Case No. # S22A1060

**IN THE SUPREME COURT OF GEORGIA**

JO-ANN TAYLOR, as Executor for
TIA MCGEE'S ESTATE,

*Appellant/Plaintiff,*

v.

THE DEVEREUX FOUNDATION, INC., a Pennsylvania corporation, and
GWENDOLYN B. SKINNER, an individual,

*Appellees/Defendants.*

# BRIEF OF *AMICUS CURIAE* GEORGIANS FOR LAWSUIT REFORM

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Pursuant to Rule 23 of the Rules of the Supreme Court of Georgia and the Court's Order dated July 18, 2022, Georgians for Lawsuit Reform ("GLR") hereby submits this *Amicus Curiae* Brief as a party of interest, but not of record, in the above-styled matter, and in support of affirming the trial court. The identity and interest of GLR is set forth below.

## INTRODUCTION

GLR is an organization formed by prominent members of the business community representing a diverse cross-section of industries across Georgia. The mission of GLR is to advocate for a fair, balanced, and efficient civil justice system and to educate the public on the impact that such a system has on Georgia's economy and business environment. GLR advances its members' interests in a variety of forums, including through the courts. In this regard, GLR files *amicus curiae* briefs in cases of concern to the legal and business communities, including addressing important limitations the legislature has placed on excessive, non-compensatory damage awards. GLR recognizes an efficient tort system is an important part of a thriving free-enterprise economy because it significantly increases economic opportunity, jobs and growth for the citizens of Georgia. An efficient tort system ensures businesses have proper incentives to act responsibly, and that truly injured people are fully compensated. An efficient tort system results in greater trust among market participants, leading to more trading, increased economic development, and

eventually a higher standard of living. In sum, as GLR recognizes, an efficient tort system benefits all Georgians.

Conversely, an unpredictable tort system imposes excessive costs on society. If the judiciary dismantles tort reform statutes, like the punitive damages cap found in O.C.G.A. § 51-12-5.1, then all Georgians will shoulder the burden of an increasingly expensive and inefficient tort liability system through decreased growth, higher prices for consumers and health care patients, lower wages, jobs lost to other states, reduced returns on investments, restricted access to health care, and less innovation. Businesses that are forced to spend more money each year on litigation costs and liability insurance have less money available for research and development or for health and other benefits for their employees.

As the Court is aware, this appeal involves the application of Georgia's $250,000 statutory cap contained in O.C.G.A. § 51-12-5.1 to a jury's award of punitive damages against Appellee The Devereux Foundation, Inc. ("Devereux") following a trial on claims arising from the May 2012 sexual assault of a resident of Devereux's behavioral healthcare facility in Kennesaw, Georgia. On November 18, 2019, a Cobb County jury returned a verdict finding, *inter alia*, that (1) the victim suffered compensatory damages in the amount of $10,000,000; (2) Devereux and the abuser were each 50% at fault; and (3) Devereux was liable for punitive damages. After a phase two trial on the amount of punitive damages, the jury returned an

additional award of $50,000,000. Devereaux objected to the award on the basis that the claim did not involve a product liability case or a tort case involving a specific intent to harm or an intoxicated tortfeasor, and thus the statutory cap of $250,000 was warranted pursuant to O.C.G.A. § 51-12-5.1(g). The trial court agreed with Devereaux and capped the punitive damages award at $250,000. Appellant objected to the trial court's application of the $250,000 cap on punitive damages and argued that the cap was unconstitutional. After briefing and oral argument on the issue, the trial court affirmed its application of the cap and entered final judgment against Deveraux in the amount of $7,638,055.03.[1] As explained below, this Court should affirm the trial court's judgment that the application of the statutory cap was proper. And moreover, the Court should also take this opportunity to recognize that *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010), was wrongly decided, as there is no constitutional right to have a judgment entered awarding noneconomic damages or punitive damages, in the amount determined by a jury. The Court should recognize that the General Assembly was within its authority to enact O.C.G.A. § 51-12-5.1, and it should refuse to adopt Appellant's interpretation of *Nestlehutt*,

[1] This award represented $5 million in compensatory damages allocated to Devereux (reflecting its 50% allocation of fault), $250,000 in punitive damages (per application of the statutory cap), and in excess of $2.3 million for Plaintiff's litigation expenses.

which would upend the civil justice system in Georgia by rendering a myriad of statutes *per se* unconstitutional.

This case—in which the trial court properly applied Georgia's $250,000 statutory cap to a jury's award of punitive damages—presents issues that directly implicate GLR's interests in ensuring an efficient and fair tort system in Georgia. Therefore, GLR encourages this Court to affirm the trial court's decision, and in so doing, uphold the decision of the people's elected representatives to protect against excessive punitive damage awards and provide predictability to businesses who decide to do business in Georgia.

## ARGUMENT AND CITATION OF AUTHORITY

### I. This Court Should Reject the Faulty Reasoning in *Nestlehutt* and Overrule that Decision.

This appeal addresses the Georgia Supreme Court's opinion in *Nestlehutt* from 2010 and the resulting uncertainty surrounding the constitutionality of noneconomic damages caps in Georgia. The Court should take this opportunity to recognize that *Nestlehutt* was wrongly decided.

The 2010 opinion in *Nestlehutt* involved a constitutional challenge to O.C.G.A. § 51-13-1, which in the relevant part, capped noneconomic damages in medical malpractice actions at $350,000. 286 Ga. at 731. The *Nestlehutt* Court made a number of correct conclusions, but its ultimate finding—that the noneconomic

damages cap in O.C.G.A. § 51-13-1 violated the constitutional right to trial by jury—was the direct result of a critical misstep in the *Nestlehutt* Court's reasoning.

*Nestlehutt* correctly noted that the Georgia Constitution "guarantees the right to a jury trial only with respect to cases as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798." *Id.* at 733. Thus, the Court reasoned, "the initial step in our analysis must necessarily be an examination of the right to jury trial under late eighteenth century English common law." *Id.* The Court also found, with ample support, that medical negligence claims existed in 1789. *Id.* at 734. The Court then noted that "the amount of damages sustained by a plaintiff is ordinarily an issue of fact, this has been the rule from the beginning of trial by jury." *Id.* Finally, it found that "[n]oneconomic damages have long been recognized as an element of total damages in tort cases." *Id.* at 735.

The Court then abandoned its careful step-by-step approach and made a grievous logical error: it found that "at the time of the adoption of our Constitution of 1798, there did exist the common law right to a jury trial for claims involving the negligence of a health care provider *with an attendant right to the award of the full measure of damages, including noneconomic damages*, as determined by the jury." *Id.* (emphasis added). In so doing, the Court conflated two facts which, independently, had historical and legal support: (1) that the amount of damages

*sustained by a plaintiff* is ordinarily an issue of fact for the jury's determination, and (2) that noneconomic damages have long been recognized as an element of *total* damages in tort cases. And from this conflation, the Court concluded that there is a constitutional right to have a judgment entered for the full amount of damages that a jury has determined that the plaintiff sustained. Critically, there is a missing link in the Court's reasoning: there is simply no support in the *Nestlehutt* opinion for this conclusion. The historical sources cited in *Nestlehutt* clearly support the idea that, to the extent that the measurement of noneconomic damages in medical negligence cases involves factual questions—that is, to the extent that the legal measure of damages is simply whatever damage the plaintiff sustained—these factual questions must be resolved by a jury. That does not mean, however, that the General Assembly can never change or put bounds around the legal measurement of damages to be applied to the facts of a case by a jury. And notably, the *Nestlehutt* Court, like Appellant here, did not cite a single case or historical source for the proposition that a plaintiff is entitled—under the constitutional guarantee of trial by jury or any other provision of the state constitution—to a particular legal standard for measuring damages or to an award of all the damages that a jury has determined factually that the plaintiff sustained. Even to the extent that the measurement of damages at common law in 1798 was that a plaintiff was entitled to recover all of the damages he sustained, there is no support for notion that this particular measure of damages

was an essential element in a jury trial at common law. Indeed, as explained *infra*, there is ample support for the contrary.

## II. The General Assembly Was Well Within Its Constitutional Authority to Limit Punitive Damages Awards in Georgia.

The Constitution of Georgia gives authority to the General Assembly "to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state." Ga. Const. Art. III, § VI, ¶ 1. Pursuant to this authority, in 1987, the General Assembly enacted the Tort Reform Act of 1987, which included the punitive damages cap found in O.C.G.A. § 51-12-5.1. Ga. L. 1987, p. 915, § 5. The purpose of the Tort Reform Act of 1987 was, in part: "To provide substantive and comprehensive civil justice reforms affecting tort claims litigation," "to provide the purposes of punitive damages awards," "to provide trial procedures for pleadings, evidentiary standards, findings of fact, and judgments for awards of punitive damages," and "to provide under what circumstances punitive damages may be awarded because of the actions of a defendant." *Id.* Georgia was not alone in recognizing the need for this reform; indeed, during the 1980s, at least thirty-three state legislatures passed some version of tort reform, purportedly in response to "the tort and insurance 'crises.'" Han-Duck Lee et al., *How Does Joint and Several Tort Reform Affect the Rate of Tort Filings? Evidence from the State Courts*, 61 J. RISK & INS. 295, 295-96 (1994).

Under Georgia law, a statute is presumed constitutional, and the burden is on the party challenging the law to prove its invalidity. *See, e.g.*, *Smith v. Cobb County-Kennestone Hosp. Auth.*, 262 Ga. 566, 570 (1992). This "strong presumption" can be overcome "only by a showing of a 'clear and palpable' conflict with the Constitution." *DeKalb Cnty. Sch. Dist. v. Georgia State Bd. of Educ.*, 294 Ga. 349, 352–53 (2013).

### A. The punitive damages cap in O.C.G.A. § 51-12-5.1 does not infringe upon the constitutional right to a trial by jury.

The Georgia Constitution provides the "right to trial by jury shall remain inviolate." Ga. Const. Art. I, § I, ¶ XI; O.C.G.A. § 9-11-38. Thus, the right to a jury trial has no application to causes of action or remedies that became known or were created after 1798. *See Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 207–08 (1848). In Georgia, an unconstitutional deprivation of the right to trial by jury does not exist "so long as trial by jury is not directly nor indirectly, abolished." *Id.* at 208. Moreover, "the right to a jury trial is not denied so long as a jury trial can be had 'by compliance with reasonable conditions.'" *Harvey v. Sullivan*, 272 Ga. 392, 393 (2000).

Contrary to Appellant's assertions, the Constitution does not protect a right to have a jury determine the amount of an award of noneconomic damages. First, a historical review establishes that when Georgia adopted the common law of England in the 18th Century, there was no "right" to a jury-determined damages award,

including exemplary or punitive damages. *See* Brief of Appellees at 7–8 (collecting cases). Even though exemplary damages were sometimes considered by juries, they were awarded to punish *intentional* torts in egregious cases, not to inflict punishment for causes of action rooted in ordinary negligence.[2] This is why Appellant was unable to cite to a single pre-1798 case awarding exemplary damages for a nonintentional tort. *See* Appellant's Brief at 14–15. For example, in *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763), the case from which Appellant argues Georgia's punitive damages law derives, the King's Bench affirmed the jury's award of exemplary damages for the plaintiff's illegal arrest and wrongful imprisonment. Yet that case did not involve a claim of negligence or other nonintentional tort. Appellant cannot accurately characterize exemplary damages as an essential element of a jury trial at common law.

Thus, contrary to Appellant's arguments, a legislative cap on punitive damages does not take away any essential element of a jury trial. Indeed, Georgia courts have recognized that the General Assembly may modify the contours of available remedies without implicating or infringing the right to trial by jury. *See, e.g.*, *Lisle v. Willis*, 265 Ga. 861, 863 (1995) (holding remittitur statute did not violate

[2] This comports with the statute, which exempts intentional torts from the statutory cap. *See* O.C.G.A. § 51-12-5.1(f) (providing that punitive damages shall not be limited "if it is found that the defendant acted, or failed to act, with the specific intent to cause harm").

the constitutional right to trial by jury); *State v. Moseley*, 263 Ga. 680, 681 (1993) (upholding statutory provision giving 75% of punitive damage awards to the state because it did not violate the right to trial by jury); *Douglas Cnty. v. Abercrombie*, 226 Ga. 39, 41 (1970) (noting that the General Assembly has the right to pass a law which "modif[ies] . . . the remedial right given [] to the plaintiff"). Indeed, the legislature may even abrogate certain remedies entirely. *See, e.g.*, *Teasley v. Mathis*, 243 Ga. 561, 563 (1979) (upholding the bar of punitive damages where no serious injuries occurred as "within the province of the legislature").

The legislature may limit the parameters of available remedies because doing so does not invade the province of the jury to determine disputed *facts*. *See Gasperini v. Center for Humanities, Inc*., 518 U.S. 415 (1996) (Scalia, J., dissenting) (noting that punitive damages, "unlike the measure of actual damages suffered are not really a 'fact' 'tried' by the jury"). In Georgia's modern procedural scheme, the jury still determines, as a factual matter, whether there is clear and convincing evidence to support an award of punitive damages. O.C.G.A. § 51-12-5.1(b). The Georgia legislature has determined, however, as a matter of *law*, that for torts not involving products liability or specific intent, the corresponding remedy be capped at $250,000. O.C.G.A. § 51-12-5.1(f). And this determination is certainly proper.

An analogy is useful to illustrate this point. In *Shelton v. Lee*, 299 Ga. 350 (2016), this Court considered the constitutionality of Georgia's venue provisions in

homicide cases. The venue statute provided that, "where it cannot be readily determined in which county the cause of death was inflicted, it shall be considered that the cause of death was inflicted in the county in which the dead body was discovered." *See id.* at 350 (quoting O.C.G.A. § 17-2-2(c)). The appellant in *Shelton* argued that the venue statute impermissibly usurped the jury's factfinding role. 299 Ga. at 350–51. The Court disagreed, finding the jury must first "determine as a matter of fact . . . the county in which the dead body was discovered." *Id.* at 354–55. Then, applying the venue statute, "the homicide 'shall be considered,' as *a matter of law*, as having been committed in the county in which the body was discovered." *Id.* at 355 (emphasis added). Thus, there was an important distinction between telling a jury how to determine certain facts (which usurps their role as factfinders) and telling a jury what that a given fact means as a matter of law (which is a proper legislative function). *See id.* at 354–55. Similarly, here, the factual question of whether punitive damages are warranted and the amount of those damages is separate and distinct from the *legal* question of what portion of those damages are provided as remedies to the plaintiff through the ultimate award. In short, the jury decides the first question and the legislature can decide the second.

For these reasons, Appellant cannot overcome the "strong presumption" that the punitive damages cap is constitutional and have not established "a 'clear and

palpable conflict with the Constitution." *DeKalb Cnty. Sch. Dist.*, 294 Ga. at 352–53.

### B. This Court should not improperly substitute its judgment for the legislative policy decision of the General Assembly.

In reviewing the constitutionality of statutes, a Georgia court may not substitute its judgment for that of the judgment of the legislature. *Teasley*, 243 Ga. at 563. Instead, the Court must uphold a law if any set of facts exist upon which it is constitutional. *Smith*, 262 Ga. at 570.

This Court has previously recognized that there are valid public policy reasons for limiting punitive damages, and that the General Assembly may do so in its legislative judgment. In *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539 (1993), this Court considered the constitutionality of a different subsection of O.C.G.A. § 51-12-5.1. In so doing, however, it noted that, in cases involving neither product liability nor specific intent to harm, "the individual plaintiff, rather than society, is harmed, but the legislature has determined that, absent specific intent to harm, there are public policy reasons which dictate that a cap should be placed on punitive damages." *Id.* at 543. This Court noted "that the legislature may lawfully circumscribe punitive damages in this circumstance." *Id.* (citing *Bagley v. Shortt*, 261 Ga. 762 (1991)). The same result should be reached here, and the Court should defer to the General Assembly's policy judgments.

## III. Appellant's Interpretation of *Nestlehutt* Would Upend the Civil Justice System in Georgia.

Under Appellant's interpretation of the law, the remedial options available to a jury must be precisely the same now as they were in 1798 for any tort which existed at that time. Thus, according to Appellant's reasoning, any legislative restriction of remedies would be *per se* unconstitutional. This position is ludicrous and would turn Georgia's civil justice system on its head and destroy the predictability the General Assembly carefully considered and intentionally codified as a result of its careful study and consideration of the policy considerations involved. The Court should reject such an outcome and overrule *Nestlehutt*.

This conclusion is underscored by other Georgia doctrines. Take, for example, the doctrine of contributory negligence. At common law, contributory negligence was an absolute bar to recovery; thus, if a plaintiff was found to be 1% at fault for her injury, she was not entitled to any remedy whatsoever. *See Ohio S. Exp. Co. v. Beeler*, 110 Ga. App. 867, 868 (1965) ("Under the common law, as construed by the courts of this State, contributory negligence on the part of the plaintiff bars any right to recover."). However, in 1910 the General Assembly adopted a comparative negligence doctrine, which "represent[ed] a change from the common law contributory negligence rule." *Id.*; *see also City of Ocilla v. Luke*, 28 Ga. App. 234, 234 (1922) (citing Civil Code 1910, §§ 2781, 4426) ("The common-law rule that contributory negligence by a plaintiff prevents a recovery has been changed in this

state by the Code."). According to Appellant, if a jury could award a certain type of damages in 1798, then on those same facts, a jury must be permitted to award that type of damages today. And unless Appellant is suggesting that the constitutional right is a one-way ratchet that favors only plaintiffs, it would follow that a jury must also be permitted to refuse damages on the facts that would have justified a jury in refusing damages in 1798. Thus, under Appellant's reasoning, the doctrine of comparative negligence would be unconstitutional as applied to common law torts since it was decided after 1798. Nor could the General Assembly modify the elements of a given tort or recognize a new defense to a tort, as this would restrict a jury's ability to give the award identical damages for that tort today as it could have in 1798.

This cannot be so. Otherwise, many statutes in Georgia modifying common law causes of action and recognizing new defenses would be unconstitutional as a matter of law. *See* Appellees' Brief at 8–9 (explaining that statutes such as Georgia's wrongful death statute, the Worker's Compensation Act, the Dram Shop Act, and modern procedural guardrails in professional malpractice cases would all be "on the chopping block"). Such interference with legislative judgment creates the type of uncertainty that is the anathema to a vibrant business environment. To adopt Appellant's arguments would be judicial activism in the extreme, and the Court should refuse to do so. For these reasons, GLR respectfully submits that this Court

should reject Appellant's appeal, and in so doing, overrule the erroneous holding in *Nestlehutt*.

Respectfully submitted this 7th day of September, 2022.

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## CERTIFICATE OF SERVICE

This is to certify that I have this day serviced a copy of the foregoing **BRIEF OF AMICUS CURIAE GEORGIANS FOR LAWSUIT REFORM IN SUPPORT OF AFFIRMANCE** upon all counsel of record by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage thereon addressed to:

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