SUPREME COURT OF GEORGIA

Case Number S26A0349

Charles Clark, et al.,
Appellants

— *versus* —

Thomas B. Leigh, MD, et al.,
Appellees

Brief of Clinton Crawford
As Amicus Curiae in Support of Appellants

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IDENTITY AND INTEREST OF AMICUS CURIAE

Clinton Crawford is the plaintiff in a wrongful-death medical malpractice case pending in Richmond County State Court (*Crawford v. Piedmont Healthcare, Inc., et al.*, File No. 2024 RCSC 00591). This Court's decision in the present case will directly impact Mr. Crawford.

INTRODUCTION[1]

This brief addresses only two issues: *First*, we address which Constitution the *Nestlehutt/Taylor* framework should be applied to — namely, the 1983 Constitution. Applying the framework to the operative Constitution, the damage caps are unconstitutional as applied to wrongful death claims, because wrongful deaths claim in 1983 were the same as they are today.

Second, this brief addresses the law concerning wrongful death claims in 1798. That issue has been confused by a century of bad history. Nonetheless, both in Georgia and in England, as of 1798 wrongful death claims existed, and juries decided non-economic damages for such claims. The Defendants and their amici here will presumably say common law did not recognize wrongful death claims;

[1] All quotations are cleaned up, all citations are simplified, and all emphasis is added unless otherwise noted.

that such claims were created solely by statute. They will say that, and they will be wrong. This Court should not join them in the error.

ARGUMENT

1. The *Nestlehutt/Taylor* framework should be applied to the operative (1983) Constitution. Under that framework, the damages cap is unconstitutional because wrongful death claims existed in 1983.

If the *Nestlehutt/Taylor* framework is applied to the current, operative, governing Constitution — the one adopted in 1983 — then the damage caps are unconstitutional. When the People of Georgia in 1983 decided that "the right to trial by jury shall remain inviolate," wrongful death claims in 1983 were the same as they are today. In wrongful death claims, juries in 1983 decided the same issues they decide today.

The question is whether the jury right embodied in the current Constitution is limited to the scope of the right as it existed in 1798. In *Nestlehutt* and *Taylor*, the Court *assumed* the answer is Yes, but did not address the question or decide it. In *Taylor*, the Court explicitly refrained from answering the question.

The proper answer is No — the jury right adopted in 1983 is not frozen in its *circa*-1798 form. That is so even when we apply the interpretive principle of constitutional continuity. There are clear indicators, both in the text of the current

Constitution and in our history, that the current jury right is broader than the right as it existed in 1798.

The Principle of Constitutional Continuity

In *Elliott v. State*, the Court discussed the principle of constitutional continuity. 305 Ga. 179 (2019). It's an interpretive principle. The meanings of constitutional language become publicly known over time, so when language is readopted in new constitutions, we start with a rebuttable presumption that the meaning remains the same.

> Of course, the relevant question is not the fact of what specific legislators did or did not know; rather, the point is what was sufficiently part of the public legal context such that a presumption is appropriate.

305 Ga. at 184.

Along with the continuities in our history, there are enormous discontinuities, too. And as to the jury right, there are clear indicators — from text and from history — that the right to a jury today is not the right as it existed in 1798. The 1983 Constitution created a right to jury trials as they existed in 1982 (when the Constitution was approved by the People).

1.1. The People of Georgia rejected Founding-Era limits on trial by jury.

No normal adult in 1982 could have thought the Constitution adopted that year (to take effect in 1983) guaranteed only the jury-trial right that existed in 1798. In 1798, Georgia law allowed human slavery. The jury right did not apply to slaves — approximately 35% of the population.[2] In 1798, women could not serve on a jury, *propter defectum sexus* (on account of the defect of their sex).[3] Even men (white and free non-white) were excluded from jury service if they did not meet certain property-holding requirements.[4] Litigants then had no right to a jury that represented a cross-section of society. Litigants with positions easily understood by white land-owning men were systematically advantaged with the jury.[5]

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[2] For population estimates, *see, e.g.*, https://teachingamericanhistory.org/resource/the-constitutional-convention-free-and-slave-populations-by-state-1790/.

[3] *See, e.g.,* Matthews, Burnita Shelton. "The woman juror." Women Law. J. 15 (1927): 15.

[4] *See, e.g.,* Brackett, William S. "The Freehold Qualification of Jurors." The American Law Register (1852-1891) 29, no. 7 (1881): 436-446.

[5] Even as late as 1976, the Georgia constitution limited jury service to "intelligent and upright men." *See* 1976 constitution, Art. VI, § XV, ¶ II.

The 1983 Constitution did not countenance Founding-era restrictions on the jury right. This we think obvious enough to dispense with proof.[6]

1.2. The text of the current Constitution shows it did not simply readopt the same jury right that existed in 1798.

The jury right has not been continuously readopted in Georgia's various constitutions. The right to a jury in civil cases vanished from Georgia's Civil-War-era constitutions and reemerged after the War.

And the 1983 Constitution did not readopt the language of any prior constitution. The text concerning the jury right in the 1983 Constitution differs from the text of prior constitutions. The 1798 constitution, for example, said "trial by jury *as heretofore used in this state* shall remain inviolate." (Art. IV, § 5.) The 1983 Constitution omits any reference to prior use, and it explicitly authorizes procedures to take certain cases from juries. Directed verdict and the like did not exist in common law in the form we now have them, and their constitutionality was

[6] Apart from basic equities, normal jury practice in 1798 differed significantly from jury practice in 1982. A detailed history of jury practice is beyond the scope of this brief, but even a passing knowledge of legal history explodes the illusion that the jury has always worked the way it does now. It is fanciful to suppose the public in 1982 knew how juries worked in 1798 and intended to protect only that system. We know of no evidence of such public knowledge.

subject to question. In 1983 the new Constitution resolved that doubt.[7] Thus, the Constitution says:

> The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party.

Art. I, § I, ¶ XI. The text and history of the Constitution show that the jury-right preserved is the right that existed in 1983, when the People adopted the Constitution.

Procedural Language. The procedural language in the grant of a jury right further emphasizes that the jury right preserved is the right that existed in 1983 (not 1868, 1798, etc.). The qualifying phrase, "except that the court shall render judgment …," does not appear in any prior constitution. That was new, and it reflected changes in civil procedure over recent decades.

Absence of "As Heretofore Used in this State." The 1798 constitution said that trial by jury "as heretofore used in this state shall remain inviolate." The current Constitution omits that qualifying language. The lack of the prior, explicit callback

[7] On the constitutionality of summary judgment, etc. *see generally, e.g.,* Thomas, Suja A. "Why summary judgment is unconstitutional." Virginia Law Review (2007): 139-180.

to former times again confirms that it was the *current* right — not a prior, historical right — enshrined by the 1983 Constitution.

"Shall Remain." The word "remain" refers to a then-current right, jury trials as they existed at the time. That is confirmed by the final provision of the 1983 Constitution, that "except as otherwise provided in this Constitution, all previous Constitutions and all amendments thereto shall thereupon stand repealed." Art. XI, § 1, ¶ VI. The salience of the jury-trial right as of 1983 is further confirmed by the Constitution's provision that, "All laws in force and effect on June 30, 1983, not inconsistent with this Constitution shall remain in force and effect…." Art. XI, § 1, ¶ II.

1.3. The public record does not support a smorgasbord, mix-and-match selection of specific aspects of the jury right circa 1798.

The Defense and their amici will not advocate a wholesale return to slavery-era restrictions on basic rights. If they grapple with these questions at all, they will have to argue for a smorgasbord, mix-and-match approach to the constraints of 1798. The Defense will concede that slavery-based restrictions no longer limit the jury right. The Defense will concede that women are not precluded from jury service by defect of their condition. The Defense will concede that those who rent apartments and own no land may serve on juries. The Defense will concede that

litigants have a right to a jury not systematically skewed in favor of white landowning men.

But the Defense and their amici presumably will say that in 1983 the public meaning of the jury right in the current Constitution was that the right only applied to issues decided by juries in 1798. The problem with that argument is that there's no support for it. Again, as the Court said in *Elliott*, "Of course, the relevant question is not the fact of what specific legislators did or did not know; rather, the point is what was sufficiently part of the public legal context such that a presumption is appropriate." 305 Ga. at 184. We find nothing in the public record to suggest the People of Georgia had a mental checklist of the characteristics of the jury right *circa* 1798, had crossed out some of those features, and put checkmarks next to others. So far as we have found, there is no evidence to support that view.

By its terms, our current Constitution creates a right to jury trials as they existed in 1983.

Honor for the Founding Generation does not require (or allow) limiting the current Constitution.

To the extent the Founding Era seems appealing as the key date for current rights, the appeal likely comes from the proper but complicated respect we have for the Revolutionary Generation. That Generation stood at a great inflection point in

history and accomplished enormous good. And yet they were human, standing in the flow of history, subject to the virtues and vices common to the species. Honor for the Revolutionary Generation does not justify limiting the People who ratified the 1983 Constitution to the rights recognized two centuries earlier.

The Founding Generation itself would not have it so. In 1789, Thomas Jefferson wrote to Madison from Paris and discussed the problem of the hand of the past weighing too heavily on the living. Jefferson argued (impractically, perhaps) that constitutions should be renewed with every generation:

> The question, whether one generation of men has a right to bind another … is a question of such consequences as not only to merit decision, but place also among the fundamental principles of every government. … [T]he earth belongs in usufruct to the living; [] the dead have neither powers nor rights over it. … [N]o society can make a perpetual constitution, or even a perpetual law. … The constitution and the laws of their predecessors are extinguished then, in their natural course, with those whose will gave them being. … Every constitution, then, and every law, naturally expires at the end of thirty-four years. If it be enforced longer, it is an act of force, and not of right.[8]

As it happens, Georgia has followed Jefferson's suggestion more than most states. In any event, the Revolutionary Generation itself would have acknowledged that

[8] Jefferson, Thomas. *The Works of Thomas Jefferson: Published by Order of Congress from the Original Manuscripts Deposited in the Department of State*. US: Townsend Mac Coun, 1884, pg. 103-06.

their own sense of human and political rights did not constrain the People of Georgia two hundred years later.

For purposes of Constitutional law today, the founding generation is the generation of 1982. That sounds odd to say. We all remember the 1980s, and probably few of us feel any special reverence for the that generation (which includes us). But veneration is not the point. Venerable or not, the People of 1982 had no less autonomy than the People of prior eras.

Applying the *Nestlehutt/Taylor* framework to the 1983 Constitution, the right to a jury trial applies to the type of damages recoverable on a wrongful death claim, because wrongful death claims existed in 1983 in the same form as now.

1.4. Stare decisis does not warrant limiting the jury-trial right to 1798.

This Court has *assumed* that the *circa* 1798 jury-trial right defines the scope of the right today. But the Court has never considered the question and decided it. Indeed, in *Taylor* the Court explicitly refrained from doing so, because the issue had not been briefed. *See* 316 Ga. 44, n.19 ("We need not resolve this mystery today, however, given that no one has asked us to reconsider our precedents setting the key date at 1798. Accordingly, we will follow those precedents.").

Courts often make assumptions on issues not called into question: There is no way to avoid making such assumptions. But an assumption is not a holding. On this question — whether the 1983 Constitution enshrined the right to a jury trial as jury trials existed in 1983 — there is no controlling precedent. Furthermore, pre-1983 decisions could even have *assumed* anything about the scope of the right in the 1983 Constitution. Absent any explicit decision on a disputed point, it is not obvious that a *stare decisis* analysis is required.

Nonetheless, on a *stare decisis* analysis, the cases treating the 1798 Constitution as an anchor for the jury right in the 1983 Constitution should be disapproved on that point.

First, as for age of precedent: Again there is no decision that actually addresses the question and decides it. Such a decision has yet to be written.

Second, the pro-1798 decisions are inadequately reasoned on this point. The potential basis for tying the jury right to 1798 would be the presumption of constitutional continuity. But application of that interpretive principle requires analyzing the relevant continuities and discontinuities in our history and in the constitutional text. No decision has done that with respect to the jury trial right in the 1983 Constitution. And on that analysis, the discontinuities in our history preclude any conclusion that the generation of 1982 simply readopted the jury right as that right existed in 1798.

Third, no one has relied to their detriment on the idea that the 1983 Constitution is limited to protecting rights recognized in 1798. Here, for example, the Defendants and their amici did not choose to commit medical malpractice because they thought (a) it would kill the patient and (b) the Court would carve out an exception to *Nestlehutt* for medical malpractice that kills rather than merely harms the patient. To the contrary, in the 15 years since *Nestlehutt*, we have all assumed that damage caps are unconstitutional in death cases just as in non-death cases. There is no legitimate reliance interest for 1798 as an anchor on the rights created in the 1983 Constitution.

Fourth, as for workability: It's much easier to understand 1983 than to try to learn pre-1800's English and American legal history. The past is a foreign country.

Finally, as to weight: This is a constitutional question, so *stare decisis* necessarily carries less weight here than elsewhere. *See Ammons v. State*, 315 Ga. 149 (2022) ("We have also said that stare decisis carries less weight when our prior precedent involved the interpretation of the Constitution, which is more difficult than statutory interpretation for the legislative process to correct.").

There is no valid basis on which to limit the jury right in the current Constitution to the scope of the jury right in 1798. And applying the *Nestlehutt/Taylor* framework to the operative Constitution, the damages cap is

unconstitutional because wrongful death claims in 1983 were the same as they are today.

2. Even if the jury right were limited to what it was in 1798, the damages cap would still be unconstitutional because wrongful death claims existed under common law and juries decided noneconomic damages in such cases.

There's a myth that wrongful death claims did not exist in common law. The myth has been widely believed for a century and a half. The myth has persisted for two reasons: *First*, it started with a confident statement in the preface to a British legislative act. *Second*, the status of pre-1800's common law rarely matters to present-day lawyers and judges, so the issue receives limited, sporadic attention. In any event, wrongful death claims did exist in common law, and noneconomic damages were permitted (and decided by juries) in such cases.

2.1. Wrongful death claims existed under common law.

This issue requires understanding a long-obsolete legal doctrine. Understanding is also aided by a careful reading of this Court's 1854 decision in *Shields v. Yonge*, 15 Ga. 349. *Shields* has never been overruled, and it remains controlling precedent. *Shields* is conclusive: Under common law in Georgia, wrongful death claims existed.

The "Felony Merger" or "Crown Merger" Rule

English common law included a "felony-merger" rule. The idea was that if a tort amounted to a felony, it became a matter for the crown. And "felony" was a much broader category in the old days.[9] Pending prosecution, the crown's interest superseded and precluded the private interest of the victim. (By analogy, in our own time a civil case may be stayed while a related criminal case proceeds.) In the 1607 case of *Higgins v. Butcher*, the report reads:

> If a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, *it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence, and private wrong offer'd to the master before*, and his action is thereby lost.[10]

In practice, the suspension of a private action often became permanent, because felonies were punishable by death and the crown confiscated the wrongdoer's property. But some prosecutions were dropped, and some torts did not amount to felonies. And due to lenient statutes enacted in 1566 and -76, some

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[9] By the end of the 1700's, England had something like 200 offenses punishable by death. One of those offenses was burning a haystack at night. *See generally* Radzinowicz, Leon. *A history of English criminal law and its administration from 1750: The movement for reform, 1750-1833*. Vol 1. London: Stevens & Sons. (1948), pg. 3-40.

[10] 80 Eng. Rep. 61 (1607).

felons could escape death by taking benefit of clergy, being "burnt in the hand," and so forth. The beneficiaries of that leniency forfeited all property they owned at the time of the offense, but they could acquire new property after conviction.[11] In such cases, private actions could resume.

William S. Holdsworth, one of the leading historians of English law,[12] cites two examples of cases in which felons were sued after the suspension was lifted: *Markham v. Cobb* (1625) and *Dawes v. Coveneigh* (1652).[13] Holdsworth thus concludes that under common law principles, a plaintiff "ought to be able to sue if the tortious act causing death does not amount to a felony."[14]

And so it was: In the 1796 case of *Jones v. Perry*, the defendant kept a dog "by which the Plaintiff's child was bit and torn, and in consequence thereof died *per quod servitium amisit*" ("whereby he lost the service"). "The jury found a verdict for the Plaintiff, damages 30 [pounds sterling]." 2 Esp. 482.[15] In the negligent keeping

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[11] Holdsworth at 433.

[12] Holdsworth's life's work was the 17-volume *A History of English Law*, published between 1903 and 1966.

[13] Holdsworth at 433-34.

[14] Holdsworth *Baker* at 434.

[15] 'Espinasse, Isaac. *Reports of Cases Argued and Ruled at Nisi Prius: In the Courts of King's Bench and Common Pleas, 1793-1807*. UK: n.p., 1799.

of the dog, there was no felony — and therefore nothing barring the recovery of wrongful death damages.

In still-binding precedent, this Court held in *Shields v. Yonge* that wrongful-death claims exist in Georgia under common law.

Today, it's a rare lawyer who's ever heard of the felony-merger rule. But 170 years ago, this Court knew the rule when the Court decided *Shields v. Yonge*, 15 Ga. 349 (1854). The decision in *Shields* is hard to read if you don't already understand the felony-merger rule; but with that understanding, *Shields* becomes clear. In short, *Shields* held that in Georgia under common law, the felony-merger rule does not apply to a wrongful death claim where the tortious conduct was mere negligence (and thus not a felony). A man's son had been killed on a train by negligence. After analyzing application of the felony-merger rule at length, this Court held:

> [Defendant] was guilty of involuntary manslaughter, in the performance of a lawful act; that is to say, was guilty of a misdemeanor, and not of a felony.
>
> 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.
>
> . . .
>
> It follows that the father, in this case, had the right to sue in the manner in which he has sued, in the count aforesaid--the first count in

> the declaration; and therefore, that the decision of the Court below, sustaining the demurrer to that count, was wrong.

15 Ga. at 356-57.

Shields is controlling law on this question: A claim for wrongful death exists in Georgia under common law, if the death was caused by negligence.[16]

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[16] Three secondary points concerning *Shields*:

First, Shields was decided in 1854, four years after Georgia's first wrongful death statute was enacted. But *Shields* makes no mention of the statute, and the lengthy discussion of the felony-merger rule would have been irrelevant under the statute. So we know the claim was brought under common law, not under the statute.

Second, the *Shields* court assumed without discussion that the felony-merger rule applied in Georgia. That assumption was likely wrong, because early Georgia statutes were incompatible with the felony-merger rule. Many early Georgia statutes provide both criminal penalties and civil fines or damages to the victims of various offenses — meaning that the offense to the "crown" did not even temporarily preclude a civil recovery. For example, a 1787 act to prevent biting, gouging, and maiming provided both a criminal fine and compensation for the victim — for a first offense, 50 pounds to the State and 50 to the victim. *See* Watkins 1800 Digest, pg. 356-57. Similarly, by a 1770 law, anyone who murdered another's slave was to suffer penalties and also to "mak[e] satisfaction to the owner of such slave." *Id.* at 178. A 1773 law against stealing or maiming horses, cattle, etc. provided both for criminal fines and "the damages otherwise recoverable by law." *Id.* at 185-86. Georgia's provisions for criminal punishment and compensation to victims leave no room for the felony-merger rule.

Third, in *Bibbs v. Toyota*, 304 Ga. 68 (2018) the Court cited *Shields* for the proposition that "at common law, the death of a human being could not be complained of as an injury." That was a mistake. The *Shields* court *rejected* that conclusion. The *Shields* court wrote, "In *Baker vs. Bolton* and others, in Campbell's

Other early American decisions confirm there was no bar on wrongful death claims.

Malcolm Mason has collected early wrongful death cases from the Massachusetts and Connecticut colonies. Mason describes the court that decided a 1794 Connecticut case:

> [A] court consisting of Andrew Adams, C. J., Jonathan Sturges, Benj. Huntington, Asher Miller, and Jesse Root, men of "brilliant scholarship" and "great learning," "severe students of the law"….[17]

The case was brought by a husband against a physician whose negligent operation caused the wife's death. The jury awarded 1,000 pounds damages to the husband. On appeal, the defendant argued for application of the felony-merger rule. The court rejected the argument and upheld the verdict: "The rule urged by the defendant, is applicable, in England, only to capital crimes, where from necessity, the offender must go unpunished, or the injured individual go unredressed."[18]

Nisi Prius Cases, Lord Ellenborough is reported to have used these words: 'in a Civil Court, the death of a human being could not be complained of as an injury'. **No authority is cited for this opinion.**" *Shields* went on to reject that statement from *Baker v. Bolton*: "I must say, therefore, that Lord Ellenborough's unsupported Nisi Prius declaration, … opposed, as it is [to multiple authorities] seems to me to be too broad."

[17] Mason, *supra*, at 5.

[18] Root, Jesse. *Reports of Cases Adjudged in the Superior Court and Supreme Court of Errors*. United States: Hudson and Goodwin, 1802, pg. 90-92.

Earlier, in 1643 in the Colony of Connecticut, John Ewe negligently caused the death of Thomas Scott, and a jury required him to pay five pounds to the government and ten to the widow.[19] In 1677 in the Massachusetts Bay Colony, John Flynt was acquitted of murdering Eljaze Coates but found guilty of manslaughter, for which he was ordered to pay the government 20 pounds and, to Coates' father, another 20 pounds.[20] Similarly in the 1675 case of "Jn° ffoster" who accidentally shot "Samuel fflacks."[21] And also in the 1675 case of "James ffoord" who drove a cart over Abigaile King, killing the child.[22] In 1677 the portentously named Samuel Hunting shot John Dexter in the woods, was found guilty of manslaughter, and was ordered to pay "twenty pounds to the widow of the said John Dexter towards her loss & damage."[23] And so on it went in Massachusetts Bay.

In early American law as in English law, wrongful death damages were allowed.

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[19] *The Public Records of the Colony of Connecticut [1636-1776]*. US: Brown & Parsons, 1850, pg. 103.

[20] *Records of the Court of Assistants of the Colony of the Massachusetts Bay, 1630-1692*. United States: AMS Press, 1973, pg. 85.

[21] *Id.* at 54.

[22] *Id.* at 60.

[23] *Id.* at 114.

The Origin of the Myth

To dispel the myth that wrongful death claims did not exist under common law, it may help to see how the myth came to be.

The myth got started with a case report from an 1808 trial-court decision, *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808). The myth gained most of its force from the preamble to Lord Campbell's Act (1846) — written by the same lawyer (Campbell) who reported the decision in *Baker v. Bolton*.

Baker v. Bolton was a nisi prius (trial court) decision. The report of the case is cursory. It spans half a page. The reporter, John Campbell, (not the judge himself) wrote:

> Lord Ellenborough said, the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence.[24]

[24] For the original report, *see* Baron Campbell. *Reports of Cases Determined at Nisi Prius, in the Courts of King's Bench and Common Pleas, and on the Home Circuit* .... United Kingdom: Saunders and Benning, 1809, pg. 493.

The report includes no basis for the statement — neither precedent nor reasoning.[25]

At least some judges in Britain as well as America rejected *Baker v. Bolton.* As we have seen, in 1854 this Court did so in *Shields v. Yonge.* Even as late as 1873, British judges were not uniformly convinced that *Baker* was good law in England. *E.g., Osborn v. Gillett*, LR 8 Exch 88, 99 (1873) (dissenting judge: "No argument is stated, no authority cited, and I cannot set a high value on that case….").[26] On the American side, the following year in 1874, the court in *Sullivan v. Union Pacific*, 23 F. Cas. 368 (Cir. Ct. Nebraska) declined to follow *Baker*, writing: "[A]ll the cases, English and American, on this subject, rest upon the nisi prius decision, in 1808, of Lord Ellenborough in *Baker v. Bolton*. … [I]t is not reasoned and cites no authorities…."

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[25] Law reports as we know them did not exist in olden times. Now, judges author written opinions, which get published in official reports. In the old days, private lawyers attended court hearings, took notes, and wrote up their own accounts of the case. Not until 1865 did British law reporting start to approximate current practice. *See generally,* Bryan, Michael. "Early English law reporting." *University of Melbourne Collections* 4 (2009): 45-50; Daniel, William Thomas Shave. *The History and Origin of the Law Reports: Together with a Compilation of Various Documents Shewing the Progress and Result of Proceedings Taken for Their Establishment. And the Condition of the Reports on the 31st December, 1883*. Germany: W. Clowes, 1884.

[26] Anstie, James, et al. *The Law Reports. Court of Exchequer: From Michaelmas Term, 1865, to Trinity Term, 1875*. UK: T. and J. W. Johnson, 1873.

In 1916, William Holdsworth wrote the definitive inquiry into the status of *Baker v. Bolton* within English common law.[27] Holdsworth concluded that the statement in the report of *Baker* did not reflect prior law, but rather that "**when Lord Ellenborough gave his ruling in *Baker v. Bolton* he was the victim of [a] confusion of ideas**."[28] More recent commentators have agreed. *See, e.g.,* Smedley (1960) ("[I]t seems probable that Lord Ellenborough unwittingly (or, if deliberately, wholly without authority) phrased his rule too broadly and thereby caused the restriction against recovery to be extended to a degree not warranted by the earlier decisions.").[29]

Nonetheless, Ellenborough's declaration caught on with enough English judges that less than 40 years later Parliament stepped in to undo some of the damage *Baker* had done. Parliament passed the Fatal Accidents Act of 1846, commonly known as Lord Campbell's Act. (This was the same Campbell who reported the *Baker* decision.) The preamble treated *Baker* as established law: "Whereas no action at law is now maintainable against a person who by his

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[27] *See* W. S. Holdsworth, "Origin of the Rule in *Baker v. Bolton*," *Law Quarterly Review* 32, no. 4 (1916): 431-437.

[28] *Id.* at 435.

[29] T. A. Smedley, Wrongful Death-Bases of the Common Law Rules, 13 *Vanderbilt Law Review* 605 (1960).

wrongful act, neglect or default may have caused the death of another person…."[30] That preamble, while incorrect, largely formed later generations' impressions of English legal history, contributing to the nearly universal belief today that common law always barred wrongful death claims.[31]

Malcolm Mason, a fellow of the Foundation for Research in Legal History, concludes that **"The rule that no action may be brought against one who wrongfully causes another's death has no foundation in common law principle."**[32] Of *Baker v. Bolton*, Mason writes: "It has little history. It was casually created by Lord Ellenborough in the charge to the jury in *Baker v. Bolton*, perpetuated by the preamble to the Death by Accidents Bill, and accepted thereafter on no other authority."[33]

The myth that wrongful death claims did not exist under common law is understandable, but wrong nonetheless.

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[30] *Parliamentary Papers: Bills, Public, Vol. II*. UK: H.M. Stationery Office, 1846, 18 May 1846.

[31] There are thousands court opinions, including from this Court, saying that wrongful death claims did not exist at common law. But while court decisions can make or remake law, they cannot make or remake historical fact.

[32] Mason, Malcolm S., Civil Liability at Common Law for Wrongful Death (July 9, 2009). Available at SSRN: https://ssrn.com/abstract=1431922., pg. 3.

[33] *Id.* at 4.

The supposed bar on wrongful death claims gains no support from the maxim *actio personalis moritur cum persona*, because Georgia's adoption of the non-abatement act in 1789 abrogated the maxim.

The maxim *actio personalis moritur cum persona* might be asserted as fallback support for the supposed common-law bar on wrongful death damages as of 1798. The maxim does not relate to claims brought by a survivor for the death of a decedent. Rather, it relates to the decedent's own claims — which now would be brought by the estate of the decedent, not by a wrongful death plaintiff. In any event, the maxim does not support a supposed bar on wrongful death claims in Georgia as of 1798, because the non-abatement act of 1789 (nine years before the 1798 constitution) abrogated the maxim.

The maxim translates as "a personal right of action dies with the person." The legal historian Henry Goudy wrote of it, "Though this is one of the most familiar maxims of English Law, the veil of obscurity covers not only its origin but its true import and significance."[34] The maxim never applied categorically. It did

[34] Goudy, Henry. "Two Ancient Brocards" in Vinogradoff, Paul, ed. *Essays in legal history read before the International Congress of Historical Studies held in London in 1913*. Oxford University Press, 1913, pg. 216.

not apply to actions concerning real property, and eventually it had no application to contracts. English judges did apply it to what we now call torts.[35]

No one has any very good explanation of the rationale for the maxim. Goudy thought the maxim "was originally deduced from a misunderstanding of the Roman Law."[36] As to its rationale, Blackstone said survivors weren't personally involved in the events of a tort and therefore have no interest in a tort claim, whereas they do have interests in a decedent's contracts.[37] That makes little sense. A later scholar, Frederick Pollock, noted of the maxim that, "This is one of the least rational parts of our law." Pollock suggested that "At one time it may have been justified by the vindictive and quasi-criminal character of suits for civil injuries. A process which is still felt to be a substitute for private war may seem incapable of being continued on behalf of or against a dead man's estate…." He added, "But when once the notion of vengeance has been put aside, and that of compensation substituted, the rule … seems to be without plausible ground."[38]

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[35] *Id.* at 217.

[36] *Id.* at 218.

[37] Blackstone, *supra*, pg. 302.

[38] Pollock, Frederick. *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law*, Fourth Ed. UK: Stevens, 1895, pg. 55-56.

In any event, whatever the rationale, Georgia abrogated the maxim with the adoption of a non-abatement statute in 1789. *See* Watkins 1800 Digest, pg. 395, § XVIII. With that act, the death of a party no longer ended the action. So whatever support the *actio personalis* maxim might have given to the supposed common-law bar on wrongful death damages, that support evaporated in 1789, nine years before the 1798 constitution.

2.2. Noneconomic damages were allowed and found by juries under common law — including in wrongful death actions.

As this Court discussed in *Nestlehutt*, noneconomic damages were allowed at common law and were decided by juries. *See* 286 Ga. 735. There was no principle under common law for removing noneconomic damages in wrongful death claims. Thus, in the 1794 Connecticut case of *Cross v. Guthery*, a husband whose wife had been killed by medical malpractice was given damages of 1,000 pounds for the loss of "the service, company and comfortship of his said wife."[39] (Converting 1,000 pounds sterling to modern-day dollars is tricky, but the average yearly income at the time was something like 14 pounds. So by comparison to average incomes now, the 1,000-pound verdict was the equivalent of a verdict today in the low millions.)

[39] Root, *supra*, at 91.

In common-law wrongful death claims, as in other claims, noneconomic damages were allowed and were decided by juries.

The Defense and their amici may point to the damages allowed by *statutory* wrongful death claims. But statutory claims and common law claims are two different things. Whatever was allowed by a statute passed in 1850, common law wrongful death claims in 1798 allowed noneconomic damages.

The Defense and their amici may also seize on the phrase "full value of the life" which was eventually written into the statute as the measure of damages. But this Court has already held that "the measure of damages in wrongful death actions is much the same as in personal injury actions." *Bibbs v. Toyota*, 304 Ga. 68 (2018). The specific phrase "full value of the life" may have been new when it was written into the statute, but the meaning — the value of years of life taken away — is no different in a death case than in a coma case (as in *Bibbs*) or a locked-in case (as in *Buckelew v. Womack*, 374 Ga. App. 711 (2025)).

At common law, wrongful death claims existed, noneconomic damages were allowed, and the type of damages encompassed by the "full value of the life" of the decedent were decided by juries.

CONCLUSION

The state of the law in 1798 should be irrelevant to this case. The People of Georgia in 1983 created the Constitution that governs us. The *Nestlehutt* framework should be applied to the operative Constitution, not to a repealed one from two centuries before, when the right to a jury excluded much of the population.

But even if 1798 is treated as the year that anchors and limits our right to a jury trial, the damages cap is still unconstitutional under the *Nestlehutt/Taylor* framework. In 1798, the supposed common-law bar on wrongful death damages did not exist. So even if applied to 1798, the Court of Appeals correctly applied *Nestlehutt* to hold that the right to jury trial applies in wrongful death cases just as it does in other cases.

This submission does not exceed the word count limit imposed by Rule 20 (7,000 words excluding TOC, TOA, etc.).

Respectfully submitted November 14, 2025

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