IN THE SUPREME COURT
STATE OF GEORGIA

No. S22X1097

MICHELLE MCKINNEY, Individually, and as Administrator of The Estate of Lucille Dubose,

Appellant,

v.

GWINNETT OPERATIONS, LLC d/b/a LIFE CARE CENTER OF LAWRENCEVILLE, and LIFE CARE CENTERS OF AMERICA, INC.

Appellees.

BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE

James D. Meadows, President
Elissa B. Haynes, Chair
Anne Kaufold-Wiggins, Vice Chair
Philip Thompson, Vice Chair
Georgia Defense Lawyers Association
P.O. Box 67
Rossville, Georgia 30741
(706) 956-4848

Prepared By:

Elissa B. Haynes
Georgia Bar No. 804466
P. Michael Freed
Georgia Bar No. 061128
Freeman Mathis & Gary, LLP
100 Galleria Parkway, Suite 1600
Atlanta, Georgia 30339
(770) 818-0000
Elissa.Haynes@fmglaw.com
Michael.Freed@fmglaw.com

TABLE OF CONTENTS

STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (GDLA) submits this amicus brief in response to the Court's invitation[1]. The GDLA is an association of nearly 1,000 lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, strengthening the adversary system of jurisprudence in our courts, and otherwise promoting improvements in the administration of justice. Though its membership is diverse, GDLA members frequently represent individuals and businesses alike in various tort actions in which punitive damages are sought by plaintiffs.

The GDLA and its members share a common interest in ensuring basic principles of Georgia tort law are clearly defined and that the desire of plaintiffs to recover ever-increasing damages awards in tort lawsuits does not override the lawful intent and actions of the legislature. Additionally, the GDLA, its members, and their clients, share a common interest in ensuring that jury awards are not inflated and disproportionate through excessive punitive damages awards. The

[1] The GDLA is grateful for this Court's invitation to submit an amicus brief on this important issue and is likewise appreciative of the extension of time provided for it to do so. A copy of this Court's Order granting GDLA's request for an extension is attached as Exhibit A.

GDLA respectfully contends that Georgia's cap on punitive damages—for cases which do not involve product liability or torts where the defendant acted or failed to act with a specific intent to harm or while under the influence of alcohol or drugs—which has withstood the test of time for more than 35 years, is constitutional and should not be disturbed by this Court.

INTRODUCTION

The following questions were posed to amici in both the *Taylor* and *McKinney* matters: (1) Does the punitive damages cap in OCGA § 51-12-5.1(g) violate the Georgia Constitution, either facially or as applied? (2) What relevant causes of action existed and provided for punitive damages before the adoption of the Georgia constitutional right to a trial by jury, and how, if at all, does this answer inform the analysis of the constitutionality of OCGA § 51-12-5.1(g)? *See Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 733-737 (691 SE2d 218) (2010). July 18, 2022 Order at 1-2 (Case Nos. S22A1060; S22X1061; S22A1161; S22X1097).

Starting with the second question, no relevant causes of action both existed ***and*** provided for punitive damages before the adoption of the Georgia constitutional right to trial by jury. In fact, the historical record appears devoid of any cases from the pre-1798 common law in which punitive damages were

assessed in either premises liability or medical malpractice cases and Appellants are likewise unable to point to any.

As to the first question, Georgia's punitive damages cap does not violate the constitutional right to trial by jury, either facially or as applied. Appellants take a fractured approach to answering this question by first contending that causes of action for premises liability and medical malpractice existed by 1798 and then independently asserting that juries awarded punitive damages during the same timeframe. But the correct analysis here is whether Appellants have met their burden of proving that as of 1798, the common law recognized causes of action for premises liability and medical malpractice, ***and*** that punitive damages could be assessed against a defendant found liable ***for those particular causes of action***. Appellants have failed to meet their burden and have therefore failed to establish a facial or as applied constitutional violation.

When the Georgia legislature established caps on punitive damages in 1987 in an effort to mitigate excessive awards meant not to compensate a plaintiff but to deter and punish a defendant, attacks from the plaintiff's bar began almost immediately on numerous fronts. Those attacks have traditionally included arguments such as the arguments made here, that the cap violates a plaintiffs constitutionally protected right to trial by jury, the doctrine of separation of powers, and equal protection of the law under Georgia's Constitution. The resumed

attacks on the constitutionality of Georgia's punitive damages statute—and in these two cases, Georgia's cap on punitive damages—are doomed to fail, just as the initial attacks failed thirty years ago. Georgia's punitive damages cap does not infringe upon a plaintiff's constitutionally protected right to a jury trial, nor does it violate the principles of separation of power or equal protection.

ARGUMENT AND CITATION TO AUTHORITY

I. No Relevant Causes of Action Existed *and* Provided for Punitive Damages Before the Adoption of the Georgia Constitutional Right to a Jury Trial in 1798

A. The contemporary concept of punitive damages—meant *solely* to punish, penalize, or deter—was not well-established at common law

As Appellees have demonstrated, the modern-day concept of punitive damages did not exist in the pre-1798 common law.[2] *See* David M. Gold, *Trial by Jury and Statutory Caps on Punitive Damages: Lessons for Alabama from Ohio's Constitutional History*, 31 Cumb. L. Rev. 287, 299 (2001) ("[I]t is still not clear when true punitive damages became well established in the English common law."). The "exemplary damages" that were assessed in a narrow category of cases were not purely punitive in nature, but rather, served a compensatory function. *See*

[2] The GDLA does not address this issue at length here but endorses positions taken by the respective Appellees.

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages As Punishment for Individual, Private Wrongs,* 87 Minn. L. Rev. 583, 616 (2003) ("Nineteenth-century American judges and commentators made frequent references to the compensatory elements and origins of punitive damages."); John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation,* 55 DePaul L. Rev. 435, 442 (2006) ("Nowhere does [Blackstone][3] suggest that these exemplary damages are different in kind from 'ordinary' damage awards, or that they are awarded for public rather than private purposes. Quite the opposite, they form part of the redress to which the victim is entitled because of the nature of the tortfeasor's mistreatment of the victim."). Accordingly, they were not considered a separate category of damages. *Goldberg*, 55 DePaul L. Rev. at 451 ("Blackstone recognized the propriety of 'exemplary' damages, but did not conceptualize them as a separate 'head' of damages.").

B. Common law courts did not allow exemplary damages for all causes of action in tort

Scholars generally agree that the common law concept of exemplary damages stems from two 1763 cases. "The English doctrine of exemplary damages originated as a means to punish the abuse of governmental power in the

[3] This Court has recognized Blackstone's *Commentaries on the Law of England* as authoritative on the right to a trial by jury as of 1798. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt,* 286 Ga. 731, 733 (2010).

1763 companion cases *Wilkes v. Wood* [98 Eng. Rep. 489 (K.B. 1763)] and *Huckle v. Money* [95 Eng. Rep. 768 (K.B. 1763)]." Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 Md. L. Rev. 461, 469 (2005). Those cases "arose out of the government's prosecution of the publishers and printers of The North Briton, a newspaper that had been critical of the government."[4] *Id.*; *see also* Bradley Raboin, *Punish the Crown, but Protect the Government: A Comparative Analysis of State Tort Liability for Exemplary Damages in England and Punitive Damages in the United States*, 24 Cardozo J. Int'l & Comp. L. 261, 265–66 (2016) ("The 1763 cases, *Wilkes v. Wood* and *Huckle v. Money*, stemmed from the oppressive conduct of government agents in suppressing *The North Briton*, a newspaper critical of King George II's Secretary, Lord Halifax.") (internal quotations omitted). "Lord Justice Camden coined the term 'exemplary damages' to describe a large award where the actual damage was slight. His choice of the word 'exemplary' reflects the role the remedy played in moderating abuses of power." *Rustad*, at 470. "While the remedy originated to punish misdeeds by government officials, it soon

[4] "In *Wilkes*, John Wilkes, the publisher of The North Briton and a member of Parliament, sued the Secretary of State for trespass, after the Secretary issued a general warrant for the search of Wilkes's house. *Huckle* involved a lower-level employee of the paper who was arrested and detained under the general warrant." *Id.* at 469-70.

evolved to punish wealthy elites who abused their position of power by breaching mores of the local community." *Id.* at 470-71.

"More generally, the exemplary damages remedy served to protect the social order by punishing conduct breaching normative boundaries of acceptable behavior considered critical to a community's survival." *Id.* at 471. One such example is seduction cases. *Id.* at 472. Similarly, one of "[t]he first American exemplary damages award grew out of an aggravated breach of promise to marry case." *Id.* (citing *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791)). That same year, exemplary damages were awarded in "a case where the defendant debauched the plaintiff's daughter." *Id.* at 473 (citing *Stout v. Prall*, 1 N.J.L. 79 (1791)). Another early example involved a defendant who "put something in the plaintiff's drink which caused the plaintiff great pain" before a duel to settle an argument between the two. William B. Hicks, *Vandevender v. Sheetz, Inc.: A Closer Look at the Framework for Review of Punitive Damages Awards*, 101 W. Va. L. Rev. 523, 563 n. 34 (1999) (citing *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (1784)). "In cases such as these, exemplary damages exacted punishment against those social deviants who violated social norms, but not necessarily the criminal law, and served as a remedy designed to keep the community peace as an alternative to dueling or self-help." *Rustad*, at 475.

These late-eighteenth-century cases demonstrate that the scope of cases in which exemplary damages could be assessed at common law was narrow. They were limited to addressing abuses of power and deviant breaches of social norms. Courts sometimes justified exemplary awards in cases where the plaintiff's compensatory damages were slight, demonstrating that such awards were not purely punitive during this era but often served a compensatory purpose.[5] What these cases do *not* show, however, is that punitive damages—especially as the law conceives them today as a purely punitive civil fine divorced from compensatory

[5] "At this period in time, punitive damages served both to punish the defendant, and compensate the plaintiff. Punitive damages' role as a deterrent was not well established until the early eighteenth century when their compensatory function began to decrease." William B. Hicks, *Vandevender v. Sheetz, Inc.: A Closer Look at the Framework for Review of Punitive Damages Awards*, 101 W. Va. L. Rev. 523, 527 (1999); *see also Goldberg*, 55 DePaul L. Rev. at 460 (*Huckle* is not best read as creating a separate category of 'exemplary' or 'punitive' damages that stands apart from the category of 'compensatory' or 'make-whole' damages. Instead it suggests (in keeping with Blackstone) that the jury ought to set damages at an amount that will constitute a satisfaction or vindication of the plaintiff's rights, which in turn requires them to adjust their damages award in light of their assessment of the nature of the wrong committed by the defendant against the plaintiff."); *Goldberg*, 55 DePaul L. Rev. at 460-61 ("[W]hat 'appeared to them at the trial' [in *Huckle*] was a wrong committed against a private citizen by agents of an entity that enjoyed a unique claim of authority to exercise power over citizens, and that had explicitly disavowed well-established limits on that authority. In other words, the jury acted appropriately 'in giving exemplary damages' because a relatively large award accurately reflected the enormity of the wrong that the victim had suffered at the hands of his government captors.").

damages—were generally available in all types of tort cases, including personal injury cases arising from alleged negligence.

The U.S. Supreme Court's decision in *Day v. Woodworth*, 54 U.S. 363 (1851), does not establish otherwise. *Day* involved a claim for trespass arising from the defendants' removal of a portion of the plaintiff's milldam. *Id.* at 369. One of the issues reviewed by the Court was a jury instruction providing that if the jury found "that the defendants had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then the jury would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, but not any thing for counsel-fees or extra compensation to engineers." *Id.* at 370. The issue before the Court, thus, was the plaintiff's right to recover attorneys' fees and consequential damages.

Nonetheless, the Court commented that it "is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff." *Id.* at 371. But because the case did not involve any claim for pure punitive or exemplary damages, the Court's comments were dicta.

Several commentators have noted this.[6] And the Court itself has downplayed the precedential value of *Day's* discussion of punitive damages. *Smith v. Wade*, 461 U.S. 30, 41 n. 9 (1983) ("[T]he *Day* case did not present any issue of punitive damages; the Court discussed them merely as a sidelight to the costs-and-fees issue presented.").

Appellants seize upon *Day's* dicta by stretching it to the conclusion that the common law, as incorporated into Georgia law, recognized the right to modern-day punitive damages in all tort cases. (Taylor's Principal Br. at 15; Taylor's Reply Br. at 1; McKinney's Principal Br. at 12-13). It did not. The Court's nonbinding, overly generalized statement certainly does not answer the specific question presented here: whether the premises liability or medical malpractice claims provided for punitive damages before 1798.

On that question, the historical record appears devoid of any cases from the pre-1798 common law in which punitive damages were assessed in either premises

---

[6] *See* Joseph J. Solberg & Karen A. Hosack, *Punitive Damages After Philip Morris USA v. Williams: Has the Smoke Cleared?*, 18 J.L. Bus. & Eth. 73, 75 (2012); William B. Hicks, *Vandevender v. Sheetz, Inc.: A Closer Look at the Framework for Review of Punitive Damages Awards*, 101 W. Va. L. Rev. 523, 527–28 (1999); Mimi Bass Miller, *Torts-Punitive Damages: A New Finish on Punitive Damages. BMW of North America v. Gore*, 116 S. Ct. 1589 (1996), 19 U. Ark. Little Rock L.J. 519, 525–26 (1997); Forrest Campbell, *Bankers Life: Justice O'connor's Solution to the Jury's Standardless Discretion to Award Punitive Damages*, 24 Wake Forest L. Rev. 719, 743 (1989).

liability or medical malpractice cases. As evidence of that, Appellants are unable to point to any. Instead, they resort to a fragmented approach that should be rejected.

C. Appellants' fractured analysis should be rejected

Appellants' approach to answering this governing question is misdirected because they incorrectly treat the inquiry as an elemental one; if element A (the existence of a cause of action for premises liability and medical malpractice at common law) is satisfied, and element B (the existence or punitive damages at common law) is satisfied, then the standard is met. In this way, they improperly separate the question into two distinct inquiries and then combine the results to reach the desired conclusion.

To begin, they contend that causes of action for premises liability and medical malpractice existed by 1798. (Taylor's Principal Br. at 9-14; McKinney's Principal Br. at 9-10.) Then, independently, they assert that juries awarded punitive damages during the same timeframe. (Taylor's Principal Br. at 14-18; McKinney's Principal Br. at 10-13.) Merging those suppositions, they conclude:

> The Georgia Constitution preserves trial by jury as it existed in 1798; as of 1798, the common law recognized a premises liability claim by an invitee; and as of 1798, a jury decided the amount of punitive damages. With those elements established, the punitive damages cap violates [Appellants'] constitutional right to have the jury decide the amount of punitive damages in this premises liability action [and medical negligence action].

(Taylor's Principal Br. at 18; McKinney's Principal Br. at 10-13.)

The question the Court posed to the invited amici demonstrates the error in their approach. The determination of whether the statutory punitive damages cap violated their right to a trial by jury rests on their showing that, as of 1798, the common law recognized causes of action for premises liability and medical malpractice, ***and*** that punitive damages could be assessed against a defendant found liable ***for those causes of action***. They have failed to do so. Consequently, neither Appellant has established a violation here. *See S&S Towing & Recovery, Ltd. v. Charnota*, 309 Ga. 117, 119 (2020) ("Because all presumptions are in favor of the constitutionality of a statute, the burden is on the party claiming that the law is unconstitutional to prove it.").

Taylor's proffered justifications for this approach are equally misdirected. First, she contends that the U.S. Supreme Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009) "uses" the same approach. (Taylor Reply Br. at 3 n.5.) It does not. The question presented in *Townsend* was "whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure."[7] *Id.* at 407. The Court held that he could, based on its finding that "[h]istorically, punitive damage have been available *and awarded in*

[7] "A claim for maintenance and cure concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship." *Id.*

general maritime actions, including some in maintenance and cure." *Id.* (emphasis added); *see also id*. at 411-14 (examining historical cases in which punitive damages were assessed in claims arising under federal maritime law, including claims for maintenance and cure). The Court, in other words, found historical support for the notion that punitive damages were available at common law for the very claim at issue.[8] That is not the approach Appellants employ here.

Second, Taylor states that *Nesttlehutt* "does not reject this type of historical analysis." (Taylor's Reply Br. at 3 n.5.) While that may be true on its face, equally true is that *Nesttlehut* neither employed nor endorsed Appellants' approach. *Nesttlehut* did not deal with a statutory punitive damages cap but rather a cap on noneconomic damages[9] in medical malpractice cases. The Court's holding that the cap violated the right to a trial by jury guaranteed by the Georgia Constitution rested on its conclusion that "[n]oneconomic damages have long been recognized as an element of total damages in tort cases, including those involving medical negligence." *Nesttlehutt*, 286 Ga. at 735. The Court determined, in other words, that the compensatory damages due to a medical malpractice plaintiff encapsulated

---

[8] Regardless, the U.S. Supreme Court's analytical framework for determining whether claims under federal maritime law provide for punitive damages has no bearing on this Court's analysis of the Georgia constitutional right to a trial by jury issue here.

[9] The statutory definition of "noneconomic damages" did not include punitive damages. O.C.G.A. § 51-13-1(a)(4).

noneconomic damages. *Id.* at 735 ("[W]e conclude that at the time of the adoption of our Constitution of 1798, there did exist the common law right to a jury trial for claims involving the negligence of a health care provider, with an attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury.").

Punitive damages, by contrast, are not an element of a premises liability or medical malpractice plaintiff's compensatory damages, nor is there any evidence that they were at common law. In fact, they are not compensatory at all. *See* O.C.G.A. § 51-12-5.1(c) ("Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant."). Because of this distinction, the Court's reasoning in *Nesttlehut* cannot be paralleled here. And so, to the extent Appellants attempt to do so, their approach should be rejected.

II. As a Result, Georgia's Statutory Punitive Damages Cap Does Not Violate the Appellants' Constitutional Right to a Trial by Jury, Either Facially or as Applied

"[A]ll presumptions are in favor of the constitutionality of an Act of the legislature." *Sentinel Offender SVCS., LLC v. Glover*, 296 Ga. 315, 324 (2014) (quoting *JIG Real Estate, LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 490 (2011)). "[B]efore an Act of the legislature can be declared unconstitutional, the conflict between it and the fundamental law must be clear and palpable and this Court must be clearly satisfied of its unconstitutionality." *Id.*

"The right to trial by jury shall remain inviolate." Ga. Const. Art. I, Sec. 1, Par. XI(a). But that right 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." *Nesttlehutt*, 286 Ga. at 733. Determining whether the statutory cap on punitive damages violated Appellants' constitutional right to a trial by jury requires an examination of late eighteenth-century common law. *Id.*

As discussed above, purely punitive damages as conceived today were not an established, separate component of damages at common law. Consequently, O.C.G.A. § 51-12-5.1(g) does not facially violate the constitutional right to a jury trial.

As the parties mounting a facial challenge to the constitutionality of the statute, Appellants "can succeed only by establishing that no set of circumstances exists under which the statute would be valid, i.e., that the law is unconstitutional in all of its applications, or at least that the statute lacks a plainly legitimate sweep." *Sentinel Offender*, 296 Ga. at 324-25 (internal punctuation omitted). They have not done so. Appellants conflate the exemplary damages narrowly available at common law with modern-day punitive damages in effort to show that the latter was established as of 1798. They then misconstrue *Day* as acknowledging a common law right to punitive damages in all tort cases, and rely merely on the existence of causes of action for premises liability and medical

malpractice to argue that punitive damages were available for those claims. But their misguided attempts to stitch together these disparate concepts do not clearly and palpably establish a conflict between the statutory cap and the constitutional right to a jury trial. Their facial challenge, thus, fails.

Nor is the statutory punitive damages cap violative of the constitutional right to a jury trial as applied in the cases at bar. "An as-applied challenge addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party." *Major v. State*, 301 Ga. 147, 152 (2017) (internal quotations omitted). As with their facial challenge, the Appellants bear the burden of showing that the statute as applied here violates their right to a trial by jury. Again, they have not done so. As discussed above, Appellants have not shown that causes of action for premises liability or medical malpractice provided for punitive damages at common law. Consequently, their as-applied challenge fails.

It follows, then, that the General Assembly has the power to limit the amount of punitive damages awardable. *See State v. Mosley*, 263 Ga. 680, 681 (1993). "If punitive damages lawfully may be eliminated, as we held in *Teasley v. Mathis,* 243 Ga. 561, 255 S.E.2d 57 (1979) (constitutionality of elimination of exemplary damages under no-fault automobile insurance law is not violative of due process, equal protection, or right of access to courts), then they may be circumscribed, as in this Code section. OCGA § 51–12–5.1(g)." *Bagley v. Shortt*,

261 Ga. 762, 762 (1991). In *Moseley*, the plaintiffs alleged that the statutory requirement that 75% of any punitive damages award arising from product liability must be paid to the state violated their constitutional rights, including their right to a jury trial as guaranteed by the Georgia Constitution. *Moseley*, 263 Ga. at 681. This Court rejected the notion that "Art. 1, Sec. 1, Par. 11 prohibits the General Assembly from abrogating or circumscribing common law or statutory rights of action," holding that "that provision of the Constitution has no such effect." *Id.*

The same applies here. Because there was no common law right to punitive damages in premises liability or medical malpractice cases, the General Assembly may circumscribe the right to punitive damages in those cases. *See Teasley*, 243 Ga. at 563 ("The legislature, however, may modify or abrogate common law rights of action, as well as statutorily created rights.") (internal citations omitted); *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 541 (1993) ("We begin with the premise that there is no constitutional right to an award of punitive damages.").

III. Georgia's Statutory Punitive Damages Cap Does Not Violate the Separation of Powers Doctrine

The Georgia Constitution provides that "[t]he legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided." Ga. Const. Art. 1, § 2, ¶ 3. Appellants argue that Georgia's statutory cap on punitive damages violates the principle of

separation of powers by "usurp[ing] the judiciary's remittitur power and decid[ing] for itself, when punitive damages verdicts should or should not be reduced as excessive, and by how much." (Taylor's Principal Br. at 26). But Appellants seemingly disregard the key distinction between remittitur and the cap as each applies in a different set of circumstances. As the Virginia Supreme Court held when faced with a challenge to a statutory cap on damages in medical malpractice cases, "[r]emittitur . . . is utilized only after a court has determined that a party has not received a fair and proper jury trial. The cap, however, is applied only after a plaintiff has had the benefit of a proper jury trial." *Pulliam v. Coastal Emergency Services of Richmond, Inc.*, 257 Va. 1, 12 (Va. 1999).

"While the separation of powers is fundamental to our constitutional form of government, it does not follow that a complete separation is desirable or was intended. The three departments of government are not kept wholly separate in the Georgia Constitution." *Adams v. State*, 282 Ga. App. 819, 821 (2006). This Court has previously recognized, "[t]he General Assembly being the sovereign power in the state, while acting within the pale of its constitutional competency, it is the province of the Courts to interpret its mandates, and their duty to obey them, however absurd and unreasonable they may appear." *Fulwood v. Sivley*, 271 Ga. 248, 254 (quoting *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 194 (1848).

Just as the legislature, not the courts, has the power to define crimes, set sentencing guidelines, establish statutes of limitation and repose, and create new causes of action, so too, can the legislature define and limit punitive damages. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) ("[a]s in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards."). And while Appellants point this Court to other States which have found noneconomic damages caps to violate or be otherwise inconsistent with the separation of powers doctrine, there are States which have found otherwise. *See, e.g. Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 681 (N.C. 2002) (finding North Carolina's $250,000.00 cap on punitive damages did not violate the principle of separation of powers); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1056 (Alaska 2002) (holding noneconomic damages caps do not violate the separation of powers and finding cap different from remittitur "because it is a general alteration applied to all cases, and is not case-and-fact-specific like remittitur."); *Franklin v. Mazda Motor Corp.*, 704 F.Supp.1325, 1336 (Md. 1989) ("the power of the legislature to abolish the common law necessarily includes the power to set reasonable limits on recoverable damages in causes of action the legislature chooses to recognize.")

Further, our legislature has made other policy-based determinations surrounding reductions of damages awards which have been deemed

constitutional. *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 364 (2012) (holding mandatory apportionment between property owner and criminal assailant under O.C.G.A. § 51-12-33 was constitutional, despite fact that apportionment to the criminal assailant would be taking away a portion of Plaintiff's financial recovery); O.C.G.A. § 51-12-33(a) (Georgia's comparative negligence statute which instructs jury to determine the percentage of fault of the plaintiff before judge reduces the amount of damages awarded to the plaintiff in proportion to plaintiff's percentage of fault); O.C.G.A. § 51-12-12 (Georgia's remittitur statute which allows the trial court to order a new trial as to damages only when a jury's award of damages is "clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence.").

Nothing within O.C.G.A. § 51-12-5.1(g) infringes upon a trial court's authority to grant a new trial or a remittitur or otherwise impermissibly divests the judiciary of the jurisdiction granted to it by our Constitution.

IV. Georgia's Statutory Punitive Damages Cap Does Not Violate the Georgia Constitution's Mandate of Impartial, Complete, and Equal Protection of the Laws

Appellant Jo-Ann Taylor argues that Georgia's punitive damages cap violates the Georgia Constitution's mandate of equal protection of the laws because it "provide[s] certain persons with only *miniscule* protection of the law provided to similarly situated others[,]" fails to contain an "index to inflation or

other mechanism for adjusting the cap[,]" and because it "lacks a rational basis and is not grounded on any finding that is rationally related to any legitimate interest." (Taylor's Principal Br. at 28-29).

As this Court has repeatedly recognized, there is no constitutional right to an award of punitive damages. *Mack Trucks*, 263 Ga. at 541; *Teasley*, 561 Ga. at 561; *Kelly v. Hall*, 191 Ga. 470, 472 (1941). The purpose behind Georgia's punitive damages statute is to punish and deter the defendant in a tort action. *Mack Trucks*, 263 Ga. at 542. O.C.G.A. § 51-12-5.1(c) unequivocally notes that "[p]unitive damages shall not be awarded as compensation to a plaintiff but solely to punish, penalize, or deter a defendant." Subsections (e)-(g) then provide instruction on how punitive damages shall be applied in certain tort cases such as product liability cases, cases where it is found that the defendant acted, or failed to act, with the specific intent to harm or while under the influence of drugs or alcohol, and then cases which do not involve product liability or a specific intent to harm/a defendant who acted or failed to act wile under the influence of drugs or alcohol. This Court has further recognized that "subsections (e), (f) and (g) constitute a consistent statutory scheme for the regulation of punitive damages." *Mack Trucks*, 263 Ga. at 542. In cases such as the two currently before this Court, "the legislature has determined that, absent specific intent to harm, there are public policy reasons

which dictate that a cap should be placed on punitive damages" and "the legislature may lawfully circumscribe punitive damages[.]" *Id*. at 543; *Bagley*, 261 Ga. at 762.

Despite having the burden of proof to establish Georgia's punitive damages cap lacks a rational relationship to a legitimate interest, Appellant merely argue that the cap is "arbitrary and thus unconstitutional." (Taylor's Principal Br. at 30). It is true that Georgia's punitive damages statute treats plaintiffs in various tort actions differently. But as this Court has recognized, "all *similarly situated* plaintiffs and defendants, including those in product liability actions, are treated equally by the [punitive damages] statute." *Mack Trucks*, 263 Ga. at 543. Further, the "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative objective." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88, n. 32 (1978) (quoting *Silver v. Silver*, 280 U.S. 117, 112 (1929)). Here, Appellants are not a member of a suspect class and thus are not entitled to strict scrutiny.[10] And under the rational basis test, "the court will uphold [a] statute if, under any

[10] Taylor's footnote suggests that this Court should apply the strict scrutiny test. (Taylor's Principal Br. at p. 30, n. 25). In support of this argument, Taylor simply states that the right to a trial by jury is a fundamental constitutional right. *Id.* But as previously noted, Georgia's cap on punitive damages does not eliminate or infringe upon Taylor or McKinney's fundamental right to a fair trial by jury. Rather, the cap is only applied *after* a plaintiff has had the benefit of a proper jury trial. The strict scrutiny test should not apply here.

conceivable set of facts, the classification bears a rational relationship to a legitimate end of government not prohibited by the Constitution." *Craven v. Lowndes County Hosp. Auth.*, 263 Ga. 657, 659 (1993). The legislature's intent and purpose here is to "punish the defendant, and not to provide compensation or . . . a windfall to an individual plaintiff." *Mack Trucks*, 263 Ga. at 542.

Lastly, Taylor's argument that the absence of an index to inflation amounts to an equal protection violation is likewise without merit. (Taylor's Principal Br. at 29). This argument is solely about the amount of damages that can be pursued, as referenced by Taylor's comment that $250,0000 at the time Georgia's punitive damages statute was enacted is now valued at $657,140.29 (*Id*.) But because punitive damages are not awarded as compensation to a plaintiff but **solely** to punish, penalize, and deter a defendant, Taylor's inflation argument is unpersuasive. Additionally,

> The role of "changed circumstances" in constitutional analysis is fraught with institutional tension and analytical difficulties. "It is not . . . easy for courts to step in and say that was rational in the past has been made irrational by the passage of time, change of circumstances, or the availability of new knowledge. Nor should it be. Too many issues of line drawing make judicial decisions hazardous. Precisely at what point does a court say that what once made sense no longer has any rational basis? What degree of legislative action, or of conscious inaction, is needed when that (uncertain) point is reached? These difficulties—and many others—counsel restraint, and do so powerfully."

Chan v. Curran, 237 Cal.App.4th 601, 613 (Cal. Ct. App. 2015) (citing *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (con. opn. of Calabresi, J.); *see*

generally Ponomarenko, *Changed Circumstances and Judicial Review*, 89 N.Y.U. L.Rev. 1419 (2014).

CONCLUSION

Georgia's punitive damages cap does not impermissibly infringe upon Appellants' constitutionally protected right to trial by jury, nor does it violate the separation of powers doctrine or equal protection. As such, the GDLA respectfully requests that this Court uphold the constitutionality of O.C.G.A. § 51-12-5.1(g).

Respectfully submitted this 12th day of September, 2022

GEORGIA DEFENSE LAWYERS ASSOCIATION

James D. Meadows, President
Elissa B. Haynes, Chair
Anne Kaufold-Wiggins, Vice Chair
Philip Thompson, Vice Chair
Georgia Defense Lawyers Association
P.O. Box 67
Rossville, Georgia 30741
(706) 956-4848

FREEMAN MATHIS & GARY, LLP

/s/ Elissa B. Haynes
Elissa B. Haynes
Georgia Bar No. 804466
P. Michael Freed
Georgia Bar No. 061128
100 Galleria Parkway, Suite 1600
(770) 818-0000
elissa.haynes@fmglaw.com
Michael.freed@fmglaw.com

On Behalf of the Georgia Defense Lawyers Association

EXHIBIT A

SUPREME COURT OF GEORGIA
Case No. S22X1097

September 6, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MICHELLE MCKINNEY, ADMINISTRATOR v. GWINNETT OPERATIONS, LLC et al.

Your request for an extension of time to file the Amicus Brief of amicus curiae in the above case is granted. The Amicus Brief shall be filed no later than 10:00 a.m. on Monday, September 12, 2022. Counsel should expect no further extensions of time.

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

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing **BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE** in the above-listed case on all counsel via electronic filing and by e-mail, addressed as follows:

Michael B. Terry
Naveen Ramachandrappa
BONDURANT MIXSON & ELMORE LLP
1201 W Peachtree Street NW Ste 3900
Atlanta, GA 30309

Lance D. Lourie
Steven R. Chance
Xavier O. Carter, Sr.
Andrew J. King
WATKINS, LOURIE, ROLL & CHANCE, PC
5607 Glenridge Dr, Ste. 500
Atlanta, GA 30342

Lindsay A. Forlines
FORLILNES LAW, LLC
1226 Ponce de Leon Ave NE, Ste 200
Atlanta, GA 30306

Teresa Pike Tomlinson
Jeffrey Saxby
HALL BOOTH SMITH, P.C.
191 Peachtree St NE, Ste 290
Atlanta, GA 30303
ttomlinson@hallboothsmith.com
jsaxby@hallboothsmith.com

Leah Ward Sears
Edward H. Wasmuth, Jr.
SMITH, GAMBRESS & RUSSELL, LLP
1105 W Peachtree St NE, Ste 100
Atlanta, GA 30309
lsears@sgrlaw.com
ewasmuth@sgrlaw.com

Andrew S. Ashby
Maxwell K. Thelen
ASHBY THELEN LOWRY
445 Franklin Gateway, SE
Marietta, GA 30067
drew@atllaw.com
max@atllaw.com
Counsel for Amici Curiae AARP and AARP Foundation

Sébastien Monzón Rueda
AARP FOUNDATION
601 E Street, NW
Washington, DC 20049
Counsel for Amici Curiae AARP and AARP Foundation

Respectfully submitted this 12th day of September, 2022

GEORGIA DEFENSE LAWYERS ASSOCIATION

James D. Meadows, President
Elissa B. Haynes, Chair
Anne Kaufold-Wiggins, Vice Chair
Philip Thompson, Vice Chair
Georgia Defense Lawyers Association
P.O. Box 67
Rossville, Georgia 30741
(706) 956-4848

FREEMAN MATHIS & GARY, LLP

/s/ Elissa B. Haynes
Elissa B. Haynes
Georgia Bar No. 804466
P. Michael Freed
Georgia Bar No. 061128
100 Galleria Parkway, Suite 1600
(770) 818-0000
elissa.haynes@fmglaw.com
Michael.freed@fmglaw.com

On Behalf of the Georgia Defense Lawyers Association