 Ill. 2d 519, 528-29 (1997) ("Ultimately, however, this court retains primary constitutional authority over court procedure."); *see also Jackson*, 69 Ill. 2d at 260. There is a difference between statutes that regulate when a party may make a timely jury demand, which run concurrently with the Court's general administrative authority without direct conflict, and the

current statute, which redefines the permissible composition of the civil jury and contradicts the Illinois Supreme Court in an area in which it has issued its own rules. Additionally, there is a lengthy historical record supporting the position that jury size is part of the substantive guarantee of a civil jury trial under Article I, Section 13 of the Illinois Constitution, which does not apply to the various procedural and administrative regulations the Legislature has validly enacted in the past.

Therefore, the amended 735 ILCS 5/2-1105 is unconstitutional on its face pursuant to the doctrine of separation of powers.

V. Public Policy

While this court's decision is squarely founded on the text, history, and judicial interpretation of our constitution's jury trial right, it is also instructive to look at the potential impact of altering Illinois' long-standing adherence to allowing a twelve-member jury. Plaintiffs argue that defendants fail to show that a jury of less than twelve is intrinsically superior to a jury of twelve in the fair and equitable resolution of cases. Notwithstanding the following analysis of some of the research done on jury size, this court does not find it necessary for defendants to make such an argument. Even if the research showed that a six-person jury is as good as or better than a jury of twelve, the Legislature cannot alter the constitutional civil jury trial right as it did here. However, there is evidence in support of this state's longstanding acceptance of the twelve-person jury.

This court has already touched on some of the policy concerns the U.S. Supreme Court discussed in *Ballew*. Since that decision, research on the impact of jury size has continued to grow. Available studies on the impact of jury size support the conclusion that decreasing the number of jurors corresponds to a decrease in the diversity of the jury and may impede the deliberative process. Additionally, PA 98-1132 has prompted commentators in the legal field to set forth the historic, legal, and policy arguments for why this amendment is unconstitutional, and as such, this issue is ripe for resolution by our courts.[2] Research shows that reducing juries from twelve to six members results in a decrease in the accuracy and predictability of jury verdicts, as determined by how well a jury verdict reflects the views of an informed public upon consideration of the law and available evidence.[3]

A larger jury panel allows for a larger sample of the diverse array of people present in a community, both in terms of demographic categories like race, age, and sex, as well as diversity of opinions and views. Decreasing the number to six provides a less-accurate cross-section of the public.[4] This is troubling because the very nature of a jury is to represent as accurate a cross-section of the community as possible; the Supreme Court recognized this as well in its opinion in *Ballew*, stating

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[2] See Dennis M. Dohm, *The Record Reflects It: Six-Person Civil Jury Law is Unconstitutional*, Chicago Daily Law Bulletin, (Jan. 21, 2015); Robert I. Park, *A constitutional question about reduced jury size*, Illinois State Bar Association Trial Briefs, Vol. 6, No. 7 (Jan. 2015); Michael L. Resis and Britta Sahlstrom, *Public Act 98-1132: An Unconstitutional Violation of the "Inviolate" Right to Trial By Jury?*, IDC Defense Update, Vol. 16, No. 3 (April 2015); Hon. Deborah Mary Dooling and Hon. Lynn M. Egan, *Living with a Six Person Jury*, Presentation Before the Society of Trial Lawyers Annual Election Meeting (Sept. 15, 2015). This court is grateful to these authors for their analyses, which this opinion draws on.

[3] See Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1, 8-9 (2001).

[4] See *id* at 14.

that heterogeneity is of the utmost concern when states choose to employ smaller juries. *Ballew*, 435 U.S. at 236-37.

Even if members of minority groups do appear in juries of six, there are more likely to be multiple representatives of that group on a jury of twelve, making it easier for those individuals to assert their viewpoints.[5] This is also reflected in social psychology experiments on conformity and group dynamics—the minority opinion in a five-one split is more likely to acquiesce to the majority than if the numbers were doubled to ten and two on a twelve-person jury.[6] The issue of diversity also arose during the Constitutional Convention that drafted our current state constitution. The record mentions a new study at the time that collected data on the effects of reducing a jury of twelve to a jury of six, and that a clear finding of that study was that a six-person jury was less likely to represent an accurate cross-section of the population. 3 Record 1429. The current move away from the twelve-person jury directly goes against the aim of protecting diversity on our juries.

Not only is a six-member jury less likely to reflect the diversity of groups and viewpoints within a community, but it also may lead to shorter deliberation times. While this is cited as a benefit of smaller juries—for example, in resolving the backlog and trial delay that the Illinois Constitution Study Commission was concerned with—research shows that this longer deliberation time is not necessarily due to the difficulty of reaching a consensus with a larger group. In fact, the lengthier deliberation seen in twelve-person juries is also more substantive

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[5] See *id.*

[6] See Nicole L. Waters, Judicial Council of California, *Does Jury Size Matter: A Review of the Literature*, National Center for State Courts (2004).

deliberation—it involves greater consideration of the evidence and facts, and a greater sharing of ideas.[7] Twelve-person jury deliberations not only consist of more facts, but those facts are also more accurately remembered when there are more people available to discuss their recollections.[8] Research in social psychology shows that the cumulative process of memory recall improves in larger groups—a crucial factor long trials containing many facts that a jury must consider.[9] Therefore, a twelve-person jury can lead to more accurate verdicts. While past studies have found that disagreements in jury verdicts between six- and twelve-member juries only occurred approximately 14% of the time, it was also theorized that this relatively small difference was skewed by the fact that the evidence in most cases heavily favors one side, and therefore the statistics may mask the true impact of jury size on close cases.[10] Finally, another benefit of more accurate verdicts is that they are more predictable. The ability to predict the verdict a jury would return in a given case is crucial in facilitating pretrial settlement negotiations.[11]

Lastly, plaintiffs argue that the Legislature had an important policy consideration behind its decision to set a mandatory limit on the size of a civil jury. PA 98-1132 not only amended 735 ILCS 5/2-1105's jury size provision, but also concurrently amended 55 ILCS 5/4-11001, which provides for the compensation of jurors. Prior to this amendment, the amount that jurors were paid for their service varied from county to county, with the highest being Cook County's $17.20 per day.

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[7] See Michael J. Saks and Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, Law & Human Behavior, Vol. 21, No. 5, p. 458 (Oct. 1997).
[8] See Waters, *supra* note 6.
[9] See *id.*
[10] See *id.*
[11] See *id.*

The amount was amended to $25 for the first day and $50 each day thereafter, effective June 1, 2015. 55 ILCS 5/4-11001. Plaintiffs cite to the record of the General Assembly's discussion of the amendment to show that the Legislature intended to better incentivize and compensate those citizens selected to perform their civic duty by serving on a jury, particularly when juror compensation had not increased in over forty years. *See* 98th Ill. Gen. Assem., Judiciary Committee Meeting, Dec. 1, 2014, at 4; 98th Ill. Gen. Assem., House Proceedings, Dec. 2, 2014, at 37-38. Disallowing a civil jury of twelve permits counties to pay jurors more while lessening the financial burden by limiting the number of jurors who would need compensation. This also increases the fairness of requiring all jurors, regardless of their financial situation, to forgo their regular paycheck for the significantly smaller juror compensation, and decreases the chances that individuals will have their lives disrupted by being called for jury duty in the first place.

Defendants reply with other sections of the record, arguing that even if this court were to give weight to the practical considerations and desirability of the amendment, the representatives who debated the change to jury compensation had their doubts as to whether the legislation would achieve these goals. Some of their concerns included: the lack of data on the legislation's cost-effectiveness; whether the juror compensation raise would negate any savings of moving to six-member juries; the impact this change would have on various county budgets; and whether decreasing civil jury sizes would offset the cost of increasing juror compensation for

criminal cases, which continue to use juries of twelve. *See* 98th Ill. Gen. Assem., House Proceedings, Dec. 4, 2014, at 40, 60, 62-63; 98th Ill. Gen. Assem., Senate Proceedings, Dec. 3, 2014, at 36-37, 40.

This court is mindful of the need to provide jurors with fair compensation for their valuable service. Furthermore, plaintiffs and the Legislature do make compelling arguments for a smaller, better-compensated jury. However, the issue here is not whether the Legislature's decision was well-intentioned. The problem is that it acted beyond the scope of its powers in enacting this amendment by contradicting a right specifically provided for by our constitution. Furthermore, a statute that violates the constitution is invalid regardless of how beneficial its effects may be. *See Best*, 179 Ill. 2d at 378. Therefore, the Legislature's intentions cannot save this amendment.

CONCLUSION

With the amendment to 735 ILCS 5/2-1105, the Illinois Legislature limited the civil jury to six members and disallowed parties from demanding more. The research done in the areas of jury size and group decision-making dynamics shows that there are several downsides to making the move to a smaller jury. More importantly, the Illinois Constitution does not permit the Legislature to pass a law restricting the constitutional jury trial right. The right to a trial by jury in Illinois shall remain inviolate, and the Illinois Constitution specifically guarantees the rights that were available at the time this provision was adopted. Our highest court has repeatedly stated that this includes the availability of a twelve-person jury. PA

98-1132 cannot be construed in any manner other than as a violation of this twelve-person jury right. In amending 735 ILCS 5/2-1105, PA 98-1132 unconstitutionally restricts that right on its face, and therefore, this provision cannot stand.

COURT'S RULING

Therefore, for all of the reasons stated above, this court follows the plain language of the Illinois Constitution, the legislative record, and the interpretations of the Illinois Supreme Court in holding that Public Act 98-1132, amending 735 ILCS 5/2-1105, creates a facially unconstitutional infringement of the right to trial by jury as provided by the 1970 Constitution of the State of Illinois, and that 735 ILCS 5/2-1105 as it is currently written cannot reasonably be construed in any manner that would preserve its validity. The court's finding of unconstitutionality is necessary to its decision on Defendants' motion, and this decision cannot rest on alternative grounds. Pursuant to Illinois Supreme Court Rule 308(a), this Court certifies the question of the constitutionality of the amended 735 ILCS 5/2-1105.

ENTERED:

Judge William E. Gomolinski #1973

Judge William E. Gomolinski

DEC 21 2018

Circuit Court-1973