No. S22A1060

IN THE
Supreme Court of Georgia

JO-ANN TAYLOR, as Executor for Tia McGee's Estate,

Appellant,

v.

THE DEVEREUX FOUNDATION, INC.,

Appellee.

On appeal from Final Judgment in
State Court of Cobb County, No. 17A2772

BRIEF OF AMICI CURIAE GEORGIA TRIAL LAWYERS ASSOCIATION AND AMERICAN ASSOCIATION FOR JUSTICE

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IDENTITY AND INTEREST OF AMICI CURIAE

The Georgia Trial Lawyers Association is a voluntary organization of about 2,000 trial lawyers throughout Georgia who represent people injured by the wrongdoing of others. GTLA's mission is to protect the constitutional promise of justice for all by guaranteeing the right to trial by jury, preserving an independent judiciary, and providing Georgians access to the courts.

The American Association for Justice is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiffs trial bar. AAJ's members mainly represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Georgia. Throughout its 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

INTRODUCTION

GTLA and AAJ concur with Appellants Jo-Ann Taylor and Michell McKinney: the punitive damages cap in O.C.G.A. § 51-12-5.1(g) is unconstitutional. But this brief does more than concur with Appellants. This brief answers the Court's questions to amicus curiae:

Does the punitive damages cap in OCGA § 51-12-5.1(g) violate the Georgia

Constitution, either facially or as applied?

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 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).[1]

The answer to the first question is yes. Taylor and McKinney bring as-applied challenges, after the jury's punitive damages verdict in each's case was reduced to $250,000—the blanket, arbitrary, inflation-unadjusted cap imposed by the General Assembly in 1987.[2] The cap is unconstitutional "as applied" in their cases because it renders almost all that the jury said on punitive damages meaningless.[3] The cap abrogated 99.5 percent of the jury's $50 million punitive damages verdict in *Taylor* and 97.27 percent of the jury's combined $9.17 million punitive damages verdict in *McKinney*. Applying the cap in these cases is unconstitutional.

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[1] Order at 1-2, *Taylor v. The Devereux Found., Inc.*, Nos. S22A1060 & S22X1061 (July 18, 2022); Order at 1-2, *McKinney v. Gwinnett Operations., LLC*, Nos. S22A1161 & S22X1097 (July 18, 2022).

[2] Tort Reform Act of 1987, 1987 Ga. Laws 915, 917-19 (codified at O.C.G.A. § 51-12-5.1(g)).

[3] *Cf. Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 164 (Ala. 1991) ("Because the statute caps the jury's verdict automatically and absolutely, the jury's function, to the extent the verdict exceeds the damages ceiling, assumes less than an advisory status.").

The answers to the two-part second question are (1) all tort actions provided for punitive damages when trial by jury secured in the Georgia Constitution, including premises liability (as in *Taylor*) and medical negligence (as in *McKinney*); and (2) under *Nestlehutt*, that fact is relevant to the constitutionality analysis.

In this brief, GTLA and AAJ argue that ***all parties in a tort action*** have a constitutional right for a jury to decide questions about punitive damages. Protecting the jury-trial right isn't pro-plaintiff and anti-defendant. Here, we support Taylor and McKinney because Georgia's punitive damages statute deprives them of the right to trial by jury. That isn't true for defendants. The statute requires the jury, before imposing punitive damages, to find clear and convincing evidence proving that the defendant's misconduct warrants them. Each jury in the cases before this Court did so. The statute next requires the jury, in a separate phase, to decide the amount of punitive damages necessary to punish, deter, and penalize them. Thus, the punitive damages statute entitles Devereux and Life Care to have a jury decide whether they should be deprived of their property and to what extent. The entitlement to have a jury make these decisions wasn't a matter of legislative grace; it was their constitutional right.[4]

Devereux, Life Care, and their amici disagree. According to them, the Georgia

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[4] "The right, then, of the people of this province was, that their lives, liberty, and property should not be forfeited, but by the judgment of their peers, that is, by a trial by jury." *Tift v. Griffin*, 5 Ga. 185, 189 (1848).

Constitution does not guarantee that an impartial Georgia jury will decide punitive damages questions in cases like these.[5] That position is posture not principle. Suppose the General Assembly decreed that when the jury finds the defendant's misconduct warrants punitive damages, the judge must enter judgment for a *minimum* of $10 million (or some other arbitrary amount) regardless of the punitive damages imposed by the jury. Devereux, Life Care, and their amici would object that the statute infringes their constitutional right to trial by jury. And they would be right to do so. The same constitutional command protects Taylor's and McKinney's right to have a jury determine the amount of punitive damages warranted by the evidence. GTLA and AAJ ask the Court to say so.

ARGUMENT

The punitive damages cap violates the Georgia Constitution in three ways. *First*, the cap deprives plaintiffs of their "inviolate" right to trial by jury.[6] *Second*, the cap obviates the separation of legislative and judicial powers.[7] *Third*, the cap denies equal protection.[8]

Taylor and McKinney have expertly briefed the separation-of-powers and

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[5] The jury-trial right is symmetrical. If it applies to plaintiffs in cases like these, then it applies to defendants. If it doesn't apply to plaintiffs (as Devereux, Life Care, and their amici claim), then it doesn't apply to defendants.

[6] Ga. Const. of 1983, art. I, § I, ¶ XI(a).

[7] *Id.* art. I, § II, ¶ III.

[8] *Id.* art. I, § I, ¶ II.

equal-protection constitutional violations. For that reason, GTLA and AAJ focus their unconstitutionality argument on the violation of the right to trial by jury.

I. The punitive damages cap violates the right to trial by jury.

The Georgia Constitution provides that "[t]he right of trial by jury shall remain inviolate."[9] This Court has held that this provision "guarantees the right to a jury trial only with respect 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."[10] The "initial step" of the constitutionality analysis is to examine "the right to jury trial under late eighteenth century English common law."[11]

Because few Georgia cases are reported before 1846, "Georgia precedent is of limited utility in ascertaining the extent of the jury trial right as of 1798."[12] For that reason, early decisions of Georgia's sister states clarify "American common law."[13] As shown below, English and American common law before 1798 secured the right of trial by jury, and that right allowed the jury to impose punitive damages.

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[9] *Id.* art. I, § 1, ¶ XI.

[10] *Nestlehutt*, 286 Ga. at 733.

[11] *Id.*

[12] *Id.* at 733 n.3.

[13] *See id.*

A. The right of trial by jury existed at common law in Colonial America, the American states, and Georgia before 1798.

Jury trials aren't new. The ancient Greeks had them as did the Romans.[14] Jury trials came to England with the Normans in 1066, if not before.[15] The use of jury trials soon passed from practice into right—a right centuries older than Georgia.

1. The right of trial by jury at common law.

The *Magna Carta* guaranteed the right of trial by jury in 1215.[16] In the last eight centuries, no section of the *Magna Carta* "has been cited more often as a guarantee of the liberties of the citizen."[17] Judgment by one's peers—the *Magna Carta*'s phrasing of trial by jury—is "one of the oldest principles of English law."[18]

William Blackstone was the most accepted authority on English common law in Colonial America.[19] His *Commentaries*, this Court has said, "constituted the law

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[14] Erwin Chemerinsky, *The Jury Trial and Remedy Clauses*, 96 Or. L. Rev. 677, 678 (2018).

[15] Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 582-83 (1993).

[16] Magna Carta § 39 (1215) ("No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land."), *reprinted in* Sources of Our Liberties 1, 17 (Richard L. Perry & John C. Cooper eds., 2d impression 1960).

[17] Richard L. Perry, Sources of Our Liberties, *supra* note 16, at 5.

[18] *Id.* at 7.

[19] *See Schick v. United States*, 195 U.S. 65, 69 (1904).

of this State, before and since the Revolution."[20] Blackstone revered the English jury system. He declared the ancient right of "trial by jury" the "glory of the English law" and "the most transcendental privilege which any subject can enjoy" because no subject can "be affected in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals."[21] Blackstone hailed jury trials as the "principal bulwark of our liberties" and exclaimed that trial by jury "was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it."[22]

2. The right of trial by jury in Colonial America and the early American states.

The *Magna Carta*'s guarantee of trial by jury influenced early America. The earliest American colonies guaranteed the right of trial by jury. Virginia, for example, has guaranteed jury trials in both civil and criminal cases since at least 1624 (and maybe since 1606).[23] Massachusetts did so in 1641; the Colony of West New Jersey did the same in 1677; and Pennsylvania followed suit in 1682.[24] Every American

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[20] *Rouse v. State*, 4 Ga. 136, 145 (1848) (Lumpkin, J.); *see also Tucker v. Howard L. Carmichael & Sons, Inc.*, 208 Ga. 201, 203 (1951) ("This [C]ourt regards Blackstone as an authority on the common law.").

[21] 3 William Blackstone, *Commentaries* *379.

[22] *Id.* *350.

[23] Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury*, 31 U. Dayton L. Rev. 307, 314 (2005).

[24] Massachusetts Body of Liberties ¶ 29 (1641), *reprinted in* Sources of Our Liberties, *supra* note 16, at 143, 151.

colony ultimately embraced jury trials.[25] The American colonies' embrace of jury trials results from 17th century England's enthusiasm about using jury trials "as a bulwark of liberty" and "a means of preventing oppression by the Crown."[26]

The American colonists' admiration for jury trials continued unabated into the 18th century. For example, in 1744, the First Continental Congress claimed trial by jury as a right.[27] The Declaration of Independence cites circumvention of trial by jury as a reason to sever ties with England.[28] In fact, whenever "the jury right was threatened in the colonial era, the citizen reaction was generally swift and hostile."[29]

After the start of the American Revolution, trial by jury was the only right secured by the constitution of all thirteen original states.[30] Each state protected the

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[25] *Id.* at 592.

[26] Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918).

[27] Peck, *supra* note 23, at 315.

[28] Declaration of Independence ¶ 20 (1776). The Declaration of Independence referred to the 1765 Stamp Act. The Stamp Act not only taxed all sorts of documents needed for every day colonial life but also granted admiralty courts—where there was no right of trial by jury—jurisdiction to enforce the Act. That jurisdictional rejiggering was intentional, for "the British assumed juries would be sympathetic to the American plight" caused by the Stamp Act. Peck, *supra* note 27, at 316. In response, the American colonies convened the Stamp Act Congress to "protest" the removal of the "trial by jury," which they described as "the inherent and invaluable right of every British subject in these colonies." Resolutions of the Stamp Act Congress ¶ 7 (1765), *reprinted in* Sources of Our Liberties, *supra* note 16, at 261, 270.

[29] Landsman, *supra* note 15, at 594.

[30] *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 655 (1973).

right in civil cases.[31] Trial by jury was also protected in U.S. territories. For example, in 1787, the Confederation Congress guaranteed the right of trial by jury in civil cases in U.S. territory northwest of the Ohio River.[32]

The U.S. Constitution of 1787 does not expressly secure the right to civil jury trials. While several reasons for this omission were given, including by Alexander Hamilton in *The Federalist No. 83*, the absence of a constitutional right to civil jury trials was "[o]ne of the strongest objections originally taken against the constitution of the United States."[33] So strong was this objection that six states proposed amendments to protect civil jury trials when they ratified the U.S. Constitution.[34]

In 1789, at the first session of the First Congress, a constitutional amendment to add a right to civil jury trials was proposed: "In suits at common law, between man and man, the trial by jury, as one of the best securities of the rights of the people, ought to remain inviolate."[35] On December 15, 1791, the Seventh Amendment to the U.S. Constitution was ratified, guaranteeing the right of trial by jury in civil actions

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[31] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting).

[32] Northwest Ordinance of 1787 art. II, *reprinted in* 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 957, 960-61 (Francis Newton Thorpe ed. 1909) [hereinafter Federal and State Constitutions].

[33] *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.).

[34] *Galloway v. United States*, 319 U.S. 372, 398 n.3 (1943) (Black, J., dissenting).

[35] *Parklane*, 439 U.S. at 343.

where the amount in controversy exceeds $20.

3. English and American common law recognized causes of action for premises liability and medical negligence.

Taylor and McKinney bring common-law claims. Taylor's claims arise from premises liability. McKinney's claims arise from medical negligence. This Court has already held in *Nestlehutt* that claims for medical negligence existed at common law.[36] Premises liability has an equally "ancient" origin, as Taylor ably proves in her opening and reply briefs.[37] We join those arguments.

4. At common law and in early America, juries could impose punitive damages.

The English origin of the principle that the amount of punitive damages[38] falls within the purview of the jury is usually traced to two 1763 cases.[39] *Wilkes v. Wood*[40] and *Huckle v. Money*[41] arose after government agents executed warrants against the

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[36] *Nestlehutt*, 286 Ga. at 733-34.

[37] *See* Br. of Appellant 9-14, *Taylor*, No. S22A1060 (July 13, 2022); Reply Br. of Appellant 1-3, *Taylor*, No. S22A1060 (Aug. 29, 2022).

[38] "Punitive damages have alternatively been known as vindictive damages, exemplary damages, deterrent damages, additional damages, punitory damages, penal damages, and smart money." Eric James Hertz & Mark D. Link, Punitive Damages in Georgia § 2-2 (2d ed.).

[39] Some scholars have suggested that English juries imposed punitive damages before 1763, though they did so without having them called by that name. David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1263 n.19 (1974).

[40] 95 Eng. Rep. 489 (K.B. 1773).

[41] 95 Eng. Rep. 768 (K.B. 1763).

printers, publishers, and distributors of the *North Briton* (No. 45), a newspaper critical of King George II.[42] Those cases prove that English juries could award damages beyond those necessary for compensation.[43]

Indeed, in *Huckle v. Money*, the Chief Justice characterized the "personal injury" to the plaintiff—six hours in custody during which he was treated well—as "small" requiring perhaps only £20 to remedy.[44] Yet because the jury was not "confined by their oath to consider mere personal injury only," the court could not grant the defendant's request for a new trial just because the jury awarded £300.[45] In fact, the Chief Justice concluded that the jurors "have done right in giving exemplary damages."[46] Justice Bathurst concurred, underscoring that "in the matter of damages," the jury was "not bound to certain damages."[47]

Huckle v. Money "introduced the term 'exemplary damages' as a legal doctrine

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[42] *See* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. Univ. L. Rev. 1269, 1287-90 & nn.95-97 (1993).

[43] "Punitive damages have long been an available remedy at common law for wanton, willful, or outrageous conduct. Under English law during the colonial era, juries were accorded broad discretion to award damages as they saw fit." *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 409 (2009). That broad discretion "included the authority to award punitive damages when the circumstances of the case warranted." *Id.* For support, Justice Thomas, the author of *Townsend*, cites *Wilkes v. Wood*.

[44] 95 Eng. Rep. at 768-69.

[45] *Id.*

[46] *Id.* at 769.

[47] *Id.*

to explain an award that exceeded actual damages in order to punish outrageous actions."[48] But *Wilkes v. Wood* and *Huckle v. Money* were hardly the only mid- and late-18th century English cases imposing punitive damages. Take *Tullidge v. Wade*.[49] There, a father sued the man who seduced his daughter and impregnated her out of wedlock. The jury awarded £50. Denying the motion for new trial, Chief Justice Wilmot explained that "[a]ctions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages."[50] He then went further, professing that if the jury had given "much greater damages," the court would not "have been dissatisfied therewith."

Then there's *Grey v. Grant*, which emphasizes that juries "are the proper judges of damages," including "exemplary damages."[51] There, the court held that "the jury have done right in giving exemplary damages" in an action arising from a fight that broke out when the defendant refused to return to the plaintiff a misdelivered turtle brought back from the West Indies.[52]

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[48] Rustad & Koenig, *supra* note 42, at 1288 n.96.
[49] 95 Eng. Rep. 909 (K.B. 1769).
[50] *Id.* at 909.
[51] 95 Eng. Rep. 794, 795 (K.B. 1794).
[52] *Id.* at 794-95.

After *Wilkes v. Wood* and *Huckle v. Money*, English juries imposed, and English courts allowed, exemplary damages "to punish and deter the misuse of wealth and power that threatened the eighteenth-century English social order."[53] Blackstone's *Commentaries* confirm that juries could impose punitive damages.[54]

In America, juries have given damages above those needed to compensate the plaintiff since at least 1784. South Carolina has the earliest reported case. There, the court charged the jury that the defendant's "very wanton outrage" entitled the plaintiff to "very exemplary damages."[55] The defendant's wanton outrage was drugging the plaintiff's drink while pretending to "make friends" with the plaintiff after the defendant "contrived" a "sham dispute" that led to introducing "pistols" and the "fir[ing] off at each other" of "powder."[56]

Early American juries could impose damages "for *example's* sake" and "to prevent" misconduct "in the future."[57] The jury did not have to "estimate the damages by any particular proof of suffering or actual loss" but could "give such a sum

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[53] Rustad & Koenig, *supra* note 42, at 1289-90; *see also id.* at 1289-90 n.101 (collecting English cases from 1764 awarding exemplary damages).

[54] *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) (noting Blackstone's recognition of punitive damages use).

[55] *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (1784).

[56] *Id.* at 6-7.

[57] *Coryell v. Colbaugh*, 1 N.J.L. 77, 77 (1791).

as would mark their disapprobation, and be an example to others."[58] In America, as in England, when warranted by the defendant's misconduct, the jury's province was "to weigh well and consider all the circumstances of the case" before assessing not only "such damages as they thought would be commensurate with the nature of the injury" but also "such [damages] as would effectually check" the misconduct.[59] American courts admitted that in certain cases the jury "will probably feel themselves bound to assess exemplary damages, taking into consideration the circumstances of the case."[60] And they did.

The law reports from early America contain other references to punitive damages. *See, e.g.*, *Eden v. Legare*, 1 S.C.L. (1 Bay) 171, 171 (1791) (The court noted that "the plaintiff did not go for vindictive damages, but only to vindicate himself from slander."); *Farnesly v. Murphy*, 1 Add. 22, 22 (Pa. 1792) ("As to the quantity of damages[,] . . . in some cases, it is proper to give exemplary damages."); *Hoomes v. Kuhn*, 8 Va. (4 Call.) 274, 274, 278 (Va. 1792) (discussing a related action between the parties in which Hoomes recovered £17, which the court characterized as "vindictive damages, there being no actual loss of service sustained"); *Heacock v. Walker*, 1 Tyl. 338, 343 (Vt. 1802) ("If the least collusion between the defendant and

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[58] *Id.* at 77, 78.

[59] *Chanellor v. Vaughn*, 2 S.C.L. (2 Bay) 416, 416 (1802).

[60] *Legaux v. Feasor*, 1 Yeates 586, 588 (Pa. 1795).

[a third party] had been shewn in this cause, the Court would have directed you to find not merely retributive but exemplary damages for the plaintiff.").

This discussion of English and American law shows that juries could impose punitive damages under the right circumstances before 1798. In 1847, the first edition of Theodore Sedgwick's celebrated treatise on damages confirms this fact. For cases involving a "question of fraud, malice, gross negligence, or oppression," the jury could "give what [the law] terms punitory, vindictive, or exemplary damages; in other words, [the law] blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the suffer, but to punish the offender."[61] "This rule seems settled in England, and in the general jurisprudence of this country."[62]

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[61] Theodore Sedgwick, A Treatise on the Measure of Damages 38-39 (1847).

[62] *Id.* Other authors of mid- and late-19th century treatises agreed. *See, e.g.*, 1 J.G. Sutherland, The Law of Damages 716 (1883) ("There is much authority for allowing damages beyond compensation for torts whenever a case shows a wanton invasion of the plaintiff's rights, or any circumstances of outrage or insult; whenever there has been oppression or vindictiveness on the part of the wrongdoer; whenever there is a [willful], malicious or reckless tort to person or property." (footnotes omitted)); George W. Field, The Law of Damages 67-68 (1876) (The doctrine of exemplary damages "has been recognized in almost every variety of injuries," such as "trespass to real estate, *quare clausum fregit*; in trespass to personal property; in actions for gross negligence; gross breaches of duty; false imprisonment; replevin; trover; slander; libel; fraud; assault and battery, and willful and malicious injuries to the person; trespass *de bonis asportatis*; breach of promise of marriage; malicious prosecution; seduction; for the willful wrongful suing out of an attachment; and for willful wrongs, and gross breaches of duty by common carriers." (footnotes omitted)).

Four years later, the U.S. Supreme Court reached the same conclusion. The Court explained that "a well-established principle of the common law" is "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."[63] Acknowledging that "some writers" have questioned "the propriety of this doctrine," the Court concluded that "if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."[64] Quite so.

This history shows that English and American common law before 1798 permitted not only causes of action for premises liability and medical negligence but also that the jury in those (and all tort) cases could give "exemplary" damages to punish the defendant's misconduct.

B. The right of trial by jury in Georgia.

1. Jury trials in Georgia before the American Revolution.

Georgia, the last of the thirteen colonies, formally begins with the Charter of

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[63] *Day v. Woodworth*, 54 U.S. 363, 371 (1851).

[64] *Id.*

1732.[65] Granted by King George II, the Charter gave certain men, the trustees, control over Georgia for 21 years.[66] The Charter empowered the trustees to establish courts "for the hearing and determining of all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes and things whatsoever, arising or happening within the said province of Georgia, or between persons of Georgia."[67] And they did so before setting sail from England.[68] The first Georgia court was sworn in on July 7, 1733, in Savannah. Although there was a court, there were no lawyers—whether by express law (now lost to history) or practice.[69] All appearing in court had to plead their own case. And there were plenty of cases—both civil and criminal.[70] Yet during this period, Georgia's judiciary had many "shortcomings."[71]

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[65] Charter of 1732, *reprinted in* 2 Federal and State Constitutions 765.

[66] Albert B. Saye, A Constitutional History of Georgia 1732–1968, at 12-18 (rev. ed. 1970) [1948].

[67] Fed and state constitutions, at 774.

[68] Joseph R. Lamar, The Bench and Bar of Georgia During the Eighteenth Century 5 (1913). Born in Ruckersville, Georgia, Joseph Lamar served as an associate justice on both the Georgia Supreme Court (1901–1905) and then the U.S. Supreme Court (1911–1915).

[69] *See id.* at 7 (noting the near "certain[ty]" that under the trustees' control "there was no practitioner in Georgia and that the courts were not authorized to admit persons to the Bar").

[70] *Id.* at 7.

[71] Scott D. Gerber, *The Origins of the Georgia Judiciary*, 93 Ga. Hist. Q. 55, 60-62 (2009); *see also* Saye, *supra* note 66, at 24 (characterizing Georgia's early courts as marred by "the incompetence of the judges" who never "displayed anything above mediocre ability").

The charter period ended in 1752, and Georgia became a royal colony.[72] When King George II appointed John Reynolds governor, the king commissioned him to call together a legislative assembly and empowered him to create courts and define their powers.[73] Reynolds created the new judiciary for the royal colony in 1754,[74] but the judiciary's fecklessness "persisted in the first period of royal control."[75] A persistent problem was that some judges were "unacquainted with the law."[76] But by 1760, some of the judiciary's problems started to subside.[77]

Georgia had many courts during the royal period,[78] but most cases were heard in the "Inferior Courts, or Courts of Conscience, held by justices of the peace."[79] These courts had jurisdiction over petty crimes and minor civil disputes. They heard civil disputes valued at fewer than £8 and not involving "Titles of Land."[80] The original 1760 act empowering justices of the peace to hear these cases also required the

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[72] *See* Saye, *supra* note 66, at 45-49.

[73] Lamar, *supra* note 68, at 14.

[74] Lamar, *supra* note 68, at 14-15.

[75] Saye, *supra* note 66, at 64.

[76] Gerber, *supra* note 71, at 64 (quoting Saye).

[77] *See* Gerber, *supra* note 71, at 63 ("By 1760, it seems, Georgia finally had a functioning judicial system, although one that remained beset by problems.").

[78] *See* Saye, *supra* note 66, at 65 (listing "The General Court, The Court of Sessions of Oyer and Terminer and General Gaol Delivery, The Court of Appeals, The Court of Admiralty, and the Court of Ordinary").

[79] *Id.*

[80] *Id.*

use of a jury.[81] That same year, the legislature created a special court to decide disputes between merchants and shippers with a "special jury."[82]

Examining Georgia's pre-Revolution history, this Court "found no court in existence prior to the Constitution of 1777, which had common-law jurisdiction in civil cases, in which trial by jury was not provided for."[83] Nor have GTLA and AAJ.

2. Georgia's constitutional right of trial by jury.

Georgia enacted its first state constitution in 1777 after the Continental Congress recommended that representatives in each colony form independent states.[84] The Constitution of 1777 had several jury-trial provisions. *First*, jurors were the "judges of law, as well as fact," though the jury could ask the court's judges for their view of the law if the jury "ha[d] any doubts concerning points of law."[85] *Second*,

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[81] An Act for the More Easy and Speedy Recovery of Small Debts and Damages (1760), *reprinted in* 18 The Colonial Records of the State of Georgia: Statutes Enacted by the Royal Legislature of Georgia from Its First Session in 1754 to 1768, at 372, 372-73 (Allen D. Candler ed., 1910) [hereinafter Colonial Records].

[82] An Act for Holding Special or Extraordinary Courts of Common Pleas for the Tryal of Causes Arising Between Merchants Strangers & Mariners (1760), *reprinted in* 18 Colonial Records 362.

[83] *DeLamar v. Dollar*, 128 Ga. 57, 60-61 (1907).

[84] 2 Federal and State Constitutions 777 n.a.

[85] Ga. Const. of 1777, art. XLI. The 1777 Constitution established on court in each county called the "superior court," *id.* art. XXXVI, also called the "supreme court," *id.* art. XL, which sat twice a year (in March and October), *id.* art. XXXVI. When the superior court sat, it did so with a chief justice and "three or more" associate justices who lived in the county. *Id.* art. XL. "All causes, *of what nature soever*, shall be tried in the supreme court," other than those "hereafter mentioned." *Id.* art. XL

jurors had to swear to return a verdict "according to law, and the opinion they entertain of the evidence" that wasn't "repugnant to" the constitution's "rules and regulations."[86] *Third*, the jury could not return a "special verdict."[87] *Fourth*, in civil cases, a dissatisfied party could appeal the jury's verdict and demand a new trial before a "special jury" that would "try the cause" and whose verdict was final.[88] *Fifth*, the special jury had to swear to return a verdict "according to law, and the opinion they entertain of the evidence" that wasn't "repugnant to justice, equity, and conscience, and the rules and regulations contained in this constitution, *of which they shall judge*."[89] *Lastly*, "trial by jury" was to "remain inviolate forever."[90]

Twelve years later, Georgia enacted its second constitution in 1789, extending the prior constitution's guarantee that "trial by jury shall remain inviolate."[91]

(emphasis added). The 1777 Constitution later includes two exceptions. The first is for "[c]aptures, both by sea and land," and "maritime causes." *Id.* art. XLIV. The second was for "the court of conscience," which would continue "as heretofore practiced" with one caveat: its jurisdiction would expand to try cases "not amounting to more than ten pounds." *Id.* art. XLVI.

[86] *Id.* art XLII.

[87] *Id.* art. XLI.

[88] *Id.* art. XL.

[89] *Id.* art. XLIII (emphasis added).

[90] *Id.* art. LXI. In full this article provides, "Freedom of the press and trial by jury to remain inviolate forever."

[91] Ga. Const. of 1789, art. IV, § 3. In full this section provides, "Freedom of the press and trial by jury shall remain inviolate."

Georgia's third constitution, the Constitution of 1798, contains the most important jury-trial guarantee: "trial by jury, *as heretofore used in this State*, shall remain inviolate."[92] That guarantee is important because the emphasized phrase, per decisions of this Court, froze the *constitutional* "right to a jury trial" to "only" those "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."[93]

Since 1798, Georgia has had seven constitutions. In the turbulent period of 1861 to 1877, Georgia adopted four constitutions. The first two, the Constitutions of 1861 and 1865, do not explicitly enshrine the inviolate right of trial by jury, but they do so implicitly.[94] The Constitutions of 1868 and 1877 return to the explicit declaration that the right of trial by jury "shall remain inviolate," but both invoke an important caveat: "except where it is otherwise provided in this Constitution."[95] This

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[92] Ga. Const. of 1798, art. IV, § 5 (emphasis added). In full this section provides, "Freedom of the press, and trial by jury, as heretofore used in this State, shall remain inviolate; and no *ex post facto* law shall be passed."

[93] *Nestlehutt*, 286 Ga. at 733 (quoting *Benton v. Ga. Marble Co.*, 258 Ga. 58, 66 (1988)).

[94] *See* Ga. Const. of 1861, art. I, § 27 ("The enumeration of rights herein contained shall not be construed to deny to the people any inherent rights which they have hitherto enjoyed."); Ga. Const. of 1865, art. I, § 21 ("The enumeration of rights herein contained is a part of this constitution, but shall not be construed to deny to the people any inherent rights which they have hitherto enjoyed.").

[95] Ga. Const. of 1868, art. V, § 13, ¶ 1 ("The right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate."); Ga. Const. of 1877, art. VI, § 18 ("The right of trial by jury, except where it is otherwise provided in this

pattern of explicitly noting that the "inviolate" right of trial by jury "shall remain" except where otherwise provided in the Constitution continued in Constitutions of 1945, 1977, and 1983.[96] Today, trial by jury remains an "inviolate" right in Georgia—except as modified by the Constitution.[97]

3. How trial by jury was "used" in Georgia before 1798.

Because the Constitution of 1798 provides that "trial by jury, as heretofore used in this State, shall remain inviolate," understanding how juries were used ***in Georgia*** before 1798 is crucial. Having discussed the role of Georgia juries *before* the Revolution, this section looks at how juries were used between 1777 and 1798.

The judiciary act of 1778, which replaced the judiciary act of 1777, established a "superior court" in each county where "all causes of what nature or kind

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Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial or traverse jury in Courts other than the Superior and City Courts.").

[96] Ga. Const. of 1945, art. VI, § XVI, ¶ I ("The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court."); Ga. Const. of 1977, art. VI, § XV, ¶ 1 (same as 1945); Ga. Const. of 1983, art. I, § I, ¶ XI(a) ("The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party.").

[97] *See Nestlehutt*, 286 Ga. at 736 (Legislature has authority to modify or abrogate the common law but may not abrogate "*constitutional* rights that may inhere in common law causes of action.").

soever are to be tried," except as otherwise provided in the Constitution of 1777.[98] The superior courts had jurisdiction over all actions "for any debt or damages, or any sum of money above ten pounds," and those courts had "to give judgment according to the verdict of the jury."[99] The superior courts' jurisdiction extended to actions at both law and equity.[100]

After the Constitution of 1789, the General Assembly passed the judiciary act of 1789. That act gave superior courts the "full power and authority to exercise jurisdiction in and to hear and determine, ***by a jury of twelve men***, all pleas, civil and criminal; and all causes of what nature or kind soever, according to the usage and custom of courts of law and equity (except such as are hereby referred to inferior jurisdictions)."[101] The superior courts were authorized "to proceed with a jury on a petition or bill" in civil disputes "for any debt or damages, or any sum of money above ten pounds."[102] That act also created "inferior county courts," staffed by justices of the peace, that had jurisdiction "to hear and determine causes at common law, within their respective counties," except for cases about "the right of title of

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[98] Judiciary Act of 1778, *reprinted in* Digest of the Laws of the State of Georgia 219 (Robert & George Watkins ed. 1800) [hereinafter Watkins' Digest].

[99] *Id.* at 220

[100] *Id.*

[101] Judiciary Act of 1789, *reprinted in* Watkins' Digest 389, 391 (emphasis added).

[102] *Id.* at 391.

lands or tenements."[103] The inferior county courts could decide actions for "small debts" ("any debt or liquidated demand due by judgment, specialty, or account" under "five pounds steering") "without the solemnity of a jury"; but any unhappy party could appeal to the superior court "for final hearing and determination by jury."[104]

In 1790, the General Assembly set out rules for how superior courts were to decide "all cases respecting the discovering transactions between co-partners or co-executors, compelling distribution of intestate estates or payments of legacies, or in any other case whatsoever" that were customarily heard in equity.[105] Even so, the superior court had to submit such suit's merits and supporting evidence "to a special jury."[106]

In 1791, the General Assembly gave the superior courts concurrent jurisdiction with the inferior county courts in all cases.[107] That act requires "[t]hat the trial of all cases of what nature or kind they may be, shall be by jury in the customary and established mode."[108] The next year saw another judiciary act, but the General Assembly did not change the use of trial by jury established in the prior acts. The

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[103] *Id.* at 396, 397.
[104] *Id.* at 401.
[105] Act Amending Judiciary Act of 1789, *reprinted in* Watkins' Digest 422, 422.
[106] *Id.*
[107] Act Amending Judiciary Act of 1789, *reprinted in* Watkins' Digest 439, 440.
[108] *Id.* at 440.

superior courts still had to decide all cases by a 12-person jury.[109]

In 1797, the General Assembly overhauled the Georgia judiciary's structure. Yet despite making changes, the 1797 judiciary act did not revise any prior use of jury trials in Georgia. Superior courts continued to have jurisdiction to decide all cases, civil and criminal, "by a jury of twelve men."[110] Superior courts also retained original jurisdiction over civil disputes for any debt or damages, or any sum of money," though the threshold was raised to "thirty dollars."[111] Superior courts had all powers of a court of equity and could use those powers to compel the parties provide testimony "necessary to the investigation of truth and justice"; that proof had to then "be submitted to a special jury, whose verdict shall be final."[112] Justices of the peace could decide "small debts" cases without a jury; but the unhappy party could appeal and try the case to a five-person jury and before a justice of the peace.[113]

* * *

This history shows how Georgia used trial by jury before 1798. Both before and after the Revolution, Georgia required jury trials for all actions in courts of general jurisdiction—whether the case arose at law or equity. Before the Revolution,

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[109] Judiciary Act of 1792, *reprinted in* Watkins' Digest 480, 481.
[110] Judiciary Act of 1797, *reprinted in* Watkins' Digest 619, 621.
[111] *Id.* at 621.
[112] *Id.*
[113] *Id.* at 638-39.

jury trials were required in all "inferior" and "special" courts. After the Revolution, starting in 1789, actions for "small debts" could be decided by justices of the peace without a jury—but either party could appeal that decision and receive a trial by jury. This was the history of trial by jury in Georgia when the Constitution of 1798 declared that this historical practice "shall remain inviolate."

The history of both England and America before 1798 proves that plaintiffs could bring causes of action for premises liability and medical negligence. That same history shows that juries, who were the judges of damages, were not strictly bound to give compensation only. Rather, English and early-American juries could, and did, impose additional damages in tort actions to punish and deter tortfeasors for egregious misconduct. Nothing in the historical record suggests that Georgia juries were not empowered to do so as well. Nor does the historical record suggest that the framers of the Constitution of 1798 understood Georgia juries to not have this power.

Because O.C.G.A. § 51-12-5.1(g) deprives the jury of the ability to determine the amount of punitive damages need to punish, deter, and penalize egregious tortfeasors like Devereux and Life Care, that cap deprives plaintiffs like Taylor and McKinney of their "inviolate" constitutional right to trial by jury.

II. The constitutional right to trial by jury extends to all causes of action sounding in tort.

The fundamental right of trial by jury is centuries older than Georgia. The Georgia Constitution has guaranteed that right as "inviolate" since 1777. Because

that right is constitutional, rather than a feature of the common law or legislative whim, any statutory affront to that right should be zealously guarded against.

Relying on this Court's precedent, *Nestlehutt* held that the 1983 Constitution's guarantee of trial by jury applies "only" for "***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 of 1798."[114] To determine whether the caps on noneconomic damages in medical-malpractice cases violated the Georgia Constitution, *Nestlehutt* first considered whether the "antecedents" of medical malpractice existed at common law; and because they did, the Court next the considered whether the noneconomic caps infringed on the jury-trial right.[115] GTLA and AAJ—like Taylor and McKinney—use a similar argument to show that the punitive damages cap is unconstitutional.

In this part, GTLA and AAJ urge the Court to hold that *Nestlehutt*'s use of "cases" extends to all actions for damages sounding in tort.[116] As shown above, the pre- and post-Revolution history of jury trials in Georgia reveals that Georgians had a right to have all causes of action for damages tried to a jury before 1798. That was true even for "small" claims first decided by justices of the peace, for the aggrieved party could appeal and receive a trial by jury.

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[114] 286 Ga. at 733 (emphasis added).

[115] *See Nestlehutt*, 286 Ga. at 733-34.

[116] We read the Court's second question to amicus curiae as inviting this argument.

The framers who wrote the 1798 Constitution knew the history of trial by jury in Georgia. That constitution guarantees that "trial by jury, as heretofore used in this State, shall remain inviolate." The use of *inviolate* underscores the desire to preserve "trial by jury" as it had been "used" in Georgia. Dictionaries published before 1798 show that *inviolate* meant "unhurt; uninjured; unprofaned; unpolluted; unbroken."[117] Dictionaries published after 1798 confirm this meaning.[118]

The framers who drafted the 1798 Constitution knew not only that the right of trial by jury sprang from the *Magna Carta* in 1215 but also that this right expanded over the common law period to embrace new causes of action.[119] Trial by jury was important to early Americans—so important that they were willing to spill blood and spend treasure to protect it from legislative encroachment.[120]

Given that background, the framers of the secured the constitutional right of "trial by jury, as heretofore used in this State" would not have understood that this

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[117] *E.g.*, Samuel Johnson, A Dictionary of the English Language (6th ed. 1785).

[118] *See, e.g.*, Noah Webster, American Dictionary of the English Language (1828) ("Unhurt; uninjured; unprofaned; unpolluted; unbroken"). This Court frequently uses dictionaries to determine the ordinary and natural meaning of words. *E.g.*, *Williamson v. Schmid*, 237 Ga. 630, 632 (1976).

[119] *See* Theodore F.T. Plucknett, A Concise History of the Common Law 130-31 (Liberty Fund ed. 2010) [1956] ("[J]ury trial almost immediately became normal in trespass, both for the trial of misdemeanours and of torts. In the end, trespass and its derivatives supplanted the old real actions (and also the old personal actions of debt, detinue, etc.) with the result that all the civil trial juries now in use descend directly from the jury in trespass, as likewise the juries for the trial of misdemeanours.").

[120] *See supra* note 28, and accompanying text.

"inviolate," fundamental right did not extend to new causes of action for damages (sounding in tort) that later evolved by caselaw or statute.[121] Just the opposite.

Accordingly, GTLA and AAJ ask that this Court hold that one class of cases "cases" entitled to trial by jury under *Nestlehutt* are all tort actions for damages, regardless of whether that specific cause of action existed at common law or in Georgia statutory law before 1798. Georgia law before 1798 is clear: juries were used in all tort actions. English common law and early-American caselaw confirms that juries were the judges of damages—all damages special, general, and punitive. This analytical approach to deciding whether a statute violates the right to trial by jury focuses on the nature of the cause of action. Prior justices of this Court have endorsed such an approach.[122] This approach is also similar to that used by the U.S. Supreme Court to determine whether the Seventh Amendment applies to a cause of action.[123]

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[121] *Elliott v. State*, 305 Ga. 179, 212 (2019) ("We interpret a constitutional provision according to the original public meaning of its text, which requires considering its context. Where, as here, a constitutional provision incorporates a pre-existing right, the provision cannot be said to create that right—it merely secures and protects it. And where the right enshrined in the constitution was one found at common law, that constitutional right is understood with reference to the common law, absent some clear textual indication to the contrary." (cleaned up)). The 1798 Constitution's incorporation of the phrase "as heretofore used in this State" to describe the "trial by jury" that was to "remain inviolate" is a clear textual indication that this jury-trial right was not limited to that which existed at common law.

[122] *See Swails v. State*, 263 Ga. 276, 278-80 (1993) (Hunstein, J., dissenting, joined by Sears-Collins & Benham, JJ.).

[123] *See, e.g.*, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348

CONCLUSION

GTLA and AAJ ask that the Court find the punitive damages cap unconstitutional in these cases.

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(1998) (The jury-trial right extends both to common-law causes of action and to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century."); *Tull v. United States*, 481 U.S. 412, 417 (1987) ("To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought.").

CERTIFICATE OF SERVICE

I certify that I have sent this brief to counsel of record via email and by U.S. mail, first-class postage prepaid:

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SUPREME COURT OF GEORGIA
Case Nos. S22A1060; S22X1061;
S22A1161; S22X1097

July18, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JO-ANN TAYLOR, EXECTUOR v. THE DEVEREUX FOUNDATION, INC. et al.
THE DEVEREUX FOUNDATION, INC. et al. v. JO-ANN TAYLOR, EXECUTOR

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

In each of these cases, the trial court entered an order reducing the jury's punitive damages award for the plaintiff to a total of $250,000 under OCGA § 51-12-5.1 (g). On appeal, each plaintiff reasserts her argument, which the trial court rejected, that OCGA § 51-12-5.1 (g)'s punitive damages cap violates the Georgia Constitution. Oral argument in each case has been set for the November 2022 calendar. In addition to the briefs of the parties, the Court invites the Solicitor General's Unit of the Office of the Attorney General of Georgia, the Georgia Trial Lawyers Association, and the Georgia Defense Lawyers Association to file briefs of amicus curiae expressing their views on the following questions:

Does the punitive damages cap in OCGA § 51-12-5.1 (g) violate the Georgia Constitution, either facially or as applied?

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 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).

Any brief of amici curiae filed pursuant to this order shall comply with the page limits set forth in Supreme Court Rule 20 (4).

Any amicus briefs from the amici listed above, and any other amici curiae who wish to express their views on this question—whether in support of an appellant, of an appellee, or of neither party—shall be filed on or before September 7, 2022.

The Court discourages any requests for extension of time to file amicus briefs.

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