**IN THE SUPREME COURT**
**STATE OF GEORGIA**

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| CHARLES CLARK, Individually, and APRIL D. CLARK, as Administrator of the Estate of April S. Clark, Deceased,<br><br>Appellants,<br><br>v.<br><br>THOMAS LEIGH, M.D., WILLIAM SHIRLEY, M.D., and OB/GYN SPECIALISTS, LLP,<br><br>Appellees. | Appeal No. S26A0349 |

# RESPONSE BRIEF OF APPELLEES

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## INTRODUCTION

This appeal asks whether the General Assembly can limit by statute a remedy which it created by statute. Precedent and common sense dictate that it can. Accordingly, the trial court properly held that Georgia's statutory cap on noneconomic damages, O.C.G.A. § 51-13-1, applied to Plaintiff Charles Clark's recovery of noneconomic damages awarded for the statutory remedy of wrongful death, requiring it to reduce its original judgment. Plaintiffs show no error in that decision.

In 2020, Plaintiffs sued Drs. Thomas Leigh and William Shirley (among others) for medical malpractice and wrongful death, arising out of April S. Clark's death in 2019. A jury found in their favor, awarding Charles Clark more than $29 million for his wrongful death claim. In post-judgment motions, Defendants asked the trial court to remit the judgment on that verdict to $350,000, as required by O.C.G.A. § 51-13-1. They acknowledged that this Court had held in *Nestlehutt* that the cap was invalid when applied to some common-law damages. But Defendants argued that *Nestlehutt* did not invalidate the cap *as applied to wrongful death*. While the motions were pending, this Court *agreed* with that premise in *Turner*, holding that because *Nestlehutt* was limited to its

factual context, it could not have invalidated all applications of O.C.G.A. § 51-13-1's cap. The trial court then did the analytical work this Court demands and correctly concluded that a statutory cap on the statutory remedy of wrongful death did not violate Georgia's jury trial right. The court also rejected Plaintiffs' other challenges, applied the cap, and reduced the judgment.

Plaintiffs now challenge that decision, asserting a bevy of procedural and constitutional objections. None should persuade.

***First***, Plaintiffs' waiver argument misconstrues the nature of the cap in relation to pretrial orders. The cap plays no role at trial, only becoming relevant once an offending verdict or judgment actually exists. Because the cap presents no issue for the jury's decision and does not alter the evidence before the jury, a party may assert the cap in a post-judgment motion, just like Defendants did here.

***Second***, Plaintiffs incorrectly assert that O.C.G.A. § 51-13-1 suffers from a severability problem, claiming that *Nestlehutt*'s holding means that *every* application of the cap must fail. But that reasoning flies in the face of *Turner*, which separated these applications with little trouble. Moreover, the analysis Plaintiffs propose is unnecessary where a court

declares that a statute is void to the extent it violates a constitutional right, like in *Nestlehutt*. Even if a severability analysis were required, the statute can still be preserved, as applying the cap only to wrongful death awards still promotes the General Assembly's goals.

***Third***, Plaintiffs' jury trial right analysis is flawed. Drawing on 175 years of consistent interpretation, this Court's framework for evaluating the jury trial right asks whether Georgia juries in 1798 decided a plaintiff's claim and awarded the kind of damages a plaintiff sought. Juries in 1798 did neither for wrongful death claims; such claims are entirely a post-common-law creation. Thus, the General Assembly may limit a remedy it created, as the trial court correctly held here.

***Fourth***, Plaintiffs fail to show any equal protection violation. Charles Clark is not similarly situated to plaintiffs pursuing other forms of noneconomic damages, given his assertion of the distinct cause of action of wrongful death. And, in any event, the General Assembly could conceivably have determined that capping wrongful death damages, even if it was forbidden from limiting *all* noneconomic damages, served the legitimate government interest of promoting access to healthcare and affordable liability insurance.

***Finally***, Defendants ask the Court to reconsider *Nestlehutt* itself, which would negate almost all of Plaintiffs' arguments. *Nestlehutt*'s holding erroneously treats a *procedural* right to have juries decide the facts of a case as creating a *substantive* right for plaintiffs to obtain particular results from those facts. The time has come to put *Nestlehutt* aside, and the Court should overrule it.

For these reasons, the Court should affirm the trial court's decision granting Defendants' motion to remit and entering a judgment which complied with O.C.G.A. § 51-13-1.

## STATEMENT OF THE CASE

***Plaintiffs' lawsuit.***[1] In May of 2019, April S. Clark had surgery to remove an ovarian cyst, during which her bowel was perforated. Over the next two days, she was treated by the nurses at Coliseum Medical Center, as well as multiple doctors, including Defendants Dr. Thomas Leigh and Dr. William Shirley. When the then-undiagnosed bowel leak became known, Clark underwent a series of operations to try and repair her bowel, primarily performed by former defendants Dr. Thomas Woodyard

[1] The underlying facts are more fully described in Defendants' brief in their cross-appeal, Case No. S26X0350.

and Dr. John Williams. About a month later, Clark eventually succumbed to the effects of sepsis from the bowel leak.

In October 2020, Charles Clark (Clark's husband) and April D. Clark (her daughter) sued the various providers who oversaw Clark's care, including Drs. Leigh and Shirley, alleging various forms of medical malpractice. [V1 – 6-21.] Plaintiffs settled with the hospital, Dr. Williams, and Dr. Woodyard, eventually proceeding to trial against only Drs. Leigh and Shirley. [*See* V26 – 39.] Plaintiffs targeted the 19-hour span during which Drs. Leigh and Shirley were involved, blaming them for not only for delaying Clark's return to surgery, but also her death.

***The verdict.*** A jury eventually returned a verdict in Plaintiffs' favor. [V20 – 74-75; V25 – 145-46.] The jury allocated 40% of the fault to Dr. Leigh, 35% to Dr. Shirley, 15% to Dr. Woodyard, and 10% to Coliseum Medical Center. [V20 – 75.] The jury awarded a total of $33,465,176, including $29.25 million for wrongful death. [V20 – 75.]

The trial court entered judgment on the verdict, apportioning damages in line with the jury's fault allocation. [V20 – 76-77.] The Court distinguished April D. Clark's recovery on behalf of her mother's estate from Charles Clark's recovery for wrongful death. [V20 – 76.] The

judgment thus granted Charles Clark a recovery for wrongful death of $21,937,500.00. [V20 – 76.]

***Defendants' motion to remit.*** Defendants moved for a new trial, which the trial court denied. [V20 – 78-80; V26 – 12-34, 137-46.] Defendants also moved to remit and amend the judgment, asking the court to apply O.C.G.A. § 51-13-1's noneconomic damages cap to the wrongful death award. [V20 – 85-92; V26 – 32-33.] The trial court granted this motion, holding that O.C.G.A. § 51-13-1 applied to the wrongful death following this Court's decision in *Medical Center of Central Georgia, Inc. v. Turner*, 322 Ga. 129, 917 S.E.2d 697 (Ga. 2025).[2] [V26 – 148-49.] The court then considered and rejected Plaintiffs' various arguments against applying O.C.G.A. § 51-13-1. [V26 – 149-157.]

Starting with their constitutional challenges, the court held that Plaintiffs had failed to show that capping wrongful death damages violated the jury trial right. Applying the framework laid out in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010), and *Taylor v. Devereux Foundation, Inc.*, 316 Ga. 44 (2023), the court evaluated the

[2] *Turner* was decided after the post-trial motions hearing. The trial court thus asked both parties to submit proposed orders to account for *Turner*'s holding. [See V26 – 148-49, 160-203, 207-33.]

history of wrongful death claims in Georgia. It concluded that both the claim and kind of damages pursued here were not decided by juries in 1798, so a statutory limitation on his recovery did not offend the jury trial right. [V26 – 149-53.] Next, the court held that applying the cap to a context which *Nestlehutt* had not invalidated did not constitute judicial lawmaking. [V26 – 153-54.] Finally, the court held that Plaintiffs had failed to show that applying the cap to wrongful death violated equal protection, explaining that it is not irrational to distinguish damages awarded for wrongful death from other kinds of damages. [V26 – 154-55.]

The court also rejected Plaintiffs' procedural challenges. In particular, the court held that Defendants had not waived O.C.G.A. § 51-13-1's application by not asserting the cap earlier, explaining that the cap did "not present an issue for the jury to decide," but rather "define[d] the limits of the recovery a plaintiff may actually obtain following the jury's decision." [V26 – 156-57.] Thus, the need to enforce the cap only arose once a there was a "total amount recoverable" which exceeded the cap, and the cap "appl[ies] as a matter of law in that situation." [V26 – 157.] Accordingly, Defendants timely asserted the cap in a post-judgment motion. [V26 – 157.] Applying O.C.G.A. § 51-13-1, the trial court then

entered an amended judgment, revising Charles Clark's recovery for wrongful death to a total of $350,000. [V26 – 158-59.]

## ARGUMENT

### I. O.C.G.A. § 51-13-1's cap applied to Charles Clark's recovery of noneconomic damages for wrongful death.

As an initial matter, O.C.G.A. § 51-13-1's cap facially applied to limit Charles Clark's recovery for wrongful death. The cap's application to wrongful death is currently alive and well, because—according to this Court's decisions—that application of the cap has *not* been invalidated.

In 2005, the General Assembly sought to address various trends affecting healthcare access and the availability of insurance for healthcare providers through a series of reforms to Georgia's tort system. *See* 2005 Ga. Laws Act 1, § 1. These reforms sought to "promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims," which would "assist in promoting the provision of health care liability insurance by insurance providers." *Id.*

One of these reforms became O.C.G.A. § 51-13-1, which limited the recovery of noneconomic damages in medical malpractice actions:

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

O.C.G.A. § 51-13-1(b). Implicitly describing "economic" damages, the statute excluded various monetary expenses from the caps, such as medical expenses, lost income, and funeral expenses. O.C.G.A. § 51-13-1(a)(4). So, by "noneconomic damages," the statute referred to any "nonpecuniary loss of any kind or nature." O.C.G.A. § 51-13-1(a)(4).

The caps drew constitutional challenges, leading to this Court's decision in *Atlanta Oculoplastic Surgery, P.C., v. Nestlehutt*, 286 Ga. 731 (2010). *Nestlehutt* arose out of a botched plastic surgery, with Ms. Nestlehutt recovering damages for pain and suffering and her husband recovering for loss of consortium. *Id.* at 731. After trial, a court granted the plaintiffs' motion to declare O.C.G.A. § 51-13-1 unconstitutional. *Id.* This Court affirmed, concluding that "the noneconomic damages caps in O.C.G.A. § 51-13-1 violate the constitutional right to trial by jury." *Id.* at 731, 738. After analyzing the history of "the modern medical malpractice action," the Court held that, in 1798, "there did exist a common law right

for a jury trial for claims involving the negligence of a health care provider, with an attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury." *Id*. at 735. As Justice Nahmias explained in a concurrence, the Court held that caps "on noneconomic compensatory damages, as found by juries in common-law medical malpractice cases," violated Georgia's jury trial right. *Id*. at 740 (Nahmias, J., concurring specially).

*Nestlehutt*'s holding was limited to the common-law damages it considered. *See Gonzales v. State*, 315 Ga. 661, 665 (2023) ("[A] decision's holding is limited to the factual context of the case being decided and the issues that context necessarily raises."). Nevertheless, the broad language of the *Nestlehutt* opinion convinced some that *Nestlehutt* had, in fact, invalidated O.C.G.A. § 51-13-1's caps in *every* application.

This Court corrected that misunderstanding in *Medical Center of Central Georgia, Inc. v. Turner*, 322 Ga. 129, 917 S.E.2d 697 (2025). There, it explained that *Nestlehutt* had *only* considered whether the caps "could be constitutionally applied to reduce a jury's award of noneconomic damages for pain and suffering and loss of consortium following a verdict in the plaintiffs' favor for medical malpractice claims." *Id*. at 700. So,

"because the question of whether OCGA § 51-13-1's caps can be constitutionally applied to statutory wrongful death claims (and their associated 'full value of the life' damages) was not at issue in *Nestlehutt*, the *Nestlehutt* Court could not (and did not) decide [that] issue." *Id.* "Consequently, *Nestlehutt*'s holding does not control the question at issue" of whether wrongful death damages can be capped by statute. *Id.* Thus, the *Turner* trial court erred by presuming that *Nestlehutt* had also invalidated the cap as applied to wrongful death damages. *Id.* at 700-01.

So, here is the lay of the land: O.C.G.A. § 51-13-1's cap is currently valid as applied to wrongful death, as *Nestlehutt* never invalidated that application. No one has genuinely disputed that the statute applies here, in a medical malpractice action against two doctors. Plaintiffs disputed (1) whether Defendants timely asserted the cap; and (2) whether applying the cap would be unconstitutional. So, the trial court was obligated to cap the wrongful death award unless Plaintiffs proved why the cap could *not* apply. *See Taylor v. Devereux Found., Inc.*, 316 Ga. 44, 52 (2023) ("The party challenging the statute bears the burden to show that the statute manifestly infringes upon a constitutional provision or violates the rights of the people."); *Vratsinas Const. Co. v. Triad Drywall,*

*LLC*, 321 Ga. App. 451, 454 (2013) (explaining that burden of proving waiver "lies with the party asserting waiver"). Plaintiffs failed to carry that burden, so the trial court properly applied the cap here.

## II. Defendants did not waive O.C.G.A. § 51-13-1's cap.

Plaintiffs first argue that Defendants waived O.C.G.A. § 51-13-1's cap by not asserting it in the pretrial order. [Plfs.' Br. at 13-18.] But because the cap does not affect the issues for the jury's decision or the evidence which might be presented at trial, there is no need to assert it in a pretrial order. Defendants properly asserted the cap in a post-judgment motion, so no waiver occurred.

### A. O.C.G.A. § 51-13-1's caps need not be asserted before the jury renders a cap-exceeding verdict.

Defendants properly asserted that Charles Clark's recovery was capped through a post-judgment motion. The only case which appears to address this case's procedural posture directly contradicts Plaintiffs' argument. *See Scott v. Battle*, 249 Ga. App. 618, 622 (2001). In *Scott*, the plaintiff challenged the trial court's application of Georgia's punitive damages cap, arguing (like Plaintiffs) that the defendant waived the cap's application because he "did not raise this issue until a post-trial hearing on a motion for new trial." *Id.* at 622. The Court of Appeals affirmed,

rejecting the plaintiff's waiver argument and holding that an exception to "a verdict arguably in excess of that authorized by law" is "timely if raised before the entry of judgment or *in any timely post-judgment motion*, including a motion for new trial." *Id.* (emphasis added).

That's exactly what Defendants did here. The jury returned a verdict awarding $29.25 million in noneconomic damages for wrongful death. [V20 – 75.] The trial court then entered judgment on that verdict, granting Charles Clark a recovery of $21.9 million. [V20 – 76.] Then, in timely post-trial motions, Defendants asserted that this recovery exceeded O.C.G.A. § 51-13-1's cap. [V20 – 79, 85-92; V26 – 32-33, 122-31.] That is the proper procedure here.

This result makes sense, as statutory damages caps are not issues for pretrial orders to address. Pretrial orders seek to "limit the claims, contentions, defenses, and evidence that will be submitted to the jury." *Ga. Dept. of Hum. Res. v. Phillips*, 268 Ga. 316, 318 (1997). But § 51-13-1's caps *do not* alter the claims, defenses, or evidence at trial. There is nothing for the jury to decide about whether these caps apply. This Court said as much about *this* cap: § 51-13-1's caps "ha[ve] no impact on the determination of liability" and, "as they [are] to be applied only after the

jury reached its verdict, would have . . . no bearing on evidentiary rulings, arguments of counsel, or jury instructions." *Nestlehutt*, 286 Ga. at 739.

Thus, caps are a *post-trial* question about the limits of a plaintiff's recovery. Put differently, damages caps are not "affirmative defenses, but . . . binding and unconditional statements of law." *Khatabi v. Car Auto Holdings, LLC*, No. 21-20458-CIV, 2024 WL 3326888, at *11 (S.D. Fla. July 8, 2024) (rejecting argument that caps were waivable affirmative defenses); *Garrison v. Target Corp.*, 869 S.E.2d 797, 806 (S.C. 2022) (punitive damages cap not affirmative defense "because it does not affect liability or require new matter to be asserted but instead limits the amount of damages a plaintiff can recover"); *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 157 (Tex. 2015) (same, because cap "does not require proof of any additional fact to establish its applicability").

The statute's language confirms this point. O.C.G.A. § 51-13-1's caps limit "the total amount recoverable" in "any verdict returned or judgment entered in a medical malpractice action." O.C.G.A. § 51-13-1(b). Thus, the caps need only be asserted when a "verdict returned" or "judgment entered" allows an above-cap recovery. That cannot happen before trial. And, as observed by *Nestlehutt*, O.C.G.A. § 51-13-1's caps are

"automatically triggered when a damages award exceeds the threshold amount." 286 Ga. at 737. So, the proper vehicle for applying caps is through a post-judgment motion.

*Phillips* does not demand a different result. There, this Court held that a *plaintiff* had acquiesced to the imposition of a damages cap under the State Tort Claims Act. *See Phillips*, 268 Ga. at 317-18. More specifically, the pretrial order showed the plaintiff committing to a later remittitur: "[I]f the jury awards an amount in excess of [the statutory cap], said amount shall be written down by the Court." *Id.* at 317. Thus, a trial court erred by overriding that agreement and entering judgment for an amount greater than the cap. *Id.* at 319-20. Here, however, the Defendants did not preemptively consent in the pretrial order to a particular result in the event of a cap-exceeding verdict, such that applying § 51-13-1 functionally rewrites the order.

Plaintiffs' cases about omitted "procedural defenses" are also inapposite. [*See* Plfs.' Br. at 17.] *Zambetti*, for example, concerned a Statute of Frauds defense—a defense to liability for a contract claim. *See Zambetti v. Cheely Invs., L.P.*, 343 Ga. App. 637, 642 (2017). Similarly, *Eagle Jets* concerned an argument that federal regulations defining an

aircraft's "operator" preempted liability under state agency law—again, a defense affecting liability. *See Eagle Jets, LLC v. Atlanta Jet, Inc.*, 321 Ga. App. 386, 399-400 (2013). And the one case about a true "procedural" defense (*Long*) concerned insufficient service of process, a *jurisdictional* defense which can be waived by failing to obtain a ruling before trial. *Long v. Marion*, 257 Ga. 431, 433 (1987); *see also Agri-Cycle LLC v. Couch*, 284 Ga. 90, 91 (2008) (explaining waiver of jurisdictional venue defense "by failing to elicit a ruling from the trial court . . . prior to the entry of judgment or the commencement of trial").

Those circumstances look nothing like a request for a court to apply damages caps which "ha[ve] no impact on the determination of liability" and are "automatically triggered" by certain verdicts. *Nestlehutt*, 286 Ga. at 737, 739. Rather, damages caps are properly enforced post-judgment.

### B. Defendants' statements regarding the measure of damages do not show consent to uncapped damages.

At several points, Plaintiffs essentially claim that Defendants acquiesced to uncapped wrongful death damages by stating that the wrongful death statute defined the measure of damages for that claim. [Plfs.' Br. at 6, 13, 16-17 & n.7; *see also* V20 – 42-43.] This argument confuses a general statement about damages with a specific limitation on

a plaintiff's ability to *recover* those damages. O.C.G.A. § 51-13-1's caps do not affect the measure of a plaintiff's damages. The jury still determines the factual question of the full value of a decedent's life, consistent with the wrongful death statute. The caps address "the total amount *recoverable* by a claimant"—i.e., the legal effect of the jury's decision, manifested through a "judgment entered." O.C.G.A. § 51-13-1(b).

Thus, there was no contradiction in asking the Court to apply § 51-13-1 and also saying that damages for wrongful death are measured by the full value of April Clark's life. Contrast this situation with *Phillips*, where the plaintiff preemptively *agreed* to have the court write off cap-exceeding damages after trial. *See* 268 Ga. at 317-20. Asking for a court to apply damages caps which are "automatically triggered" by an offending verdict, *Nestlehutt*, 286 Ga. at 737, without stating their application earlier does not demonstrate a "clear and unmistakable" relinquishment of the statute's protection. *See Vratsinas Constr.*, 321 Ga. App. at 453-54 (describing standard for waiver).

### C. O.C.G.A. § 51-13-1's caps do not alter a plaintiff's incentives regarding damages evidence.

Plaintiffs assert that they planned their case around the (mistaken) assumption that wrongful death damages would not be capped. [Plfs.' Br.

at 15-18.] Here again, they ignore how the caps *do not* affect the evidence at trial. As *Nestlehutt* explained, O.C.G.A. § 51-13-1's caps have "no impact on the determination of liability" and "no bearing on evidentiary rulings, arguments of counsel, or jury instructions." 286 Ga. at 739. Indeed, the Court declined to find that applying *Nestlehutt* retroactively would be unfair *because* the caps were unlikely to affect a party's strategy. *See id*. at 739-40 (calling this argument "too speculative").

In any event, the prospect of caps would not have changed Plaintiffs' damages presentation. Plaintiffs were always encouraged to prove economic damages, as such damages—like lost income or the value of household services—were never capped. *See* O.C.G.A. § 51-13-1(a)(4) (excluding certain damages from cap). Proven economic damages could only have *added to* the verdict. *See Bibbs v. Toyota Motor Corp.*, 304 Ga. 68, 75-76 (2018) (explaining "components" of wrongful death damages). Accordingly, Plaintiffs had every incentive to prove the economic value of April Clark's life *in addition to* its intangible value, regardless of whether the cap applied. Plaintiffs' choice to forgo these additional damages (and rely on the jury's discretion as to noneconomic damages) shows no waiver.

Applying the cap would not have affected Plaintiffs' presentation of *non*economic damages, either. Plaintiffs were still incentivized to offer every shred of evidence about the intangible value of April Clark's life in order to maximize their payout. There is no reason to believe that Plaintiffs would have eased up on arguing the intangible value of April Clark's life if they had thought those damages would be capped. In short, Plaintiffs' purported reliance interests are conjured post hoc to claim prejudice from their tactical choices.

## III. O.C.G.A. § 51-13-1 can be separately applied to wrongful death damages.

Next, Plaintiffs argue that different applications of O.C.G.A. § 51-13-1 cannot be severed, suggesting that, after *Nestlehutt*, the statute is "incapable of meaningful interpretation" in cases like this. [*See* Plfs. Br. at 18-25.] Put differently, Plaintiffs assert that *Nestlehutt*, by invalidating the cap as applied to *some* noneconomic damages, functionally invalidated it as to *all* noneconomic damages. But Plaintiffs' argument (1) cannot be reconciled with *Turner*; (2) demands an unnecessary severability analysis; and (3) fails to demonstrate that capping only wrongful death damages (in light of this Court's limitations) would contravene the General Assembly's intent.

### A. *Turner* necessarily rejected Plaintiffs' argument.

First, Plaintiffs' severability argument is squarely contrary to this Court's decision in *Turner*. There, the plaintiff made essentially the same argument as Plaintiffs, to the point that it made up almost the entirety of her counsel's time at oral argument.[3] But it had no effect on this Court's analysis, which saw no need to discuss severability at all. In fact, this Court's holding only makes sense if the cap's applications can be separated. *Turner* explained how *Nestlehutt* addressed the "*application* of O.C.G.A. § 51-13-1's caps" to the noneconomic damages sought by the *Nestlehutt* plaintiffs. *See* 917 S.E.2d at 700 (emphasis added). That left open "the question of whether O.C.G.A. § 51-13-1's caps can be constitutionally applied to statutory wrongful death claims." *Id*. Likewise, the Court held that *Nestlehutt* "could not (and did not) decide" whether § 51-13-1's caps can be constitutionally applied to wrongful death damages. *Id*. So, the Court remanded the case for the trial court to *separately* apply *Nestlehutt*'s framework to analyze whether capping wrongful death damages violated the jury trial right. *Id*.

[3] *See* Oral Argument, *Med. Ctr. of Cent. Ga., Inc. v. Turner*, No. S25G0132, at 16:00-36:00 (May 14, 2025), available at https://www.gasupreme.us/oa-may-14-2025/; Brief of Appellee, *Med. Ctr. of Cent. Ga., Inc. v. Turner*, No. S25G0132, at 18-23.

If Plaintiffs are right, the result in *Turner* would have been impossible. Under Plaintiffs' reading, *Nestlehutt*'s invalidation of *some* applications of the cap necessarily brought down *every* application, even those which were not (and could not have been) before the Court. That is exactly the argument this Court rejected in *Turner*. Similarly, Plaintiffs' theory would make the remand in *Turner* pointless, as there would be no reason to apply the proper framework to an application which, in Plaintiffs' telling, is already dead. Plaintiffs' argument cannot be reconciled with *Turner*'s core premise—that *Nestlehutt* did not mean that § 51-13-1's caps failed in their entirety. *See* 917 S.E.2d at 699-700.

**B. Plaintiffs' severability analysis is unnecessary.**

Even if Plaintiffs' argument could be reconciled with *Turner*, the severability analysis they demand is not warranted. Plaintiffs insist that when a statute is partially invalidated, a court "must" conduct a severability analysis. [Plfs.' Br. at 18.] That is not reflected in this Court's cases, however. This Court frequently sifts out the constitutional applications of statutes from unconstitutional ones without the granular analysis Plaintiffs demand.

For example, in *Jefferson*, this Court declared that a statute regarding the use of non-party convictions in gang prosecutions was unconstitutional, but only "to the extent that it authorizes the admission of the convictions of non-testifying non-parties as evidence of a criminal street gang." *State v. Jefferson*, 302 Ga. 435, 437-38, 443 (2017). In doing so, the Court did not then proceed to ask whether the entire statute had to be thrown out; it was enough to say that the statute was only void "to the extent" it allowed a constitutionally-impermissible result.[4] *Id.* at 443; *see also Nunn v. State*, 1 Ga. 243, 251 (1846) (statute unconstitutional where it prohibits bearing arms openly, but constitutional "so far as [it] seeks to suppress the practice of carrying certain weapons secretly"). And in *Barnes*, this Court voiced no concern about whether severing a local occupation tax "only so far as it applies to lawyers" threatened the entire ordinance's validity, saving that concern for the argument that the court

[4] Plaintiffs suggest that the trial court was "led astray" by *Jefferson* because that case "did not even discuss" severability and concerned a statute without a severability clause. [Plfs.' Br. at 22 n.9.] But that is exactly Defendants' (and the trial court's) point. The lack of a severability clause suggests that the *entire* statute should fall in the face of a partial invalidation. *See Daimler Chrysler Corp. v. Ferrante*, 281 Ga. 273, 275 (2006) (noting "usual presumption" that a statute is intended to be "an entirety"). Yet *Jefferson* invalidated a statute in one situation, without suggesting that this result might invalidate the statute in all situations. *Jefferson* thus indicates that a severability analysis is *not* always mandatory.

should have severed a requirement critical to how the tax plan worked. *City of Atlanta v. Barnes*, 276 Ga. 449, 450-51 (2003).

This tracks broader notions about severability. As the United States Supreme Court has explained, courts have a "decisive preference for surgical severance rather than wholesale destruction," seeking to "salvage rather than destroy the rest of the law." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 626-27 (2020). In other words, courts "try to limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006). Severance of "problematic portions" is one option, but so is choosing to "enjoin only the unconstitutional applications of a statute while leaving other applications in force," such that a statute is declared "invalid to the extent that it reaches too far, but otherwise left intact." *Id.* at 329.

That latter option—declaring a statute "invalid to the extent it reaches too far"—is what happened in *Nestlehutt*. *See Turner*, 917 S.E.2d at 699-700. *Nestlehutt*'s "claim- and remedy-specific" analysis means that it only declared the caps invalid *to the extent* they limited "noneconomic compensatory damages, as found by juries *in common-law medical malpractice cases*." *Nestlehutt*, 286 Ga. at 740 (Nahmias, J., concurring

specially) (emphasis added) (explaining holding). Though *Nestlehutt*'s language suggested a wholesale invalidation, its factual context precluded that result without further analysis, as *Turner* explained. *See* 917 S.E.2d at 699-700. And *Nestlehutt* did not conduct a facial-invalidation analysis (i.e., explaining how there is "no set of circumstances . . . under which the Act would be valid"). *See Ga. Dept. of Hum. Servs. v. Stiener*, 303 Ga. 890, 899 (2018). Thus, *Nestlehutt* concerned an as-applied challenge (i.e., where the statute is unconstitutional only in its application "on the facts of a particular case or to a particular party"). *See Major v. State*, 301 Ga. 147, 152 (2017).

That narrower holding thus did not "strike down" parts of O.C.G.A. § 51-13-1; it held that the statute could not be lawfully applied to the damages recovered by the Nestlehutts. And in that situation, there is no need to discuss how to "sever" particular *language* of the statute. A court simply applies the statute to the extent it may do so consistent with the Constitution. *Compare Daimler Chrysler Corp. v. Ferrante*, 281 Ga. 273, 274-75 (2006) (analyzing severability after concluding that language increasing burden in asbestos claims to proof of "*substantial* contributing factor" violated prohibition on retroactive laws).

This understanding is consistent with the relevant severability clause. That clause says that when "any section, subsection, sentence, clause, or phrase" is "declared or adjudged invalid or unconstitutional," it should be treated as if it "were not originally part hereof." 2005 Ga. Laws Act 1, § 14. Thus, this clause only matters when *specific words* in the statute are invalidated, not when an application of the statute is declared unconstitutional. *Nestlehutt* did the latter, holding that the caps impermissibly limited common-law damages rather than saying that certain words in the statute ran afoul of the Constitution. *See* 286 Ga. at 735-36. And when the relevant holding concerns such an as-applied challenge, the detailed severability analysis Plaintiffs demand is unnecessary. *See United States v. Jones*, 980 F.3d 1098, 1111 n.19 (6th Cir. 2020) (explaining that severability was "not at issue" where decision "merely limit[ed] the contexts in which [the statute] applies without invalidating any part of [its] policy statement"); *Local 514 Transp. Workers Union of Am. v. Keating*, 83 P.3d 835, 838-39, 841 (Okla. 2003) (holding severability analysis unnecessary where federal statutes preempted some, but not all, applications of state labor law).

### C. Applying O.C.G.A. § 51-13-1 to wrongful death damages promotes the General Assembly's purpose.

Even if Plaintiffs were right that a detailed severability analysis was required, their conclusions miss the mark. Plaintiffs argue that O.C.G.A. § 51-13-1 suffers from an "interdependency problem," suggesting that enforcing *Nestlehutt* but applying the cap to wrongful death damages requires a court to "rewrit[e] the core components of the cap." [Plfs.' Br. at 20-22.] Not so.

Plaintiffs' assertion that applying the cap to wrongful death requires a "new qualifier" is wrong. The statute already denotes wrongful death as a different application, noting that the cap applies to "any verdict returned or judgment entered in a medical malpractice action, *including an action for wrongful death*." O.C.G.A. § 51-13-1(b) (emphasis added). Wrongful death must be capable of separate definition, as an estate's personal injury claim and a survivor's wrongful death claim are "distinct causes of action." *Mays v. Kroger Co.*, 306 Ga. App. 305, 306 (2010); *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."). And those causes of action necessarily presume different "claimants," which is why Charles Clark sought and recovered

for wrongful death *separately* from April Clark's estate. [*See* V20 – 76-77.] The statute's contemplation of wrongful death as a separate claim within "medical malpractice actions" thus rebuts the notion that all claimants and damages get mashed into one amalgamated claim.

At core, Plaintiffs claim that the General Assembly's desire to limit noneconomic damages had to be all-or-nothing. But Plaintiffs never prove that theory. In fact, the presence of a severability clause *refutes* thier premise. Where (as here) the General Assembly states its intent for severance, courts presume that the statute *can* be severed. *See Daimler*, 281 Ga. at 275. That presumption holds unless severance would "result in a statute that fails to correspond to [the statute's] main legislative purpose." *Barnes*, 276 Ga. at 451.

Applying § 51-13-1's caps to *some* noneconomic damages in medical malpractice cases still promotes the General Assembly's purpose: limiting the size of medical malpractice judgments. *See* 2005 Ga. Laws Act 1, § 1. Even if the statute cannot limit *all* damages, limiting damages for wrongful death claims still reduces some portion of medical malpractice judgments, furthering the legislative goal of "promot[ing] predictability and improvement in the provision of quality health care

services and the resolution of health care liability claims and . . . thereby assist[ing] in promoting the provision of health care liability insurance by insurance providers." *Nestlehutt*, 286 Ga. at 732. The need for predictability is especially acute for noneconomic *wrongful death* damages. The measure of such damages—the full intangible value of a life—is particularly vague, even compared to other kinds of damages. *See Gregory v. Chohan*, 670 S.W.3d 546, 558 (Tex. 2023) (describing "plac[ing] a value on human life" as "an even more nebulous and speculative task than monetizing mental anguish and loss of companionship").

O.C.G.A. § 51-13-1 thus promotes "predictability" by narrowing the range of possible medical malpractice judgments when a claim arises. That purpose is still served even if the statute's reach is limited to wrongful death claims. To the extent that this limited reach requires word-by-word analysis, it requires no addition or "rewriting." 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." O.C.G.A. § 51-13-1(b) (strike-through added to show deletion). That comports with *Nestlehutt*, *Turner*, the statute's severability clause,

and the General Assembly's overall intent. Plaintiffs' severability argument shows no error.

## IV. Capping wrongful death damages does not violate Georgia's jury trial right.

Plaintiffs next argue that capping wrongful death damages violates their right to trial by jury. [Plfs.' Br. at 25-37.] But Plaintiffs mostly avoid the framework demanded by this Court, misconstruing the nature of the wrongful death claim in the process. The trial court correctly declined to find a violation of the jury trial right.

### A. The framework for evaluating Georgia's jury trial right under *Nestlehutt* is "claim- and remedy-specific."

Analyzing the relationship of the jury trial right and statutory damages caps starts with *Nestlehutt*, as clarified by *Taylor* and *Turner*. In *Nestlehutt*, this Court explained that the right to trial by jury is limited "to cases as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798." 286 Ga. at 733; *see also Taylor*, 316 Ga. at 58-59 ("Because Georgia's constitutional jury trial right protects only those rights to a jury trial that existed in Georgia in 1798, to determine whether a party has a right to a jury trial for a particular claim, we must determine whether such a claim existed and was decided by a jury in Georgia in 1798.").

Under this framework, if the "type of claim at issue in the case" was subject to jury decision in 1798, "our Constitution's right to a trial by jury applies in the same way the right applied in 1798." *Taylor*, 316 Ga. at 45, 77, 81. "For other types of claims, the right does not attach," as the creation of statutory remedies "that did not exist before 1798" does not mean that those claims and remedies "automatically come with a constitutional right to a trial by jury." *Id.* at 58. When a remedy "is not of constitutional origin and is instead purely a creation of statute, the Georgia Constitution's jury-trial right does not prevent the General Assembly from modifying that remedy—including by restricting it." *Id.* at 81 n.48.

This framework is "claim- and remedy-specific." *Turner*, 917 S.E.2d at 700. To show that the jury trial right applies to a given claim, a plaintiff must show two things: (1) that the plaintiff's "claims of liability against [the defendant] existed in Georgia in 1798"; and (2) "that the kind of damages [the plaintiff sought] were within the scope of [the plaintiff's] right to a jury trial on that claim." *Taylor*, 316 Ga. at 59. A plaintiff must demonstrate *both* components, as damages awarded for claims which existed before 1798 may still be subject to statutory caps if the kind of

damages awarded for that claim is more recent. In *Taylor*, for example, the plaintiff showed that both her underlying claim (premises liability) and claims for punitive damages were decided by Georgia juries before 1798. *Id.* at 45, 63-70. But, historically, punitive damages were based only on *intentional* misconduct. The plaintiff in *Taylor* had only sought punitive damages based on an "entire want of care," which juries did not award until the General Assembly later created that recovery by statute. *Id.* at 55, 71-74, 77. So, because the plaintiff could not show that the jury trial right included "the kind of punitive damages she sought," this Court held that those damages could be capped. *Id.* at 77, 81.

### B. Charles Clark's wrongful death claim did not exist in 1798 as a cause of action or kind of damages.

Applying that framework here, Plaintiffs can neither show that Charles Clark's wrongful death claim was decided by Georgia juries in 1798 nor that such juries awarded the kind of damages he sought. They cannot do so because wrongful death claims did not exist in Georgia in 1798. As Georgia courts have explained for almost a century, "there is no common law right to file a claim for wrongful death; the claim is entirely a statutory creation." *Tolbert v. Maner*, 271 Ga. 207, 208 (1999); *see also Edenfield v. Jackson*, 251 Ga. 491, 492 (1983) ("Creation of a cause of

action for wrongful death depends upon our statutes, for no such right existed at common law."); *Burns v. Brickle*, 106 Ga. App. 150, 152 (1962) (prior to wrongful death statutes, "the right to recover for the negligent homicide of a husband, wife, parent or child, did not exist" and statutes "establish liability for wrongful death where none existed before"); *Bloodworth v. Jones*, 191 Ga. 193, 194 (1940) (wrongful death statues "give a right which did not exist at common law"); *W. & Atlantic R. Co. v. Michael*, 175 Ga. 1, 165 S.E. 37, 43 (1932) ("These statutes of this state adopted and extended Lord Campbell's Act and its successors, and establish liability for wrongful death where none existed before."); *Engle v. Finch*, 165 Ga. 131, 139 S.E. 868, 868 (1927) ("At the common law . . . a widow or child could not recover for the homicide of the husband or parent, and the husband could not recover for the homicide of his wife.").

The history of wrongful death claims in Georgia does not begin until the mid-1800s, as explained by the thorough history recounted in the trial court's order. [*See* V26 – 150-52.] To summarize that history, Georgia adopted a wrongful death statute in 1850, seeking to "ameliorate the harshness and inequity of the common law." *Bibbs*, 304 Ga. at 70-71. Even then, that statute only allowed a decedent's *representative* to

maintain an action for the circumstances resulting in death, providing a claim and damages to a representative suing for damages as if the decedent had survived. *See id.*; Robert E. Cleary, Jr., *Eldridge's Georgia Wrongful Death Actions*, §§ 1.4, 1.6, 1.8 (4th ed. 2018) (noting implicit limit of damages under early statutes to that "which the decedent would have sustained had he survived as a totally disabled person").

The wrongful death claim Plaintiffs presented only emerged from another statute in 1861, creating a new cause of action that allowed a widow or child to "recover for the homicide of the husband or parent." *Bibbs*, 304 Ga. at 71-72. Departing from the prior scheme, this statute "eliminated any action vested in the legal representative of the decedent and vested the right of action in specific beneficiaries only," much like the modern statute. *See* Cleary, *supra*, § 1.9; *id.* § 1.3 (distinguishing "later Georgia acts" because "they vest a new cause of action in a specified individual or class of individuals without reference to the prior common law"); *see also Macon & W.R. Co. v. Johnson*, 38 Ga. 409, 433 (1868) (emphasizing statute's abandonment of prior use of legal representatives in favor of granting right of action only to survivors). And in 1878, the General Assembly codified the current measure of damages for wrongful

death: "the full value of the life of the deceased, as shown by the evidence." *Bibbs*, 304 Ga. at 72; *see also Engle*, 139 S.E. at 869. *Compare* O.C.G.A. § 51-4-2(a).

Thus, the wrongful death claim Plaintiffs asserted here did not exist in 1798, either as a claim or a kind of damages. The statute providing Plaintiffs' claim diverged from those of its underlying tort, requiring different, specific parties (survivors) to prove a different, specific harm (homicide). And the measure of damages here was not in place until 1878. So, the trial court correctly held that Plaintiffs' wrongful death claim was a post-1798 creation. Georgia's jury trial right does not forbid the legislature from modifying this "purely statutory" remedy, "including by restricting it." *Taylor*, 316 Ga. at 81 n.48.

Plaintiffs avoid this history by denying the independence of wrongful death claims, pointing at this Court's statements that wrongful death damages are "grounded in" and "much the same as" the estate's personal injury claim. [Plfs.' Br. at 26-28 (citing *Bibbs*, 304 Ga. at 73-74).] But *Bibbs* noted the crucial *differences* between these claims. Rather than providing a way for "the victim's *estate* to bring (or continue) a personal injury action," the wrongful death statute "allows the victim's

*spouse or children* to bring an independent action for wrongful death." *Bibbs*, 304 Ga. at 72 n.6. Thus, "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." *Id.* (quoting *Mays*, 306 Ga. App. at 306). And despite some similarities, there are "practical differences in the measure of damages for one who is deceased and one who is totally and permanently disabled." *Id.* at 74 n.7.

So, the right to recover for wrongful death "is a separate cause of action from the right to recover for personal injuries of the plaintiff and not merely an additional element of damages." *Burns*, 106 Ga. App. at 152 (1962). Plaintiffs' rejection of this premise mirrors the Court of Appeals' rationale in *Turner*, which found *Nestlehutt* controlling by folding wrongful death claims into the underlying personal injury claim. *See Med. Ctr. of Cent. Ga., Inc. v. Turner*, 372 Ga. App. 644, 654 (2024). But this Court *reversed* that holding, based on the necessary premise that wrongful death damages are different from those the estate recovered here. *See Turner*, 917 S.E.2d at 699-700. Here again, Plaintiffs' arguments cannot be reconciled with precedent.

*Cross v. Guthery* (cited in *Nestlehutt*) does not demonstrate that the modern wrongful death action existed at common law. To be sure, that 1794 case involved a malpractice suit brought by a husband after his wife's death. *See Nestlehutt*, 286 Ga. at 734-35 (citing *Cross v. Guthery*, 2 Root 90 (Conn. Super. Ct. 1794)). But the suit did not seek recovery *for* the wife's death. The damages there were based on (a) the wife's pain and suffering ("languish[ing] for about three hours"); (b) the defendant's breach of a promise *to the husband* to perform the operation skillfully; (c) *the husband's* "great cost and expense"; and (d) *the husband's* loss of consortium. 2 Root at 90. *Cross* does not show a common-law jury granting damages for the full, intangible value of a decedent's life, like Charles Clark recovered here.

Alternatively, Plaintiffs argue that "wrongful death" claims existed at common law based on the archaic "crown merger" rule. [Plfs. Br. at 29-31.] But this theory would have made wrongful death statutes unnecessary. If the claim already existed, why would the General Assembly create a new remedy to allow for a spouse or child to recover for a homicide? *See City of Atlanta v. City of College Park*, 292 Ga. 741, 744 (2013) (explaining presumption that statutes are "enacted by the

legislature with full knowledge of the condition of the law and with reference to it," including common law). Regardless, Plaintiffs' discussion does not show that the *kind of damages* Charles Clark recovered existed under this scheme. Even to the extent this doctrine contemplated some form of "reparation" for the "private wrong" of a homicide, *see Shields v. Yonge*, 15 Ga. 349, 351-52 (1854), how was that reparation measured? Plaintiffs do not explain, let alone show, that it was by determining the "full value" of the decedent's life.

*Shields* likewise fails to show that modern wrongful death damages were contemplated at common law. *Shields* involved a suit by a father, following the death of his son, for the *loss of services* of his son *as a servant*. *See Shields*, 15 Ga. at 354, 356-57 (discussing case in terms of "the manslaughter of a man's servant"). At most, then, *Shields* suggests a common-law action for the loss of a *surviving plaintiff's* interest in the work of a *servant* who is killed by another's negligence. This is not a recovery by surviving family members for the value of the decedent's life *to the decedent*. *See Brock v. Wedincamp*, 253 Ga. App. 275, 280-81 (2002) (explaining that wrongful death damages "are measured from the decedent's point of view," not by the survivor's "loss from [the decedent's]

absence"). That recovery was only provided for in 1878, well after the key date under *Nestlehutt*'s framework. *Bibbs*, 304 Ga. at 72; *Engle*, 139 S.E. at 868-69. Plaintiffs show no violation of the jury trial right.

### C. Plaintiffs' arguments for altering the Court's historical framework are unavailing.

Plaintiffs argue that the Court should change the key date for the *Nestlehutt* framework. But as this Court explained in *Taylor*, the 1798 cutoff is "well-settled." 316 Ga. at 56. "For almost 175 years, this Court has consistently interpreted the Georgia Constitution's right to a jury trial as meaning that the people of this State . . . are entitled to the trial by jury, as it was used in the State prior to the Constitution of 1798." *Id.* (citation modified). So, the trial court's treatment of the 1798 Constitution as "the only one that mattered," [Plfs.' Br. at 34], was not error; it was fidelity to this Court's holdings.

Plaintiffs give no good reason for this Court to overturn 175 years of consistent interpretation. In fact, *Taylor* noted several of the points Plaintiffs offer, including the removal of the "as heretofore used in this State" language in Georgia's 1868 Constitution and the jury right's absence in the 1861 and 1865 Constitutions. *See Taylor*, 316 Ga. at 56-57 & nn. 18-19. Yet the Court stood by the framework's use of 1798 anyway,

with no member of this Court taking these points as a reason to move the key date *forward*. Rather, the potential resolutions to this "mystery" contemplated pushing the key date *backwards*. The only alternatives this Court suggested were dates of *earlier* constitutions. *Id.* at 57 n.19 (contemplating 1777 and 1789 Constitutions). Justice Ellington's dissent argued that the correct date was 1777, when Georgia's first constitution was adopted. *Id.* at 106-07 (Ellington, J., dissenting in part, concurring in judgment only in part). Plaintiffs offer no good reason for this Court to fully invert its thinking.

Pinning the right's scope to its common-law understanding aligns with the Court's presumption of interpretive continuity. Courts presume that a constitutional provision "retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution." *Elliott v. State*, 305 Ga. 179, 182-83 (2019). It similarly presumes that provisions "readopted without material change in multiple constitutions" carry forward "consistent and definitive construction[s]" placed on them by the judiciary. *Id.* at 184; *see also Olevik v. State*, 302 Ga. 228, 236 (2017) ("When the framers of our Constitution considered language that had

already been definitively interpreted and kept it without material alteration, they are strongly presumed to have kept with the text its definitive interpretation."). Thus, the regular readoption of the jury trial right across "almost every Georgia Constitution since 1777, with very similar language," *Taylor*, 316 Ga. at 56-57, indicates that the provision carries forward the meaning from its original adoption, with its scope defined by the right's use at common law. *See Kemp v. Gonzalez*, 310 Ga. 104, 108 (2020) (older interpretations of constitutional provision controlled despite some language changing in later constitutions because relevant language was "consistent with" prior versions). Nothing in the consistent interpretation of Georgia's jury trial right warrants altering the scope of the right from its common-law understanding.

## V. Capping wrongful death damages does not violate equal protection.

Plaintiffs also argue that a cap on wrongful death damages, but not other kinds of noneconomic damages, would violate equal protection. [Plfs.' Br. at 37-41.] Their analysis misunderstands the General Assembly's intent, as well as rational basis review more broadly.

As an initial point, the usual equal protection analysis is a poor fit here. The General Assembly did not draw the classification Plaintiffs

suggest. *This Court* created that classification through its interpretation of the jury trial right in *Nestlehutt*, declaring that the "application of O.C.G.A. § 51-13-1's caps" to some noneconomic damages was unconstitutional. *Turner*, 917 S.E.2d at 700. Attacking the General Assembly's basis for a distinction it did not draw makes little sense.

In any event, Plaintiffs fail to show any equal protection violation in applying the cap only to wrongful death damages. Because the classification here is subject only to rational basis review, Plaintiffs had to show both (1) "that they are treated differently than similarly situated individuals" and (2) "that there is no rational basis for such different treatment." *Taylor*, 316 Ga. at 84. In doing so, Plaintiffs were required to "negate every conceivable basis that might support" the classification, as a statute is to be upheld under rational basis review if "under any conceivable set of facts" the statute bears a rational relationship to legitimate government objectives. *Id*. at 85.

Charles Clark is *not* similarly situated to plaintiffs seeking other forms of noneconomic damages. "[C]ivil litigants are considered similarly situated only to others litigating the same cause of action." *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 274 (2008). As discussed, wrongful

death is *not* the same cause of action as the one at issue in *Nestlehutt*; it is a separate cause of action asserted by a separate kind of plaintiff. *Bibbs*, 304 Ga. at 72 n.6; *Burns*, 106 Ga. App. at 152.[5] Nor did his claim seek the same damages—other forms of noneconomic damages might have existed at common law, but wrongful death's "full value of the life" damages were created by statute. Plaintiffs thus only challenge the implementation of different rules for different causes of action, a situation where this Court consistently rejects equal protection challenges. *See Nichols v. Gross*, 282 Ga. 811, 813-14 (2007) (statute of repose did not irrationally distinguish medical malpractice from other form of professional malpractice).

Moreover, there is an inherent dissimilarity between claims by living patients and claims by survivors regarding a deceased patient: death, and the ensuing end of pain and suffering. Even as it noted potential for overlap, *Bibbs* explained that there are "practical

[5] Plaintiffs' suggestion of a post-*Nestlehutt* subclass of plaintiffs who have a wrongful death claim "joined with pain and suffering or consortium claims" again ignores wrongful death's distinctness. [Plfs.' Br. at 38.] Charles Clark's wrongful death claim was *not* joined with a pain and suffering claim; that claim belonged solely to the estate. *See Blackstone*, 282 Ga. App. at 518 (Barnes, J., concurring) ("While the claim for pain and suffering by the decedent before his death belongs to the estate, the wrongful death action does not belong to the estate.").

differences in the measure of damages" for a deceased person and a significantly injured one, including "one who is totally and permanently disabled." 305 Ga. at 74 n.7. A person injured (but not killed) by malpractice may be entitled to recover long-term care expenses or damages for "certain [additional] elements of pain and suffering." *Id*. Similarly, this Court cannot "say as a as a matter of law that there is no difference in value between living in a permanent coma and not living at all." *Id*. at 81. Moreover, a wrongful death action replaces compensation for future pain and suffering with a different measure of damages which some courts have called punitive, rather than compensatory. *Id*. at 74 n.7, 80. So, when it comes to tort remedies, death is, in fact, different.

At any rate, there is a conceivable basis for treating recoveries for wrongful death differently than other forms of noneconomic damages, as the trial court found. Plaintiffs' arguments confuse the assessment of an expressed *classification* with a court's ability to consider unexpressed *rationales* for that classification. Courts are *not* limited to a legislature's stated reasons; the statute survives if there is any *conceivable* basis for it. Put differently, a party only shows an equal protection violation if "the legislative facts on which the classification is apparently based could not

reasonably be conceived to be true by the government decisionmaker." *City of Atlanta v. Watson*, 267 Ga. 185, 188-89 (1996) (finding error in equal protection analysis which "end[ed] its inquiry" without "examining other justifications supported by the record"); *see also Taylor*, 316 Ga. at 85 (affirming punitive damages cap based on what General Assembly "*could* have concluded") (emphasis added).

As discussed above regarding Plaintiffs' severability argument, the General Assembly could conceivably find that limiting wrongful death damages serves the purpose of limiting medical malpractice payouts, thus promoting the affordability of liability insurance for healthcare providers. And it could conceivably determine that a cap balances the uncertainty of a highly-discretionary measure of damages against the desire to provide a remedy for wrongful death. *See Taylor*, 316 Ga. at 85 (rejecting equal protection challenge to punitive damages cap). That the statute now may only partially address the General Assembly's objective is immaterial. *See Deen v. Stevens*, 287 Ga. 597, 605 (2010) (legislature "is lawfully permitted to fashion a partial solution to a far more general problem" and advance proper goals "however incrementally"). It makes no sense to claim that the General Assembly could *only* intend an all-or-

nothing approach to controlling runaway tort liability. The trial court correctly rejected Plaintiffs' equal protection challenge.

## VI. The Court should overrule *Nestlehutt*.

There is an implicit assumption in Plaintiffs' arguments: that *Nestlehutt*'s holding was correct. If *Nestlehutt* is wrong, then (1) there is no jury-trial-right violation; (2) there is no need to sever differing aspects of the statute; and (3) there is no classification between wrongful death damages and other noneconomic damages.

*Nestlehutt* was (and is) wrong. It erroneously morphs the procedural right to have a jury decide facts into a substantive guarantee of a particular legal result. This is a point one member of this Court has made twice, noting that *Nestlehutt* "appears inconsistent with [the] traditional understanding of [the jury trial] right" and suggesting that the Court should "take a careful look at *Nestlehutt* in an appropriate case." *Turner*, 917 S.E.2d at 701 (Colvin, J., concurring); *Taylor*, 316 Ga. at 99-104 (Colvin, J., concurring). And the appellants in cases docketed to the same term as this case, raising almost identical issues to those here, have expressly asked this Court to overrule *Nestlehutt*. *See* Brief of Appellant, *Luis Cayamcela, M.D. v. Advocacy Trust, LLC, et al.*, No.

S26A0229, at 18; Brief of Appellant, *Hospitalist Servs. of Ga., P.C. v. Advocacy Trust, LLC, et al.*, No. S26A0242, at 12-36. Defendants join them in asking the Court to overrule *Nestlehutt*.[6]

*Nestlehutt*'s belief that a right to a jury trial entitles a plaintiff to "the full measure of damages . . . as determined by the jury," such that a cap "nullifies the jury's findings," 286 Ga. at 734-35, misstates the role of both caps and the jury. *See, e.g., Horton v. Oregon Health & Sci. Univ.*, 376 P.3d 998, 1041 (Or. 2016) (explaining how "it does not follow . . . that a trier of fact has free rein to determine the amount of a party's damages, unconstrained by legal limits," and a damages cap "does not reflect a legislative attempt to determine a fact in an individual case"). Moreover, *Nestlehutt*'s reasoning conflicts with the overwhelming majority of states to consider the issue, and its rationale for a divergent approach overstates the meaning of an "inviolate" jury trial right. *See Siebert v. Okun*, 485 P.3d 1265, 1277-78 & n.3 (N.M. 2021) (surveying nationwide authority and finding 16 jurisdictions upholding damages caps despite "inviolate" constitutional right to jury trial).

[6] Defendants asserted below that *Nestlehutt* should be overruled. [See V20 – 91-92; V26 – 33.]

Thus, *Nestlehutt*'s reasoning is unsound, tilting the "most important factor" against adhering to stare decisis. *See Olevik*, 302 Ga. at 245. This factor "becomes even more critical" when discussing constitutional decisions, as they are harder "for the legislative process to correct." *Id.* In other words, "the more wrong a prior precedent got the Constitution, the less room there is for the other factors to preserve it." *Id*. *Nestlehutt* got the nature of the jury trial right very wrong, weighing heavily in favor of overruling it.

The other stare decisis factors—the age of the precedent, reliance interests, and workability—do not bolster *Nestlehutt*'s preservation. *Nestlehutt* is 15 years old, and this Court regularly overrules older cases. *See id.* (noting overruling of cases 19 to 29 years old). *Nestlehutt*'s youth also suggests weaker reliance interests. *See Cook v. State*, 313 Ga. 471, 488-91 (2022) (discussing how age and reliance interests can be "intertwined"). It has had little time to entrench itself, and it is cited almost as much for boilerplate language regarding standards of review or retroactivity as for its constitutional analysis. And the only two cases which might have entrenched *Nestlehutt* have either used its framework to *uphold* a statutory damages cap (*Taylor*) or explained how its

constitutional holding was limited to its factual context (*Turner*). Finally, *Nestlehutt*'s granular test is unworkable in the long term, tying up significant resources in historical research in order to make a judgment call about whether modern claims and damages sufficiently analogize to common law claims and remedies. In sum, stare decisis should not prevent this Court from setting *Nestlehutt* aside.

## CONCLUSION

The Court should affirm the trial court's decision granting Defendants' motion to remit and amend and its entry of an amended judgment consistent with the limitations of O.C.G.A. § 51-13-1.

Respectfully submitted this 8th day of December, 2025.

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

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## 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:

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This 8th day of December, 2025.

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EXHIBIT A

SUPREME COURT OF GEORGIA
Case No. S26A0349

November 18, 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 appellee in the above case is granted until December 08, 2025.

A copy of this order **MUST** be attached as an exhibit to the document for which the appellee 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