COA 24-454 28TH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

ALLISON SWEENEY MOHEBALI,

Plaintiff-Appellant,

v.

JOHN DAVID HAYES, MD and HARVEST MOON WOMEN's HEALTH, PLLC

Defendant-Appellees.

From Buncombe County
No. 21 CVS 2884

****

PLAINTIFF-APPELLANT'S BRIEF

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ISSUES PRESENTED

I) Whether the statutory restriction on noneconomic damages in medical malpractice actions (N.C.G.S. § 90-21.19(a)) violates the "inviolable" right to trial by jury under Article I, § 25 of the North Carolina Constitution.

INTRODUCTION

The General Assembly may not enact a statute that deprives a citizen of a constitutional right. *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). The North Carolina Constitution enshrines the "ancient" right to trial by jury as "sacred and inviolable." N.C. Const. art. I, § 25. For centuries, this guaranteed all citizens the right to have a jury determine compensatory damages in medical negligence claims. But in 2011, the General Assembly enacted a statute that arbitrarily caps those damages, irrespective of a jury's unanimous verdict on that factual issue. *See* N.C.G.S. § 90-21.19(a).

This appeal challenges the constitutionality of that statute. Here, a jury heard the evidence at trial and unanimously found that Allison Mohebali was entitled to $7,500,000 to compensate for the noneconomic damages she suffered. The trial judge applied the cap statute to reduce the jury verdict by over 90%.

This statute violated Allison's "sacred and inviolable" right to have a jury decide her compensatory damages. It is unconstitutional both as applied to medical negligence actions historically recognized under common law and as applied to the extraordinary and horrific facts of this case. Accordingly, this Court should vacate the judgment below and remand for entry of a new judgment that restores the jury's full and unanimous verdict.

STATEMENT OF THE CASE

Plaintiff Allison Mohebali commenced this medical malpractice action by filing a Complaint and the issuance of a Summons on 14 July 2021. (R pp 3–30). In her Complaint, Allison sought compensatory damages from Defendants John David Hayes, M.D. ("Dr. Hayes") and his medical practice, Harvest Moon Women's Health, PLLC ("Defendant Harvest Moon") for their negligent medical treatment that directly and proximately caused Allison to experience severe and permanent physical and emotional harms.[1] (R pp 29, 115). Plaintiff's Complaint did not assert a claim for gross negligence or seek punitive damages. *Id*. Prior to filing, Plaintiff's Complaint complied with the pre-suit expert review requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure. (R p 10). On 19 July 2021 and again on 19 August 2021, Allison served both Defendants with the Complaint and Requests for Admission. (R pp 95, 117, 179–80).

Despite proper service, Defendants never responded to the Complaint or Requests for Admission. (R p 180). Accordingly, the allegations therein were

[1] Although Defendants' negligence also caused the loss of Allison's viable unborn baby, Plaintiff did not assert a wrongful death claim in this action. Instead, Plaintiff's Complaint demanded a trial by jury for the physical pain, mental suffering, and permanent injuries Allison Mohebali experienced, all forms of noneconomic damages long recognized at common law in personal injury tort actions. *Id*.

deemed judicial admissions by each Defendant as a matter of law. (R p 343; *see* R pp 179–85); N.C. R. Civ. P. 36(a)).

On 20 August 2021, Allison filed a Motion for Entry of Default, along with a supporting Affidavit, as to both Defendants. (R p 181). The Buncombe County Clerk of Superior Court entered Entries of Default as to both Defendants. (R p 181).

On 10 June 2022, Allison filed a Motion for Partial Summary Judgment solely on the issues of Defendants' negligence liability and proximate cause. (R pp 179–342). In addition to Defendants' prior admissions, Allison supported this motion with the sworn affidavit of Dr. Hytham Imseis, who testified in detail how Defendants' conduct fell below the applicable standard of care and proximately caused Allison's harm. (R pp 263). Although it was not required (*see* N.C. R. Civ. P. 5(a)), Plaintiff's counsel served Defendants with the Motion for Partial Summary Judgment and Notice of Hearing. (R pp 188; Doc.Ex.II p 163).

Following a duly noticed hearing, the trial court entered an order granting Allison's motion in its entirety. (R p 343). The trial court granted Allison judgment as a matter of law on two issues: (1) Defendants' liability to Allison for their negligence; and (2) Defendants' negligence was a proximate cause of harm to Allison. (R p 343). That left only one issue for the jury to decide at trial, the dollar amount of noneconomic damages Allison was entitled to

recover. (R p 343;). The trial court served its summary judgment Order on Defendants. (Doc.Ex.II p 160).

On 22 July 2022, Dr. Hayes filed for Chapter 7 bankruptcy, triggering an automatic stay on this litigation. (R p 345). However, the Bankruptcy Court later determined that Dr. Hayes filed the bankruptcy in bad faith and for the sole purpose of avoiding this underlying litigation. The Court therefor dismissed the bankruptcy proceedings, thus lifting the stay. (R pp 345–46).

On 24 May 2023, Allison filed with the Buncombe County trial court and served on Defendants a Motion for Scheduling Conference Concerning Trial Date (R pp. 344–76) along with accompanying Notice of Hearing (R p 382; Doc.Ex.II p 170, 171). On 1 June 2023, the trial court held a scheduling hearing at which Defendant appeared and made argument. (*See* R p 386). The trial court set the jury trial to begin on 18 July 2023. (R p 386).

Judge Warren presided over the two-day jury trial beginning on 18 July 2023. The trial included pretrial motions; jury selection; introduction of numerous exhibits; the testimony of Dr. Hytham Imseis (qualified medical expert), Allison Mohebali, and James Mohebali; charge conference; closing argument; and the trial court's jury charge. (*See* 18 July T p 2; 19 July T p 199 (trial transcripts indexes)). Despite prior notice, Defendants chose to not appear or be represented by counsel for any aspect of the trial. (*See* 18 July T p 18). Plaintiff made no claim for economic damages at trial.

At the conclusion of trial, the verdict sheet included only one issue for the jury to answer: "What amount is Plaintiff entitled to recover for personal injury?" (R p 434). The verdict sheet's answer line provided for solely an award of "noneconomic damages." (R p 434). On 19 July 2023, the jury returned a unanimous verdict that Allison deserved $7,500,000.00 to compensate her for noneconomic damages. (R p 434).

On 4 December 2023, and after prior notice to Defendants (R p 439), the trial court held a hearing regarding the entry of judgment. Plaintiff's counsel timely asserted constitutional objections to the damages cap statute and the reduction of the jury's determination of Allison's damages amount. (8 December T pp 4–8). After consideration of counsel's arguments, the trial court overruled Plaintiff's objections and applied the statutory cap to the jury's verdict. (8 December T pp 8).

The trial court entered Judgment on 8 December 2023. (R p 441). Under N.C.G.S. § 90-21.19(a), the trial court reduced Allison's damages to $656,730.00, cutting the jury's unanimous verdict ***by over 90%***. (R pp 441–57).

On 5 January 2024, Allison timely filed and served a Notice of Appeal. (R pp 473–74). The final Record on Appeal, along with all documentary exhibits and transcripts, were filed and served on 22 May 2024. (R p 497).

STATEMENT OF FACTS

The 2nd of August 2019 marked the "worst event of [Allison's] life." (19 July T p 246; 18 July T p 183). On that day, instead of welcoming their newborn daughter into the world, Allison and her husband James experienced the loss of their healthy, full-term baby, Anastasia, as Defendants' negligence caused Allison's body and mind to suffer unimaginable, permanent, and life-altering injuries and suffering. These losses and harms were "completely preventable" and "needlessly tragic." (Doc Ex I pp 40, 61). The following summarizes the evidence heard by the jury at trial.

Pregnancy and Loss

Allison and James became pregnant with their first child in late 2018. (19 July T p 235). The couple was thrilled, and Allison could not wait to be a mother. (19 July T p 211). Thoughtful in approaching their healthcare, the Mohebalis wanted natural medicine to play a role in their pregnancy, including a home birth if they could do so safely. (18 July T p 178; 19 July T pp 235–36). Specifically, they wanted to be sure that a home birth would not impair their ability to go to the hospital or receive additional heightened care if necessary, such as an induction or c-section delivery. (18 July T p 178; 19 July T pp 235–36). It was thus important to them to have their care managed by a duly licensed OB-GYN doctor throughout the pregnancy and birth. (19 July T pp 212–13).

Shortly after Allison became pregnant, the Mohebalis located Dr. Hayes and his practice through Defendants' website and scheduled an appointment. (19 July T p 212.). Dr. Hayes is a North Carolina OB-GYN who specializes in home birth services. (18 July T pp 176–77). Defendant Harvest Moon is Dr. Hayes' wholly-owned and operated medical practice. (18 July T p 176).

Defendants promised Allison the best of both worlds: a home birth with a licensed medical doctor who also had the background, experience, and expertise to identify any need for heightened care or hospitalization. (19 July T pp 236–38). If Allison required such heightened care, Dr. Hayes assured Allison that he could provide it. (19 July T pp 213–14, 236–38). He promised that if either Allison's or the baby's health and safety were at risk, he would quickly get Allison to nearby Mission Hospital in Asheville. (19 July T pp 213–14, 236–38).

Allison's pregnancy initially progressed very smoothly. (18 July T p 179). As her obstetrician, Dr. Hayes regularly conducted ultrasounds and check-ups on Allison and her baby. (19 July T p 238). Allison's due date was 7 July 2019. (18 July T p 179). Eventually, they learned Allison was having a baby girl, which is "one of [Allison's] fondest memories during the pregnancy." (19 July T p 238–39). Like most new parents, Allison and James were beyond excited for their daughter's arrival. (19 July T p 239). They enjoyed a large baby

shower with their church, moved to a bigger house, and decorated the nursery in anticipation of her arrival. (19 July T p 239).

On 7 July 2019, Allison reached her due date and was full term, 40 weeks pregnant, but did not exhibit signs of labor. (19 July T p 215). Dr. Hayes insisted that Allison and James need not worry because it was normal to progress past a due date. He assured them he had the situation under control. (18 July T pp 179–80; 19 July T pp 216, 239–40). Allison and James trusted Dr. Hayes' medical judgment and expertise.

Allison then progressed into and surpassed the 41st, 42nd, *and* 43rd week of her pregnancy. (18 July T p 180; 19 July T p 216). As the weeks passed, Allison and James repeatedly raised concerns to Dr. Hayes about the delay. (18 July T pp 181–82). In response, Dr. Hayes repeatedly dismissed their concerns and assured them they had nothing to worry about. (19 July T p 216). He continued to monitor Allison and her baby and advised the Mohebalis that their situation was normal and that it was safe to continue with a natural birth at home. (19 July T pp 216, 240–41). He insisted that Allison would deliver their baby naturally only when her body was ready. (18 July T pp 181–82). As first-time parents relying on their medical doctor, the Mohebalis continued to trust Dr. Hayes, (19 July T p 216) who had a duty to provide them with proper care, including getting Allison to the hospital if needed. (Doc.Ex.I p 42).

At 43 weeks, Allison's condition began to deteriorate. She developed a fever, intense pain, serious confusion, and urinary incontinence. (19 July T pp 241–43). Dr. Hayes observed all of these alarming symptoms, but yet again dismissed all concern and insisted that Allison was not in active labor because she did not yet scream from the pain. (19 July T pp 241–42).

In reality, Allison had been in labor for an excessive amount of time—five days straight—suffering through excruciating pain, exhaustion, malnourishment, and nausea. (19 July T pp 241–42). She was leaking amniotic fluids. (Doc Ex I pp 47–48). She suffered pain all day and night, unable to sleep or eat. (19 July T p 218). Allison and James again raised concerns about Allison's condition to Dr. Hayes, but he remained dismissive and continued to assure them that all was normal, that Allison and their baby were safe, that labor would start soon, and that the baby would come when the time was right. (18 July T p 182; 19 July T p 218). Dr. Hayes never took any action to get Allison to the hospital for an induction or c-section. (19 July T pp 243–44).

On 1 August 2019, Allison reached 43 weeks and four days of pregnancy. That day, Dr. Hayes spent ten hours at the Mohebalis' home monitoring Allison and her baby. (18 July T pp 182–83). Despite Allison's deteriorating condition, Dr. Hayes, in dismissive tone, ordered Allison to get out of bed and walk up and down the stairs to stimulate labor. (19 July T p 243). He stated that this "was the only intervention [he] would ever recommend to anyone" in Allison's

position. (19 July T p 243). By that point, Allison hardly had the strength to talk, much less the physical capability to walk up and down the stairs. (19 July T p 243). Nevertheless, she tried as hard as she could to comply with Dr. Hayes' instructions.

Dr. Hayes' improper care only worsened. When Allison and James begged him to conduct a cervical check, he blamed Allison, accusing her of not having proper awareness of her body. He blamed her nervousness for impeding her labor. (18 July T p 183; 19 July T pp 219–20). Dr. Hayes again insisted that the baby would come when the time was right, that Allison was healthy and progressing normally, and that hospitalization was unnecessary. (18 July T pp 182–83). He did nothing to induce labor, despite confirming that Anastasia remained alive with a heartbeat at that time. (Doc Ex I pp 46, 50).

Inexplicably, Dr. Hayes left the Mohebalis' home that evening promising to return the following morning. (18 July T p 183). Allison did not sleep due to extreme pain, lapsing in-and-out of consciousness throughout the night. (18 July T p 183; 19 July T pp 244–45). She wondered if she would die from the unbearable pain. (19 July T p 244).

On 2 August 2019, when Allison regained consciousness, she immediately knew something was wrong. (19 July T p 245). She panicked, feeling an even "new level of sick". (18 July T p 183; 19 July T p 245). Her stomach felt different, hard, and she no longer felt Anastasia moving like the

day before. (19 July T p 220, 245–46). Allison and James immediately called Dr. Hayes to their house. (18 July T pp 183–84; 19 July T pp 220–21).

Upon his arrival, Dr. Hayes could not locate Anastaisa's heartbeat. (18 July T pp 183–84; 19 July T p 221). He looked panicked and he clearly knew the baby had died overnight. (19 July T p 221). Allison could not bear the crushing silence of the machine trying in vain to locate Anastaisa's heartbeat. (19 July T p 247).

Allison and James, both in complete shock, followed Dr. Hayes' order to go to his medical office in Asheville. (19 July T pp 221–22). Allison, who could hardly see or hear, struggled to sit in the car because of the pain radiating throughout her body. (19 July T pp 248–49). Dr. Hayes then confirmed via ultrasound that Anastaisa had died. (18 July T p 184; 19 July T pp 221–22). He asked to deliver their deceased baby at his office, but Allison and James refused. Instead, they immediately went to Mission Hospital. (18 July T p 183). Dr. Hayes neither accompanied them to the hospital nor ever checked on them thereafter. (18 July T p 183).

Upon arrival at Mission, Allison received immediate emergency medical treatment. (19 July T pp 222–23). She suffered from an extreme intrauterine infection. The medical staff catheterized her and drained large quantities of fluids and blood from her bladder. (19 July T pp 223, 249). The fluids had blocked Anastaisa's passage for delivery, and the blood indicated that Allison's

continued contractions had been painfully forcing Anastasia's head into Allison's bladder. (19 July T p 223).

Despite urgent hospital care, Allison's condition continued to deteriorate. (19 July T pp 223–24). Her fever worsened and she faded in and out of consciousness. (19 July T p 223–24). She appeared green in color and her body approached septic shock. (Doc.Ex.I pp 38; 19 July T pp 224, 249). When conscious, Allison experienced an unrelenting state of emotional trauma and tears. (19 July T pp 223–25).

Allison received medications to stimulate contractions and further cervical dilation. (Doc.Ex.I p 53). She tried to deliver her deceased daughter vaginally but could not. (19 July T p 223–50). Her doctors feared she would die from sepsis.

In an effort to save Allison's life, doctors performed a c-section surgery. (19 July T p 223–50). The anesthesia made Allison feel like she was dying, and she had a severe panic attack. (19 July T pp 250–51). Surgery revealed that Allison had suffered uterine atony—her uterus was so overworked from the length of her labor that it had become flaccid, allowing extensive bleeding. (Doc.Ex.I p 57). When medications failed to stop the bleeding, the surgical team placed sutures around the uterus to manually squeeze the blood vessels closed. (Doc.Ex.I pp 57–58).

When the surgeon removed Allison's deceased daughter, he said Anastaisa was "beautiful" and let Allison hold her. (19 July T p 251). Allison was overwhelmingly disoriented and confused by holding her still-warm, dead baby. (19 July T pp 251–52). Her medical providers placed Anastasia into a medical device that cooled her body, allowing Allison and James to spend time with their baby before preparing her for the funeral. (19 July T p 225).

Allison and James named her Anastasia, Greek for "resurrection." (19 July T p 255).

Expert Testimony Regarding Causation

As a qualified expert, Dr. Imseis testified that *all* of Allison's injuries and suffering were foreseeable consequences of Dr. Hayes' negligence, inexplicably allowing the pregnancy to progress dangerously too far. (Doc.Ex.I p 21). Beginning at 39 weeks of pregnancy, the risks to both Allison and the baby significantly increased with each passing day. (Doc.Ex.I p 43). At absolute latest, Defendants should not have allowed Allison to progress beyond 42 weeks. (Doc.Ex.I pp 44–45). Dr. Hayes' failure to ensure delivery before the start of the 43rd week of pregnancy clearly violated the applicable standard of care. (18 July T pp 180–81; Doc.Ex.I p 45). Allowing Allison to progress past 42 weeks created the foreseeable risks that she would suffer the very harms and losses she then experienced. (18 July T p 181; Doc.Ex.I pp 43–45).

Allison's Continued Suffering

The depth and breadth of Allison's mental and physical harm from these events defies description. After losing Anastasia, life for Allison was "[u]nbearable and impossibly difficult." (19 July T p 252). After a four-day stay involving critical care, Allison left Mission in a wheelchair without Anastasia in her arms, while watching other new mothers leaving with their babies. (19 July T p 252). At home, Allison arrived to a house full of baby toys and a fully decorated nursery—without Anastasia. (19 July T p 252). Allison did not leave her bed for days and completely disengaged from normal life. (19 July T p 226). At Anastasia's funeral, Allison was "like a ghost." (19 July T p 226).

As time progressed, Allison's mental and emotional conditions only worsened. (19 July T p 254; Doc.Ex.I pp 58–61). She stopped making eye contact with people, her vision blurred, and she could not "talk [her] body into being alive." (19 July T p 254). She could not moderate her emotions or even comprehend hunger or thirst. (19 July T pp 254–55). Allison also suffered serious post-surgical pain from her internal and external surgical wounds and life-threatening infection. (19 July T p 255).

The magnitude of Allison's loss triggered a severe psychiatric response. (Doc.Ex.I p 38). During follow-up appointments at Mission, she watched new mothers and their happy babies, which she simply could not bear. (19 July T pp 255–56). When Allison expressed that she had lost the desire to live, her

doctor referred her to Chapel Hill for an in-patient stay at a specialized postpartum psychiatric care facility. (19 July T pp 227–28; Doc.Ex.I p 60).

She checked into the facility and remained there for nearly three weeks, including over her birthday. (19 July T p 229). There, Allison was prescribed numerous psychiatric medications, including for nightmares, severe anxiety, and depression. (19 July T p 258; Doc.Ex.I pp 63–64). While Allison witnessed other women at the facility also struggling with postpartum effects, those women at least had their newborn babies visiting. (19 July T p 258). Allison was an "incredibly depressed, incredibly distressed woman," who had lost the will to live and ability to care for herself. (Doc.Ex.I p 63).

Doctors diagnosed Allison with postpartum depression, major depressive disorder, anxiety, and posttraumatic stress disorder. (19 July T pp 261–62; Doc.Ex.I pp 60–61). Upon her release from this inpatient facility, Allison regularly saw two counselors and a psychiatrist for grief counseling and trauma recovery. (19 July T pp 230, 261).

Despite this intensive treatment, Allison's condition continued to spiral. One month after Anastasia's death, Allison's most severe disassociation began. (19 July T p 259). Just hearing someone mention pregnancy or birth sent her into a disassociation spiral and triggered additional stress responses. (19 July T p 260; Doc.Ex.I p 63). Allison's psychiatric appointments also caused intense hallucinations and disassociation. (19 July T p 262). At night, she experienced

severe panic, nightmares, and insomnia. (19 July T p 260; Doc.Ex.I pp 65–66). She could not be around others or attend church. It took her months to begin taking steps toward reintegrating back into society. (19 July T p 260).

Years after Anastasia's death, Allison and James were finally blessed to become pregnant with their second daughter. (19 July T p 230–31, 264–66). But this only further impacted Allison's mental and emotional state. (Doc.Ex.I p 65). She understandably feared every step of the pregnancy, labor, and birth. (19 July T p 264). Her pregnancy caused "shock for nine months:" she could not sleep, she experienced constant panic, disassociation, flashbacks, and she worred that her new baby would also die like Anastasia. (19 July T pp 231, 263–65; Doc Ex I p 65). Every time her baby received heartbeat checks at check-ups, Allison completely panicked. (19 July T p 265).

Beyond this emotional distress, Allison also experienced continued and permanent physical injuries. The damage to her organs caused permanent incontinence. (19 July T p 231, 267). Due to uterine damage, Allison was unable to safely deliver her second child vaginally and instead was required to undergo a second c-section. (19 July T pp 268–69). Allison also suffers from severe, chronic insomnia. (19 July T p 267). She must remove herself from any situation that involves a degree of response to stress; otherwise, her mind and body shut down and she disassociates. (19 July T p 267).

Today, five years after losing Anastasia and experiencing her own unimaginable suffering, Allison's physical and mental ailments still play a major role in her life. (19 July T p 267–77). While she is "very grateful for [her] life and [her] daughter," she continues to suffer from chronic insomnia, panic, disassociation, incontinence, permanent uterus damage, and significant physical limitations. (19 July T p 267–77). She must live a lower-stress lifestyle to manage her mental, physical, and emotional health. (19 July T p 267–77). Allison will carry these enormous physical and emotional traumas for the rest of her life. (19 July T p 267, 269).

STATEMENT OF GROUND FOR APPELLATE REVIEW

The trial court entered the final judgment in this matter on 8 December 2023. (R pp 441–57). Allison timely filed a Notice of Appeal on 5 January 2024. (R pp 473–74). This Court has jurisdiction over this appeal under N.C.G.S. § 7A-27(b)(1).

STANDARD OF REVIEW

All statutes must comply with the constitution. *See Bayard*, 1 N.C. (Mart.) 5 (declaring unconstitutional a statute restricting the right to trial by jury). The General Assembly may not infringe upon a citizen's constitutional right by enacting a statute. *Id.*

Under our Constitution's separation of powers, "North Carolina courts have the authority and responsibility to declare a law unconstitutional." *Hart*

v. State, 368 N.C. 122, 126 (2015). In doing so, the Court considers whether the law is unconstitutional beyond a reasonable doubt. *Id.* When a statute violates a constitutional right, the Court "will not hesitate to pronounce the law unconstitutional and vindicate whatever constitutional rights have been infringed." *Cmty. Success Initiatives v. Moore*, 384 N.C. 194, 212 (2023). Constitutional questions are reviewed de novo. *Hart*, 368 N.C. at 130.

Challenges to a statute's constitutionality may be either facial or as-applied. *See Town of Beech Mt. v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460 (2016) (summarizing this distinction). A facial challenge "represents a plaintiff's contention that a statute is incapable of constitutional application in *any* context," while "an as-applied challenge represents a plaintiff's protest against how a statute was applied in [a] *particular* context." *Id.* (internal quotation omitted) (emphasis added).

ARGUMENT

As applied to Plaintiff, N.C.G.S. § 90-21.19(a)'s cap on noneconomic damages is unconstitutional under Article I, § 25 in two contexts. First, by overriding the jury's verdict of noneconomic damages, the statutory cap violates Plaintiff's "sacred and inviolable" right under Article I, § 25 to have a jury determine her claim. N.C. Const. art. I, § 25. Since its first adoption in 1776, our Constitution has protected and guaranteed the preexisting right to have a jury determine claims that were historically recognized at common law.

This includes medical malpractice claims for compensatory damages. Because Plaintiff's claim for compensatory damages was recognized at common law (and not created solely by statute, such as a wrongful death claim), it is incorporated into the constitutional right to trial by jury and the damages cap statute unconstitutionally infringes upon that right.

Second and alternatively, the cap is unconstitutional as applied to the compelling and exceptional facts of this case.

Accordingly, this Court should vacate the trial court's judgment applying this unconstitutional law and remand for entry of a new judgment in conformity with the jury's full and unanimous verdict.

I. N.C.G.S. § 90-21.19(a) is Unconstitutional as Applied to Causes of Action Enshrined as "Inviolable" under Article I, § 25.

First, the statutory cap on noneconomic damages is unconstitutional as applied to causes of action protected under the constitutional right to trial by jury. As applicable here, this includes claims for compensatory damages in medical negligence actions historically recognized under common law.

a. Article I, § 25 Protects the Right to a Jury Trial as Historically Recognized under Common Law.

Constitutional interpretation begins with the text. *Comm. to Elect Forest v. Employees PAC*, 376 N.C. 558, 564 (2021). Article I, § 25 of the North Carolina Constitution states: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the

people, and shall remain sacred and inviolable." This provision "addresses the substantive constitutional right to trial by jury in civil cases in almost the exact same language" as found in the North Carolina Constitutions of 1868 and 1776. *Kiser v. Kiser*, 325 N.C. 502, 507 (1989); *see* N.C. Const. of 1868, art. I, § 19 ("In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable"); N.C. Const. of 1776, Declaration of Rights § 14 (same).

Accordingly, our courts have interpreted the protections of Article I, § 25 "to apply only to actions respecting property in which the right to jury trial existed either at common law or by statute at the time of the adoption of the 1868 Constitution." *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 517 (1989). Conversely, "[f]or causes of action created since 1868, the right to a jury depends upon statutory authority." *Id.*

Put differently, in determining whether a particular cause of action is included within the constitutional right to trial by jury, courts must consider whether common law or statute recognized that action in 1868 or earlier. *See id.* at 518 ("Thus, the question before us is whether [the applicable cause of action] existed at common law or by statute at the time of the adoption of the 1868 Constitution). If yes, then the cause of action is "constitutionali[zed]" within the right to trial by jury and may not be limited or abridged by a law enacted by the General Assembly. *See* John V. Orth, *The Strange Career of the*

Common Law in North Carolina, 36 Adel. L. Rev. No. 1, 23, 26 (2015). In other words, "[a] statute trumps the common law, but the common law, to the extent that it is incorporated into the constitution, trumps a statute." *Id.* at 27. Because North Carolina adopted English common law during its colonial and post-independence period, pre-nineteenth century English common law particularly informs this constitutional inquiry. *See id.* at 23–27 (summarizing North Carolina's adoption of English common law); *see also* N.C.G.S. § 4-1 ("Common law declared to be in force"); *State ex rel. Brunton v. Flying "W" Enterprise, Inc.*, 273 N.C. 399, 411–412 (1968) (observing that the General Assembly has enacted statutes declaring English common law to be in force since the early 1700s).

b. Historical Common Law Recognized Claims for Medical Malpractice and Protected Compensatory Damages as Property.

To determine whether Article I, § 25 protects the claims at issue here from statutory modification, this Court must consider whether pre-1868 common law recognized claims for medical malpractice and protected compensatory damages as "property." On both accounts, the historical record is unequivocal: it did. Pre-1868 common law both recognized claims for medical malpractice and protected a citizen's right to compensatory damages as property to be determined by a jury.

Medical Malpractice Actions. First, pre-1868 common law recognized the cause of action of medical malpractice. Indeed, "[t]he antecedents of the modern medical malpractice action trace back to the 14th century." *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, et al.*, 691 S.E.2d 218, 221 (Ga., 2010) ("*Nesstlehutt*"). "The first recorded case in Anglo-American law goes back to the year 1374 when one J. Mort, surgeon, undertook to treat a wounded hand and allegedly acted in such a negligent manner as to maim the hand." Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 Vanderbilt L. Rev. 549, 550 (1959). Directly resembling the modern concept of a standard of reasonable care, early English courts considered the "professional liability of physicians and surgeons" by determining whether the provider "exercise[d] his calling with the skill commonly possessed by those engaged in it." *Id.*

This ancient cause of action continued to develop in later English law. "By the mid-18th century, the concept of 'mala praxis' was sufficiently established in legal theory as to constitute one of five classes of 'private wrongs' described by Sir William Blackstone in his Commentaries." *Nestlehutt*, 286 S.E.2d at 221. Before North Carolina's 1776 Constitution, Blackstone observed that "the neglect or unskillful management of [a] physician, surgeon, or apothecary . . . is a great misdemeanor and offense at common law . . . because it breaks the trust which the [injured] party had placed in his physician, and

tends to the patient's destruction." 3 W. Blackstone, *Commentaries on the Laws of England*, Ch. 8, p. 122 (1772).

English settlers to the American colonies brought this common law cause of action with them. Medical negligence actions took firm root in early American common law, where eighteenth- and nineteenth-century cases continued to develop the concept of a medical standard of care. McCoid, *supra* at 550–51. For example, a Connecticut court deemed sufficient a complaint alleging that a physician "performed [an] operation in the most unskillful, ignorant, and cruel manner, contrary to all the well known rules and principles of practice in such cases." *Cross v. Guthery*, 2 Root 90 (Conn. 1794). Likewise, a Pennsylvania court held that a physician was obligated to perform his practice with "such reasonable skill and diligence as are ordinarily exercised in his profession . . . such as thoroughly educated surgeons ordinarily employ." *McCandless v. McWha*, 22 Pa. (10 Harris) 261, 267–68 (1853). Finally, a New Hampshire court held that a physician or surgeon must possess and exercise "that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such business." *Leighton v. Sargent*, 27 N.H. 460, 469–72 (1853).

North Carolina was no exception here. "From its first permanent settlement in the early 1600s, the colony of North Carolina . . . accepted as much of the common law as suited its frontier conditions." Orth, *supra* at 23. Shortly after declaring independence in 1776, North Carolina "adopted a constitution that incorporated sections" from the Magna Carta and English Declaration of Rights and re-adopted English common law as previously adopted by the colony. *Id*. at 23–25.

Notably, North Carolina's incorporation of English common law into its 1776 Constitution famously included the right to civil trial by jury. In *Bayard v. Singleton*, sixteen years *before* the Supreme Court of the United States recognized judicial review in *Marbury v. Madison*, 5 U.S. 137 (1803), our Supreme Court held unconstitutional a statute depriving expropriated Tories of the right to trial by jury, reasoning that "no act . . . could by any means repeal or alter the constitution." 1 N.C. (Mart.) at 7. Thus, since 1787, our Supreme Court has upheld citizens' constitutional rights when the General Assembly passes a statute that attempts to limit or diminish those rights.

North Carolina's adoption of English common law also included the existing cause of action for *mala praxa*, now known as medical malpractice. For example, in an 1860 suit against a physician for negligent medical care, our Supreme Court stated that the determinative inquiry was "whether the defendant possessed the requisite skill, and had exerted it in the plaintiff's

behalf." *Woodward v. Hancock*, 52 N.C. 384, 386 (1860). The Court further framed the issue as a "question[ ] of skill and care in a surgeon's treatment of his patient." *Id*.

Thereafter, our courts have continued to recognize the common law basis for medical malpractice claims in North Carolina. *See, e.g.*, *Wall v. Stout*, 310 N.C. 184, 192–93, (1984) (noting the common law roots of medical malpractice claims); *Wiggins v. E. Carolina Health-Chowan, Inc.*, 234 N.C. App. 759, 767 (2014) (same).

This history distinguishes traditional medical malpractice suits from other causes of action that did not exist at common law, and thus were not incorporated into the constitutional protection of Article I, § 25. For example, "[t]he right to maintain an action to recover damages for the wrongful death of a human being, occasioned by the negligent or other wrongful act of another, did not exist at common law." *Bell v. Hankins*, 249 N.C. 199, 201 (1958). Instead, this cause of action "is a right provided only by statute," so "any action brought for wrongful death must be asserted in conformity with the applicable statutory provisions." *King v. Cape Fear Memorial Hospital, Inc.*, 96 N.C. App. 338, 341 (1989).

As applied to causes of action created by statute post-1868, therefore, the statutory cap on noneconomic damages would not violate the Article I, § 25 right to jury trial. *See, e.g., Kiser*, 325 N.C. at 508–09 (holding that because no

action for equitable distribution existed in pre-1868 common law, "there is no constitutional right to trial by jury . . . in a proceeding for equitable distribution" under Article I, § 25.)

Old English common law, early American jurisprudence, and North Carolina constitutional and judicial history unanimously agree: pre-1868 common law recognized the cause of action of medical malpractice. Accordingly, this cause of action is included within Article I, § 25's "inviolable" protection of the right to civil trial by jury.

Compensatory Damages. Second and similarly, pre-1868 common law recognized a citizen's right to recover compensatory damages, which include noneconomic damages,[2] as a vested property interest to be determined exclusively by a jury. As above, this principle traces its earliest roots to old English common law. For example, seventeenth-century English caselaw held that "by the law the jury are the judges of the damages." *Lord Townshend v. Hughes*, 86 Eng. Rep. 994, 994–95 (C.P. 1677). Accordingly, Blackstone observed a century later that because "the *quantum* of damages sustained" by a plaintiff "cannot be [ascertained] without the intervention of a jury," "where

[2] N.C.G.S. § 90-21.19 defines "noneconomic damages" as "[d]amages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and any other nonpecuniary compensatory damages. 'Noneconomic damages' does not include punitive damages." N.C.G.S. § 90-21.19(c).

damages are to be recovered, a jury must be called in to assess them." Blackstone, *supra*, Ch. 24, p. 397–98 (1772).

This principle applied not only to torts generally, but to medical negligence actions specifically. Thus, Blackstone further noted that victims of "*mala praxis*" are entitled to recover for "all personal wrongs and injuries." Blackstone, *supra*, Ch. 8, p. 122. Eighteenth-century English courts also expressly recognized a plaintiff's entitlement to damages for "excruciating pain and torment." *Scott v. Sheper*, 95 E. R. 1124, 126 (K.B. 1773).

This common law principle was likewise adopted in early American jurisprudence. *See, e.g., Grannis v. Branden*, 5 Day 260 (Conn. 1812) (recovery sought for "great unnecessary pain" caused by medical negligence); *Cross*, 2 Root 90 (awarding damages for loss of consortium arising from medical negligence); *Beebe v. Trafford*, 1 Kirby 215 (Conn. Super. 1787) (involving damages for pain and distress). The Supreme Court of the United States has repeatedly observed that "the common law rule as it existed at the time of the adoption of the [federal] Constitution" was that "in cases where the amount of damages was uncertain, their assessment was a matter *so peculiarly within the province of the jury* that the Court should not alter it." *Dimick v. Schiedt*, 293 U.S. 474, 480 (1935) (emphasis added). Indeed, "there is *overwhelming evidence* that the consistent practice at common law was for juries to award

damages." *Feltner v. Columbia Pictures Tv*, 523 U.S. 340, 353 (1998) (emphasis added).

Again, North Carolina was no exception here. For over two centuries, our law has recognized a citizen's right to a jury determination on compensatory damages. By 1849, it was already "settled in this state" that the measure of compensatory damages in tort actions was to be determined by jury. *Gilreath v. Allen*, 32 N.C. 67, 69 (1849). Our Supreme Court thus expressly recognized the principle of "*damnum et injuria*" ("damage without injury"), in which juries award plaintiffs damages not only "to give ample compensation for the injury actually sustained," but also for "the degree of suffering and agony inflicted upon them." *McAulay v. Birkhead*, 35 N.C. 28, 31 (1851).

Later North Carolina jurisprudence further emphasized this principle. In 1898, for example, our Supreme Court reiterated that "it must be deemed the settled rule of this Court that damages may be recovered for mental anguish, irrespective of any physical injury, caused by the negligence of a defendant in failing to exercise reasonable care and diligence." *Cashion v. Western Union Tel. Co.*, 123 N.C. 267, 270 (1898).

The Court noted that calculation of these damages "is peculiarly within the province of the jury and should be settled by them . . . in accordance with the dictates of conscience and of common sense, giving the plaintiff the just measure of compensation for the unlawful injury he has sustained." *Id*. at 273;

see also Gainey v. Western Union Tel. Co., 170 N.C. 7, 9 (1915) ("The amount of damages is a matter peculiarly within the province of the jury."); N.C.P.I. 809.100, 809.115 (recognizing the jury's duty to determine the amount of compensatory damages in medical malpractice cases, just as in all personal injury actions).

Under common law, compensatory damages have always encompassed "noneconomic damages" as defined in N.C.G.S. § 90-21.19(c). Also referred to as "general damages," this includes recovery for personal injuries, physical pain, mental suffering, and loss of enjoyment of life. *See e.g. Iadanza v. Harper*, 169 N.C. App. 776, 779–80 (2005) (explaining common law recognition of these categories of compensatory damages) (quoting *Penner v. Elliott*, 225 N.C. 33, 35 (1945) and 22 Am. Jur. 2d Damages § 42 (2003)).

Crucially, our Supreme Court has made clear that this common law right to a jury's determination on compensatory damages is a *property* right. *Osborn v. Leach*, 135 N.C. 628, 633–39 (1904); *see also* William B. Hale, *Handbook on the Law of Damages*, p.2 n.5 (1896) (explaining the right to recover compensatory damages "*vests* in the injured party immediately on the commission of the wrong. It is not the subsequent verdict and judgment but the commission of the wrong that gives the right. Being property, it is protected by the ordinary constitutional guarantees."). This distinguishes compensatory damages from punitive damages, which "are awarded on grounds of public

policy and not because the plaintiff has a *right* to the money, but . . . merely because it is assessed in his suit." *Osborn*, 135 N.C. at 633 (citing 18 Am. & Eng. Ency. (2 Ed.), 1901). Therefore, "[t]he right to have punitive damages assessed is . . . not property," while "[t]he right to recover actual or compensatory damages *is property*." *Id.*

This distinction makes a constitutional difference. Article I, § 25 expressly preserves as "inviolable" the right to trial by jury "[i]n all controversies at law respecting *property*." (emphasis added). Accordingly, because the right to punitive damages is "not property," our Supreme Court has repeatedly and for over a century emphasized that "the jury's role in awarding *punitive* damages can be dictated by our state's policy-making body, the General Assembly, *without* violating plaintiffs' constitutional right to trial by jury." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 177–78 (2004) (emphasis added); *see also Osborn*, 135 N.C. at 632–33 (holding that a statute restricting punitive damages is constitutional because punitive damages are "not property.")

Conversely, our Supreme Court has repeatedly held that if a statute restricted the recovery of compensatory damages—which the damages cap does—it "***would be unconstitutional***" because the right to compensatory damages "*is property*." *Osborn*, 135 N.C. at 640 (emphasis added); *see also Rhyne*, 358 N.C. at 176–77 ("[H]ad the act restricted the recovery of actual or

compensatory damages, *it would have been unconstitutional*") (emphasis added).

The historical record is unequivocal: pre-1868 common law both recognized claims for medical malpractice and protected the right to compensatory damages as property to be determined by a jury. Accordingly, the right to a jury's determination of compensatory damages in medical malpractice actions is protected from statutory infringement within the "inviolable" constitutional right to trial by jury under Article I, § 25.

c. N.C.G.S. § 90-21.19(a) Violates the "Inviolable" Constitutional Right to a Trial by Jury.

The statutory cap on noneconomic damages infringes upon Plaintiff's constitutional right to have a jury determine her compensatory damages. N.C.G.S. § 90-21.19(a) states: "Except at otherwise provided in subsection (b) of this section, in any medical malpractice action in which the plaintiff is entitled to an award of noneconomic damages, the total amount of noneconomic damages for which judgment is entered against all defendants shall not exceed five hundred thousand dollars ($500,000)." The statute subsequently directs the Office of State Budget and Management to adjust this restriction to

inflation by periodically "reset[ting]" it in relation to the Consumer Price Index. *Id.*[3]

By its plain language, the statute applies to noneconomic compensatory damages and mandates a uniform cap for *all* verdicts exceeding this amount. In other words, it applies equally regardless of whether the jury awarded $10 or $10 million above the cap.

This statutory restriction plainly infringes upon Plaintiff's constitutional right to trial by jury. "By requiring [a] court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, [a statutory cap like N.C.G.S. § 90-21.19(a)] clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function." *Nestlehutt*, 691 S.E.2d at 223. In doing so, it violates a plaintiff's "inviolable" right to a jury determination of noneconomic damages.

The mere fact that N.C.G.S. § 90-21.19(a) allows for *some* recovery of noneconomic damages does not cure its constitutional defect. Rather, "[t]he very existence of the cap[ ], in any amount, is violative of the right to trial by jury." *Id*. No statute can modify a constitutionally protected right. *See Bayard*, 1 N.C. (Mart.) 5.

[3] In December 2023, for example, this calculation restricted Allison's recovery to $656,730.00. (R pp 441–57).

As noted above, longstanding precedent from our Supreme Court necessitates this conclusion. Over a century ago, the Court held that a statute restricting punitive damages survived constitutional challenge only because "[t]he right to have punitive damages assessed is . . . not property." *Osborn*, 135 N.C. at 633. Conversely, the Court held that because "[t]he right to recover actual or compensatory damages *is property*," if the statute had restricted compensatory damages, "the statute would be unconstitutional." *Id.* at 639. The Court emphasized that each citizen is "entitled by constitutional right" to have "***the amount of just compensation*** for his wrong settled by a jury of his peers," and that this right cannot be "deprived . . . by legislative adjudication[.]" *Id.* at 639 (emphasis added).

Our Supreme Court recently reemphasized that distinction in *Rhyne*. Citing *Osborn*, the Court again held that a statute passed constitutional muster—this time under Article I, § 25—only because it restricted punitive damages, rather than compensatory damages. 358 N.C. at 176–77.

With N.C.G.S. § 90-21.19(a), the General Assembly enacted precisely what *Osborn* and *Rhyne* hypothesized would violate the constitution: a statutory restriction on compensatory damages. Accordingly, this Court should reach the same conclusion that our Supreme Court reached there: by restricting a plaintiff's property right to a jury's determination on

compensatory damages, N.C.G.S. § 90-21.19(a) is unconstitutional under Article I, § 25.

d. Many Other States Have Declared Statutory Caps on Noneconomic Damages Unconstitutional.

Many other states have already recognized that similar statutory caps violate the right to trial by jury under nearly identical constitutional provisions. The chart below summarizes this persuasive authority.

State	**Constitutional Provision**	**Holding**
Georgia	"The right to trial by jury shall remain inviolate." Ga. Const. of 1983, Art. I, § I, ¶ XI(a)	"[W]e conclude that the noneconomic damages caps . . . violate the right to a jury trial as guaranteed under the Georgia Constitution." *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 224 (Ga. 2010)
Alabama	"That the right of trial by jury shall remain inviolate." Ala. Const. art. I, § 11.	"[W]e conclude that the portion of § 6-5-544(b) limiting damages for noneconomic loss . . . violates the state constitution's guarantee of the right to trial by jury." *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 171 (Ala. 1991).
Kansas	"The right of trial by jury shall be inviolate." Kan. Const. § 5.	Holding that statutory caps on medical malpractice damages "violate the right to jury trial guaranteed by Section 5 of the Bill of Rights of the Kansas Constitution." *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 346 (1988).

Missouri	"That the right of trial by jury as heretofore enjoyed shall remain inviolate." Mo. Const. art. I, § 22(a).	"This Court holds that [the statutory cap] is unconstitutional to the extent that it infringes on the jury's constitutionally protected purpose of determining the amount of damages sustained by an injured party." *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 636 (2012).
North Dakota	"The right of trial by jury shall be secured to all, and remain inviolate." N.D. Const. art. I, § 13.	Holding that a statutory restriction on jury trials in certain actions "constitutes an unconstitutional deprivation of the right to a jury trial." *Arneson v. Olson*, 270 N.W.2d 125, 136 (1978).
Oregon	"In all civil cases the right of Trial by Jury shall remain inviolable." Ore. Const. Art. I, § 17.	"[W]e conclude that [the statute] interferes with the resolution of a factual issue, *i.e.*, noneconomic damages, that Article I, section 17 commits to the jury. Thus, the statute's [cap] violates the injured party's right to receive an award that reflects the jury's factual determination of the amount of damages as will fully compensate plaintiffs for all loss and injury to them." *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 474 (Or. 1999) (cleaned up).
Washington	"The right of trial by jury shall remain inviolate." Wash. Const. Art. 1, § 21.	"[T]he limit on noneconomic damages . . . is unconstitutional." *Sofie v. Fireboard Corp.*, 771 P.2d 711 (Wash. 1989).

While not controlling, this authority further demonstrates the widespread and longstanding understanding that statutory restrictions on

noneconomic damages in medical malpractice actions violate a citizen's "inviolable" right to trial by jury.[4] This Court should hold the same.

* * *

Accordingly, N.C.G.S. § 90-21.19(a) violates the "inviolable" constitutional right to trial by jury as applied to Allison's claim: noneconomic damages in medical negligence actions historically recognized under common law. This Court should therefore vacate the trial court's reduced judgment order and remand for entry of a new judgment restoring the jury's full and unanimous verdict.

II. N.C.G.S. § 90-21.19(a) is Unconstitutional As Applied to the Compelling and Exceptional Facts of this Case.

Second, and alternatively, the statutory cap is unconstitutional as applied to the exceptional and horrific facts of this case. Specifically: (a) the trial court's summary judgment order as to both Defendants' liability and proximate cause; (b) the uncontroverted evidence of the horrific harms that Defendants' negligence inflicted upon Allison; (c) Defendants' refusal to participate in the trial despite repeated fair and adequate notice; and (d) the

[4] Notably, at least four other state supreme courts have held similar statutory caps on damages to be unconstitutional under other constitutional protections. *See Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997) ("special legislation prohibition"); *Carson v. Maurer*, 120 N.H. 925 (1980) (equal protection clause); *Morris v. Savoy*, 61 Ohio St. 3d 684, 690 (1991) (due process clause); *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex. 1988) ("open courts" provision).

jury's unanimous verdict finding that Allison is entitled to $7,500,000 in noneconomic damages.

Even if the cap statute could be envisioned *arguendo* as constitutional as applied to some medical malpractice cases, the constellation of facts here sets Allison's claim apart. These facts shock the conscience, presenting an entirely unique case. The General Assembly could not have foreseen these circumstances when it enacted the statute. The cap does not serve an equitable or constitutional purpose in Allison's case, where the jury unanimously determined that she deserved *more than ten times* the statutory limit. Instead, the statute works a grave injustice. This Court should therefore rule it unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should vacate the trial court's reduced judgment order and remand for the entry of a new judgment restoring the jury's full and unanimous verdict.

This the 22nd day of July 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, Plaintiff-Appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding Cover Page, Caption, Index, Table of Authorities, Signature blocks, Certificate of Service, and this Certificate of Compliance) as reported by the word-processing software.

This the 22nd day of July 2024.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served PLAINTIFF-APPELLANT'S BRIEF in the above-entitled action upon the following persons by [ ] hand delivering a copy of same, properly addressed as follows: [X] by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service; [X] via electronic mail; [ ] via facsimile, properly addressed as follows and/or to the address identified below which is the last address known to me:

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