IN THE SUPREME COURT OF GEORGIA

Case No. S26A0229

LUIS CAYAMCELA *et al.*,
Appellants,

v.

ADVOCACY TRUST, LLC *et al.*,
Appellees.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE GEORGIA CHAMBER OF COMMERCE, AND GEORGIANS FOR LAWSUIT REFORM AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The **Chamber of Commerce of the United States of America** is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every part of the country.

The **Georgia Chamber of Commerce** is the state's largest business association. It has nearly 50,000 members, from small businesses to Fortune 500 corporations, engaged in a wide range of industries across all of the state's 159 counties.

Georgians for Lawsuit Reform is the leading advocate for a more fair, balanced, and efficient civil-justice system in Georgia. Founded by prominent members of the business community, it represents a broad range of businesses in a variety of industries throughout the state.

To represent their respective members and constituencies, these organizations regularly file *amicus curiae* briefs in cases, like this one, that raise issues of vital concern to the Nation's business community.

I. INTRODUCTION

Twenty years ago, the General Assembly adopted OCGA § 51-13-1, altering the common-law measure of noneconomic damages recoverable in cases arising from medical malpractice.[1] The General Assembly enacted this measure to promote "predictability and improvement in…the resolution of health care liability claims," in the light of "a crisis affecting the provision and quality of health care services in this state" that had an "adverse impact on the health and well-being of the Citizens of this state."[2] But only five years later, this Court upended this remedial legislation in *Atlanta Oculoplastic Surgery v. Nestlehutt,* 286 Ga. 731 (691 SE2d 218) (2010), holding that OCGA § 51-13-1 works an unconstitutional denial of the right to trial by jury in common-law, medical malpractice cases. As a result of *Nestlehutt*, the People of Georgia have been deprived of the predictability and improvement that OCGA § 51-13-1 promised.

If *Nestlehutt* were a faithful interpretation and application of our state constitution, so be it. But *Nestlehutt* understood our constitution incorrectly. Indeed, *Nestlehutt* rests on the unsound premise that the right to jury trial precludes the statutory limitation or alteration of common-law remedies in cases triable at the Founding by juries. This premise has no precedent in the jurisprudence and constitutional history of this state, finds no support in Founding-era understandings of the right to jury trial, and is inconsistent with traditional understandings of the robust legislative power vested in the General Assembly. The essential premise of *Nestlehutt* is irredeemably flawed, and the doctrine of *stare decisis* cannot save this misbegotten precedent. The Court should reconsider and overrule *Nestlehutt.*

But even if the Court adheres to *Nestlehutt,* it still should conclude that OCGA § 51-13-1 constitutionally may be applied to damages awarded for wrongful death arising from medical malpractice. Wrongful death and medical malpractice are separate and distinct causes of action, and wrongful death was not cognizable under Georgia law at the time of the Founding. To the contrary,

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[1] *See* Ga. L. 2005, p. 1, § 13.

[2] Ga. L. 2005, p. 1, § 1.

our law only recognized a cause of action for wrongful death in 1850, and it did not recognize the modern cause of action for wrongful death—which awards damages for the full value of the life lost—until 1878. Even under *Nestlehutt*, OCGA § 51-13-1 works no denial of the constitutional guarantee of the right to jury trial when applied to damages awarded for wrongful death.

II. ARGUMENT AND CITATION OF AUTHORITY

A. *Nestlehutt* Rests on the Premise that the General Assembly Constitutionally Cannot Limit or Alter Common-Law Remedies.

In *Nestlehutt,* this Court considered whether OCGA § 51-13-1 could be applied to an award of noneconomic damages in a common-law, medical-malpractice case consistent with the constitutional guarantee of the right to jury trial. The Court's analysis in *Nestlehutt* started in the right place. To begin, the Court noted that the constitutional guarantee applies "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." 286 Ga. at 733 (cleaned up).[3] For this reason, the Court explained, "the initial step in our analysis must necessarily be an examination of the right to jury trial under late eighteenth century English common law." *Id.* The Court proceeded to examine whether claims for medical malpractice were cognizable at the time of the Founding, whether such claims then were triable by juries, and whether Founding-era juries were authorized to award noneconomic damages for medical malpractice.[4] Looking to the English common law and early Georgia practice, the Court found that medical malpractice was cognizable at common law and triable by juries. *See id.* at 733-34. The Court also concluded that

[3] The Court reaffirmed this understanding in *Taylor v. Devereux Found.,* 316 Ga. 44, 56 (885 SE2d 671) (2023) ("[F]or almost 175 years, this Court has consistently interpreted the Georgia Constitution's right to a jury trial as meaning that 'the people of this State are entitled to the trial by jury, as it was used in the State prior to the Constitution of 1798.'" (cleaned up)).

[4] The Court reaffirmed this approach to resolving the threshold inquiry in *Taylor,* identifying three key questions to be answered in a case involving the power of juries to award particular damages: (1) whether the cause of action was cognizable at common law and triable by juries in 1798; (2) whether the sort of damages at issue was cognizable at common law and could be awarded by juries in 1798; and (3) whether the sort of damages at issue could be awarded at common law for the particular cause of action at issue. *See* 316 Ga. at 45.

noneconomic damages—in particular, the sorts of noneconomic damages with which OCGA § 51-13-1 is concerned—"have long been recognized as an element of total damages in tort cases, including those involving medical negligence." *Id.* at 735. And the Court correctly observed that, because "the amount of damages sustained by a plaintiff is ordinarily an issue of fact," the valuation of the damage sustained "rests peculiarly within the province of the jury." *Id.* at 734. So far, so good.

At that point, however, the Court made a critical misstep. From its examination of the English common law and early Georgia practice, the Court concluded that, "at the time of the adoption of our Constitution of 1798, there did exist the common law right to a jury trial for claims involving the negligence of a health care provider, *with an attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury*." *Id.* at 735 (emphasis added). And the Court counted this "attendant right" as part and parcel of the right to jury trial guaranteed by the state constitution. *See id.* Remarkably, the Court did so without any effort to explain *why* the right to jury trial ought to be understood to incorporate a particular measure of damages. *See id.* After all, the Court just as easily—and just as consistently with the common law on which its analysis rested—could have framed the "attendant right" as a "right to all damages determined by a jury *and* recoverable under applicable law." But *that* framing of the "attendant right" would have produced no conflict with OCGA § 51-13-1, which limits the quantum of recoverable damages in cases arising from medical malpractice. Having framed the "attendant right" as it did, the Court then readily concluded that OCGA § 51-13-1—by "requiring [a] court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit"—unconstitutionally "nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function." 286 Ga. at 735.

With its unexplained analytical jump, the Court effectively held that the General Assembly has no power to alter the scope of common-law remedies in cases triable at the Founding by juries. To be sure, the Court expressly acknowledged "the general principle…that the Legislature has authority to modify or abrogate the common law," as well as the corollary principle that "the Legislature generally has the authority to define, limit, and modify

available legal remedies." *Id.* at 736-37. The Court also noted, however, a caveat that "the exercise of such authority simply cannot stand when the resulting legislation violates the constitutional right to jury trial." *Id.* at 737. This caveat is a truism, of course, but it begs the question of whether a particular exercise of authority actually *violates* the constitutional guarantee of the right to jury trial.

Notably, the Court cited no Georgia precedent for the idea that the constitutional guarantee of the right to jury trial incorporates the scope of legal remedies available at common law.[5] Instead, the Court relied exclusively on four decisions by courts in other states. *See id.* at 735-36. One of these foreign decisions involved a provision of a state constitution that specifically preserves common-law remedies.[6] Another had been called into question years before *Nestlehutt* by the court that decided it.[7] And since *Nestlehutt,* yet another of these decisions has been expressly disavowed and overruled.[8] None of these decisions considered Georgia constitutional text, history, or precedent, of course.

In *Taylor,* Justice Colvin recognized the extraordinary analytical leap at the heart of *Nestlehutt:*

> *Nestlehutt* correctly recognized that "the amount of damages sustained by a plaintiff is ordinarily an issue of fact" and that the right to a jury trial has therefore been understood as "including the right to have a jury determine the amount of damages, if any, awarded

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[5] *Nestlehutt* cites *Pollard v. State,* 148 Ga. 447 (96 SE 997) (1918), for the proposition that the constitutional guarantee protects the right to jury trial "in all its essential elements." *Nestlehutt,* 286 Ga. at 735 (citing *Pollard*). *Pollard* did not involve, however, a limitation of common-law remedies. *Pollard* instead involved statutes governing the constitution and composition of a jury. *See Pollard,* 148 Ga. at 448.

[6] *See Smith v. Dept. of Ins.,* 507 So2d 1080, 1087-89 (Fla. 1987).

[7] *See Mobile Infirmary Med. Ctr. v. Hodgen,* 884 So2d 801, 813-14 (Ala. 2003) (acknowledging "erosion" of *Moore v. Mobile Infirmary Ass'n,* 592 So2d 156 (Ala. 1991), upon which *Nestlehutt* relied).

[8] *See Horton v. Ore. Health & Sci. Univ.,* 376 P3d 998, 1030-44 (Ore. 2016) (overruling *Lakin v. Senco Prods.,* 987 P2d 463 (Ore. 1999), upon which *Nestlehutt* relied, explaining that *Lakin* is inconsistent with the constitutional text and history, neither of which "suggests that [the right to jury trial] was intended to place a substantive limitation on the legislature's authority to alter or adjust a party's rights and remedies").

> to the plaintiff." But it does not follow from the existence of a procedural right to have a jury, rather than a judge, make factual findings about damages that, as *Nestlehutt* concluded, the right to a jury trial also guarantees a substantive "right to the award of the full measure of damages…as determined by the jury." Because reducing a damages award as prescribed by law does not require a judge to act as a factfinder or substitute his judgment for that of the jury, doing so does not appear to "infringe" on or "nullify" the procedural right to have a jury make factual findings regarding damages. Thus, in concluding that a court violates the right to a jury trial by reducing damages in accordance with a statutory cap, *Nestlehutt* appeared to recognize a novel substantive component of the right—a substantive right to a particular remedy that limits a legislature's ability to define the legal principles applicable to a cause of action.

316 Ga. at 103-04 (Colvin, J., concurring) (cleaned up). Justice Colvin expressed doubt about the correctness of *Nestlehutt, see id.* at 101, and encouraged the Court to "take a careful look at *Nestlehutt* in an appropriate case." *Id.* at 104. *See also Medical Ctr. of Cent. Ga. v. Turner,* 322 Ga. 129, 133 (917 SE2d 697) (2025) (Colvin, J., concurring). This is the appropriate case to reexamine *Nestlehutt*.

B. The Premise of *Nestlehutt* Is Unsound, and the Court Should Overrule *Nestlehutt*.

The essential premise of *Nestlehutt*—the idea that the scope of legal remedies available at common law is immutable in cases triable by juries and that the General Assembly may not constitutionally alter, limit, or abrogate common-law remedies—is unsound. It finds no support in the precedents of this Court, it likewise finds no support in Founding-era understandings of the right to jury trial, and it is inconsistent with the traditional understanding that the legislative power includes the authority to modify legal liabilities, defenses, and remedies. *Stare decisis* cannot save *Nestlehutt,* and this Court should overrule it.

1. As this Court has explained, the legislative power vested in the General Assembly is nearly plenary. *See McInerney v. McInerney,* 313 Ga. 462, 467 (870 SE2d 721) (2022). In general, the legislative power includes the power to

modify, limit, or even abrogate the common law by statute. *See Harvey v. Thompson,* 128 Ga. 147, 151 (57 SE 104) (1907). *See also Hartridge v. Wesson,* 4 Ga. 101, 105-06 (1848). And more specifically, the legislative power always has been understood to include the authority to modify the extent and availability of common-law remedies. *See Cunningham v. Campbell,* 33 Ga. 625, 639 (1863) ("[I]n this country, as in England, not only common law remedies, but common law rights, are every year modified by statute."). *See also Wilder v. Lumpkin,* 4 Ga. 208, 220 (1848). This was the traditional understanding not only in Georgia, but in American law more generally: "As a general rule every State has complete control over the remedies which it shall afford to parties in its courts…. It may give a new and additional remedy for a right already in existence. And it may abolish old remedies and substitute new." Thomas M. Cooley, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION at 861-62 (1868). *See also* Henry St. George Tucker, COMMENTARIES ON THE LAWS OF VIRGINIA at 3 (1836) ("The remedies afforded by law, for the recovery of debts, or compensation for injuries, are the creatures of the legislative power, and subject at its pleasure to alteration.").

Certainly, the General Assembly has no power to abrogate *constitutional* rights, *see Taylor,* 316 Ga. at 62, but this Court "presume[s] that statutes are constitutional, and before an act of the General Assembly can be declared unconstitutional, the conflict between it and fundamental law must be clear and palpable." *Georgia Ass'n of Club Executives v. State,* 320 Ga. 381, 386 (908 SE2d 551) (2024) (cleaned up). As shown by an examination of the English common law and early American understandings—and reinforced by the Georgia precedents—there is no "clear and palpable" conflict between the right to jury trial and the legislative power of the General Assembly to modify, limit, and abrogate common-law causes of action, defenses, and remedies. The adoption of OCGA § 51-13-1 was a constitutional exercise of that legislative power.

2. When the Constitution of 1798 was adopted, juries were understood to have an important—but distinct and limited—role in the trial of civil cases. This Court has "long accepted [William Blackstone] as the leading authority on the common law," *Sons of Confederate Veterans v. Henry County Bd. of Commrs.,* 315 Ga. 39, 48 (880 SE2d 168) (2022), and it has regarded Blackstone

as especially instructive on Founding-era understandings of the right to jury trial. *See Rouse v. State,* 4 Ga. 136, 145-46 (1848).[9] In his COMMENTARIES ON THE LAWS OF ENGLAND, Blackstone discussed the nature of trial by jury in terms of the distinctive roles that the common law assigned to judges and juries in civil trials. Ascertaining the law was the province of judges, and ascertaining the material facts was the province of juries. This division of adjudicative responsibility, Blackstone explained, was a safeguard against the twin evils of judicial corruption and bias and popular whim and caprice:

> The impartial administration of justice…is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men…their decisions, in [spite] of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that the few should always be attentive to the interests and good of the many. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law … should be deposited in the breasts of the judges…. But *in settling and adjusting a question of fact … a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice.*

3 Blackstone, COMMENTARIES at 379-80 (1768) (emphasis added). Blackstone was clear that the essential function of a jury was to find disputed *facts* that are relevant under the applicable law. *See id.* at 366 (when jury has been struck, jurors are "ready to hear the merits [and] fix their attention closer to *the facts which they are empaneled and sworn to try*") (emphasis added). *See also* James B. Thayer, *"Law and Fact" in Jury Trials,* 4 HARV. L. REV. 147, 147-48 (1890) (under English common law, a jury existed for "a pending legal controversy, where the parties were at issue on some question of fact, to say what

[9] *See also* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 639, 654 n.45 (1973) (noting that Blackstone was "[b]y far the most widely read" authority on the right to jury trial among the Founding generation).

the fact was"). By its assignment to juries of the responsibility to resolve disputed issues of material fact, the common-law right to trial by jury "preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens." 3 Blackstone, COMMENTARIES at 380.

"[A]t the time of the American Revolution the general principle was well established in English law that juries must answer to questions of fact and judges to questions of law." Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure,* 31 HARV. L. REV. 669, 677 (1918). This understanding is reflected in early American decisions, including in Georgia. *See, e.g.*, *Sheftall v. Clay,* 1 Charlton 7, 12 (Chatham Co. Super. Ct. 1811) (Berrien, J.) ("I subscribe to the doctrine that Judges answer to the law, and jurors to the facts. I am speaking of civil cases; and while I sit here, I will repress any attempt to divest this Court of its constitutional and exclusive powers in matters of law."). Soon after its establishment, this Court endorsed Blackstone's understanding that trial by jury was meant to divide adjudicative responsibilities between judges and juries, assigning to juries the distinct and limited role of resolving questions of fact. *See Anderson v. State,* 2 Ga. 370, 380 (1847) ("Whilst we hold it to be the right of the jury to pronounce upon the facts, we need scarcely say it is not only the right, but the duty of the court, in every case, plainly and independently to declare the law.") (cleaned up). Since then, this Court has adhered to this understanding. *See, e.g.*, *Harry v. Glynn Cty.,* 269 Ga. 503, 505 (501 SE2d 196) (1998) (affirming constitutionality of summary judgments) ("[I]f there is no issue of fact, there is no right to a jury trial."); *Tilley v. Cox,* 119 Ga. 867, 870-71 (47 SE 219) (1904) (affirming constitutionality of directed verdicts) ("Under our procedure it is the province of the jury, in civil cases, to pass upon questions of fact, and a trial by jury in such cases presupposes an issue of fact; so, if there be no such issue, there is nothing for a jury to pass on.").

Even *Nestlehutt* itself acknowledges this understanding: "As with all torts, the determination of damages rests peculiarly within the province of the jury. *Because the amount of damages sustained by a plaintiff is ordinarily an issue of fact,* this has been the rule from the beginning of trial by jury." 286 Ga. at 734 (emphasis added). The Court no doubt was correct to say that the

valuation of the *damage sustained* by a plaintiff typically is a question for the jury, precisely because it is a question of fact. That does not mean, however, that it always and necessarily is the essential function and constitutional prerogative of a jury to award damages in the full amount of its factual valuation of the damage sustained by a plaintiff. Certainly, if the legal measure of damage calls for full and unlimited compensation, a jury would be authorized to do so. But as the trier of *fact,* a jury takes the *law* as it is given by the judge and applies that law to the facts that it finds. And if the law—the legal measure of damages—does not permit full and unlimited compensation in all cases, the function and prerogative of the jury is only to award those damages consistent with its valuation that the law permits. Remitting a legally excessive award to an amount that is legally permissible does not impair the essential function or constitutional prerogative of the jury. That is what OCGA § 51-13-1 allows.

3. Under English common law and at the time of the Founding, the right to jury trial was understood as an essential, *procedural* right to insist that civil cases be tried—and that disputes of material facts be resolved—*by* juries, not judges. In his COMMENTARIES, Blackstone hailed trial by jury "as the glory of the English law," 3 Blackstone, COMMENTARIES at 379 (1768), and he devoted a full chapter of the COMMENTARIES to jury trials. *See id.* at 349-85. But Blackstone "focused solely on the procedures associated with jury trials," *Horton,* 376 P3d at 1037, describing the nature of the right to trial by jury as "the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." 3 Blackstone, COMMENTARIES at 379. Blackstone discussed the varieties of jury trials at common law, *see id.* at 351-52, the procedures for summoning the venire, *see id.* at 352-58, the grounds for challenging members of the venire, *see id.* at 359-65, the process for striking and swearing the jury, *see id.* at 365-66, trial procedures relating to the presentation of issues and evidence in a jury trial, *see id.* at 367-75, and jury deliberations and verdicts. *See id.* at 375-79.

Conspicuously absent from the COMMENTARIES, however, is any suggestion "that the right to a civil jury imposed a substantive limit on the ability of either the common-law courts or parliament to define the legal principles that create and limit a person's liability." *Horton,* 376 P3d at 1037. This absence is

altogether unsurprising because Blackstone subscribed to the view that parliament could alter the common law by statute. Blackstone cited ancient English authority for the proposition that "the original writs upon which all our [civil] actions are founded" are "fixed and immutable, *unless by authority of parliament*." 3 Blackstone, Commentaries at 117 (emphasis added) (citing Henry de Bracton). Other prominent commentators on the common law likewise accepted the principle of parliamentary supremacy, *see Gunn v. Hendry,* 43 Ga. 556, 559-60 (1871) (discussing views of Edward Coke and Matthew Hale), including the power of parliament to displace the common law. *See* R.A. MacKay, *Coke—Parliamentary Sovereignty or the Supremacy of the Law?,* 22 MICH. L. REV. 215, 231 (1924) (explaining that Coke's influential INSTITUTES OF THE LAWES OF ENGLAND "nowhere…hint that any part of the Common Law is beyond the power of Parliament to change if it so wills"). Nothing suggests that these commentators perceived any tension—much less a clear and palpable conflict—between the right to trial by jury and the general prerogative of the legislature to change the common law.

The English understanding of the right to trial by jury—that it is concerned with *who* finds material facts in civil cases, not *which* facts the applicable law deems material—is consistent with early American practices and views, which regarded the right in procedural terms. A "deeply divisive issue" in the years leading up to the War of American Independence was "the extent to which colonial administrators were making use of judge-tried cases to circumvent the right of civil jury trial," particularly by steering cases to chancery and admiralty courts. Wolfram, *supra* at 654 & n.47. Concerns about this colonial practice led the Second Continental Congress in 1775 to cite laws "extending the jurisdiction of courts of admiralty and vice-admiralty beyond their ancient limits," "depriving us of the accustomed and inestimable privilege of trial by jury," in its Declaration of the Causes and Necessity of Taking Up Arms. *See* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History,* 44 HASTINGS L.J. 579, 596 (1993). And a year later, the Congress famously cited denial "of the benefits of trial by jury" in its enumeration of grievances in the Declaration of Independence. *See id.* After the break with England, a majority of the 13 original states promptly secured the right to jury trial in their state constitutions. *See id.* And in the debates over ratification of

the U.S. Constitution, a notion that the right was procedural—and largely about the division between judges and juries of the power to adjudicate law and facts—was shared by Federalists[10] and Antifederalists[11] alike.

None of these historical sources suggest that the Founding generation saw the right to trial by jury as a substantive guarantee that limits the power of the legislature to alter the common law. To the contrary, writing in FEDERALIST No. 83, Alexander Hamilton discussed the right to trial by jury in connection with taxation, and he made clear that he viewed the right as no limitation of substantive legislation: "It is evident that [the right to jury trial] can have no influence upon the legislature in regard to the amount of taxes to be laid, to the objects upon which they are imposed, or to the rule by which they are to be apportioned." THE FEDERALIST, *supra,* No. 83 at 433. Put another way, "Hamilton explained that the right to a civil jury trial would not limit Congress's ability to enact statutes defining the subjects and extent of taxation. Instead, it could serve as a check on the manner in which the executive carried out the law in an individual case." *Horton,* 376 P3d at 1039.

4. Nor did this Court— before *Nestlehutt*—treat the right to trial by jury as a substantive assurance of particular rules of decision. Indeed, this Court consistently rejected claims that the right forbade the General Assembly to legislate the substantive law to be applied by triers of fact in civil cases. *See, e.g.*, *State v. Moseley,* 263 Ga. 680, 681 (436 SE2d 632) (1993) (assignment of punitive damages to state); *Teasley v. Mathis,* 243 Ga. 561, 563 (255 SE2d 57)

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[10] *See, e.g.*, THE FEDERALIST (Carey & McClellan 2001), No. 83 (Alexander Hamilton) at 434 ("The strongest argument [for jury trials in civil cases is] that it is a security against corruption."); 1 Annals of Congress 433 (1789) (James Madison) (expressing view that jury trials are "safeguards … interposed between [the people] and the magistrate who exercises the sovereign power").

[11] *See, e.g.*, Allen & Lloyd, THE ESSENTIAL ANTIFEDERALIST (2002) at 21 (Richard Henry Lee) (citing Blackstone for proposition that "every tribunal selected for the decision of facts is a step toward establishing aristocracy"), 137 (Patrick Henry) (expressing concerns about oppressive tax collection practices, unchecked by judges "inclined to favor their own officers"); 166 ("Federal Farmer") (discussing role of juries in "the trial of facts"). *See also* Landsman, *supra* at 599-600 ("All of the Antifederalists' arguments centered on their belief that the courts should not become the exclusive province of the judges. The Antifederalists frequently cited with approval Blackstone's famous statement [about the danger of judicial bias].").

(1979) (elimination of punitive damages in "no fault" accident cases).[12] The same held true after *Nestlehutt* too, even when the General Assembly altered common-law liabilities, defenses, and remedies. *See, e.g.*, *Couch v. Red Roof Inns,* 291 Ga. 359, 367 (729 SE2d 378) (2012) (apportionment of fault); *Gliemmo v. Cousineau,* 287 Ga. 7, 11 (694 SE2d 75) (2010) (heightened burden of proof for medical-malpractice claims arising from emergency care). And in the few cases—other than *Nestlehutt,* of course—in which the Court held statutes unconstitutional, the statutes altogether denied a jury trial. *See, e.g.*, *DeLamar v. Dollar,* 128 Ga. 57, 66 (57 SE 85) (1907); *Tift v. Griffin,* 5 Ga. 185, 193 (1848). There is no evidence of a clear and palpable conflict between the constitutional right and OCGA § 51-13-1, and *Nestlehutt* was wrongly decided.[13]

5. The doctrine of *stare decisis* cannot save *Nestlehutt.* S*tare decisis* is "not an inexorable command, and sometimes, there are compelling reasons to reexamine an earlier decision." *Georgia Ports Auth. v. Lawyer,* 304 Ga. 667, 677 (821 SE2d 22) (2018) (cleaned up). *See also Woodard v. State,* 296 Ga. 803, 812 (771 SE2d 362) (2015) ("[W]hen governing decisions are unworkable or badly reasoned, this Court has never felt constrained to follow precedent. Stare decisis is…a principle of policy and not a mechanical formula of adherence to

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[12] In *Taylor,* this Court discounted the reasoning in *Moseley* and *Teasley* as "cursory, fatally incomplete, and [inconsistent with] *Nestlehutt.*" 316 Ga. at 60-61. Whether or not those decisions are precedential or persuasive, they reflect a consistent treatment of the right to trial by jury.

[13] If there were any doubt about the soundness of *Nestlehutt*, two other points are worth considering. *First, Nestlehutt* is an outlier, and the vast majority of state supreme courts and federal circuit courts to consider similar challenges to statutory damages caps have rejected them. *See Horton,* 376 P3d at 1043-44 (cataloguing cases). *See also McClay v. Airport Mgmt. Servs.,* 596 SW3d 686, 690-93 (Tenn. 2020). *Second,* consider the potential consequences of taking *Nestlehutt* to its logical extension, embracing an understanding that the right to jury trial constitutionally freezes the rules of decision—the elements of causes of action, defenses, and remedies—in common-law cases as of 1798. Today, consequential damages in breach-of-contract cases at common law are limited to damages within the contemplation of the contracting parties under the rule of *Hadley v. Baxendale,* 156 Eng. Rep. 145 (Ex. 1854). But before *Hadley*, the measure of damages in breach-of-contract cases may not have been so limited. *See* Mara Kent, *The Common-Law History of Non-Economic Damages in Breach of Contract Actions Versus Willful Breach of Contract Actions,* 11 TEX. WESLEYAN L. REV. 481, 488 (2005). Under *Nestlehutt,* are damages for breach beyond the contemplation of the parties guaranteed by the right to jury trial?

the latest decision.") (cleaned up). "That's because the rule of law can…be undermined by perpetuating decisions that are obviously and harmfully wrong," and "[w]hen sticking to such decisions would cause more damage to the rule of law than correcting course, courts may choose overruling as the lesser evil." *Ammons v. State*, 315 Ga. 149, 169 (880 SE2d 544) (2022) (Pinson, J., concurring).

Ultimately, "[i]n reconsidering [its] prior decisions, [this Court] must balance the importance of having the question decided against the importance of having it decided right." *Olevik v. State,* 302 Ga. 228, 245 (806 SE2d 505) (2017). In striking this balance, the Court considers a number of "guideposts," as opposed to "a mechanical formula or a multi-factor test." *Wasserman v. Franklin Cty.*, 320 Ga. 624, 647 (911 SE2d 583) (2025). These guideposts include "the age of precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning." *State v. Jackson,* 287 Ga. 646, 658 (697 SE2d 757) (2010). In the light of these considerations, there are compelling reasons to reconsider and overrule *Nestlehutt.*

Most important, *Nestlehutt* is poorly reasoned and evidently wrong, and "the soundness of the precedent's reasoning"—or, more accurately, the lack thereof—"weighs strongly in favor of discarding it." *Nalls v. State*, 304 Ga. 168, 179 (815 SE2d 38) (2018). Its essential premise—that it is the constitutional prerogative of juries to award damages in the full amount of their valuation of the damage sustained, irrespective of the substantive rules defining the scope of the legal remedy, and that the General Assembly has no authority to limit the common-law remedy—is poorly reasoned. *Nestlehutt* cites only a handful of out-of-state cases—most of which are inapt or have been discredited—in support of this premise. And *Nestlehutt* neglected substantial evidence of historical understandings and practices that pointed away from its premise.

Practical considerations also counsel against adhering to *Nestlehutt* as a matter of *stare decisis.* For one, it is not very old, and it is not yet deeply entrenched in our jurisprudence. This Court has given extensive treatment to *Nestlehutt* in only two cases—*Taylor* and *Turner*—and in both cases, the Court distinguished *Nestlehutt.* Moreover, *Nestlehutt*—which is about the constitutionality of statutory rules of decision in litigation, specifically statutory

measures of damages—is not the sort of decision likely to have engendered substantial, private reliance interests of the sort with which *stare decisis* is concerned. *See Olevik*, 302 Ga. at 245 (in applying *stare decisis*, "[s]ubstantial reliance interests are an important consideration for precedents involving contract and property rights, where parties may have acted in conformance with existing legal rules in order to conduct transactions.") (citation omitted). As for workability, the historical examination that the *Nestlehutt* framework requires often is time- and resource-intensive for courts and litigants alike. *See, e.g.*, *Taylor,* 316 Ga. at 63-80 (applying *Nestlehutt* standard). Moreover, the nature of the framework makes the ultimate resolution of issues arising under it uncertain and unpredictable, which can impede the swift and efficient resolution of the litigation in which those issues arise. If the constitution required such an impractical framework, so be it. But with respect to legislative alterations of common-law rules of decision, the constitution requires no such thing.

Nestlehutt is a constitutional decision, and as the Court has explained, *stare decisis* "carries less weight when our prior precedent involved the interpretation of the Constitution, which is more difficult than statutory interpretation for the legislative process to correct." *Olevik,* 302 Ga. at 245. With respect to constitutional decisions, the soundness of their reasoning "becomes even more critical. The more wrong a prior precedent got the Constitution, the less room there is for the other factors to preserve it." *Id.* For 15 years, *Nestlehutt* has deprived defendants in medical-malpractice cases of the benefit of OCGA § 51-13-1, a statute duly enacted by the General Assembly in a constitutional exercise of its legislative power. Moreover, *Nestlehutt* has cast doubt on the power of the General Assembly to change the common law, putting a cloud over legislative proposals to reform the substantive law. *Nestlehutt* improperly has tied the hands of lawmakers for long enough, and this Court now should restore the proper balance of powers between the legislative and judicial branches.

C. Even If the Court Adheres to *Nestlehutt,* the Application of OCGA § 51-13-1 to Damages Awarded for Wrongful Death Does Not Work a Denial of the Right to Jury Trial.

Even under *Nestlehutt*, damages awarded for the full value of life in wrongful-death cases do not implicate the constitutional guarantee of the right

to jury trial. In *Nestlehutt* itself, the Court recognized that the constitutional guarantee applies "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." 286 Ga. at 733 (cleaned up). For this reason, to determine whether the constitutional guarantee is even implicated by a limitation of a damages award, the Court must consider whether the particular cause of action was cognizable and triable by juries at common law, whether juries at common law awarded the sort of damages at issue, and whether they did so for the particular cause of action. *See Taylor,* 316 Ga. at 45. As this Court explained in *Turner,* "the analytical framework that we set out and applied in *Nestlehutt*…was claim- and remedy-specific." 322 Ga. at 132. Applying the framework here invariably leads to the conclusion that the constitutional guarantee is not implicated at all by a claim to recover full-value-of-life damages for wrongful death.

To begin, causes of action for medical malpractice and for wrongful death arising from medical malpractice are separate and distinct. This distinction necessarily was recognized by the Court in *Turner*. *See id.* And the Court has said explicitly that wrongful death and the underlying tort are "separate cause[s] of action." *Bibbs v. Toyota Motor Corp.,* 304 Ga. 68, 74 (815 SE2d 850) (2018). *See also Carringer v. Rodgers,* 276 Ga. 359, 363 (578 SE2d 841) (2003). So have learned commentators. *See* Charles J. Hilkey, *Actions for Wrongful Death in Georgia*, 9 GA. B.J. 368, 371 (1947). Indeed, the two causes of action spring from different sources of law,[14] belong to different plaintiffs,[15] have different elements,[16] and authorize the recovery of different damages.[17]

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[14] Medical malpractice arises from common law, *see Nestlehutt,* 268 Ga. at 733-34, whereas wrongful death arises from statute. *See Bibbs,* 304 Ga. at 70.

[15] A cause of action for wrongful death belongs to the statutory surviving next-of-kin, not the decedent's estate. *See* OCGA § 51-4-1 *et seq.*

[16] Death and causation of death obviously are essential elements of wrongful death, but not the underlying tort.

[17] Unlike compensatory damages authorized by the common law for the underlying tort, full-value-of-life damages for wrongful death are punitive in nature. *See Engle v. Finch,* 165 Ga. 131, 134 (139 SE 868) (1927).

A claim for wrongful death was not cognizable at common law. *See Bibbs,* 304 Ga. at 70 ("At common law, no recovery could be had for an injury resulting in death, because the right of action died with the person."). *See also* Robert Campbell, LAW OF NEGLIGENCE at 20 (2d ed. 1878) ("[B]y the common law[,] the death of a human being could not be complained of as an injury by any one in a civil Court."); James H. Deering, LAW OF NEGLIGENCE at 611 (1886) ("The common law allowed of no remedy by way of civil action for the death of a human being." (cleaned up)); John W. Salmond, LAW OF TORTS, A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES at 334 (1907) ("At common law it is not a civil wrong to cause the death of a human being."). Georgia first recognized a cause of action for wrongful death in 1850. *See Bibbs,* 304 Ga. at 71. And Georgia law did not recognize the modern version of wrongful death—with damages for the full value of life—until 1878. *See id.* at 72. Because the right of action and the legal remedy at issue are creations of statutes enacted long after 1798, *see Tolbert v. Maner,* 271 Ga. 207, 208 (518 SE2d 423) (1999), the constitutional right to jury trial is not even implicated by a claim for wrongful death. *See Benton v. Ga. Marble Co.,* 258 Ga. 58, 66 (365 SE2d 413) (1988). *See also Taylor,* 316 Ga. at 58; *Nestlehutt,* 286 Ga. at 733.

Consequently, even under *Nestlehutt,* the application of OCGA § 51-13-1 to damages awarded for wrongful death does not work a denial of the right to jury trial as guaranteed by the state constitution.

III. CONCLUSION

The Court should overrule *Nestlehutt.* In the alternative, even if the Court decides to adhere to *Nestlehutt*, it still should conclude that OCGA § 51-13-1 constitutionally may be applied to awards of damages for the full value of life in wrongful-death cases.

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This brief does not exceed the word limit imposed by Rule 20 (5).

Respectfully submitted,

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The undersigned counsel certifies that there is an agreement with counsel of record to allow documents to be served in a PDF format by electronic mail and that, contemporaneous with the filing of this document, a copy of this brief in PDF format was served by electronic mail upon each of the following counsel of record:

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