IN THE SUPREME COURT
STATE OF GEORGIA

CHARLES CLARK *et al.*, Appellants, v. THOMAS B. LEIGH, M.D. *et al.* Appellees.	Case No.: S26A0349 Lower Court Case No.: 20SCCV091967 (Bibb State Court)

BRIEF OF APPELLANTS

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I. INTRODUCTION

A. Case Summary

Though centering on purely legal issues, this appeal arises from the wrongful death of April Clark, as a result of medical negligence committed by the various Defendants/Appellees – **Thomas B. Leigh, M.D.**; **William Shirley, M.D**., and **OB/GYN Specialists, LLC**.[1] The underlying litigation resulted in a multimillion-dollar award for the full value of Ms. Clark's life. Facing that hefty judgment, Defendants for the first time then claimed that Clark's noneconomic damages should be capped under O.C.G.A. § 51-13-1, the State's "medical malpractice damages cap."

Buying into that argument, the trial court invalidated the largest portion of the jury's award, "capping" the wrongful death verdict at $350,000 under the Cap Statute. There were several problems with that approach, and conclusion.

On purely procedural grounds, the Defendants waived the cap issue not only by failing to so much as mention it until after the trial, verdict and judgment, but also by **affirmatively** stating in the Pretrial Order that the measure of damages for any wrongful death claim was the "full value of the

[1] For purposes of this appeal, there is no real need to distinguish between the Defendants, so the generic will be used, for readability's sake.

life" of Ms. Clark, as determined by the enlightened conscience of a reasonable jury. The trial, of course, was conducted in reliance on the Pretrial Order, and so the evidence that Clark introduced, and the strategic choices her counsel made before and during trial, were premised on the "rules of engagement" laid out in that Order.

Substantively, the statute as currently written leaves no room for a standalone "cap" on wrongful death damages in medical malpractice cases, much less one that survives constitutional muster. Since this Court, in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt,* 286 Ga. 731 (2010), invalidated vast swaths of the "cap" – specifically, as to pain and suffering and consortium claims – the remaining portions of the statute cannot operate without violating the severability clause of the tort reform legislation of which the "cap" is a part and contravening the clear intent of the General Assembly in passing the omnibus cap. And even if some semblance of a wrongful death cap could be cobbled together in the wake of *Nestlehutt*, the end result would be constitutionally infirm for reasons different than those espoused in *Nestlehutt*.

At base, the trial court upheld a "cap" that no Court, plaintiff, litigant, scholar, or citizen appeared to have believed existed in the wake of *Nestlehutt*, for the better part of two decades. The General Assembly might wish to pick up the issue using a new pen, on a blank slate, but that is for

another day. What the cap is, now, is void and unconstitutional, and the trial court erred in finding otherwise.

B. Jurisdiction

This appeal is timely, as the rulings below – following a full trial and months of post-trial motions practice – resulted in a final judgment, suitable for appeal. O.C.G.A. § 5-6-34(a)(1)(B); *see* V1 1-2 (Plaintiff's Notice of Appeal).

Appeal to this Court is proper, as this Court exercises exclusive appellate jurisdiction over "[a]ll cases involving the construction . . . of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question." Ga. Const. of 1983, Art. VI, Sec. VI, Par. II(1).

Here, the Trial Court's Amended Judgment (and underlying Order) squarely addressed and ruled upon the constitutionality of O.C.G.A. § 51-13-1. V26 149-53 (jury trial right); 153-54 (separation of powers); 154-55 (equal protection); *see* V26 158-59 (Amended Judgment). The constitutionality of the wrongful death portion of the "cap" statute has not been previously ruled on by this Court. *Med. Ctr. of Cent. Ga., Inc. v. Turner*, 322 Ga. 129 (June 24, 2025) (remanding, declining to reach the constitutionality of the damages cap to wrongful death award); *see generally Nestlehutt*, *supra*.

The trial court's Amended Judgment was entered on August 14, 2025. V26 158-59; *see* V26 147 (Order granting Motion to Remit, filed August 13, 2025). Clark's Notice of Appeal was filed the next day, timely under O.C.G.A. § 5-6-38(a). This appeal was docketed on October 15, 2025, and this initial brief follows within twenty days of that date.

C. Enumeration of Errors

The trial court erred in enforcing the "cap" on wrongful death damages under O.C.G.A. § 51-13-1.

1. The trial court erred in determining that Defendants had not waived the right to assert the "cap."

2. The trial court erred in concluding that it could enforce the "cap" as to wrongful death claims without effectively rewriting the statute—in violation of the constitutional separation of powers and general severability principles.

3. The trial court erred in concluding that enforcing the "cap" as to wrongful death claims would not violate the right to trial by jury.

4. The trial court erred in concluding that enforcing a "cap" as to wrongful death claims would not violate equal protection guarantees.

D. Statement of the Case

Though most of the "medicine" and trial proceedings are more germane to the companion appeal, S26X0349, a brief recap is necessary given some of Clark's procedural arguments, which the trial court misconstrued.

Underlying Facts

In 2019, April Clark underwent abdominal surgery to remove a cyst on her ovary; her surgeons that day were Defendants Leigh and Shirley. Though initially planned as an outpatient procedure, Clark was held overnight at the hospital for observation. Her condition worsened and by the following afternoon she developed classic signs of a bowel perforation – fever, tachycardia (rapid heart rate), pain, and a distended abdomen. Both Dr. Leigh and Dr. Shirley had the opportunity to diagnose her deteriorating condition, and both failed to do so.

About 48 hours after her surgery, Clark suddenly became unresponsive. CT imaging revealed the presence of "free air" in Clark's abdomen – a classic sign of bowel perforation and red flag for sepsis. She underwent emergency surgery to repair the bowel leak, and her heart stopped while she was on the operating table. Clark never regained consciousness. V23 33, 45. She remained on life support for 31 days, and died on June 27, 2019. *Id.*

Relevant Proceedings

Litigation followed. Clark's family members brought claims for wrongful death: her surviving husband, Charles, as the statutory wrongful death plaintiff, and her daughter, April, as Administrator of the Estate, for conscious pain and suffering and medical bills. V1 6 (original Complaint).

After years of litigation, in which the "cap" issue was never raised, the case convened for trial in 2024. *See* generally Volumes 21-25 (Days I-V of trial). By that point, **three** separate Consolidated Pre-Trial Orders had been submitted and entered by the court. None mentioned any "cap," at all. V13 157-93 (PTO of May 21, 2024); *id.* 305-27 (PTO of July 18, 2024); V20 33-55.

In fact, in **each** PTO, these Defendants explained that the proper measure of damages for any wrongful death claim was indeed governed by statute – but not the "cap" statute they now champion. Instead, in each PTO, these Defendants agreed that "should the jury find in favor of plaintiffs, the applicable damages would be those damages appropriate pursuant to OCGA § 51-4-1 and OCGA § 51-12-2." V13 173; V13 315 (same); V20 43 (same; operative PTO).

After a five-day trial – including a full day's worth of "damages" witnesses – the jury deliberated for some time and ultimately, unanimously, awarded a significant verdict:

- $29,250,000 for the full value of the life of Ms. Clark;[2]
- $2,500,000 for the pain and suffering of Ms. Clark; and

[2] According to the evidence, including mortality tables, at the time of her unnecessary death, April Clark had more than 33 remaining **years** of life as a wife, mother and grandmother. V25 110-13.

As more evidence of the waiver argument set forth in more detail in just a bit, even the verdict form itself instructed the jury it was to deliberate and decide on the "full value of the life" of Ms. Clark. V20 74-75.

- $1,715,176 in medical expenses.

V25 at 1003-04; V20 74-75 (verdict form). In total, $33,465,716.[3]

Defendants filed post-trial motions, seeking a new trial and to "remit and amend" the judgment; amendments and additional briefing followed completion of the voluminous trial transcript. V26 12-35 (amended new trial motion and bundling remittitur/cap arguments); V26 42-89 (amended new trial response); *id.* 90-113 (amended "cap" response).

Among Defendants' arguments was the claim that the judgment must be reduced under O.C.G.A. § 51-13-1, which, Defendants claimed, was still viable as to wrongful death awards even after *Nestlehutt*. Specifically, Defendants contended that the "cap" was enforceable because there was, supposedly, no claim for wrongful death at common law. V27 50-51; *see id.* 51-52 ("I'm going to start with substantive ones about what *Nestlehutt* means and how this works"); *id.* 53-54 (reiterating that arguments were undertaken under *Nestlehutt* framework); *id.* 54-55 (to credit some of Clark's arguments as to rights under the 1983 Georgia Constitution, "essentially, to get to this use of the 1983 Constitution, the Court would have to **completely throw**

[3] Following apportionment to non-parties, the verdict was still north of $20 million. V20 76-77 (Judgment).

out *Nestlehutt* itself and *Taylor*. **And there's no basis for doing that**, certainly until the Supreme Court says otherwise") (all emphases added).

Opposing Defendants' gambit to cap the wrongful death award, Clark contended that Defendants had waived the right to invoke the "cap" by failing to raise the issue until after judgment was entered, and that enforcing the "cap" on wrongful death awards would abrogate the constitutional separation of powers under severability principles, and violate the constitutional rights to jury trial and equal protection. V26 (Response to Amended Motion for New Trial) 85-86; V26 (Supplemental Response to Motion to Remit) 90-113; V26 (Proposed Order) 160, 176-203; V27 (hearing transcript) 63-71.

In tandem with these proceedings, the Court of Appeals decided *Turner*, *supra,* holding that this Court's decision in *Nestlehutt* applied in the wrongful death context. This Court then granted *certiorari* and, ultimately, vacated the judgment and remanded the case with instructions that the trial court resolve the constitutional question in the first instance under the analysis utilized in *Nestlehutt*. *Turner*, 322 Ga. at 133.

Ultimately, after asking for proposed orders from both sides that crystallized each's positions, the trial court largely adopted Plaintiff's proposed Order on the new trial issues, and the Defendants' proposed Order

on the "cap" issues.[4] V26 147. *See also* V26 160-202 (Notice of Filing Proposed Order for Plaintiff), 207-33 (proposed defense motions).

The Relevant Order

The trial court's Order straightforwardly, but incorrectly, held that the post-*Nestlehutt* remnants of O.C.G.A. § 51-13-1(b) capped the wrongful death award. V26 148. Noting that this Court's decision in *Turner* meant that the "wrongful death cap" issue was still an open one, the trial court proceeded without significant elaboration to reject Clark's procedural and constitutional claims. V26 149-53 (jury trial right); 153-54 (separation of powers); 154-55 (equal protection); 155-57 (procedural objections). Perhaps most notably, the trial court ruled that since the cap statute "as applied" would pass constitutional muster, it need not engage in any more painstaking redline/blue pencil of what portions of the statute were even in play.

E. Summary of Argument

The trial court erred in enforcing the § 51-13-1(b) "cap" in this case.

First, the "cap" argument was waived – the contention that the death of April Clark could only ever be worth $350,000 was **never** mentioned – **not**

[4] The New Trial Motion ruling was ultimately reduced to a separate Order, in Clark's favor. That ruling gives rise to a cross-appeal, *Thomas B. Leigh, M.D. et al. v. Charles Clark*, Case No. S26X0350. The arguments raised and ruled upon as part of the New Trial Motion, then, will be addressed in that proceeding, via separate briefing.

one syllable – until after the litigation, trial, verdict, and Judgment. Even more telling, the Defendants affirmatively took the position in multiple Pre-Trial Orders that **another** statute would govern Plaintiff's damages – the "full value of the life" standard memorialized in O.C.G.A. § 51-4-1 *et seq*.; *see Ga. Dep't of Human Res. v. Phillips*, 268 Ga. 316, 318 (1997).

Second, application of the "cap" as construed by the trial court is impossible, in light of *Nestlehutt,* under longstanding separation-of-powers principles, which forbid courts from rewriting or "adding a line" to a given statute. The trial court's enforcement of the "cap" post-*Nestlehutt* also contravenes the severability provision of the Tort Reform Act of 2005, of which § 51-13-1 is a part.

Third, application of the "cap" would violate the inviolate right to a trial by jury under Georgia's Constitution, whether utilizing Georgia's 1798 version examined in *Nestlehutt* and *Turner*, the post-Civil War 1868 Constitution, or Georgia's current (1983) version. Actions for wrongful death did exist at common law, as did jury deliberation on damages almost precisely like those at issue, here. Caps are unconstitutional.

Fourth, application of the "cap" via some post-*Nestlehutt* rewriting would violate the Georgia and United States Constitutional guarantees of equal protection of the laws. *See* GA. CONST. art. I, § I, ¶ II ("Protection to person and property is the paramount duty of government and shall be

impartial and complete. No person shall be denied the equal protection of the laws"). The trial court erred in ruling otherwise.

II. ARGUMENT AND CITATION TO AUTHORITIES

A. Georgia's noneconomic damages "cap" – generally, and in light of *Nestlehutt*

The Court is well aware that the "cap" statute was adopted in 2005, and held largely unconstitutional in *Nestlehutt* five years later. Since then, there has been no trial court ruling or appellate decision holding that whatever language or vestige remains of O.C.G.A. § 51-13-1 still caps wrongful death awards in medical malpractice actions. There are numerous reasons why, to be explored below.

But first, in any dispute over statutory language, a good starting point is, well, the statute. The cap applies to any "claimant," which (though singular) means any and all persons who might claim damages from malpractice involving a single victim. O.C.G.A. § 51-13-1(a)(1) ("**All persons** claiming to have sustained damages as the result of the bodily injury or death of a single person are **considered a single claimant**") (emphasis added). That means in this matter, both Mr. Clark (wrongful death plaintiff, supposedly "capped") and April Clark (Estate representative, whose damages, under *Nestlehutt*, are not subject to any cap) are the **same**

"claimant," together subject to the one-size-fits-all cap, in the General Assembly's eyes.

The operative language of the "cap" provision is quite inclusive:

> In any verdict returned or judgment entered in a medical malpractice **action**, including an action for wrongful death, against one or more health care providers, the **total amount recoverable by a claimant** for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00, regardless of the number of defendant health care providers against whom the claim is asserted **or the number of separate causes of action on which the claim is based**.

O.C.G.A. § 51-13-1(b) (emphasis added). Subpart (c) has the same qualifying language (or really, lack of any such language) as to any "single medical facility," while subpart (d) expands the "cap" if more than one "medical facility" is involved. Importantly, subpart (e) of the statute commands that "[i]n applying subsections (b), (c), and (d) of this Code section, the aggregate amount of noneconomic damages recoverable under such subsections **shall in no event** exceed $1,050,000.00." (emphasis added).

And circling back a bit, the cap for any one "claimant" (no matter how many plaintiffs are involved) is $350,000, unless two or three or more defendants are involved (and then no more than $1.05 million, no matter what). The "noneconomic damages" covered by the "cap" include quite a sprawling list of damages categories, including loss of enjoyment of life. O.C.G.A. § 51-13-1(a)(4).

Nestlehutt, of course, invalidated the "pain and suffering" and consortium aspects of the cap. 286 Ga. at 738 (where noneconomic damages were awarded for pain and suffering and loss of consortium, holding that "the noneconomic damages caps in OCGA § 51-13-1 violate the right to a jury trial as guaranteed under the Georgia Constitution").

B. The cap argument was waived, and the trial court erred in concluding otherwise.

A party is forced to live with choices made throughout a given litigation. In the years between the inception and trial of this case, the Defendants never mentioned any "cap" on wrongful death damages, no matter what the pleading, position, argument or defense. The same was true in not one, but three separate Pretrial Orders, in which those Defendants embraced the "full value of the life" standard, even agreeing to such language on the verdict form. *See* O.C.G.A. § 9-11-16 (pretrial order governs the proceedings). There was **no** moment before, during or immediately after the trial in which this issue/defense was raised.[5] That is waiver, pure and

[5] To the contrary – the Defendants knew that Clark was relying on the "full value" standard during the proceedings, directly using the issue to their advantage in closing. V25 73 ("[W]hen I sit down, Ms. Shamp is going to ask for millions of dollars. And you should demand more. You should expect more than to have this huge gap in evidence before you're asked to conclude that these two gentlemen over here caused the death of April Clark and award that kind of money."); 96 ("And it's really: Demand more, expect more. They wanted to come in and ask for millions of dollars, you ought to get it right. He didn't get it right."). The Defendants should not be able to leverage

simple.[6]

This Court's decision in *Ga. Dep't of Human Res. v. Phillips*, 268 Ga. 316, 318 (1997), is likely the most helpful precedent. There, the parties stipulated in the pretrial order that the Georgia Tort Claims Act cap on damages **was** applicable to the action – much like the Defendants here agreed that damages in the case were to be governed by O.C.G.A. § 51-4-1 *et seq*. Following a verdict in favor of the *Phillips* Plaintiffs above the statutory caps, the trial court entered judgment for that above-capped amount. This Court reversed, holding that the Plaintiffs were bound by the pretrial order:

> The pretrial order has been likened to a rudder to the ship of litigation, and is intended to limit the **claims, contentions, defenses, and evidence** that will be submitted to the jury, thereby narrowing the course of the action, and expediting its resolution.
> . . .
>
> The Code imposes a duty on each party to assist the trial court in formulating the pretrial order by defining the issues for trial, and deciding "such other matters as may aid in the disposition of the action. This process is prescribed in the hope of promoting efficiency and

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what the jury thought would be a true verdict, if it really thought the cap applied at trial.

[6] The doctrine of constitutional avoidance mandates that the Court consider disputes outside of a constitutional lens, if possible, in disposing of them. *State v. Randall*, 315 Ga. 198, 200 (2022). If Defendants waived the issue, no constitutional rulings are necessary. *E.g.*, *Phillips*, 268 Ga. 316. And even outside the constitutional context, this Court has not hesitated to disallow defenses or defense theories post-trial, if not raised during or before trial in the Pretrial Order. *E.g.*, *Gaul v. Kennedy*, 246 Ga. 290, 291 (1980) (statute of limitations defense).

> conserving judicial resources by identifying the **real issues prior to trial**, thereby saving time and expense for everyone. For all of these reasons, it generally is recognized that, unless the pretrial order is modified at or before trial, **a party may not advance theories or offer evidence that violate the terms of the pretrial order.** As noted by one federal court, if pretrial orders are to continue to serve their laudable purposes, courts and litigants must take them seriously.

Id. at 318-319 (emphasis added; cleaned up). Further buttressing the waiver analysis, this Court noted that the first attempted departure from the *Phillips* pretrial order came several days after the Judgment, and that request was even more problematic because the pretrial order was consolidated and agreed to by the parties. *Id.* at 319-20.

All of those circumstances are true here, an all the more: pretrial order (three, actually); agreement by both parties; post-judgment repudiation. In addition, like the appellant in *Phillips*, Clark adopted a trial strategy bounded by the roadmap laid out in the Pretrial Order. *See Phillips*, 268 Ga. at 319 (citing opposing party's reliance on pretrial order agreements as key factor in why such Orders must be enforced). Given that there was no objection to "full value" death damages, Clark's damages presentation emphasized the noneconomic value April Clark personified – a family leader as a devoted wife, mother and grandmother. Although there was certainly evidence that Ms. Clark had long enjoyed paid full-time work, the emphasis at trial was on the less-quantifiable value in every life, and hers in particular. Had the Defendants actually brought up the "cap" argument at trial, the

evidentiary approach might have been different, and certainly the verdict form could have been fashioned to split any wrongful death award between economic and non-economic damages, avoiding months and months of delay and hundreds of thousands of dollars in attorney time and efforts. But having failed to raise the issue until after they saw how the chips fell at trial, the Defendants should have been barred from belatedly doing so post-judgment.[7]

The trial court rejected the waiver arguments, however, reasoning that the cap did not have to be noted in the pretrial order, since the cap is not a jury issue, and is only triggered at the time of an "excess" verdict. V25 156-57. But that is incorrect. A pretrial order governs not only what the jury hears and decides, but every other issue that shapes and governs the trial. The Defendants were barred from "advanc[ing] theories" that were not just omitted but affirmatively rejected in the pretrial order. *Phillips*, 268 at 318-19; *id.* at 318 ("The Code imposes a duty on each party to assist the trial

[7] It is not just that the defendants failed to mention the "cap" in any of the three pretrial orders. The Defendants affirmatively represented to the Plaintiff and the Court that the amount of wrongful death damages is an issue for determination by the jury and that, when it comes to the applicable measure of those damages, the Defendants denied only that the Plaintiffs are entitled to any damages—they did not assert that there is a cap to those damages. *See, e.g.*, *Phillips*, 268 Ga. at 320 ("[W]e note that Phillips actively participated in preparation of the pretrial order, and consented to its entry. It is well established that one cannot complain of a judgment, order, or ruling that [their] own procedure or conduct procured or aided in causing.").

court in formulating the pretrial order by defining the issues for trial, and deciding such other matters as may aid in the disposition of the action.").

As this Court has explained, even if the "issue" omitted is in the nature of a procedural defense, "rather than an issue pertaining to the merits to be resolved at trial," it is capable of being waived. *Long v. Marion*, 257 Ga. 431, 433 (1987). Put more bluntly, "[i]f a claim or issue is omitted from the order, it is waived." *Id.*; *see Zambetti v. Cheeley Invs., L.P.*, 343 Ga. App. 637, 642 (2017) (legal defense of Statute of Frauds waived, if omitted from pretrial order); *Eagle Jets, LLC v. Atlanta Jet, Inc.*, 321 Ga. App. 386, 400 (2013) (dispositive legal defense of federal pre-emption omitted from pretrial order and thus waived).

In attempting to distinguish this Court's decision in *Phillips*, the trial court reasoned that that case involved an agreement that GTCA caps **did** apply, while this case involves the converse. V26 156 n.3. That distinction does not constitute a meaningful difference. The core rationale in *Phillips* was the parties' reliance on the pretrial order to guide the parties' conduct at trial. That same reliance interest obtains whether the parties agreed that a cap should apply, or that it shouldn't. Here, the Defendants agreed that O.C.G.A. § 51-4-1 *et seq*. governed the damages calculations, and made no mention of other authorities or statutes that might apply. Like the Plaintiff in *Phillips*, the Defendants here should be precluded from advancing a late-

breaking theory that is plainly inconsistent with the agreed-upon terms of the Pretrial Order under which the trial proceedings were conducted.

C. The trial court erred in applying the cap, in light of *Nestlehutt* and severability principles.

Under Georgia law, when a statute is unconstitutional in part, the statute is void in its entirety **unless** severance of the otherwise illegal portion is possible. *Daimler Chrysler Corp. v. Ferrante*, 281 Ga. 273, 274 (2006). In *Nestlehutt*, this Court declared a significant portion of O.C.G.A. § 51-13-1 unconstitutional – that is, all "noneconomic" damages caps in medical malpractice actions are invalid, except – possibly – caps as to wrongful death damages.[8]

When a statute has been declared unconstitutional in part, a court must perform a "severability" analysis. That framework requires an examination of whether, post-invalidation of portions of the statute, the remainder can "accomplish[] the purpose the legislature intended." *Nixon v. State*, 256 Ga. 261, 264 (1986). In other words, "[when] a statute cannot be

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[8] In theory, one straggler category of capped damages that might not have been invalidated in *Nestlehutt* is "injury to reputation," since that was not a claim at issue in *Nestlehutt*. Otherwise, every single type of "noneconomic" damage available at common law was encompassed by this Court's 2010 decision – effectively gutting the statute – or at least until fifteen years later, when wrongful death defendants raised the cap argument again.

sustained as a whole, the courts will uphold it in part, when it is reasonably certain that to do so will correspond with the **main purpose** which the legislature sought to accomplish by its enactment, if, after the objectionable part is stricken, **enough remains** to accomplish that purpose." *City Council of Augusta v. Mangelly*, 243 Ga. 358, 363 (1979), *superseded by statute on other grounds as stated in Nielubowicz v. Chatham Cty.*, 252 Ga. 330, 330 n.1 (1984) (emphasis added).

On the other hand, "if the objectionable part is so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent, the rest of the statute must fall with it." 243 Ga. at 363; *accord State v. Jackson*, 269 Ga. 308, 312-13 (1998) ("When an unconstitutional portion of a statute is so connected with the general scope of the statute that to sever it would result in a statute that fails to correspond to the main legislative purpose, or give effect to that purpose, the statute must fall in its entirety"). Put differently, "in order for one part of a statute to be upheld as severable when another is stricken as unconstitutional, they **must not** be mutually dependent on one another." *Daimler Chrysler*, 281 Ga. at 275 (emphasis added).

Importantly, however, in ascertaining whether a partially invalid enactment may survive in part, a trial court cannot functionally re-write a statute to reach the desired relief. *Gwinnett Co. School Dist. v. Cox,* 289 Ga.

265, 275-76 (2011) (refusing to judicially legislate and sever portions of an unconstitutional statute); *see also State v. Fielden*, 280 Ga. 444, 448 (2006) ("'We cannot add a line to the law.'").

Post-*Nestlehutt*, the Cap Statute is a disheveled mess, incapable of meaningful interpretation and effectuation in cases involving both wrongful death claims, and "other" noneconomic damages measures. To survive in any application of *Nestlehutt*, the statute would require judicial excising or rewriting of the core components of the "cap."

- "Any verdict returned" means that there can be only one verdict on behalf of one claimant, and even though capping portions of that verdict would be unconstitutional as to "pain and suffering" plaintiffs, and "consortium" plaintiffs, the cap is still $350,000 for wrongful death plaintiffs, regardless of whether that is the same person, or not. O.C.G.A. § 51-13-1(b). Alternatively, under the trial court's interpretation, the "any verdict returned" would require a new qualifier – that is, "any verdict returned," **but only for a wrongful death claimant**.

- The "total amount recoverable" would be $350,000, according to the original statute, but not really – "the total amount recoverable" would now need additional, judicially engrafted language to delineate which claimant was so "capped" (even though there can be only one "claimant). *Id.*

- Along similar lines, the aggregate "cap" under O.C.G.A. § 51-13-1(e) is incomprehensible without impermissible judicial rewriting – the $1.05 million cap has to add a line ("except when the verdict includes pain and suffering, or loss of consortium"), or ignore language entirely, neither of which is a judicially of constitutionally available option.

There is no question that virtually everything about the Cap Statute is inextricably intertwined. All claimants are considered as one, regardless of claim, statutory standing, or identity. All medical malpractice claims are treated as one, whether including a wrongful death claim, or not. There is but one functional "cap," as the Statute does **not** establish different caps for different claims. That sort of intended mutual dependency means that the statute must fall in its entirety, because to engage in some sort of rebuilding to reach a desired end is really judicial lawmaking – again, another unavailable option.

There is no legislative history, no statutory language, no precedential support, and no logical undergirding for the Defendants' and the trial court's interpretation. Similarly absent below were any suggestions from the Defendants—or any answers from the trial court—as to which words and phrases of the Cap Statute ostensibly survived after severing void words and phrases, and how to reassemble some undefined subset of surviving words and phrases (without adding new ones) into a functionally new statute. In simply declaring that the Cap Statute could survive as applied to wrongful death awards, the trial court engaged in lawmaking under the guise of interpretation, in violation of Georgia's constitutional separation of powers doctrine. O.C.G.A. § 51-13-1 was heralded as a noneconomic damages cap, not

a "wrongful death action" cap. And it was written accordingly, as overbroadly as one might imagine. Which is why it fails, here.

The trial court simply ignored the interdependency problem, pronouncing that even if portions of the Cap Statute were unconstitutional as to some claims, the rest of the statute remained intact – in short, that no "redlining" or word/phrase review was necessary. V27 55 ("That misunderstands how this – how courts go about declaring a statute void. The Court **doesn't have to do** sort of a blue pencil, picking which words to remove. It **just says** it doesn't apply in this circumstance under these conditions") (emphasis added).[9]

That was no mere slip of the judicial pen. The trial court openly embraced a path in which it did **not** have to perform any sort of meaningful severability analysis:

> Plaintiffs argue that, in order to apply O.C.G.A. § 51-13-1 only to wrongful death claims, the statute would have to be reenacted, and allowing its use only in applications which were not struck down by the Supreme Court would effectively rewrite the statute in a way which functionally constitutes legislation. The Court disagrees. Precedent indicates that the kind of **word-by-word editing Plaintiffs propose is unnecessary**. Courts can declare that a statute is constitutional **when applied** to some circumstances, but unconstitutional when applied to others.

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[9] The trial court was led astray on this point. As evidence, at the constitutionality hearing, the Defendants relied upon a statute – O.C.G.A. § 16-5-9 – that has no severability clause, and a case, *State v. Jefferson*, 302 Ga. 435 (2017), that did not even discuss the notion of severability. V27 55-56.

V26 154 (emphasis added).

That, of course, can be true, but not so here, under the plain language of the uncodified severability provision enacted as part of the 2005 Tort Reform Act. Once the portions of the Cap Statute that applied to pain and suffering or consortium claims were held invalid in *Nestlehutt*, the fate of what remains is governed by the Act's severability provision:

> In the event any section, subsection, sentence, clause, or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication **shall in no manner affect the other sections, subsections, sentences, clauses, or phrases** of this Act, which shall remain of full force and effect as if the section, subsection, sentence, clause, or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional.

2005 Ga. Laws 1, § 14. Notably absent from this provision is any reference to the effect of a declaration that a specific **application** of the Act is invalid. That stands in stark contrast to severability provisions in other statutes in which the legislature has authorized severance as to application.

For example, Code Section 51-15-8 provides that:

> If any part, portion, section, subsection, paragraph, sentence, clause, phrase, or word of this chapter, **or the application thereof** to any person or circumstance is held invalid, the invalidity shall not affect the other parts, portions, sections, subsections, paragraphs, sentences, clauses, phrases, or words **or applications of this chapter** that can be given effect without the invalid part, portion, section, subsection, paragraph, sentence, clause, phrase, or word **or application**.

O.C.G.A. § 51-15-8 (emphasis added); *see* O.C.G.A. § 50-5-84 (allowing severance based on "application thereof to any person or circumstance"); O.C.G.A, § 11-1-105 (same); O.C.G.A. § 38-2-1145 ("application of such provision to any person or circumstance"); O.C.G.A. § 9-17-13 ("application to any person or circumstance"); O.C.G.A. § 19-11-191 (same); O.C.G.A. § 10-1-796 (same); O.C.G.A. § 7-1-628.14 (a) ("application of such provision"); O.C.G.A. § 16-17-10 (same).

In short, the General Assembly did not authorize courts to sever the void parts of § 51-13-1 based on declarations about the "application" of the statute; severance may be accomplished only by striking language from the statute and then assessing what remains. Severance clause language is to be tightly construed, and respected. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 624 (2020) ("[C]ourts today zero in on the precise statutory text and, as a result, courts hew closely to the text of severability or nonseverability clauses"). Here, the trial court did not so "hew," and thus ran afoul of the legislature's directive on severability.

And even if that kind of severability analysis did take place, as noted, excising the unconstitutional provisions cannot result in an interpretation (absent rewriting, a legislative function to be undertaken by the General Assembly, if at all) that supports the "main purpose" of the Cap Statute. The

"predictability" the General Assembly supposedly intended is absent under any reconstructed Cap Statute – practitioners cannot know during the course of treatment what kind of horrors malpractice might produce. And predictability aside, the General Assembly cannot possibly have intended a regime in which wrongful death awards would be capped and awards for injuries short of death would not—effectively "rewarding" negligence resulting in homicide, relative to that causing lesser injuries.

Here, the trial court assumed it could write off the unconstitutional parts of the Cap Statute that "applied" only to non-wrongful death claims, ignoring this Court's "redline" and "mutual dependence" precedent. But it was the trial court's job to examine carefully the Cap Statute and the applicable severability provision to ascertain whether the statute is severable at all and, if so, whether the severed portions can survive the constitutional analysis employed in *Nestlehutt*. *See Turner*, 322 Ga. at 132-33.

The Court should reverse, based upon the severability arguments alone.

D. The trial court erred in concluding that there was no jury trial infringement.

Georgia has adopted several Constitutions, the latest of which was in 1983. Most of those Constitutions – but not all – adopted a jury trial right, which was to be held "inviolate." This Court has interpreted the "inviolate"

language to mean that the jury trial right is in full force and strength just as it existed at common law. Under any of three separate constitutional touchstones, the cap violates the right to jury trial.

1798 Constitution

As this Court held in *Nestlehutt*, "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," and "there did exist . . . an attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury." 286 Ga. at 735; *accord Turner*, 322 Ga. at 131-32.

So, under the 1798 Constitution, there was indeed an intrinsic jury trial right for claims sounding in medical negligence. Since the damages in pain and suffering claims, as well as those for the "full value" of the life of a decedent almost always intersect, the takeaway is that juries in the years before 1798 were charged with the same **types** of damages evaluation as exist in modern wrongful death claims.

> Although the **cause of action** for wrongful death belongs to the decedent's survivors and benefits them directly, the **measure of damages** in wrongful death actions is much the same as in personal injury actions. As we explained in one of our earlier cases, the gist of the wrongful death action is an injury to the person, and the wrongful death statute practically, though not technically, continues and extends the right of action for personal injury.

Bibbs v. Toyota Motor Corp., 304 Ga. 68, 73 (2018) (cleaned up; emphasis in original).

Essentially, under *Nestlehutt* the "cap" was invalid because at 1798, or pre-1798 common law, a jury was charged with evaluating noneconomic damages in the case of a tortious loss, and a "cap" improperly trod on that jury-exclusive ground. Illustratively, this Court in *Nestlehutt* expressly cited to a common law medical malpractice action, *Cross v. Guthery*, 2 Root 90 (Conn. Super. 1794), a case involving unskillful surgery. *Cross* was a **wrongful death** case – a husband suing for medical negligence that resulted in the death of his wife. At common law, then, it appears to the Court that wrongful death claims were indeed available, as to medical negligence.

And completing the analysis, the types of damages were also the same, as between "injury" cases and "death" cases: "the sorts of damages recoverable in wrongful death actions are substantially the same as the kinds of damages that may be recovered in personal injury actions. These damages cover the losses *suffered by the injured* person and include economic components, such as lost earnings, **and non-economic** components, such as loss of enjoyment of life." *Bibbs*, 304 Ga. at 75 (bolded emphasis added; cleaned up).

The point is this: while the measure of damages at common law was not the "full value of the life, as seen through the eyes of the decedent," the type

of damages, evidence, and deliberation were the same then as now. "[W]hile the [wrongful death] statute may provide a new and separate cause of action, it is 'inherently rooted and grounded' in the personal injury claim; it grows out of it, and is a part of it, having almost complete identity of substance, and subject to the same defenses." *Bibbs*, 304 Ga. at 74 (cleaned up).

The trial court ruled differently, citing the usual "there was no such thing as a claim for wrongful death at common law" concept, because, as the cases usually put it, the right of action died with the tort victim. V26 150-51 (citing, amongst other cases, *Shields v. Yonge*, 15 Ga. 349 (1854)). That's not entirely accurate, and the distinction why is a decidedly meaningful one.

A "wrongful death" claim is purely derivative: a claim is brought by a survivor, even though the survivor may not have personally suffered any injury. *United Health Servs. of Ga., Inc. v. Norton*, 300 Ga. 736, 737 (2017) (death claim "wholly derivative" of a decedent's claim for injuries); *Atl., V. & W. R. Co. v. McDilda*, 125 Ga. 468, 471 (1906) (would-be injury claim by decedent, and death claim for survivor have "almost complete identity of substance").

At base, then, the various statutes that allow for wrongful death claims are standing constructs – a civil claim for "homicide" existed at common law, but there was no procedural mechanism for an individual to bring such a claim. *Engle v. Finch*, 165 Ga. 131, 132 (1927) ("[a]t the common law no

recovery could be had for an injury resulting in death, because **the right of action** died with the person") (emphasis added). That no one could viably **bring** a death claim at common law did not mean that such a claim did not exist.

Indeed, under the little-known and even less understood "felony crown" or "crown merger" rule, the right of action for a wrongful death actually belonged to the "Crown," since there was a "public" loss. *Shields*, 15 Ga. 349. In *Shields,* this Court discussed the availability at common law, and in 1854, of a wrongful death claim – holding that such a claim **did** exist. *Shields* was Georgia's first lengthy exposition of the "felony merger" rule – that is, at common law, homicides (i.e., actions that caused the death of another) were invariably criminal felonies at well as "private" wrongs. Given that the "Crown" was responsible for prosecuting and punishing felonies, the private loss – the wrongful death – was "merged" into the criminal and forfeiture proceeding, leaving survivors without a remedy. That did not mean that the right of action was nonexistent; instead, it was simply inviable.

The *Shields* Court – this Court – citing Blackstone's *Commentaries*,[10] explained:

> When, therefore, *Blackstone* says, that in "gross and atrocious injuries, the private wrong is swallowed up in the public", he, in effect says, that

[10] Blackstone's "commentaries constituted the law of this State, before and since the Revolution." *Rouse v. State*, 4 Ga. 136, 145 (1848).

> the private wrong is so swallowed up in *all* homicides that are injuries--for all homicides that are injuries at all, are injuries which amount to felonies; and in all felonies, the private wrong is so swallowed up.
>
> But how 'swallowed up'? What does he mean by these words? Does he mean that the private injury is merged in the public, so as to be forever gone; or does he mean that it is merely merged *for a time*--that it is only *suspended* until the public injury shall have been avenged? Manifestly, he means the latter; for he puts the proposition, that after reparation has been made for the public wrong, no reparation is to be made for the private wrong--**not upon the ground that no reparation is then due for that private wrong, but upon the ground, that it is practically impossible that reparation for it should be made**--all, out of which reparation could be made, having already been used up, in making reparation for the public wrong --all having gone in forfeiture to the public. This is the same as saying, that if, after reparation is made to the public, there is anything left, out of which reparation may be made to the private man, he will be entitled to reparation--that is, that the private man has a *right* to reparation, after reparation to the public; but that, practically, this right is nugatory as reparation to the public, consumes all that he, who is to make reparation, has.

15 Ga. at 353-54; *id.* at 351 (from Blackstone: "We seldom hear any mention made of satisfaction to the individual--the satisfaction to the community being so very great. And, indeed, as the public crime is not otherwise avenged, than by forfeiture of life and property, it is impossible, afterwards, to make any reparation for the private wrong, which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe; but it affords room for a private compensation also").

This Court interpreted that Blackstonian passage to mean, straightforwardly, that the merger rule "swallowed up" the private right of recompense only temporarily: that is, if the criminal punishment gutted a tortfeasor's ability to satisfy a private wrong, then there was no such reparation – but **not** because no such claim existed. *Shields*, 15 Ga. at 355 ("[E]very death of a human being that amounts to an injury at all, amounts, by the Common Law, as we have seen, to a felony; and in every felony, as we think we have also seen, the private injury is **suspended** until after the public injury has been avenged. This is the conclusion to which we are led by the English law.") (emphasis added).[11]

And the key takeaway: negligence that causes the death of another never "merged" into nonexistence – that private cause of action always existed:

> In misdemeanor, there is no merger or suspension of the private injury, until after satisfaction is made for the public.
>
> This is the English rule with respect to misdemeanors; and this Georgia has adopted. This, therefore, is the rule applicable to homicides of the degree of misdemeanors; that is to say, to homicides which are involuntary manslaughters, in the performance of a **lawful** act, where there has not been observed necessary discretion and caution.

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[11] The *Shields* Court also pointed out the staggering analytical flaws in *Baker v. Bolton*, unquestionably the source of most "there was no claim for wrongful death at common law" cases. 15 Ga. at 350 (*Bolton* had no precedent, and was wrong besides).

. . .

> It follows, therefore, that the private injury which resulted from the homicide, was not merged in the public injury, or suspended until after that had been avenged.
>
> This being so, did **this plaintiff,** the father of the minor son killed, sustain that private injury, or any part of it? Is the right in him, to prosecute this suit?

Id. at 356 (emphasis added). This Court answered yes – there was indeed an action for wrongful death, under common law principles. The same is true here, and cannot be infringed by the "cap" urged by the Defendants.

1868 Constitution

If the 1798 Constitution is not the proper touchstone for the jury trial inquiry, as might be argued, then the trial court's holdings as to the jury trial right are even less sound. Under the next possible relevant Constitutional "jury trial" provision, the arguments against caps are even stronger. Some history hopefully assists.

Although Georgia's first several Constitutions provided for the "inviolate" right to a jury trial, when the nation fractured during the Civil War, Georgia adopted two distinct Constitutions that did **not** recognize such a right – during hostilities, there functionally were no jury trials. When the Civil War ended, though, Georgia quickly adopted a new Constitution (in 1868) that reaffirmed the "inviolate" right to a jury trial.

So it may be argued that the 1868 Constitution is in fact the operative Constitution for the jury-trial-right inquiry. Under the 1868 Constitution, Georgia citizens again enjoyed an "inviolate" right to a jury trial on all issues so triable. And notably, on the books at the time of the 1868 Constitution's adoption was Lord Campbell's Law, which expressly provided a procedural vehicle and standing for survivors to bring claims based upon a decedent's life. Laws 1850, Cobb's 1851 Digest, p. 476; Laws 1855-56, p. 154, § 4; *Hargraves v. Lewis*, 7 Ga. 110, 126 (1849) (statutes inform right to jury trial); *Sw. R.R. Co. v. Paulk*, 24 Ga. 356, 369 (1858) (leaving "to the soundness of the discretion of the jury" how to decide "the question of damages" for wrongful death).[12]

So, in 1868, the type of underlying claim of liability, *i.e.*, medical malpractice, existed in Georgia; there was the right to trial by jury attached for that type of claim; and the damages found by the jury, i.e., non-economic damages, were determined by juries for that type of claim as well. Given that,

[12] Perhaps just as importantly, the 1798 Constitution reaffirmed the jury trial right "as heretofore used in this State," language that did not appear in the 1868 Constitution. *Id.* To the Court, then, while the 1798 Constitution "implicitly incorporated all of Georgia's prior history and practice with respect to jury trials, including the years before 1798," *Taylor*, 316 Ga. at 57 n. 19, the 1868 Constitution was something of a reset, as it did not include the "as heretofore used in this State" language.

if the 1868 Constitution applies, then any "cap" is violative of the right to a jury trial as recognized by that Constitution.

The trial court rejected this premise, targeting the 1798 Constitution as the only one that mattered. But this Court has expressly recognized that it is "not entirely clear why [some] cases pointed to ... 1798" as the date for defining the scope of the right to jury trial. *Taylor,* 316 Ga. at 57 n.19. And no binding precedent has decided that issue because it appears no one has asked the Court to consider the scope of the "inviolate" right to a jury trial, post-Lord Campbell's Act and under the 1868 or later Constitutions.

Of course, the 1868 Constitution was a condition of Georgia's re-admission to the Union, and its adoption constituted a complete repudiation of the past and creation of new rights. *Nicholas v. Hovenor*, 42 Ga. 514, 516-17 (1871); *Hardeman v. Downer*, 39 Ga. 425, 441 (1869). Since our State took several years off from any constitutional jury trial right, the "new" right to jury trial enshrined in the 1868 Constitution encompassed all causes of action then recognized under the law, **including** Lord Campbell's Act. *See De Lamar v. Dollar*, 128 Ga. 57, 59 (1907).[13]

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[13] In *De Lamar,* this Court reaffirmed that the 1868 Constitution was, given the Civil War, something altogether new:

> **At the time the Constitution of 1868 took effect,** in every court having jurisdiction to try a **common-law case of a civil nature**, the parties were secured the right of trial by jury, either

In other words, the Constitution of 1868 preserved the right to a civil jury trial **as it existed when it went into force in 1868**. In fact, this Court has explicitly rejected the proposition that there was anything special about the phrasing of the right to trial by jury in the 1798 Constitution that would limit subsequent constitutions:

> The Constitution of 1798 contains the words, "as heretofore used in this state," which do not appear in the other instruments; but this really would not affect the interpretation to be placed upon the declaration that trial by jury shall remain inviolate, for each declaration would mean that it must be preserved in the future in all cases in which **it was allowed under valid laws existing at the time that the Constitution was adopted**.

Id. at 86 (emphasis added).

Since Georgia's wrongful death statute predated the 1868 Constitution by more than a decade, the issue of damages as to the like those suffered by Ms. Clark would have been an issue exclusively for a jury in 1868, and thus encompassed within the right enshrined under that Constitution. *E.g.*, *Hicks v. Stewart Oil Co.,* 182 Ga. 654 (1936) ("[T]rial by jury shall remain inviolate, for each declaration would mean that it must be preserved in the

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> in that court or in some other court to which the case could be appealed upon reasonable conditions, such as the payment of costs, giving security, and the like. **This was the character of trial by jury that the Constitution intended to preserve.**

128 Ga. at 59 (emphasis added).

future in all cases in which it was allowed under valid laws existing at the time that the Constitution was adopted.").

1983 Constitution

The same analysis and answer obtains if the jury trial question is governed by our current Constitution. At the time of its adoption, the type of underlying claim of liability, *i.e.*, medical malpractice, existed in Georgia; there was the right to trial by jury attached for that type of claim; and the damages found by the jury, i.e., non-economic damages, were determined by juries for that type of claim. As the Court has noted, if that were true in 1798 and 1868, again, it was also true in 1983.[14]

In summary, there is a lot of history here, and all of it points in one direction – there was a jury trial right to have one's peers deliberate over the damages available to one who was personally injured, or died, as a result of medical negligence. Sometimes, the "Crown" seized the right to forfeiture and remuneration; sometimes not. But the trial court's overly cabined proclamation that "at common law there was simply no claim for wrongful

[14] The 1983 Constitution explicitly states that it revokes and supersedes all preceding constitutions: "except as provided in Paragraph V of this section, this Constitution shall become effective on July 1, 1983; and, except as otherwise provided in this Constitution, all previous Constitutions and all amendments thereto shall thereupon stand repealed." GA. CONST. Art. XI, § 1, ¶ VI.

death" is both superficial and wrong. This Court should reverse, on this issue alone.

E. The trial court's post-hoc interpretation of O.C.G.A. § 51-13-1 violates equal protection principles.

Clark also contended that the wrongful death "cap" violated the constitutional guarantee of equal protection under the law. That claim, of course, emanates from the notion that the State must treat similarly situated individuals in a similar manner. *City of Atlanta v. Watson*, 267 Ga. 185, 187 (1996); *see generally* GA. CONST. OF 1983, ART. I, § I, ¶ II.

It is important to demarcate the litigation battlefield. As written, O.C.G.A. § 51-13-1 unquestionably does treat similarly-situated individuals similarly in imposing (admittedly completely arbitrary) limits on damages. It is hard to run from the statutory language – the General Assembly expressly lumps every type and potential type of medical malpractice claimant together, and treats them the same: with a one-size only cap.

But that is **not** the analytical framework now. The question now is whether, post-*Nestlehutt*, a judicial rewrite that caps only medical cases involving wrongful death claims, but not others, passes equal protection muster.

A "wrongful death cap" does no such thing. The General Assembly's express purpose in adopting the across-the-board cap was to "promote

predictability and improvement in the provision of quality health care services and resolution of health care liability claims." 2005 Ga. L. Act (S.B. 3). A practitioner wishing to provide quality health care doesn't know, and hopefully doesn't take into great account, whether a mistake might kill, or merely maim or harm a patient. It certainly does not serve the end goal of quality health care to substantially immunize bad care that actually **kills** a patient, while allowing unlimited damages when injuries are non-fatal.

This argument is best illustrated by the statutory landscape in 2005, as compared to today. In 2005, there is no doubt that the classification drawn by the legislature at least attempted to treat every single person that might bring a cause of action in the medical malpractice context equally. O.C.G.A. § 51-13-1(a)(1) (defining "claimant" in unitary fashion, regardless of claim targeted defendant, statutory standing, or otherwise); *id.* § 51-13-1(b) (singular cap as to individual defendants, no matter how numerous, or what kind or mix of claims). *Nestlehutt* carved out a large and distinct class of would-be claimants; that is, those with "just" pain and suffering, or consortium claims.

Remaining is a subclass the General Assembly never intended: plaintiffs with "just" a wrongful death claim, **even if** joined with pain and suffering or consortium claims. There is no evidence that the legislature ever considered that as some sort of non-similarly-situated subclass, that might

justify a different cap; certainly not in 2005, when the General Assembly adopted a one-size-only cap, whether a would-be plaintiff had only a wrongful death claim, a death claim in conjunction with a pain and suffering claim, or any other permutation.

It is the classification drawn by the legislature that matters, not one constructed by a cadre of clever lawyers, after the fact, and fifteen years after a watershed decision that gutted the underpinnings of the cap in the first place. *See Watson*, 267 Ga. at 187 ("classification drawn by the legislature" is touchstone for analysis). At its legislative creation, the Cap Statute drew no such distinction, and it is not for courts to manufacture one in an attempt at constitutional resuscitation.

The trial court rejected those arguments, finding that, essentially, "death is different," and that the General Assembly could rationally have distinguished between a cap on death awards, and other noneconomic forms of damages, as to a given claimant. V26 155 (citing *Bibbs v. Toyota Motor Corp.*, 304 Ga. 68 (2018) for proposition that types of damages between a deceased patient, and a permanently/seriously injured one, are indeed different). As the trial court put it, "there is a conceivable basis for limiting the statutory remedy of wrongful death by statute." V26 155.

But that analysis is all wrong. The General Assembly's intent was to provide predictability in healthcare, and availability of medical malpractice

insurance *writ large*. It unfortunately adopted a functionally unitary cap, to be sure, but that solution **categorically did not** distinguish death cases as "different" in any fashion. Quite the opposite – the "cap" applied, as per the statutory definitions, to **any** medical malpractice action, including those that included death claims, those that did not, and those that bundled death and other claims. There was no separate cap for wrongful death awards, just as there was no separate cap for pain and suffering; no separate cap for consortium claims, no separate cap for reputational injury – nothing indicating any legislative consideration that "death" is different, or that "pain and suffering" or "reputational injury" was different. All of those injuries were treated the same, and not tailored in any manner.

Now, post-*Nestlehutt*, the Defendants have asked the trial court – which readily obliged – to imagine reasons why Plaintiffs are different than others that might be entitled to uncapped awards of damages. But **that is not what the General Assembly** did. Under the rational-basis test, it's the "classification drawn by the legislation"— not by lawyers for defendants after the fact—that matters. *Watson*, 267 Ga. at 187 (emphasis added); *see* V27 67 (constitutionality hearing: "There is no separate delineation for pain and suffering caps and wrongful death caps and mental suffering caps or anything of that nature. It's just medical malpractice actions.")

At base: Code Section 51-13-1 doesn't draw any classification or distinction between damages for pain and suffering and damages for wrongful death. None; in fact, the opposite. That fact does not change based upon an arbitrary, two-decades-later idea for a potential classification that is not supported in the statutory language, legislative intent, or precedent of any Georgia appellate court.

Such a classification defies common sense, and precedent of this Court, which establishes that the type of damages in wrongful death cases is functionally the same as in injury cases brought by an injured party that happens to survive. *See*, *e.g.*, *Bibbs*, 304 Ga. at 75 ("[T]he sorts of damages recoverable in wrongful death actions are substantially the same as the kinds of damages that may be recovered in personal injury actions. These damages cover the losses **suffered by the injured person** and include economic components, such as lost earnings, and non-economic components, such as loss of enjoyment of life") (cleaned up, emphasis added). If that is indeed the case (as this Court has pronounced), then any wrongful-death only cap is irrational and violative of Georgia's constitutional equal protection framework.

CONCLUSION

The trial court's resurrection of the Cap Statute was procedurally barred and constitutionally infirm. This Court should reverse and reinstate

the unanimous jury award under O.C.G.A. § 51-4-1 *et seq*., the statute that the **Defendants** themselves conceded would apply to any jury award, here.

This submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted, this 4th day of November, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day filed a PDF copy of the foregoing via filing on the Court's SCED system, making it available to the Court, Clerk, and all counsel or parties registered with that platform. In addition, I have served via email PDF copies of the foregoing to the following counsel of record at the noted e-mail addresses, given the existence of a prior agreement that such mode of service will suffice to comply with this Court's Rule 14:

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