IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

NO. A24A0378

THE MEDICAL CENTER OF GEORGIA, INC., et al.

Appellants,

v.

NORKESIA TURNER, et al.,

Appellees.

BRIEF OF GEORGIA HOSPITAL ASSOCIATION, INC. and THE MEDICAL ASSOCIATION OF GEORGIA, AS *AMICI CURIAE*

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I. STATEMENT OF INTEREST

A. Amicus Curiae – The Georgia Hospital Association.

The Georgia Hospital Association (GHA) is a nonprofit trade association made up of member health systems, hospitals, and individuals in administrative and decision-making positions within those institutions. Founded in 1929, GHA serves 145 hospitals in Georgia, which in turn employ thousands of physicians and even more nurses and other healthcare providers. Its purpose is to promote the health and welfare of the public through the development of better hospital care for all of Georgia's citizens. GHA represents its members in legislative matters, as well as in filing *amicus curiae* briefs on matters of great gravity and importance to both the public and to health care providers serving Georgia citizens.

B. Amicus Curiae – The Medical Association of Georgia.

The Medical Association of Georgia (MAG) is a non-profit, voluntary professional association of Georgia physicians. MAG, founded in 1849, is part of the American Medical Association federation and is the largest physician association in Georgia. MAG has over 8,700 members, most of whom are actively practicing medicine. MAG's mission is to enhance patient care and the health of the public by advancing the art and science of medicine and by representing physicians and patients in the policy making process, which it has done for over 170 years.

C. Interest of *Amici Curiae*.

GHA and MAG together constitute the two largest health care associations in the state, totaling over 9,000 providers and treating millions of patients every year. *Amici* submit this brief in the interest of carrying out their missions for their member hospitals and physicians and in furtherance of the overall health and welfare of the citizens of this State. This appeal calls into question the proper application of a Georgia Supreme Court case to legislative caps on recovery of noneconomic damages in wrongful death actions. But the case has much broader implications, including the appropriate interpretation of precedent and the medical-economic landscape in our state. It is imperative—and fully proper under principles of statutory construction and stare decisis—that this Court recognize that the legislative act limiting wrongful death damages remains good law. This would respect the proper role of the General Assembly and avoid exacerbating the health care crisis observed by the General Assembly that enacted the caps, helping our hospitals and physicians continue to provide timely and quality care to the citizens of Georgia. This case, therefore, presents issues of critical importance to hospitals, physicians, and their patients throughout Georgia.

II. INTRODUCTION

"[T]hat what is given or granted can be taken away." Robert F. Kennedy. "The Legislature giveth, the Legislature taketh away. The Constitution did not

prohibit it doing either." *Hill v. Taylor,* 264 Ky. 708, 95 S.W.2d 566, 569 (1936). "[W]hat Congress giveth, Congress can taketh away." *Am. Fed'n of Gov't Emps. v. D.C. Fin. Resp. & Mgmt. Assistance Auth.*, 133 F. Supp. 2d 75, 82 (D.D.C. 2001). "Being a statutory right, the General Assembly can both giveth and taketh away... ." *Kuzma v. Peoples Tr. & Sav. Bank, Boonville*, 132 Ind. App. 176, 183, 176 N.E.2d 134, 138 (1961).

This appeal involves a cause of action—a wrongful death claim—created by our General Assembly that did not exist at common law. As our Supreme Court has recognized, our wrongful death statutes, passed almost a century after the adoption of Georgia's constitution, "establish liability for wrongful death *where none existed before*." *Western & Atlantic R. Co. v. Michael*, 175 Ga. 1, 13 (1932). (emphasis added). Not only did a wrongful death claim not exist at common law, the wrongful-death statute is in "derogation of the common law and must be strictly construed." *Thompson v. Watson*, 186 Ga. 396, 405 (1938), disapproved of on other grounds by *Walden v. Coleman*, 217 Ga. 599, 605 (1962).

Years after passing the wrongful death statute, the General Assembly became concerned with the deleterious effects of runaway verdicts and therefore placed a cap on the amounts that can be recovered in medical malpractice cases, as well as those for wrongful death. As reflected in the earlier quotes, our General Assembly, having created the wrongful death claim in the first place, was fully

within its authority to modify its own creation by placing limits on the scope of recovery. The recent opinion from our Supreme Court in *Taylor v. Devereux Found., Inc.*, 316 Ga. 44 (2023) walks meticulously through this analysis for punitive damage claims and leads to the inescapable conclusion that the General Assembly's caps on wrongful death recoveries are constitutionally sound and must be upheld.

Nothing that the Georgia Supreme Court has said about the damages caps is to the contrary. In 2010, the Court considered the constitutionality of the damage caps in a medical liability case seeking damages for the pain and suffering of a patient and the loss of consortium of her husband—common law claims that existed before the Constitution of 1798. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt* ("*Nestlehutt*"), 286 Ga. 731 (2010). That case did not include a wrongful death claim. In that context, the Georgia Supreme Court ruled that the caps violated plaintiffs' rights to a jury trial under the state Constitution because they infringed on common law claims that existed prior to 1798. *Id*. at 735; *Taylor*, 316 Ga. at 56, citing *Tift v. Griffin*, 5 Ga. 185, 189 (1848) ("[t]he people of this State . . . are entitled to the trial by jury, *as it was used in the State prior to the Constitution of [17]98*.") (emphasis in original). Respecting the Legislature's proper role, the Court did not lightly question its policy choices or the rationality of its decision. Rather, it constrained its consideration to whether the Legislature's

choice ran afoul of the Constitution. *Amici's* position is fully consistent with the Supreme Court's *Nestlehutt* opinion, which did not involve claims for wrongful death or any other legislatively created claims. The *Nestlehutt* opinion was therefore constrained to the claims before it, and per the analysis in our Supreme Court's recent *Taylor* opinion, the wrongful death caps do not suffer from the same constitutional concerns.

In this appeal, the jury awarded $7.2 million in wrongful death noneconomic damages.[1] Unlike *Nestlehutt*, this appeal does not involve claims for pain and suffering, loss of consortium, or other claims similarly available at common law before 1798. Instead, it solely involves damages for wrongful death, which is a statutory cause of action that was not available at common law. The distinction is important, as it is the linchpin in *Nestlehutt's* analysis of whether the jury trial right is infringed. Despite this critical difference, the trial court treated *Nestlehutt* as dispositive of the issue before it, thereby declining to apply the statutory cap to the jury's award of noneconomic damages for wrongful death. This was error. The noneconomic damages for wrongful death cap codified at O.C.G.A. § 51-13-1 is constitutional, and *Nestlehutt* did not hold otherwise.

[1] Amici understands that, in addition to the wrongful death noneconomic damages at issue in this appeal, the jury also entered a $1.4 million award for pain and suffering. However, that award is not a part of this appeal.

By expanding *Nestlehutt*'s application beyond the Court's literal and proper holding, the trial court undermines the Legislature's policy choices in a way that is not mandated by the Constitution. A number of factors support the Legislature's policy choice. Runaway noneconomic damages awards are on the rise, including in Georgia. By their nature, noneconomic awards are intangible, and therefore unpredictable. They have no tether to actual damages or, in many instances, economic reality. This uncertainty creates direct costs in terms of increased medical liability premiums, increasing the costs on physician practices. It also creates downstream costs—many physicians logically factor perceived liability risks into their choice of where to establish a practice. Thus, more precarious litigation environments compromise access to care. In the last decade, Georgia fell from the middle of the pack (24th) to near the bottom (41st) in a ranking of how fair and reasonable states' tort liability systems are perceived to be by U.S. businesses. Many Georgia counties already face dire physician shortages, which will no doubt be exacerbated as the aging physician workforce enters retirement.

In 2005, the Georgia Legislature recognized the crisis that has now worsened even further. It saw that the liability insurance market would potentially reduce citizens' access to health care services, and so it enacted various reforms. These included caps on noneconomic damages in medical liability actions, including those actions seeking damages for wrongful death. *See* O.C.G.A. § 51-

13-1 *et seq*. The reforms put in place by the legislature were based on input from multiple interest groups and constituents with diverse views, including GHA, MAG, GTLA, and many others. After weighing those competing interests, the General Assembly did its best to strike the right policy determinations and enact those into law.

For these reasons, the *Amici* support the arguments advanced by Appellants and urge this Court to reverse. This brief endeavors not to repeat or merely restate the arguments made by Appellants but instead to focus on the policy considerations underlying the General Assembly's tort reform measures, as well as the limited scope of the *Nestlehutt* opinion, which could not and did not extend beyond the facts and issues before it, none of which involved, as here, a statutorily created cause of action such as a wrongful death claim.

III. STATEMENT OF THE CASE

Amici adopt the statement of the case presented in Appellants' opening brief.

IV. ARGUMENT AND CITATION OF AUTHORITIES

A review of the legislative history of the damages cap and the medical-economic landscape from the time of the cap's enactment to present shows that the General Assembly made a rational and permissible policy judgment in enacting the

cap on wrongful death damages.[2] In support of its wrongful death caps, the General Assembly documented a health care crisis that has only worsened since 2005. Importantly, *Nestlehutt* analyzed the constitutionality of the noneconomic damages cap only with respect to causes of action and remedies available at common law at the time of the adoption of the Georgia Constitution in 1798—not to later-created rights and remedies like the wrongful death claims at issue here. Jurisprudential principles with respect to deference owed to the General Assembly counsel that the *Nestlehutt* Court could not have invalidated the cap as to legislatively-created wrongful death claims without violating its own precepts. Finally, application of *Nestlehutt's* analytical framework shows that, on its own terms, it would not have found that the wrongful death cap infringes on the jury trial right.

[2] To be clear, *Amici* do not suggest that this Court's adoption or agreement with the General Assembly's factual conclusions or policy choices is a necessary (or sufficient) basis for finding that the legislatively-created caps are constitutional as applied to wrongful death claims. Such policy choices, of course, belong to the General Assembly alone. And it would be equally erroneous to strike the General Assembly's constitutional actions because of a policy disagreement as it would be to uphold an unconstitutional action because of agreement with the goal of that action. Rather, because the General Assembly's policy decisions are rational and permissible, they must be upheld unless they are unconstitutional.

A. The Wrongful Death Damages Cap Was A Rational and Permissible Policy Choice By The General Assembly To The Health Care Crisis.

As the *Nestlehutt* Court recognized, the Georgia General Assembly intended its tort reforms—including the wrongful death damages caps at issue here—to help address a "crisis affecting the provision and quality of health care services in this state." *Nestlehutt*, 286 Ga. at 732 (citation omitted). The General Assembly found that health care providers and facilities were being negatively affected by diminishing access to and increasing costs of procuring liability insurance and that these problems in the liability insurance market bore the potential to reduce Georgia citizens' access to health care services, thus degrading their health and well-being. *Id*. Through its reforms, the General Assembly intended to "promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and . . . thereby assist in promoting the provision of health care liability insurance by insurance providers." *Id*.

The litigation climate that prompted the General Assembly to enact the damages cap continues today, exacerbated by uncapped damage awards. Historically, unpredictable and unlimited noneconomic damages awards did not raise serious concerns because "personal injury lawsuits were not very numerous and verdicts were not large." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 560 (2006).

That has changed. "Nuclear verdicts"—defined as jury verdicts of $10 million or more—are increasing in both amount and frequency. Cary Silverman et al., *Nuclear Verdicts: Trends, Causes, and Solutions* ("*Nuclear Verdicts*"), U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, 2 (2022) https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf. Per the Chamber of Commerce, six of ten years of study data (from 2010 to 2019) showed that the total amount of noneconomic damages awarded in nuclear verdicts exceeded the total amount of economic damages and punitive damages combined. *Id*. at 11. Twenty-one percent of Georgia's nuclear verdicts in this data set arose from medical liability cases. *Id*. at 21.

Georgia's nuclear verdicts have continued beyond the Chamber of Commerce study period. In August 2022, a DeKalb County State Court jury awarded a "nuclear verdict," including a $55 million wrongful death award, in the case of *The Estate of Nicholas Carusillo v. Metro Atlanta Recovery Residences, Inc.*, No. 19A73528, 2021 WL 9958658, at *1 (Ga. State Ct. Aug. 18, 2021). *Id.*, Verdict, 2022 WL 18538758 (Ga. State Ct.). It was the biggest medical liability verdict in Georgia history. Katheryn Tucker, *DeKalb Jury's $77M Med-Mal Verdict Appears to Set New Georgia Record*, https://www.law.com/dailyreportonline/2022/09/02/dekalb-jurys-77m-med-mal-verdict-appears-to-set-new-georgia-record/ (last visited January 10, 2024).

"[M]ulti-million dollar jury awards benefit a very few, but have negative ripple effects that affect many." Donald J. Palmisano, *Case Study, Health Care in Crisis: The Need for Medical Liability Reform*, 5 Yale J. Health Pol'y L. & Ethics 371, 372 (2005). This is especially true for noneconomic damages verdicts, like wrongful death awards, which involve no direct economic loss and have no precise value. *See Bibbs*, 304 Ga. at 75-76, 815 S.E.2d at 856 (explaining that the "full value" of a decedent's life awarded in a wrongful death action includes an economic element and an "intangible element incapable of exact proof").

Statutory caps restore a measure of predictability to damages awards, benefitting both defendants and, ultimately, the nonparties who would otherwise bear the costs. H.E. Frech III *et al*., *An Economic Assessment of Damage Caps in Medical Malpractice Litigation Imposed by State Laws and the Implications for Federal Policy and Law*, 16 Health Matrix 693,693,716 (2006) (stating that decreases in medical liability costs generate significant savings for states' health care systems in that "the additional savings accrue to health care providers ... [and] when health care providers pay less for malpractice insurance, these savings are ultimately passed along to the payers—employers providing health insurance, workers, consumers and taxpayers").

As it stands, medical liability premiums are increasing nationwide. In 2022, the proportion of medical liability insurance premiums that increased from the

previous year was 36.2%—the highest rate seen since 2005. Tanya Albert Henry, *Medical Liability Premium Hikes Continue For 4th Straight Year* ("*Medical Liability Premium Hikes*"), https://www.ama-assn.org/practice-management/sustainability/medical-liability-premium-hikes-continue-4th-straight-year (last visited January 10, 2024). For physicians who can still obtain coverage, the skyrocketing costs may force physicians to relocate away from certain high-cost states or drop certain critical services that raise their liability risk. *Id*. The physicians' choices reverberate to hospitals, which struggle to find staffing for high-risk specialties, especially in rural areas. *See* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *Medical Liability Reform*, https://www.acog.org/advocacy/ policy-priorities/medical-liability-reform (last visited January 16, 2024) (stating that the costs of this country's tort system "are borne by all obstetric caregivers and the hospitals where they work, through the escalation of medical liability premiums."). The dearth of providers forces rural hospitals to eliminate high-risk services. *See* Hayley Boland, "Liberty Regional Medical Center Launching 'Mom's Heart Matters' Program" (Feb. 9, 2023), https://www.wtoc.com/2023/02/09/liberty-regional-medical-center-launching-moms-heart-matters-program/ (last visited January 16, 2024) (quoting Liberty Regional Medical Center (LMRC) CEO stating that LMRC is one of two Georgia

critical access hospitals still delivering babies). These pressures lead to reduced access to care for patients. *Medical Liability Premium Hikes*, *supra*.

This is happening in Georgia, which was one of fifteen states reporting double-digit increases for premiums in 2022. *Medical Liability Premium Hikes*, *supra*. These premium increases are unsurprising. Georgia now ranks ninth in the United States for medical liability payment severity, exceeding its neighboring states. MEDICAL ASSOCIATION OF GEORGIA, *Tort Reform*, https://www.mag.org/tortreform.html (last visited January 10, 2024). The number of paid medical liability claims in Georgia have increased by 50 percent since 2016. *Id*. Georgia is ranked near the bottom (41st) in the U.S Chamber's 2019 *Lawsuit Climate Survey*, reflecting a 10-point fall from its 2015 ranking and a 14-point fall from 2010. *Id*.; U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, 2019 *Lawsuit Climate Survey: Ranking the States*, https://instituteforlegalreform.com/wp-content/uploads/2020/10/2019-Lawsuit-Climate-Survey-Ranking-the-States.pdf; *2012 State Liability Systems Survey Lawsuit Climate: Ranking the States*, https://instituteforlegalreform.com/wp-content/uploads/2020/10/17834_FinalWeb. pdf.

This hostile litigation environment plays out as Georgia struggles to attract more physicians to serve its citizens. Tom Emerson, *Physicians and the Sword of Damocles: President's Message* (Jul. 11, 2023), MEDICAL ASSOCIATION OF

GEORGIA, https://www.mag.org/blog/physicians-and-the-sword-of-damocles (last visited January 10, 2024). Georgia has 159 counties. In 2020, there was no family medicine physician in 18 of them. GEORGIA BOARD OF HEALTH CARE WORKFORCE, *2020 Counties Without Primary Care Practitioners Report*, **Error! Hyperlink reference not valid.** (last visited January 10, 2024). In 40, there was no internal medicine physician. *Id*. In 65, there was no pediatrician. *Id*. In 82, there was no obstetrician-gynecologist. *Id*. Across the board, these numbers *worsened* since 2015. GEORGIA BOARD OF HEALTH CARE WORKFORCE, *2015 Counties Without Primary Care Practitioners Report*, https://healthcareworkforce.georgia.gov/main-publications-reports/data-publications/counties-without-pcps (last visited January 10, 2024).

Now, with malpractice insurance costs rising, there is an inability to keep hospitalists and newly trained doctors because of our tort environment. S.W. Sherman, *2023 Annual Legislative Education Meeting* (July 10, 2023), MEDICAL ASSOCIATION OF GEORGIA, https://www.mag.org/blog/2023-annual-legislative-education-meeting (last visited January 10, 2024). Georgia's healthcare workforce is losing a consistent 3.7% of its workers each year that is not being replaced by new graduates. *Georgia Healthcare Workforce Commission Final Report* (Dec. 2022) at 5, https://dch.georgia.gov/healthcare-workforce-commission (last visited January 10, 2024). And Georgia will likely be impacted by a wave of physician

retirements over the next decade, as 46.7% of practicing physicians nationwide were already over the age of 55 in 2021. ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *Physician Specialty Data Report*, https://www.aamc.org/data-reports/data/2022-physician-specialty-data-report-executive-summary (last visited January 10, 2024).

With all these swirling forces, Georgia remains as the General Assembly observed it in 2005—in a "crisis affecting the provision and quality of health care services in this state." Ga. L. 2005, p. 1, § 1. As the former Illinois Supreme Court Chief Justice stated:

> One must also wonder whether opponents of caps on noneconomic damages have fully considered the possible consequences of declaring imposition of such caps to be beyond the legislature's authority. What the majority does not see or fails to acknowledge is that by focusing on the fortunes of individual plaintiffs, it looks at only a small part of the economic landscape. The cap on noneconomic damages is premised on the assumption that the potential for unlimited awards of such damages will imperil the availability of medical care to the population as a whole. There is nothing in the record in this case by which we can ascertain whether this assumption will prove correct in practice, but we cannot say the assumption is an unreasonable one. If it is correct, the cumulative harm from reduced access to medical treatment could easily overshadow the benefits a few individual plaintiffs stand to realize from abolition of damages caps. Should that happen, the equities will look far different than opponents of the caps have portrayed them.

Lebron v. Gottlieb Mem'l Hosp., 237 Ill. 2d 217, 283, 930 N.E.2d 895, 933 (2010) (Karmeier, J., concurring in part and dissenting in part).

B. *Nestlehutt* Did Not Decide The Constitutionality Of Caps On Wrongful Death Claims.

The central question of this case is whether the trial court erred in concluding that *Nestlehutt* extended to wrongful death damages. *Nestlehutt* did not address or decide that issue. It couldn't have because *Nestlehutt* did not even involve a claim for wrongful death or any other legislatively-created claim. Instead, it involved only common law claims that existed before 1798. It is true that, after "review of the record and the applicable law," the Court stated that "the noneconomic damages caps in OCGA § 51-13-1 violate the constitutional right to trial by jury[.]" *Nestlehutt*, 286 Ga. at 731. But neither the arguments presented to the Court nor the authority it reviewed bore on the applicability of the damages caps to legislatively-created wrongful death claims. Instead, Justice Nahmias clarified in his concurrence: "As the Court correctly and unanimously concludes in Division 2 of the majority opinion, OCGA § 51-13-1's flat caps on noneconomic compensatory damages, as found by juries in *common-law* medical malpractice cases, violate this State's constitutional guarantee that '[t]he right to trial by jury shall remain inviolate.'" *Id*. at 740 (emphasis added).

A survey of the cases and principles analyzed by the majority to reach its conclusion shows that Justice Nahmias's characterization of the scope of the holding was apt. *See also Taylor*, 316 Ga. at 57-58 ("If the type of claim at issue in this case is one as to which there existed a right to trial by jury as of 1798, our

Constitution's right to a trial by jury applies in the same way the right applied in 1798. For other types of claims, the right does not attach."). Observing that the jury trial guarantee attached only to cases at 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, the *Nestlehutt* Court examined the right to jury trial under late eighteenth century English common law. *Nestlehutt*, 286 Ga. at 733. Reviewing cases involving "the treatment of a wounded hand," an "unskillful performance of operation," and "negligence in delivery of baby" (as well as an additional legal malpractice case analogizing to medical malpractice liability for unskillful operations), the Court concluded that medical negligence claims existed as of the adoption of the Georgia Constitution and therefore were encompassed within the right to jury trial. *Id*. at 733-34. Unsurprisingly, none of these cases involved a "wrongful death" claim, as such cause of action did not exist in the common law of the time.[3]

The *Nestlehutt* Court then examined whether a jury's ascertainment of noneconomic damages was within the jury trial right. *Nestlehutt*, 286 Ga. at 734. To conclude it was, the Court reviewed cases that awarded damages for "excruciating pain and torment," "great and unnecessary pain," "loss of services,"

[3] As discussed in Section IV.D. below, Georgia's first wrongful death statute was adopted in 1850. *See, e.g.*, *Bibbs v. Toyota Motor Corp.*, 304 Ga. 68, 71 (2018).

"loss of consortium," "pain and distress," and "mental sufferings." *Id*. at 735. As before, the Court reviewed no cases seeking recovery for wrongful death. *Bibbs*, 304 Ga. at 71. Indeed, in the only case cited by the Court involving a death, the damages pursued—for a man's deprivation of the "service, company, and consortship" of his late wife—show that the extant common law medical negligence claim was not analogous to Georgia's statutory wrongful death cause of action, the measure of damages of which is the full value of the decedent's life evaluated from the perspective of the decedent, not those left behind. *Nestlehutt*, 286 Ga. at 734; *Cross v. Guthery*, 2 Root 90, 91 (Conn. Super. Ct. 1794); *Bibbs*, 304 Ga. at 73, 815 S.E.2d at 854.

Based on the authorities it examined, the *Nestlehutt* Court concluded that at the time of the adoption of the Georgia Constitution, there was a common law right to jury trial for claims involving the negligence of a health care provider. *Nestlehutt*, 286 Ga. at 735. But it did not consider whether wrongful death damages caps were unconstitutional, which is not surprising as *Nestlehutt* did not involve claims for wrongful death and neither party submitted argument on the point. *See Mendez v. Moats*, 310 Ga. 114, 119 (2020) (Nahmias, J., concurring) (dismissing appeal where, "despite [the Court] teeing up [an] issue," the petitioner failed to provide "robust briefing on the issue"). And while a scant few of the state appellate court cases presented to the *Nestlehutt* Court dealt with wrongful death

damages, the cases were buried within extensive string cites, generally without explanatory parentheticals. *See, e.g. Atlanta Oculoplastic Surgery, P.C. d/b/a Oculus, Appellant, v. Betty Nestlehutt and Bruce Nestlehutt, Appellees*, 2009 WL 2954781 (Ga.) ("Appellant's Brief"), at 7; *Atlanta Oculoplastic Surgery P.C. d/b/a Oculus, Appellants, v. Betty Nestlehutt and Bruce Nestlehutt, Appellees*, 2009 WL 2954780 (Ga.) ("Brief of Emory Healthcare, Inc., as Amicus Curiae"), at 10. Notably, in attempting to discredit *amicus* Emory Healthcare's citation of wrongful death cases, the *Nestlehutt* Appellee derided the citation as "inapposite" and conceded the very point at issue here—namely, that the cases addressed "statutory causes of action that were unknown at common law, as to which the remedy can be crafted by the legislature." *Atlanta Oculoplastic Surgery, P.C. d/b/a Oculus, Appellant/Defendant, v. Betty Nestlehutt and Bruce Nestlehutt, Appellees/Plaintiffs.*, 2009 WL 6690446 (Ga.) ("Appellees' Response to *Amicus* Brief of Emory Healthcare"), at 26 & n.28.

In sum, *Nestlehutt* did not involve claims for wrongful death, and the *Nestlehutt* Court was not invited to address, and did not address, wrongful death damages caps at all. The Court's omission of analysis of the constitutionality of capping damages therefrom shows that the Court did not consider it within the scope of the opinion, and *Nestlehutt* only stands for what Justice Nahmias said it did—that "flat caps on noneconomic compensatory damages, as found by juries in

common-law medical malpractice cases," violate Georgia's jury trial right. As such, *Nestlehutt* did not invalidate caps on wrongful death damages.

C. *Nestlehutt* Could Not Have Found The Wrongful Death Damages Cap Unconstitutional Without Encroaching On The Legislative Authority.

Out of respect for the legislature and its role, courts act with restraint when considering striking a statute as unconstitutional. To be sure, it is within the Georgia Supreme Court's power to invalidate an unconstitutional statute. Courts have the power to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But that power comes with constraints that are rooted in the judiciary's role within our tripartite system. While the judiciary must ensure constitutional protections inhere in legislative acts resulting from that process, the constitutional inquiry must be begun with a presumption of validity. *Smith v. Cobb County-Kennestone Hosp. Auth.*, 262 Ga. 566, 570 (1992). Any doubt by the judiciary is resolved in favor of finding a statute constitutional. *See Taylor, Inc.*, 316 Ga. at 44 (stating that challenger to constitutionality of a statute must show there is a "clear and palpable" conflict between the law and the Constitution such that the Court must be "clearly satisfied" of the unconstitutionality).

Thus, Courts will retain as much of a statute as possible so as to give maximum constitutional effect to legislative intent. With due regard to these principles, and as discussed in more detail above, no fair reading of *Nestlehutt* invalidates the wrongful death damages limitations at issue in this case.

1. The General Assembly Is Best Suited to Address Health Policy.

Georgia courts are mindful of the deference owed to the General Assembly in making policy decisions. "It is a fundamental principle that the legislature, and not the courts, is empowered by the Constitution to decide public policy, and to implement that policy by enacting laws; and the courts are bound to follow such laws if constitutional." *WMW, Inc. v. Am. Honda Motor Co.*, 311 Ga. App. 1, 5 (2011), *aff'd*, 291 Ga. 683 (2012) (citation omitted).

Health policy issues are fittingly addressed by legislative action because the "legislature offers a forum wherein all of the issues, policy considerations and long range consequences involved" can be "thoroughly and openly debated and ultimately decided." *See Atlanta Obstetrics & Gynecology Grp. v. Abelson* ("*Abelson*"), 260 Ga. 711, 718-19 (1990) (considering wrongful birth cause of action). Legislatures are in the best position to evaluate the wisdom of damages caps because legislators have the resources to hold public hearings and collect and analyze data on the potential effects of damages caps before voting on legislation. *See Victor Schwartz, et al., Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1, 10-12 (2000) ("The legislature has the ability to hear from everybody—plaintiff's lawyers, health care professionals, defense lawyers, consumer groups, unions, and large and small business.... And, ultimately,

legislators make a judgment."). In short, the General Assembly provides the only governmental forum suitably broad to analyze and discuss the many complex issues involved formulating health policy.

In *Nestlehutt*, the Supreme Court never doubted the legitimate policy concerns underlying the General Assembly's imposition of caps. Indeed, the General Assembly engaged in a detailed fact-finding process and determined a health care crisis existed. *See Atlanta Oculoplastic Surgery, P.C. d/b/a Oculus, Appellant, v. Betty Nestlehutt and Bruce Nestlehutt, Appellees*., 2009 WL 6690445 (Ga.) ("*Amicus Curiae* Brief on Behalf of the Georgia Hospital Association and the American Hospital Association"), at 6 (explaining legislative history). The General Assembly considered a variety of evidence and engaged in vigorous debate regarding whether a health care crisis existed and possible solutions. *Id*.

The *Nestlehutt* court acknowledged the General Assembly's findings that "health care providers and facilities were being negatively affected by diminishing access to and increasing costs of procuring liability insurance," and that "these problems in the liability insurance market bore the potential to reduce Georgia citizens' access to health care services, thus degrading their health and well-being." *Nestlehutt*, 286 Ga. at 732, 691 S.E.2d at 221. The medical malpractice noneconomic damages caps, the Court observed, were "intended to help address what the General Assembly determined to be a crisis affecting the provision and

quality of health care services in this state." *Id.* (cleaned up; citation omitted). The General Assembly intended its reforms to "promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and . . . thereby assist in promoting the provision of health care liability insurance by insurance providers." *Id.* Out of deference to the General Assembly's role in forming healthcare policy, the *Nestlehutt* Court was bound to uphold the medical malpractice damages cap insofar as it was constitutional to do so. In accordance with this principle, it only struck the cap to the extent that it violated the Constitution by impairing the right to jury trial as to common law claims that existed at the creation of the 1798 Constitution.

2. The *Nestlehutt* Court Was Obligated to Give Effect to as Much of the General Assembly's Damages Cap Statute as Possible.

Deference to the respective roles of the legislature and judiciary also requires a court to give effect to as much of a law as possible. As Appellees correctly recognize, the Supreme Court has the power to sever and preserve a portion of an unconstitutional statute if the remaining portion of the statute can stand on its own and accomplish the purpose intended by the legislature. (Appellees' Br. at 15.) But Appellees wrongly state that this is merely a permissive power. (*Id.*).

"[T]he judiciary will not, and indeed cannot, void an enactment of the General Assembly merely because it is defective in part. Constitutional principles

dictate that such defective parts be excised and the remainder sustained provided the legislative scheme can be preserved." *Fortson v. Weeks*, 232 Ga. 472, 472–73, 208 S.E.2d 68, 71 (1974). Whenever possible, the legislative intent should be effectuated rather than declare the statute as a whole inoperative. *Maples v. City of Varnell*, 244 Ga. 163, 163 (1979). A cardinal rule of construction is that the legislative intent shall be effectuated, even though some verbiage may have to be eliminated. *Id*.

Moreover, a presumption of severability is operative here. The enactment containing the caps at issue includes a severability clause, thereby creating the presumption that the General Assembly intended for infirm provisions to be cut out rather than be considered an inextricable part of the whole. *Union City Bd. of Zoning Appeals v. Just. Outdoor Displays, Inc.*, 266 Ga. 393, 404, 467 S.E.2d 875, 884–85 (1996). The General Assembly's intent was clear and emphatic.

> In the event any section, subsection, sentence, clause, or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full force and effect as if the section, subsection, sentence, clause, or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional.

2005 Georgia Laws Act 1 (S.B. 3) § 14; *see also* O.C.G.A. § 1-1-3 (statutes presumed to be severable, such that invalid provisions may be struck without invalidating entire statute).

As shown above, *Nestlehutt* only found that the caps were unconstitutional as to medical malpractice actions available at common law before 1798. It did not find those caps unconstitutional as to wrongful death claims. The part of the legislative cap found unconstitutional in *Nestlehutt* can be excised neatly from the statute. For example, O.C.G.A. § 51-13-1 (b) can be edited as follows:

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

Removal of a mere three words effectuates legislative intent while protecting the constitutional rights the *Nestlehutt* Court found infringed.[4] Because the statute is severable, *Nestlehutt* is best read as removing only the portions offensive to the Constitution, leaving the balance of the statute intact.

[4] O.C.G.A. § 51-13-1(c) and (d) follow a parallel construction and can be similarly edited to preserve the legislative scheme.

3. Respect For the General Assembly Required the *Nestlehutt* Court to Only Decide the Questions Before It.

Deference to the legislature's role also requires a court to confine its holding to the issues before it. "The Georgia Constitution vests the legislative power in the General Assembly, [. . .] and demands that '[t]he legislative, judicial, and executive powers shall forever remain separate and distinct.'" *Classic Com. Servs., Inc. v. Baldwin*, 336 Ga. App. 183, 190 (2016) (Peterson, J., concurring). When courts afford legal authority to language in a judicial opinion that goes beyond the scope of the case being decided, courts "risk blurring the inviolate line separating the judicial power from the legislative." *Id*. Thus, the Georgia Supreme Court has "repeatedly cautioned that [its] decisions stand only for the points raised by the parties and decided by the court." *Holton v. Physician Oncology Servs., LP*, 292 Ga. 864, 869–70 (2013). It is "axiomatic that a decision's holding is limited to the factual context of the case being decided and the issues that context necessarily raises." *Gonzales v. State*, 315 Ga. 661, 665, 884 S.E.2d 339, 343 (2023). "Language that sounds like a holding — but actually exceeds the scope of the case's factual context — is not a holding no matter how much it sounds like one." *Id*.

So too here. While the *Nestlehutt* Court phrased its holding as "conclud[ing] that the noneconomic damages caps in OCGA § 51-13-1 violate the right to a jury trial as guaranteed under the Georgia Constitution," that language goes far beyond

what the parties before it raised and the authorities the Court relied on to reach its holding, as discussed above. (*See supra* § IV.A.) A decision of the Supreme Court is not precedent for a point it does not actually address and resolve. *Georgia Dep't of Hum. Servs. v. Addison*, 304 Ga. 425, 434 n.9 (2018). The trial court erred in finding *Nestlehutt* dispositive of Appellants' motion to remit the wrongful death damage award.

D. *Nestlehutt*'s Analytical Framework Yields But One Conclusion; The Wrongful Death Damages Cap Remains Constitutional.

As demonstrated, *Nestlehutt* did not directly address the constitutionality of the statutory cap as to wrongful death damages. However, its analytical framework shows no constitutional infirmity in the statutory cap as to the legislatively-created wrongful death cause of action. *See, e.g.*, *Taylor*, 316 Ga. at 45 (utilizing framework to guide analysis of punitive damages).

It is well established that the Georgia Constitution 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. *Nestlehutt*, 286 Ga. at 733. Thus, the initial step in the *Nestlehutt* analysis is an examination of the right to jury trial under late eighteenth-century common law. *Id*. The right does not extend to "new remedies provided" later. *Swails v. State*, 263 Ga. 276, 278 (1993).

Wrongful death actions did not exist in Georgia in 1798. *Bibbs*, 304 Ga. at 71 (stating that Georgia's first wrongful death statute was adopted in 1850). Because the cause of action did not exist by common law or statute in 1798, there is no constitutional right to a jury trial for any part of a wrongful death claim, including any "attendant right" to an award of damages as determined by the jury. *Compare Nestlehutt*, 286 Ga. at 734-35 (concluding jury right existed because of "clear existence of medical negligence claims" and associated noneconomic damages as of 1798), with *Swails*, 263 Ga. at 278 (no right to jury trial in drug forfeiture actions because drug forfeiture is a "new remedy" that did not exist in common law in 1798).

Appellees try to escape the fact that the right to a jury trial does not extend to the legislatively-made wrongful death action by asserting that "[t]his is a medical malpractice case. That is the cause of action." (Appellees' Br. at 20-21.) To do this, they must convince this Court that "'[w]rongful death' is not truly a cause of action." (*Id*.). Not so. "[A] survivor's statutory claim for a decedent's wrongful death and an estate's common-law claim for the same decedent's pain and suffering are *distinct* causes of action." *Mays v. Kroger Co.*, 306 Ga. App. 305, 306, 701 S.E.2d 909 (2010) (emphasis added).

Contrary to Appellees' arguments, a wrongful death claim is not "a statutory survival mechanism to allow claims which previously expired at death to survive."

(Appellees' Br. at 20-21.) A wrongful death claim "has none of the attributes of a mere survival of the cause of action had by the deceased, but has only those of a new and distinct right or cause of action, based merely upon the same tort which gave cause to the right of action in the deceased." *Miles v. Ashland Chem. Co.*, 261 Ga. 726, 728 n.1 (1991) (rejecting argument that medical malpractice, wrongful death, and continuing tort cases must be treated alike); *Western & Atlantic R. Co. v. Michael*, 175 Ga. 1, 13 (1932). ("The [wrongful death] statutes … create a new cause of action and new rights and duties . . . ."); *Id.* ("*These statutes . . . establish liability for wrongful death where none existed before*.") (emphasis added); *Turner v. Walker County*, 200 Ga. App. 565, 566 (1981) ("the action created by the wrongful death statute is different from the cause of action which the decedent would have possessed had he lived"); *Stiltjes v. Ridco Exterminating Co.*, 197 Ga. App. 852 (1990), *aff'd*, 261 Ga. 697 (1991) (wife in her individual capacity and in her capacity as administratrix of her husband's estate were legally different persons and were not in privity; therefore, judgment against wife in her action against defendant for wrongful death of husband did not collaterally estop action brought in her capacity as administratrix of her husband's estate seeking damages for pain and suffering of husband due to alleged defendant's negligence).

Nestlehutt's own analytical framework demonstrates the constitutionality of the cap on the legislatively-created wrongful death cause of action.

V. CONCLUSION

For all the reasons set forth above, *amici* urge this Court to reverse the trial court's order and hold that *Nestlehutt* did not invalidate the statutory limitations on wrongful death damages.

Respectfully submitted this 18th day of January, 2024.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing **BRIEF OF GEORGIA HOSPITAL ASSOCIATION, INC. AND THE MEDICAL ASSOCIATION OF GEORGIA, AS *AMICI CURIAE*** to be served upon counsel for Appellant and counsel for Appellees by depositing a copy of same in the United States Mail, with sufficient postage affixed thereto to ensure deliver, addressed to the following:

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This 18th day of January 2024.

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