IN THE SUPREME COURT
STATE OF GEORGIA

THOMAS LEIGH, M.D., WILLIAM SHIRLEY, M.D., and OB/GYN SPECIALISTS, LLP, Cross-Appellants, v. CHARLES CLARK, Individually, and APRIL D. CLARK, as Administrator of the Estate of April S. Clark, Deceased, Cross-Appellees.	Appeal No. S26X0350

REPLY BRIEF OF CROSS-APPELLANTS

David N. Nelson
Georgia Bar No. 537760
Elizabeth L. Ford
Georgia Bar No. 750034

CHAMBLESS, HIGDON, RICHARDSON, KATZ & GRIGGS, LLP
P.O. Box 6378
Macon, Georgia 31208
Telephone: (478) 745-1181
dnelson@chrkglaw.com
eford@chrkglaw.com

R. Page Powell, Jr.
Georgia Bar No. 586696
Alexander C. Vey
Georgia Bar No. 307899

HUFF, POWELL & BAILEY, LLC
999 Peachtree Street, N.E.,
Suite 950
Atlanta, Georgia 30306
Telephone: (404) 892-4022
ppowell@huffpowellbailey.com
avey@huffpowellbailey.com

Counsel for Cross-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

In their response, Plaintiffs defend the trial court's decisions largely by ignoring points they find inconvenient. Regarding the way the verdict form denied the jury the ability to render different opinions on different claims, Plaintiffs ignore how Defendants challenged the verdict form's structure as to *both* liability and apportionment, how Plaintiffs' view of the evidence is irrelevant to the form's propriety, and how the apportionment statute's language contemplates apportioning damages for specific injuries. Regarding the preexisting condition charge, Plaintiffs ignore the way their argument jams every alleged misdiagnosis into the framework of "aggravating a preexisting condition," despite a dearth of authority supporting that notion. And regarding the trial court's performance of its duties as thirteenth juror, Plaintiffs ignore how the court's statements show it to be avoiding its duty to weigh the evidence rather than defer to the jury's decision. For these reasons and those in Defendants' principal brief, this Court should reverse.

ARGUMENT

I. The trial court erred by using a special verdict form which did not allow for distinct decisions about distinct claims.

Defendants are entitled to a full new trial based on the erroneous structure of the special verdict form. The verdict form denied the jury the opportunity to reach separate conclusions on Plaintiffs' legally-distinct claims, creating error "as a matter of law." *R.C. Acres, Inc. v. Cambridge Faire Props., LLC*, 331 Ga. App. 762, 764 (2015). Plaintiffs' arguments in defense of the verdict form are wrong, on at least three fronts.

A. Plaintiffs ignore how the verdict form prevented the jury from reaching a separate conclusion as to liability for wrongful death.

First, Plaintiffs are wrong in their continued insistence that this claim *solely* concerns an error in how the verdict form treated apportionment. [*See* Plfs.' Br at 22-24 (describing only apportionment as "the issue supposedly handled incorrectly").] From the beginning, Defendants have always described the problem with the verdict form as *twofold*: (1) forcing a unitary decision on *liability* for both the Estate's claim and Charles Clark's wrongful death claim; and (2) forcing a unitary apportionment of damages for Plaintiffs' distinct recoveries. [*See* V24 – 222, 224, 227-28; V26 – 20-24; Defs.' Br. at 22-27.] Plaintiffs simply ignore

the verdict form's error in forcing the jury to make only a single decision on liability for both claims.

This is a material distinction, as allowing distinct findings on liability for April Clark's death would have eliminated the need to conduct apportionment of damages for that injury, as there would be no wrongful death claim for which the jury could award damages. This is not simply a question of "greater liability" for a certain injury, [*see* Plfs.' Br. at 22]; it is a question of whether these Defendants were liable for wrongful death *at all*. And the jury's other findings are necessarily downstream from this first error. *Compare Martin v. Six Flags Over Ga. II, L.P.*, 301 Ga. 323, 338-39 (2017) (limiting retrial to apportionment based on error in determining what nonparties would be included, but only after affirming defendant's liability). So, because the jury was not allowed to determine *liability* for April Clark's death separately from liability for her pain and suffering, the error in the special verdict form requires setting *the entire verdict* aside, contrary to Plaintiffs' (and the trial court's) claim that a new trial would only concern apportionment.[1]

[1] Plaintiffs suggest that Defendants have waived this argument by not challenging the trial court's statement that a new trial would only concern apportionment. [Plfs.' Br. at 24.] False. Defendants expressly argued that the trial court erred by not considering the verdict form's treatment of liability and that any

B. Plaintiffs' arguments about the sufficiency of the evidence and other jury instructions do not cure the harm of the verdict form.

Second, Plaintiffs are wrong in claiming that the evidence and other instructions at trial prevented the harm of this improper verdict form. [*See* Plfs.' Br. at 17-20, 22-23 & n.8.] They ignore that a verdict form which denies the jury the opportunity to decide a particular issue is essentially a *structural* error. It cannot be rendered harmless because it is an error "as a matter of law." *See Hartman v. Shallowford Cmty. Hosp., Inc.*, 219 Ga. App. 498, 500 (1995) (verdict form amounted to substantial error where jury found negligence but was not permitted to award general damages "because of the restrictive nature of the verdict form").

Moreover, arguments about whether the evidence "supported" or could be construed "in favor of the jury's ultimate verdict" are irrelevant. [Plfs.' Br. at 19-20, 23.] A special verdict form must allow for a decision on a disputed issue where there is "some evidence" permitting that dispute. *R.C. Acres*, 331 Ga. App. at 764, 766. Plaintiffs' preferred interpretation of the evidence does not determine how the jury must be

---

retrial must be as to all issues. [Defs.' Br. at 27 (arguing that failure to address this point "negates the trial court's assessment that the only possible remedy would be a retrial on apportionment alone" and that "the *entire* verdict is fatally flawed").

charged, including through a special verdict form. *See Armstrong v. Gynecology & Obstetrics of DeKalb, P.C.*, 327 Ga. App. 737, 741 (2014) ("[J]ury charges are not limited to a plaintiff's characterization of the lawsuit."). And the presence of sufficient evidence to support one possible verdict does not preclude the presence of "some evidence" to support a different verdict. Nothing in Plaintiffs' argument shows how it was *impossible* for the jury to have reached different conclusions about whether Defendants caused April Clark's death than it might reach about whether they caused her pain. So, by denying the jury the chance to make separate conclusions, the verdict form was structurally flawed.

Similarly, the presence of other instructions about negligence or apportionment does not salvage the verdict form's structure. Knowing the standards for making a decision on two distinct claims is of little use when the verdict form precludes a jury from announcing that it reached different decisions about those claims.[2] Plaintiffs' core case on this point,

[2] To the extent Plaintiffs argue that the trial court's instructions told jurors that they *could* reach different decisions about Plaintiffs' claims, that makes matters worse. In that view, the singular conclusion offered by the verdict form would make the trial court's instructions internally-contradictory, providing its own basis for reversal. *See Cheddersingh v. State*, 290 Ga. 680, 682 (2012) (finding reversible error where verdict form suggested that criminal jury had to find defendant not guilty beyond a reasonable doubt, even though trial court's other instructions correctly explained burden of proof).

Hewitt Associates, is distinguishable, as the issue allegedly precluded by the absence of a special verdict form there was the factual question of "the date that [the plaintiff] should have known of [the defendant's] breach of contract"—a concept already subsumed by the court's charges on the defendant's statute of limitations defense and the jury's finding of liability on the contract claim. *See Hewitt Assocs., LLC v. Rollins, Inc.*, 308 Ga. App. 848, 852 (2011).[3] Meanwhile, this case looks more like the Court of Appeals' decision in *Hartman*. The jury there was presumably instructed about how it could award damages for negligence, but a restrictive verdict form was still harmful as a matter of law because it did not allow the jury to act on their finding. *See* 219 Ga. App. at 499-500 (noting how verdict form allowed recovery based on some findings, but not the finding made by the jury).

[3] Plaintiffs' other case on this point, *Bristol Consulting*, is even farther off the mark. That case's refusal to "substitute [an appellate court's] judgment based upon a cold record" concerned the test for whether an actually-rendered verdict is inconsistent, not whether a special verdict form was required to include an issue based on some evidence. *See Bristol Consulting Grp., Inc. v. D2 Prop. Grp., LLC*, 366 Ga. App. 843, 853-54 (2023). Indeed, the opinion in *Bristol Consulting* said that the statute governing special verdict forms "ha[d] no bearing on the verdict form employed in this matter." *Id.* at 853. To the extent that *Bristol Consulting* can be read as rejecting an argument to divide damages by claim, it did so where the different claims were different *theories* of obtaining the same recovery, rather than distinct causes of action providing for distinct recoveries. *See id.* at 845 (noting claims for fraud, conversion, promissory estoppel, unjust enrichment, and tortious interference asserted jointly by same parties).

The verdict form here denied the jury the power to act on a finding that Defendants could be liable for causing April Clark's pain, but not her death. By using a verdict form which wrongfully channeled the jury into an all-or-nothing assessment of liability for different claims and a unitary apportionment of fault for different injuries, the trial court erred.

C. Plaintiffs ignore how the apportionment statute contemplates apportionment for specific injuries.

Third, Plaintiffs are wrong in suggesting that the language of the apportionment statute precluded the verdict form Defendants sought here. For one thing, their interpretation leans on a misreading of this Court's opinion in *Johns*. [*See* Plfs.' Br. at 21.] When this Court talked about how O.C.G.A. § 51-12-33 governs "actions for injury to person, without in any way distinguishing between the theories upon which those claims are premised," it was explaining how the apportionment statute applied to *all* personal injury claims, regardless of the particular tort theory involved. *See Johns v. Suzuki Motor of Am., Inc.*, 310 Ga. 159, 162 (2020) (rejecting argument that apportionment statute did not apply to products liability claim). *Johns* says nothing about whether a jury can be asked to separately apportion awards of damages for different injuries.

From there, Plaintiffs' argument attacks the concept of "per claim" apportionment. But that's not the actual issue. Different apportionments were possible here not merely because Plaintiffs asserted different claims, but because they sought to recover for *different injuries*. Even accepting that damages for the *same* "injury" under O.C.G.A. § 51-12-33(b) cannot be differentiated across theories of liability, that says nothing about whether damages for *different* injuries could be apportioned separately. To the contrary, O.C.G.A. § 51-12-33 speaks in terms of apportioning specific awards of damages for specific injuries. *See* O.C.G.A. § 51-12-33(b), (c) (describing apportionment of jury's "award of damages" and consideration of fault for "the alleged injury or damages").

Here, Plaintiffs did not merely assert theories which created different avenues to compensation for the same injury. They asserted separate causes of action, resulting in separate recoveries. [*See* V20 – 76-77 (judgment awarding different damages to each Plaintiff).] And considering the different requirements for proving those different injuries—proof that Defendants caused suffering versus proof that they caused death—the jury had at least some basis to assess fault differently between the Estate's claim and the wrongful death claim, apportioning

the two damages awards differently. In short, the problem with the verdict form is that it did not allow the jury to reach different apportionment decisions about different awards of damages.

Plaintiffs' argument about how the two awards of damages here could not be apportioned differently rests on a premise they only reference in a footnote: that "'wrongful death' is not really a standalone claim." [Plfs.' Br. at 18-19 n.9.] Not so. To be sure, wrongful death claims are "derivative" of the underlying tort, in the sense that there must be an act of negligence which caused the "homicide" for which a survivor may recover under the Wrongful Death Act. *See* O.C.G.A. §§ 51-4-1, -2. But wrongful death is, in fact, a separate claim, as this Court and the Court of Appeals have explained. *See Bibbs v. Toyota Motor Corp.*, 304 Ga. 68, 72-74 & n.6 (2018) (describing wrongful death statute as providing "new and separate cause of action"); *Mays v. Kroger Co.*, 306 Ga. App. 305, 306 (2010) ("[A] survivor's statutory claim for a decedent's wrongful death and an estate's common-law claim for the same decedent's pain and suffering are distinct causes of action"); *Blackstone v. Blackstone*, 282 Ga. App. 515, 517 n.5 (2006) ("A wrongful death action . . . is separate and distinct from a survival action for pain and suffering."). It is not merely

a continuation of a decedent's claim, but a new cause of action created by statute. That's why a wrongful death claim is asserted by a different party (a survivor, rather than an estate's representative) to recover for a different injury (death, rather than pain) with a different measure of damages (a life's full value, rather than the value of pre-death suffering). To wit, the caption and judgment necessarily rebut Plaintiffs' premise that there are not different things to be apportioned here: this case was brought by distinct plaintiffs resulting in carefully-distinguished awards of damages. [*See* V20 – 76-77.]

Because Defendants' fault for the distinct injury of wrongful death could have been apportioned differently, the trial court was obligated to provide the jury with the opportunity to make that different apportionment. The structure of the verdict form deprived the jury of that chance, constituting error as a matter of law. *R.C. Acres*, 331 Ga. App. at 766. The only remedy here is a new trial.

II. The trial court erred by charging the jury on aggravation of preexisting conditions.

The trial court also erred by improperly charging the jury that it could award damages for Defendants' alleged aggravation of a preexisting condition. There was no "preexisting condition" here, as this

charge intends the phrase. The condition Plaintiffs relied upon to request the charge—April Clark's bowel perforation—did not "preexist" the tort they alleged. It *was* the tort they alleged, by arguing that Defendants failed to properly diagnose and respond to its occurrence.

To justify the charge, Plaintiffs double down on the notion that any condition which arises even a second before a narrowly-defined act of negligence counts as a "preexisting condition," suggesting that this theory simply reflects the premise that a defendant takes the plaintiff as they find them. [*See* Plfs.' Br. at 26, 30-31.] Plaintiffs misconstrue the issue, wrongfully reframing this claim as concerning an "eggshell plaintiff" charge. Yet Defendants don't challenge the actual eggshell plaintiff charge given here, which said that Defendants "take . . . the Plaintiff as they find her" and that a preexisting vulnerability did not relieve Defendants of liability. [V20 – 68; V25 – 129.] Rather, Defendants challenge the charge's separate language suggesting that the jury may award more damages if it found that April Clark "had an injury or preexisting condition" and "the malpractice exacerbated her condition."

[V20 – 67-68; V25 – 128-29.] Outside of two extremely recent cases,[4] almost every case of which Defendants' counsel is aware referred to a "preexisting condition" supporting this charge as a condition *other than* the subject of the negligence, predating not just the literal act, but the entire allegedly-negligent occurrence. *See, e.g.*, *Bray v. Latham*, 81 Ga. 640, 8 S.E. 64, 66 (1888) (considering charge "where the subject of a tort is already diseased," based on plaintiffs' "ill health" *before* fire at issue); *Atlantic Star Foods, LLC v. Burwell*, 368 Ga. App. 79, 84 (2023) (considering whether hospitalization from reaction to food was caused by preexisting low blood potassium); [Defs.' Br. at 31-32 (collecting cases).]

Here, the trial court gave a preexisting condition charge based on the very condition which formed the basis of Plaintiffs' negligence claim—a novel and unsupported use of the charge. In giving this charge, the trial court injected a new and improper basis for damages into the case. That injection of an improper issue warrants reversal.

Plaintiffs' attempts to distinguish the historical use of the preexisting condition charge further misconstrues the issue. Both *Bray*

[4] *See United Obstetrics & Gynecology, P.C. v. Robinson*, 376 Ga. App. 198 (2025) (petition for certiorari pending), and *Geary v. Tapley*, 373 Ga. App. 561 (2024) (cert denied Mar. 4, 2025); *see also* Defs.' Br. at 35-37 (discussing these cases).

and *Hampton* contemplated some form of malady *separate from* the tortious conduct at issue. *Bray*, 8 S.E. at 66 (contemplating charge where plaintiff may have been "afflicted with falling or displacement of the womb" prior to arson constituting the tort); *City of Atlanta v. Hampton*, 139 Ga. 389, 395 (1913) (contemplating charge based on "an infirmity of which [the plaintiff] was ignorant" prior to tort). Indeed, if the propriety of a preexisting condition charge was as well-established as Plaintiffs claim, one would expect them to offer ample authority showing that a misdiagnosed condition can, itself, be a "preexisting condition" for that misdiagnosis. But Plaintiffs provide no such authority, instead offering only two very recent decisions from the Court of Appeals (*Geary* and *United Obstetrics*). [Plfs.' Br. at 29-30.] These cases warrant this Court's disapproval, however, given their unsupported expansion of the charge's use beyond that described in precedent. [*See* Defs.' Br. at 35-37.] And Plaintiffs make no attempt to reconcile *Geary* and *United Obstetrics* with the numerous Court of Appeals cases demonstrating a far narrower vision of "preexisting conditions." [*See* Defs.' Br. at 32.]

In the end, Plaintiffs' arguments do nothing to alleviate the way their interpretation effectively swallows up most medical malpractice

claims. In Plaintiffs' vision, every case involving misdiagnosis or delayed treatment automatically concerns "aggravating a preexisting condition," as the condition which was not properly diagnosed itself constitutes a "preexisting condition." Yet if Plaintiffs are right, the preexisting condition charge becomes redundant, merely restating a plaintiff's underlying negligence claim. Even legally-accurate charges are not required when their principles are "sufficiently or substantially covered . . . in the general charge." *See Lee v. Swain*, 291 Ga. 799, 801 (2012). In fact, giving the charge serves only to emphasize a plaintiff's preferred theory of the case and needlessly direct the jury toward a new articulation of damages. This Court should reject Plaintiffs' invitation to collapse an underlying claim into the concept of preexisting conditions.

III. The trial court erroneously declined to exercise its discretion as the thirteenth juror.

Finally, the trial court erred by failing to actually exercise its discretion as the thirteenth juror, as demonstrated by its written order. Plaintiffs' argument relies on a presumption that the trial court exercised

its discretion where it was aware of the proper standard and referenced that standard at some point in its ruling.[5] [Plfs.' Br. at 33-36.]

True enough, an appellate court does not *assume* that a trial judge "knowingly declined to exercise his discretion" as the thirteenth juror. *Butts v. State*, 297 Ga. 766, 772 (2015). But that presumption only lies "in the absence of positive evidence to the contrary." *Id.*; *see also Allen v. State*, 296 Ga. 738, 741 (2015) (affirming denial where court "did not state the incorrect standard in its order"). The orders in the cases Plaintiffs cite lacked such evidence, as those cases involved summary orders which did not explain the judge's thinking at all. *See Butts*, 297 Ga. at 771-72 (reproducing single-sentence "summary denial order" which stated no reasoning); *Allen*, 296 Ga. at 740-41 (same). So, absent some indication

[5] Plaintiffs insist that they, too, reminded the trial court of its discretion. [Plfs. Br. at 36.] False. Their opposition to Defendants' motion argued that the general grounds only permit a new trial based on "an absence of evidence, rather than the existence of competing, contrary evidence"—straightforwardly a claim that a trial court's decision is limited to the sufficiency of the evidence. [*See* V26 – 79.] And at every turn, they sought to dissuade the trial court from conducting its own evaluation and instead defer to the jury's assessment. [*See* V26 – 72-73 (criticizing Defendants for asking trial court "to substitute its opinion of the conclusions reached by 12 impartial, properly-instructed jurors"), 74 (describing "presumption that the jury's verdict was based upon a fair consideration of the matters presented at trial"), 77-78 (arguing that "the jury in this case is presumed to have assessed the credibility of Dr. Trevino"), 79-80 (arguing that "the jury could easily have found" Dr. Trevino's explanation for contradictory testimony "compelling" or credited other testimony). Plaintiffs thus fed the trial court the arguments it later employed to avoid exercising its discretion.

of a failure to actually exercise discretion, this Court could not presume that such a failure occurred.

Here, however, there *is* evidence showing that the trial court declined to exercise discretion, despite the gestures at the proper standard elsewhere in its order:

- When the trial court said that it "should interpret the evidence and verdict in favor of upholding the jury's decision," that shows it to be applying a sufficiency-of-the-evidence standard and refusing to exercise discretion. *Compare* [V26 – 144], *with White v. State*, 293 Ga. 523, 525 (2013) (vacating denial of new trial where trial court "viewed the evidence in the light most favorable to the verdict").
- When the trial court disregarded its assessment that Plaintiffs' expert inverted his opinions at trial and instead held that the jury had already "evaluate[d] the credibility of all witnesses" following cross-examination, that shows it refusing to exercise discretion. *Compare* [V26 – 143] *with Choisnet v. State*, 292 Ga. 860, 861-62 (2013) (vacating denial where trial court stated that "conflicts in testimony were matters of credibility for resolution by the jury").

- When the trial court ultimately denied the motion because there was "sufficient evidence to support the jury's verdict" as to causation" and "sufficient [evidence] to uphold the verdict," that (quite explicitly) shows it to be applying a sufficiency-of-the-evidence standard rather than exercising discretion. *Compare* [V26 – 144] *with Manuel v. State*, 289 Ga. 383, 386 (2011) (explaining that "the use of the phrase 'sufficient evidence' . . . denotes that the trial court failed to apply its discretion").

Plaintiffs' argument simply ignores these explicit statements that the trial court relied upon a sufficiency-of-the-evidence analysis, when this Court's precedent requires it to assess whether the jury's decision was, in fact, correct. *See Manuel*, 289 Ga. at 386 (explaining how failing to grant new trial despite "personally disagree[ing]" with verdict shows a refusal to exercise discretion).

So, because the trial court's order provides positive evidence rebutting the presumption that it exercised the discretion required of it, this Court should vacate the denial of Defendants' motion for new trial and remand for reconsideration under the proper legal standard.

CONCLUSION

For the foregoing reasons and those stated in Defendants' principal brief, this Court should reverse the judgment below and remand the case for a new trial.

Respectfully submitted this 18th day of December, 2025.

The attorneys signing below certify that this submission does not exceed the word count limit imposed by Rule 20.

HUFF, POWELL & BAILEY, LLC

/s/ R. Page Powell, Jr.
R. Page Powell, Jr.
Georgia Bar No. 586696
Alexander C. Vey
Georgia Bar No. 307899

999 Peachtree Street, Suite 950
Atlanta, Georgia 30309
Telephone: (404) 892-4022
ppowell@huffpowellbailey.com
avey@huffpowellbailey.com

CHAMBLESS, HIGDON, RICHARDSON, KATZ & GRIGGS, LLP

David N. Nelson
Georgia Bar No. 537760
Elizabeth L. Ford
Georgia Bar No. 750034

P.O. Box 6378

Macon, Georgia 31208
Telephone: (478) 745-1181
dnelson@chrkglaw.com
eford@chrkglaw.com

Counsel for Cross-Appellants

CERTIFICATE OF SERVICE

I certify that there is a prior agreement with counsel to allow documents in a PDF format sent via e-mail to suffice for service under Supreme Court Rule 14. I further certify that I have on this day served true and correct copies of the foregoing upon the following counsel of record via e-mail:

Laura M. Shamp
Joshua F. Silk
SHAMP SILK
1718 Peachtree Street, Suite 900
Atlanta, Georgia 30309
(404) 893-9400
shamp@shampsilk.com
silk@shampsilk.com

Darren Summerville
Elizabeth Stone
THE SUMMERVILLE FIRM, LLC
1226 Ponce de Leon Avenue
Atlanta, Georgia 30306
(770) 635-0030
darren@summervillefirm.com
elizabeth@summervillefirm.com

This 18th day of December, 2025.

HUFF, POWELL & BAILEY, LLC

/s/ R. Page Powell, Jr.
R. Page Powell, Jr.
Georgia Bar No. 586696