IN THE SUPREME COURT
OF THE STATE OF GEORGIA

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

APPELLANTS' REPLY BRIEF

Darren Summerville Georgia Bar No. 691978 Elizabeth Stone Georgia Bar No. 684098 **THE SUMMERVILLE FIRM** 1226 Ponce de Leon Avenue NE Atlanta, Georgia 30306 T: (770) 635-0030 darren@summervillefirm.com elizabeth@summervillefirm.com	Laura M. Shamp Georgia Bar No. 637560 Joshua F. Silk Georgia Bar No. 903916 **SHAMP SILK** 1718 Peachtree Street, Suite 900Atlanta, Georgia 30309 T: (404) 893-9400 shamp@shampsilk.com silk@shampsilk.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

The trial court here erred in enforcing the statutory "cap" on non-economic damages in this wrongful death medical malpractice case. The court's cursory analysis – taken from an order proposed by Defendants – ignored Defendants' waiver, failed to conduct the required severability analysis, and overlooked the constitutional failings of the "cap" under the framework of *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt,* 286 Ga. 731 (2010). This Court should reverse, with instruction to render a new Judgment that gives full effect to the jury's award of damages.

I. DEFENDANTS WAIVED THE "CAP" ARGUMENT

The trial court's first error was finding that Defendants properly preserved the "cap" issue. They did not. Instead, they stayed entirely silent on the issue until hearing the jury's verdict. By that point, the "cap" ship had sailed.

As noted in Appellants' Principal Brief, none of the three Pretrial Orders in this case so much as mentioned a damages cap. *See* V13 157-93 (PTO of May 21, 2024); *id.* 305-27 (PTO of July 18, 2024); V20 33-55 (operative PTO). In fact, in each Pretrial Order, Defendants explained that the proper measure of damages for any wrongful death claim was governed by the wrongful death statute, with not a word about the Cap Statute they now champion; in each, Defendants agreed that the "types of damages and the applicable measure of those 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); *see* O.C.G.A. §§ 51-4-1(1) (wrongful death chapter; defining "full value of the life of the decedent"); 51-12-2 (defining "general damages" and "special damages").

Under this Court's decision in *Ga. Dep't of Human Res. v. Phillips*, 268 Ga. 316 (1997), that litigation choice resulted in a waiver. *Phillips* is something of a paean to the importance of pretrial orders, especially when consented to and resulting in agreement on the issues in play, **for trial**. *Id.* at 318-20. And that makes all the sense in the world, given the statutory command that "[t]he order, when entered, controls the **subsequent course of the action** unless modified **at the trial** to prevent manifest injustice." O.C.G.A. § 9-11-16(b) (emphasis added).

Accordingly, the concession in the operative Pretrial Order that damages were to be governed by the Wrongful Death Statute operates as a waiver, pure and simple. *Compare McClure v. McCurry*, 329 Ga. App. 342, 343 (2014) (failure to include O.C.G.A. § 9-15-14 claim in pretrial order was not a waiver, since that statutory framework expressly allows for such motions to be filed after rendition of judgment).

Defendants contend that "[t]he cap plays no role at trial," and is really just a post-judgment legal issue. EE Brief at 2. That's plainly incorrect. *Phillips*, 268 Ga. at 319 (aggrieved litigant cannot complain about pretrial

order "cap" concession, since it would unduly burden an opposing litigant's ability to **conduct** the trial). That a jury does not **decide** whether the cap applies has basically **nothing** to do with the conduct of trial: what claims are raised (*i.e.*, lesser-value economic damages claims, such as lost wages), what witnesses are called, what testimony is elicited, what documentary evidence is submitted, and what arguments are emphasized in closing. *E.g.*, V25 63 (previewing damages portion of closing as being essentially about the "full value of the life" of April Clark); 110-15 (Plaintiffs' closing; "I want to talk about what the wrongful death damages mean" and including only noneconomic concepts)*;* V25 200-02 (charge conference; decision not to put up evidence of lost wages impacts charges given to jury). Not to mention the verdict form, which could have segregated the economic and noneconomic damages for the wrongful death claim, had it been known that Defendants would contend that the cap was in play.

And the defense seized on the information vacuum: in their closing, Defendants went all-in on the bogeyman of an exorbitant (read: cap-exceeding) verdict, expressly arguing that Plaintiffs would be asking for "millions" of dollars and for that reason the jurors should be especially skeptical of the arguments and evidence proffered by the Clarks. V25 73, 96.

Defendants deny that the cap affected the Clarks' strategy or impacts plaintiffs' trial strategies generally, EE Br. at 17-19, but their arguments

ring hollow. They first cherry-pick language from *Nestlehutt* to argue that this Court has concluded that the cap does not affect the evidence at trial. EE Br. at 18. In fact, the quoted language appears in the context of the Court's retroactivity analysis, in which the Court was looking **only** at whether the **defendants'** litigation strategy was affected by the existence of the cap. *Nestlehutt*, 286 Ga. at 739.

As any plaintiff's lawyer knows, it is often wise to minimize the evidence of economic damages — or forgo seeking them altogether — where those damages are small compared to potential noneconomic damages, to avoid the psychological "anchoring" effect this may have on the jury's assessment of noneconomic damages. In this case, if there had been any **hint** that Defendants were going to claim a long-dead cap would apply, the evidence as to lost wages and pain and suffering would almost certainly have been different; and the openings and closings, the charges, and the "ask" as to particular subparts of damages would **definitely** have been different.

That's why a pretrial order is so important: it demands transparency, to prevent surprises and sandbagging. And it is of no moment whether the omitted issue is in the nature of a procedural defense, "rather than an issue pertaining to the merits to be resolved at trial"; it can and will be waived "if [it] is omitted from the [pretrial] order." *Long v. Marion*, 257 Ga. 431, 433 (1987); *accord 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).[1]

Defendants' favored case, *Scott v. Battle*, 249 Ga. App. 618 (2001), does not assist them. There, because of the particular statute in play, the **damages cap was the default**; it was the plaintiff who had the burden of making the specific factual showing required to "alter the status quo"; and the plaintiff failed to do that by, among other things, failing to request special interrogatories **in the pretrial order**. *Id.* at 622. Because the cap was the "status quo," the Court of Appeals held that the defendant was permitted to seek a reduction of damages via a post-trial motion, without having objected to the verdict form or the verdict when rendered. *Id.* at 622-23.

Here, the exact opposite is true; the "status quo" since *Nestlehutt* has been that § 51-13-1's noneconomic damages cap is unconstitutional, and until *Turner*, it was understood that this extended to wrongful death claims just as all other medical malpractice claims. In these circumstances, the onus was on

[1] Defendants belittle these cases as going only to liability, or jurisdictional defenses that are waived if not ruled on before trial. EE Br. at 15-16. But the PTO "waiver" cases do not turn on the nature of the issue omitted. The rule is simple: if a litigant omits an issue from a PTO, it is waived.

Defendants to assert, in the Pretrial Order, their proffered basis for altering that status quo, or suffer the consequence: a waiver of that argument.[2]

II. SEVERABILITY CANNOT SAVE THE CAP

A. The Baseline Argument: The Caps on Wrongful Death Awards Cannot Survive a Severability Analysis After *Nestlehutt*.

The trial court further erred by either failing to conduct a severability analysis or implicitly performing one that was well off the mark. The baseline is simple: when a portion of a statute is held unconstitutional, or otherwise invalidated, a severability analysis is **required** to discern whether giving effect to the remaining portion of the statute "will correspond with the main purpose which the legislature sought to accomplish by its enactment." *City Council of Augusta v. Mangelly*, 243 Ga. 358, 363 (1979), *superseded by statute on other grounds as stated*, *Nielubowicz v. Chatham Cty.*, 252 Ga. 330, 330 n.1 (1984) (emphasis added); *see Daimler Chrysler Corp. v. Ferrante*, 281 Ga. 273, 274 (2006); *see also* NT Brief at 18-25. Such an analysis requires an assessment of the provisions' "mutual dependence": "in order for one part of a statute to be upheld as severable when another is stricken as

---

[2] Defendants also cite numerous cases from other jurisdictions about why not raising a "cap" as an affirmative defense **in an Answer** is not a waiver. EE Br. at 14. That nonbinding authority is simply not germane to the impact of omissions and affirmative concessions in a pretrial order.

unconstitutional, they must not be mutually dependent on one another." *Daimler Chrysler*, 281 Ga. at 275 (emphasis added).

B. The Trial Court's Erroneous Approach and Conclusion

The trial court did not recognize those governing analytical rules. To the contrary, the trial court abdicated that role, disclaiming the need for "word-by-word editing," since, in its view, the statute could be held constitutional as applied. V26 154. That end result is impossible under the statutory language, the Legislature's intended goal, and this Court's governing precedent.

The statutory language is, of course, paramount. The question is whether it is possible to excise from this language the provisions of the statute the *Nestlehutt* Court held to be unconstitutional, *i.e.,* the cap on pain and suffering damages and loss of consortium awards in medical malpractice cases. The answer is no:

- In every "medical malpractice action" under the statute, there can be only one "claimant," regardless of how many plaintiffs there are, and even if there are multiple claims held by those plaintiffs, there still is but one "cap," O.C.G.A. § 51-13-1(a)(1);[3]

- Any statutory "cap" on noneconomic damages applies to "any verdict returned or judgment rendered," *id.* at (b) – meaning the Legislature intended for a one-size-fits-all cap to apply in any

[3] It is extremely common for a medical malpractice action to include a death claim (for which a plaintiff is determined by statute) and a pain and suffering claim (held by a decedent's estate, often piloted by a different individual than the statutory death beneficiary).

"medical malpractice action," without separate verdicts or judgments based upon claimant or claim;

- A single cap applies to every verdict/judgment against doctors and their practice, again aggregating plaintiffs, causes of actions, and jury awards, *id.* at (b) ("total amount recoverable" is capped);

In short, the "remaining" statutory language is completely interdependent with the constitutionally infirm portions of O.C.G.A. § 51-13-1.

This case exemplifies the impossibility of severability given the statutory language. Both Charles Clark (the plaintiff with standing to bring a death claim) and April Clark (Estate claims) are one "claimant" under the statute, and subject to a single "cap" as to the "total amount recoverable . . . regardless of . . . the number of separate causes of action" asserted. O.C.G.A. § 51-13-1(b). But under *Nestlehutt*, the cap **cannot** apply to April Clark's claims. It is simply impossible to give effect to the plain language of the Cap Statute while also honoring *Nestlehutt*. The only way to cap the wrongful death claim but not the Estate claim is to rewrite the Cap Statute. It is, under the statutory interpretation urged by Defendants, impossible to render the Judgment bundling all of the claims, here.

The trial court's ultimate holding did not even attempt to parse which portions of the Statute remained viable; there was no meaningful discussion of legislative intent; there was really no more analysis than "as applied, the caps on death awards can stand." But the severability and interdependency

problems are more than a chimera. And here, the actually memorialized legislative intent was clear that line-by-line editing was the **only** option available, in issues of statutory invalidity. 2005 Ga. Laws 1, § 14 ("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**") (emphasis added). This, in contrast to the many other statutes with severability provisions allowing for statutory enforceability applied to a given set of facts. NT Brief at 23-24 (collecting other Georgia statutory language); *see Hart v. Owens-Illinois, Inc.*, 250 Ga. 397, 400 (1982) ("It is a well settled canon of statutory construction that statutes are presumed to be enacted by the legislature with knowledge of the existing law").

Underlying those interpretive rules is a search for the Legislature's intent in adopting the Cap Statute, and whether the goals of that lawmaking would be served by enforcing the cap in some applications but not others. As Defendants trumpet, the purpose of the Cap Statute – and all of the 2005 Tort Reform package – was to provide "predictability" in obtaining medical

malpractice insurance, and to promote good and available health care. EE Brief at 27-28 (citing *Nestlehutt*, 286 Ga. at 732).

But "predictability" and availability of good health care are not achieved by a cap whose operation hinges upon whether a medical professional's negligence does or does not stop just short of homicide. If anything, in the event of a medical error – especially an egregious one – the incentive would be completely upside down.[4]

Moreover, if the Cap Statute were construed as permitting a death cap and leaving noneconomic damages uncapped for non-death claims, predictability would likely go out the window – those injured by medical negligence would almost certainly elect to forgo any death claim at all, to travel under the safety of "uncapped" pain and suffering, and consortium damages. Again, medicine is not more predictable if a practitioner must gamble that his injured patient **does** ultimately die (gaining the benefit of a supposed cap).

[4] Defendants' position appears to be "any cap is a good cap," in terms of predictability – that is, if there are no sizable death verdicts, then predictability would be enhanced. That contention misses the part of the General Assembly's arm-in-arm focus on the provision of quality health care for all Georgians.

C. Defendants' Contrary Arguments Fail

The Defendants raise three arguments in opposition to the severability failures in the trial court's Order, all of which are meritless.

1. *Turner* did not decide the severability issue

Defendants first contend that the severability argument is in the rear view, since this Court already decided the issue in *Med. Ctr. of Cent. Ga., Inc. v. Turner*, 322 Ga. 129 (2025). EE Br. at 20-21. Apparently based upon a discussion at the *Turner* oral argument on severability, Defendants conclude that this Court (with nary a published word) has already decided the issue. In essence, Defendants contend that the grant-vacate-remand result in *Turner* means that wrongful death caps **were** approved as viable, since under a facial challenge approach, the entire Cap Statute would have been invalidated, already.

There are many problems, here. For starters, *Turner* is completely silent on the issue of severability. It seems ironic that a case warning against overclaiming the extent of an appellate holding would be cited in support of such an overclaim.

Second, what the Court decided in *Turner* was simply that *Nestlehutt* did not decide the constitutional argument about wrongful death caps, because Betty Nestlehutt did not perish as a result of the medical negligence alleged there. Wrongful death was not before the Court, and the Court thus

did not analyze the right to jury trial for wrongful death claims. The *Turner* trial court had assumed that *Nestlehutt* covered wrongful death awards, but that was wrong. So the remand was for the trial court **for the first time** to conduct an analysis of the death cap issue. Part and parcel of that analysis on remand will be a severability analysis.

2. A Severability Analysis is Not Only Proper, But Absolutely Necessary

Defendants next contend that no severability analysis is necessary or appropriate, since there were no "words" in the statute that were invalidated in *Nestlehutt* – put slightly differently, *Nestlehutt* was an "an applied" challenge to a set of facts, only. EE Br. at 21-25. That argument, too, is impossible to credit.

As this has Court put it,

> [w]hen a statute cannot be 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. But 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. **The courts cannot construct from a defective statute a law which the law-making body did not intend to enact and which it cannot be presumed it would have been willing to enact.**

Elliott v. State, 91 Ga. 694, 696-97 (1893) (emphasis added); *see Martin v. Ellis*, 242 Ga. 340, 345 (1978) (describing the "general rule" outlined in *Elliott*

as "well stated"). Echoing that, in perhaps even stronger language, the United States Supreme Court has commanded that statute-saving severance is unavailable if it leaves the statute "incapable of functioning **independently**." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S. Ct. 1476, 1480 (1987) (emphasis added); *see United States v. Romero-Fernandez*, 983 F.2d 195, 196 (11th Cir. 1993) (same).

Defendants' position amounts to "there is no severability analysis in any case with an as-applied finding of invalidity." EE Br. at 25. That ignores what the *Nestlehutt* invalidation did to the statute, of course. If portions of a unitary cap are unconstitutional, then severability analysis is absolutely critical – for, as this Court decided in *Turner*, the issue is simply an open one. 322 Ga. at 130-31 ("Today, we do not reach the ultimate question of whether Turner's constitutional right to trial by jury would be violated by application of OCGA § 51-13-1's caps" to a wrongful death award).

That position also ignores this Court's precedent. *Daimler Chrysler*, 281 Ga. at 273 (engaging in severability analysis in as-applied case) is just one of many.[5] There are certainly as-applied constitutional challenge cases in which

---

[5] The Defendants' citations on this front are of dubious relevance. EE Br. at 25. *United States v. Jones*, 980 F.3d 1098, 1111 n.19 (6th Cir. 2020) is cited for the proposition that severability analysis is "not an issue" in as-applied cases. That is more than a bit of an overcite, since the Court held severability was "not an issue" "[b]ecause the parties **do not raise the issue**

litigants do not raise the severability issue, but that omission means nothing more than that severability is an issue for another day – as this Court recognized in *Turner*. *See United States v. Booker*, 543 U.S. 220, 247, 125 S. Ct. 738, 758 (2005) (recognizing that "severability questions can arise from unconstitutional applications of statutes").

3. A Post-*Nestlehutt* Version of the Cap Statute Fails to Support the Legislature's Intent

Lastly, the Defendants argue that even under a severability framework, the wrongful death cap survives because any such cap furthers the General Assembly's intent. EE Br. at 26-29. A reductionist argument that "any cap is a good cap" does not square with an analysis of the **potentially** constitutional language that remains, post-*Nestlehutt*; when that process occurs, there is simply no intellectually honest method to carve up the language of the Cap Statute to support the trial court's ruling, without straying over the separation of powers principles that bind every Georgia court.

---

of severability in their briefs" **and** because there was no underlying finding of invalidity of the law at issue. *Id.* (emphasis added). *Local 514 Transp. Workers Union of Am. v. Keating*, 83 P.3d 835, 838-39, 841 (Okla. 2003) is no better; there, the severability analysis was unnecessary because the law in question was preempted by federal law.

The General Assembly adopted a unitary cap in 2005, covering every species of noneconomic damages in a "medical malpractice action," including those involving wrongful death. The Legislature did not enact a cap on one "action" for a type of damages; **all** noneconomic damages were lumped together and treated identically for capping purposes. In determining whether or not portions of an at-least-partially unconstitutional statute can be salvaged, a court must "hew closely to the text of severability or nonseverability clauses." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 624 (2020). Under that standard, there is no "sever if an an-applied challenge is successful" argument to be had here. "Severability clauses may easily be written to provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes. Moreover, the statute could itself have been written to address explicitly the [infirmity issue]. The legislature here chose neither course." *Wyoming v. Oklahoma*, 502 U.S. 437, 460-61 (1992) (cleaned up).

Defendants' position on this issue seems confused. They argue that "wrongful death" is explicitly referenced in the Caps Statute, supposedly because it is a "distinct cause of action" from an Estate's claims, and because the Estate and death claims are held by different plaintiffs/claimants. EE Br. at 25-27. Of course those claims are distinct. Thus why the Legislature's **explicit** lumping together of claims, causes of action, verdicts, judgments,

and plaintiffs is critical – that is the best evidence of the intent, as to how to treat those seeking noneconomic damages in a medical malpractice action. Now that the heart of O.C.G.A. § 51-13-1 has been cut out by *Nestlehutt*, there is **no** evidence or precedent that supports the notion that an all-for-one enactment like the Cap Statute can be parsed out under a severability analysis.

In a new argument on this issue, Defendants suggest that just a small tweak to the statutory language will solve the severability issue:

> The Court need only treat certain words as if they "were not originally a part" of the statute, treating it as applying to "any verdict returned or judgment entered in a medical malpractice ~~action, including an~~ action for wrongful death."

EE Br. at 28 (O.C.G.A. § 51-13-1(b) (strike-through added to show deletion)). But that suggestion – which the trial court did not heed, as Defendants did not make it until now – is plainly unhelpful.

First, the Legislature did **not** intend to or actually adopt a separate, standalone cap just for wrongful death "actions," as the proposed "deletion" would seem to be getting at. To the contrary, the cap lumped all types of noneconomic damages together.[6] If the General Assembly had wished to adopt a wrongful-death only (or separate) cap, it could have; it did not.

---

[6] The Defendants' proposed deletion would seem to assume that any cap would apply only in a medical malpractice action where the wrongful death claim is the only cause of action that would support a noneconomic damages

Second, the cap would still apply to any verdict returned or judgment entered, and apply in cases that had non-death claims for noneconomic damages, or where different plaintiffs hold the death and other noneconomic damages claims, as here. *See* O.C.G.A. § 51-13-1(b) (cap applies regardless of the number of causes of action underlying a claim, and all plaintiffs are a single "claimant"); *id.* at (a)(1) (wrongful death claimant and decedent's Estate are but one "claimant," despite holding separate causes of action).

There is simply no mere tweak that addresses – honestly or anything approaching comprehensively – the actual statutory language left after *Nestlehutt*. Defendants' interpretation ignores almost every substantive portion of the statute; only by contorting beyond recognition its language (including the words and phrases (1) "any verdict returned or judgment entered," (2) "action," (3) "noneconomic damages," (4) "claimant," and (5) "regardless of ... the number of separate causes of action") could it be interpreted to apply only to wrongful death damages. But "substantial legislative revision" of that type is prohibited. *Gwinnett Cnty. Sch. Dist. v. Cox*, 289 Ga. 265, 275-76 (2011) (courts cannot substantially rewrite statutes in hopes of finding an application that remains intact); *State v. Fielden*, 280 Ga. 444, 448 (2006) ("[U]nder our system of separation of powers this Court

---

award. If that is a fair read, then the Cap Statute has no application in this matter, given the standalone Estate claims.

does not have the authority to rewrite statutes. The doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced. Under that doctrine, statutory construction belongs to the courts, legislation to the legislature. We can not add a line to the law.").

The trial court here did more than just "add a line." There is simply no way to give effect to what remains of the Cap Statute without rewriting it, and that was one of the trial court's errors.

III. THE TRIAL COURT'S ORDER CONTRAVENES THE INVIOLATE RIGHT TO A JURY TRIAL

There are four of versions of the Georgia Constitution that could arguably apply to the "inviolate jury trial" analysis, and the trial court's holding was incorrect under any of them.

As to the two earliest of the four – the 1798 Constitution, the touchstone utilized in *Nestlehutt*, and the 1777 Constitution – the analysis is the same. Both codified the common law in that medical malpractice was a viable action, and the **award** of noneconomic damages was for the jury. *Nestlehutt*, 286 Ga. at 735*; accord Turner*, 322 Ga. at 131-32. In short, the "1798" Constitution – which has, curiously, been called Georgia's first in numerous opinions – and the "1777" Constitution – incontrovertibly the first – yield the same result under the *Nestlehutt* standard (existence of a claim; jury deliberation as to noneconomic damages).

Defendants' counter is that there was no such thing as a wrongful death claim at common law, so any Constitution that sought to "freeze" the right to jury trials as were held at common law by nature did not protect jury determination of damages in wrongful death cases. Incorrect, by a substantial margin. NT Br. at 26-32.

For one, Defendants' response to the **key** argument – that wrongful death claims **did** exist at common law, but were foreclosed as a matter of standing, under the felony crown merger doctrine – amounts to a series of questions, rather than citation to authority (let alone to this Court's). EE Brief at 36-37 (asking a lot of questions, rather than providing argument).[7]

The bottom line is that medical negligence claims involving wrongful death existed, as did noneconomic damages – exactly like the type addressed by juries in modern (or 1798) trials. As explained in Appellants' Principal Brief, wrongful death claims **did** exist at common law, but the standing issue was the problem. The "crown" usurped most (if not all) civil death claims as felonies that justified seizure of all of a defendant's assets. Defendants simply do not have a response to the authority posited by the Clarks. *E.g.*, NT Brief at 30-31 (citing *Shields*; Blackstone's writings included extensive treatment

[7] Defendants bizarrely criticize reference to the doctrine as "archaic." EE Br. at 36. If the doctrine were not a comparatively ancient one, it likely wouldn't be relevant to a discussion of 18th century law.

of the "suspension" of a civil claim in crown merger cases, not the absence of any claim in the first place).

There is zero question that the law pre-1777 allowed for wrongful death **damages** for medical malpractice and other claims, but there was no procedural vehicle – usually – to assert such causes. And juries at common law routinely evaluated the **type** of damages asserted in such loss-of-life claims. As this Court has ruled over the past century-plus, "a wrongful death action is wholly derivative of a decedent's right of action." *United Health Servs. of Ga., Inc. v. Norton*, 300 Ga. 736, 737 (2017). "[I]n the very nature of things it can not be independent; it is inherently rooted and grounded in the injury to the [decedent]. It grows out of it, and is a part of it, having almost complete identity of substance, and subject to the same defenses." *Atl., V. & W. R. Co. v. McDilda*, 125 Ga. 468, 471 (1906).

This Court has correctly held that there need not be an exact analogue in common law as in present day actions to establish a jury-trial common law right. *See Turner*, 322 Ga. at 132 n.3 ("we do not require a perfect match in nomenclature and a suitable analog cognizable 'under late eighteenth century English common law' may suffice."). *Nestlehutt* confirmed, via lengthy discussion, that juries were empowered to decide the full measure of noneconomic damages at common law. 286 Ga. at 735. In terms of "death" claims, standing was the issue, not the right of deliberation and decision.

The noneconomic damages juries have historically determined for living persons – *e.g.*, based on the loss of enjoyment of life – are the very same damages they now determine for deceased persons – the same loss of enjoyment of life. *See Bibbs v. Toyota Motor Corp.*, 304 Ga. 68, 75 (2018) ("[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). The only thing that has changed is standing.

The upshot: under either the 1777 or the 1798 Constitution, a cap erodes the very fundamental right of a jury to award **damages**, and is unconstitutional under *Nestlehutt*.

Alternatively, *see* NT Br. at 32-36, the 1868 Constitution could be the benchmark, since that watershed re-established an inviolate right to jury trial, after the two Civil War Constitutions eliminated that right. By that time, of course, Georgia had adopted a statute similar to Lord Campbell's Act, which provided for jury trials on medical cases, and wrongful death damages. Laws 1850, Cobb's 1851 Digest, p. 476; Laws 1855-56, p. 154, § 4; *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).

As this Court recognized in *De Lamar v. Dollar*, 128 Ga. 57, 59 (1907), the 1868 Constitution was something of a reset, and did **not** contain the "heretofore" language contained in the 1798 Constitution. Instead, "each [Constitutional inviolate jury trial right] 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.* (emphasis added). And the "valid laws existing" when the 1868 Constitution was adopted included the Lord Campbell's Act analogue, which afforded standing to survivors to bring claims based upon a decedent's life. NT Br. at 33.

Finally, under Georgia's latest (1983) Constitution, the death cap is similarly invalid. NT Br. at 36-37. That Constitution superseded all Georgia Constitutions before it, and reaffirmed that the jury trial right was inviolate. If that is the proper touchstone, the conclusion is inescapable – wrongful death claims and the attendant jury trial rights would have long appended and the Legislature would have no power to abrogate a **constitutional** right. *Id.*

IV. THE TRIAL COURT'S ORDER DENIES EQUAL PROTECTION OF THE LAWS

Plaintiffs' equal protection claim is different than the claim Defendants seemingly misinterpret in their Response Brief. Georgia's Constitution guarantees equal protection of the laws. Ga. Const. of 1983, Art. I, § I, ¶ II. That means that a given law, to be constitutional, must treat similarly-situated persons in a similar way.

Under the current status quo (*Nestlehutt*, a unanimous decision remaining good law after 15+ years), the defense position, embodied in the trial court's ruling, violates that guarantee.

The trial court's decision is grounded on the notion that "death is different" – that is, the Legislature could have "capped" death claims, even if other medical malpractice pathways could result in other noneconomic damages that, in its estimation, upset the "predictability" necessary to guaranteeing good quality, accessible health care.

But that is **not** what the General Assembly actually did. Instead, it attempted to sweep every medical malpractice claim up in a single, unitary cap, treating wrongful death and pain and suffering claims exactly the same. Now that a large swath of those claims has been removed from that unitary cap, Defendants argue – and the trial court accepted – that a completely different legislative intent and justification can be ascribed. But courts do

not safeguard equal protection rights by resorting to post-hoc, imagined legislative justifications.[8]

Under the Defendants' "predictability" hypothesis, the goals of good medical care and the availability of malpractice insurance would turn on whether and when a malpracticed-upon patient **dies**. Those severely injured by malpractice and living a long life as a quadriplegic, or birth-injury sufferers that are only befallen with "moderate" cerebral palsy injuries would "enjoy" – a horrible use of the word – a right to collect virtually unlimited damages. Those same victims, if the negligence was **bad enough**, might perish earlier in life, and have damages capped at $350,000. Defendants argue with a straight face post-*Nestlehutt* that this scenario is what the Legislature intended. All of that is, in a word, absurd.

The post-hoc classification now urged by Defendants is not reflected in any legislative history; not commented on in the legislative findings of the General Assembly; not memorialized in the statutory language as suggested

[8] As adopted, 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.

or ultimately adopted; and not covalent with reality. The General Assembly didn't intend and couldn't have intended for this disparate treatment of patients who die and patients who live but nonetheless suffer the same or similar noneconomic damages. And that should be no surprise: the General Assembly intended for an across-the-board cap; it **never** contemplated a wrongful-death only cap.

For this reason, too, such wrongful-death only cap is unconstitutional.

V. *NESTLEHUTT* NEED NOT AND SHOULD NOT BE OVERRULED

Finally, and as an obvious too-late fallback, Defendants argue that *Nestlehutt* should be overruled – a position **directly contrary** to their position in the trial court, where Defendants repeatedly embraced the *Nestlehutt* framework in hopes of prevailing. EE Br. at 1 (noting that "Defendants argued [in the trial court] that *Nestlehutt* did not invalidate the cap as applied to wrongful death"); *see* V27 50-51; *see id.* at 51-52 ("I'm going to start with substantive ones about what *Nestlehutt* means and how this works"); *id.* at 53-54 (reiterating that arguments were undertaken under *Nestlehutt* framework); *id.* at 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 out

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

The trial court (perhaps obviously at this point) relied on that representation and analytical approach, citing *Nestlehutt* in its dispositive Cap Statute Order some dozen-plus times, and **expressly embraced** Defendants' argument that the *Nestlehutt* framework **applied**. *E.g.*, V26 145 "(under *Nestlehutt* and *Taylor*; "The Court begins with the application of the Supreme Court's framework for evaluating the scope of the jury trial right in the context of statutory damages caps"); *id.* at 152 (again citing *Nestlehutt* "framework," multiple times).

It has always been the case that a "party cannot complain of a ruling his own conduct procured or aided in causing." *Hancock v. State*, 277 Ga. 835, 839 (2004). But that is what Defendants seek to do here. Though Defendants now cite to their original Motion for New Trial, EE Br. at 46 n.6, Defendants seemingly abandoned any argument for a *Nestlehutt* overrule in their Amended New Trial Motion – expressly noting that other cases might carry the water to overrule *Nestlehutt*, but failing to raise the issue further. V26 132 ("All the Court would need to do here is recognize the limits of *Nestlehutt*: striking down O.C.G.A. § 51-13-1 as applied to damages 'as found by juries in common-law medical malpractice cases,' but not addressing that statute's application to kinds of damages which did not exist at common law").

In any event, the trial court certainly did not consider the argument a full-throated one, and did not rule on the issue other than to follow the path the Defendants steered – that under the *Nestlehutt* framework, all noneconomic damages should be capped. EE Br. at 45-46; compare V26 221-22 (Defendants' proposed order on Motion to Remit, including embrace of *Nestlehutt* framework); V27 51 (post-trial motions hearing; again arguing for a wrongful death cap under *Nestlehutt*).

Given all of that, raising the argument here is improper. *City of Winder v. Barrow County*, 318 Ga. 550, 557 (2024) (declining to address a constitutional argument because, even though it was raised below, the superior court did not rule on it); *see also Wasserman v. Franklin County*, 320 Ga. 624, 653 (2025) ("We are a court of review, not of first view.").

And besides, overruling *Nestlehutt* would violate just about every parameter this Court uses in any *stare decisis* analysis.

"Once we have decided a disputed issue of law, following that decision in future cases—treating like cases alike—promotes a system of equal treatment under the law rather than the one built on 'arbitrary discretion.'" *Ammons v. State*, 315 Ga. 149, 169 (2022) (Pinson, J., concurring). That's especially true for *Nestlehutt*, which was "'deliberate[],' the product of applying sound and accepted legal principles to reach a reasoned answer to a disputed question," rather than a "'hasty and crude' decision that seems

conclusory, arbitrary, or based on something other than law, like personal preference." *Id.* at 170. *See Nestlehutt, Case No.* S09A1432 (SCED cataloging **nineteen** separate briefs, including those from amici from a large spectrum of interested parties).

Following "'deliberate'" decisions "poses little threat to the rule of law, even when it is arguably wrong in hindsight." *Ammons*, 315 Ga. at 169 (Pinson, J., concurring). Indeed, "recognizing such a decision as law and following it, even in the face of doubt about whether it was correct as an original matter, is consistent with the rule of law." *Id.* Meanwhile, "if nothing has changed besides the makeup of the court, overruling those kinds of decisions merely because the new personnel would come out on the other side of a reasonable debate ordinarily would do greater harm to the rule of law than leaving them settled." *Id.* at 171.

Defendants' primary argument is that a cap does nothing to defeat an inviolate right to a jury trial that existed at common law, since the jury would still be empaneled, hear evidence, and render a verdict. EE Br. at 46.

But that ignores the functional impact of such a cap. *Nestlehutt* correctly rejected this argument because a cap "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function." 286 Ga. at 735-76 (citing multiple foreign cases). This Court has recently reiterated that fundamental principle. "As *Nestlehutt* held, when

Georgia's constitutional right to a jury trial applies, the legislature cannot infringe on that right. We agree with the bedrock principle, articulated in *Nestlehutt*, that the legislature may not abrogate constitutional rights that may inhere in common-law causes of action." *Taylor,* 316 Ga. at 62-63 (cleaned up).

If decisional correctness is a starting point, Defendants' proof on that front amounts to disagreement, at best. Defendants muster as precedent two one-Justice concurrences in this Court, about what it even means to have a jury trial, and several foreign cases that were the lead arguments fifteen years ago. EE Br. at 45-46 (citing to Justice Colvin's concurrences in *Taylor* and *Turner*); *id.* at 46-47 (citing to a handful of foreign cases, almost all pre-*Nestlehutt*). There has been no sea change in what constitutes the scope of legislative power, vis-à-vis the common law; in fact, this Court just reaffirmed that central holding in *Taylor*, again after hard-fought argument, and careful analysis. There is simply nothing Defendants have raised that would constitute the "something pretty extraordinary to justify the serious harm to the rule of law that comes from overruling that kind of decision." *Ammons*, 315 Ga. at 172; *id.* at 173 ("mere disagreement" not enough to justify overrule of carefully-considered decision).

While *Nestlehutt* is "only" fifteen years old, the medical malpractice litigation landscape is one of the most-appealed and examined arenas of civil

law – and for *Nestlehutt*'s time on the books, until now, not a soul has approached a medical death case with any doubt that such claims were uncapped. Both in terms of time, and reliance interests, then, an overrule would be destabilizing.

At base, Defendants now glom onto an argument that they never fleshed out below and the trial court did not rule on – and that is substantively wrong besides. *Nestlehutt* is good law, and the Court should decline to overrule that unanimous decision.

CONCLUSION

The trial court's embrace of the wrongful death cap was wrong, both for procedural reasons and on its merits. The Order enforcing the cap should be reversed.

This Reply Brief does not exceed the word count limitation set out in this Court's Rule 20(2).

Respectfully submitted, this 29th day of December, 2025.[9]

/s/Darren Summerville
Darren Summerville
Georgia Bar No. 691978
Elizabeth Stone
Georgia Bar No. 684098

THE SUMMERVILLE FIRM, LLC
1226 Ponce de Leon Avenue

[9] A copy of this Court's Order, allowing a filing extension over the holidays, is attached as Exhibit A.

Atlanta, Georgia 30306
(770) 635.0030
darren@summervillefirm.com
elizabeth@summervillefirm.com

/s/ Laura M. Shamp
Laura M. Shamp
Georgia Bar No. 637560
Joshua F. Silk
Georgia Bar No. 903916

SHAMP SILK
1718 Peachtree Street, Suite 900
Atlanta, Georgia 30309
T: (404) 893-9400
shamp@shampsilk.com
silk@shampsilk.com

Counsel for Appellants

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 Supreme Court Rule 14:

David N. Nelson, Esq. Elizabeth L. Ford, Esq. CHAMBLESS, HIGDON, RICHARDSON, KATZ & GRIGGS, LLP P.O. Box 18086 Macon, Georgia 31209 *Attorneys for Respondents Thomas B. Leigh, M.D.; William Shirley, M.D. and OB/GYN Specialists*	R. Page Powell, Jr., Esq. Alexander C. Vey, Esq. HUFF, POWELL & BAILEY, LLC 999 Peachtree Street, Suite 950 Atlanta, Georgia 30309 *Attorneys for Respondents Thomas B. Leigh, M.D.; William Shirley, M.D. and OB/GYN Specialists*

Respectfully submitted, this 29th day of December, 2025.

/s/Darren Summerville
Darren Summerville
Georgia Bar No. 691978
Elizabeth Stone
Georgia Bar No. 684098

THE SUMMERVILLE FIRM, LLC
1226 Ponce de Leon Avenue
Atlanta, Georgia 30306

(770) 635.0030
darren@summervillefirm.com
elizabeth@summervillefirm.com

/s/ Laura M. Shamp
Laura M. Shamp
Georgia Bar No. 637560
Joshua F. Silk
Georgia Bar No. 903916

SHAMP SILK
1718 Peachtree Street, Suite 900
Atlanta, Georgia 30309
T: (404) 893-9400
shamp@shampsilk.com
silk@shampsilk.com

Counsel for Appellants

EXHIBIT A

SUPREME COURT OF GEORGIA
Case No. S26A0349

December 15, 2025

CHARLES CLARK et al. v. THOMAS B. LEIGH, M.D. et al.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until December 29, 2025.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently and timely filed. See Supreme Court Rule 50 for cases which will be placed automatically upon the oral argument calendar. An extension of time granted for filing a brief does not extend the time to file an oral argument request, if applicable. See Supreme Court Rule 51.

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk