9-7-2022

# Amicus Curiae Brief of Professors Anthony J. Sebok and John C. P. Goldberg in Support of Appellee the Devereux Foundation, Inc.

Anthony J. Sebok

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

| | | |
|---|---|---|
| JO-ANN TAYLOR, Executor, | ) | |
| | ) | |
| Plaintiff/Appellant | ) | |
| | ) | Supreme Court Case |
| | ) | No. S22A1060 |
| vs. | ) | |
| | ) | |
| THE DEVEREUX FOUNDATION, INC., | ) | |
| | ) | |
| Defendant/Appellee. | ) | |

---

# *AMICUS CURIAE* BRIEF OF PROFESSORS ANTHONY J. SEBOK AND JOHN C. P. GOLDBERG IN SUPPORT OF APPELLEE THE DEVEREUX FOUNDATION, INC.

---

David C. Hanson
Georgia Bar No. 940508
Weathington Firm
191 Peachtree St, NE Suite 3900
Atlanta, GA 30303
404-524-1600
dhanson@weathington.com
Attorney for *Amici* Law Professors
Anthony Sebok and John Goldberg

-Additional counsel on following page-

John C. P. Goldberg
Massachusetts Bar No. 558957
Harvard Law School
Areeda Hall Rm 232
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 496-2086.
jgoldberg@law.harvard.edu

Anthony J. Sebok
New York Bar No. 2702959
Benjamin N. Cardozo School of Law
55 5th Avenue, Room 403
New York, NY 10003
+1 (646) 592-6462.
sebok@yu.edu

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Cases

Statutes

Treatises



Law Review Articles

Other Publications

## INTRODUCTION AND STATEMENT OF INTEREST

Amici Anthony J. Sebok and John C. P. Goldberg are law professors with a particular focus in the field of tort law and damages. As scholars in this field, Amici recognize that the issues raised in this case are of tremendous importance to the history, theory, and development of tort law in the United States. The distinction between compensatory damages and punitive damages has long been recognized in both U.S. and Georgia law. Amici have a distinct interest in this Court reaching a correct decision with the benefit of complete and accurate historical information regarding the awarding of punitive damages in English common law, and endeavor to provide a thorough and accurate recounting of this important historical context for this Court's consideration.

Professor Anthony J. Sebok is an expert on legal ethics, litigation finance, tort law, and insurance law. Professor Sebok joined the Cardozo School of Law, in 2007, as a Professor of Law and Co-Director of the Jacob Burns Center for Ethics in the Practice of Law. Professor Sebok has served as an expert witness concerning issues of litigation finance and is the Ethics Consultant to Burford Capital. Additionally, Professor Sebok

is a member of the American Law Institute and is an MPRE Subject Matter Expert for the National Conference of Bar Examiners.

Professor John C. P. Goldberg is an expert in tort law, tort theory, and political philosophy. In 2008, he joined Harvard Law School's faculty as a Carter Professor of General Jurisprudence. Professor Goldberg is an Associate Reporter for the American Law Institute's Fourth Restatement of Property and serves as an advisor to the Third Restatement of Torts. Additionally, he is a member of the editorial boards of the Journal of Tort Law and Legal Theory.

## SUMMARY OF ARGUMENT

This Court has previously concluded that the right to jury trial guaranteed by the Georgia Constitution confers on juries in tort cases an exclusive power to set compensatory damages (subject to the judicial power to order a new trial where the verdict demonstrates passion or prejudice). *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010). In so holding, *Nestlehutt* emphasized that the scope of the jury trial right is determined by considering how it was understood at the time of the adoption of the Georgia Constitution in 1798. *Id.* at 733. It also took pains to distinguish the question of whether the jury trial right bars

the General Assembly from limiting a jury's power to award punitive damages. *Id.* at 736. Assuming that *Nestlehutt* was correctly decided, the distinction it drew between damages that compensate a tort plaintiff for losses (which are not subject to direct legislative limitation) and damages that punish (which are subject to direct legislative limitation) was and is entirely sound as a matter of history and theory.

To see why, one must appreciate that the right recognized in *Nestlehutt* is actually a composite of a legal right and a legal power. The legal right is the right of a successful tort plaintiff to obtain damages that compensate her for losses caused by the defendant's tortious conduct, including economic losses and non-economic losses such as pain and suffering – neither a court nor a jury has discretion to deny such a plaintiff compensation for such losses. The legal power, meanwhile, is the power of the jury to determine how much money will fairly compensate the plaintiff for these losses.

The constitutional right to monetary compensation for tortiously inflicted losses in an amount determined by a jury has no counterpart when it comes to damages that punish a defendant for the defendant's highly culpable misconduct. To be sure, a tort plaintiff who proves she

has been the victim of willful, wanton, or malicious conduct is *eligible* to receive damages that punish the defendant. But being eligible for something and having a right to something are two different things. The only legal right that has ever been enjoyed by a tort plaintiff who proves aggravating circumstances with respect to damages that punish is a right to *request* them, not a right to *obtain* them. Juries were always entirely free to honor or deny such a request. Thus, when awarding damages issued in the first instance for the purpose of punishment, the jury is *not* seeing to it that the plaintiff obtains something to which the plaintiff already has a legal right. It is instead making a discretionary decision, in response to the plaintiff's evidence, about whether the defendant should be made to pay additional damages because the defendant engaged in conduct worthy of being punished.

The main goal of this brief is to demonstrate that the foregoing distinction between damages that compensate for losses, on the one hand (to which a successful tort claimant has a legal right) and tort damages that punish, on the other (to which a successful tort claimant has no right), has long been recognized in U.S. law, including Georgia law. Doing so will require close attention to subtle shifts in the meaning of legal

terms of art such as "exemplary damages" and "punitive damages." In the early years of the American republic, damages that punish a tortfeasor for egregiously mistreating a victim were typically labelled "exemplary" or "vindicatory" damages. This terminology reflected the fact that such damages were understood to serve at least two different functions. The first and probably dominant of these was the quasi-compensatory ('vindicatory') function of providing redress to victims for their dignitary injuries – for the affronts, degradations, and humiliations they had suffered, *separate and apart from any physical, economic, or psychological losses associated with those injuries*. The second was the more overtly public-oriented function of deterring serious wrongdoing that might escape criminal punishment. Over time, courts have tended to reclassify damages that perform the quasi-compensatory or vindicatory function as belonging to the category of compensatory damages – as part of what is involved in making the plaintiff 'whole'. This is why the phrase "punitive damages" is typically today understood to refer – and by statute in Georgia exclusively refers – to damages that perform the distinct function of deterring wrongdoing for the benefit of the public.

The important points to appreciate about these shifts in historical usage are twofold. First, in the late 1700s and early 1800s, courts and commentators consistently maintained that *all damages that punish* – whether in the name of quasi-compensation/vindication or general deterrence – were awarded at the discretion of the jury, rather than as a matter of right. Second, punitive damages in contemporary Georgia law – which, as noted, are exclusively concerned to achieve general deterrence – are even more clearly damages to which no tort plaintiff has a right.

In sum, even though understandings of exactly what is being accomplished when tort damages that punish are awarded by juries have evolved, there has been a continuous recognition throughout the history of American law that, when juries award such damages, they are playing a qualitatively different role than when they award damages that compensate a plaintiff for her losses. In this distinct role, juries exercise a power – the discretionary power to punish – that is legislative in nature and thus naturally subject to legislative control. Thus, while state law, including Georgia law, has long recognized the power of juries in certain tort cases to award damages that punish, there has never been a

suggestion that juries are the *exclusive* wielders of such power (as they are, according to *Nestlehutt*, when it comes to setting the amount of compensation for losses owed to a successful tort plaintiff). Nor could there have been, as the power to punish is one that legislatures and judges have always wielded, most obviously in setting criminal fines and prison terms. While there is some reason to believe that the Georgia constitution confers on juries an exclusive power in tort cases to set compensatory damages, there is still more reason to believe that any such guarantee does *not* confer on juries an exclusive power to punish tortfeasors in the name of goals such as retribution or deterrence. O.C.G.A. § 51-12-5.1 (g), which limits the amount of money a plaintiff may receive in punitive damages – which of course are damages that punish – therefore does not violate GA Const. Art. I, Sec. 1, Para. 11(a).

# ARGUMENT

## I. The Historically Distinct Powers of Civil Juries: Determining Adequate Compensation versus Punishing Wrongdoers

### A. The Successful Tort Plaintiff's Legal Right to Damages that Compensate for Losses, as Assessed by a Jury

As it does today, English and early American common law recognized that a plaintiff who has proven all the elements of a tort claim, has overcome any proffered affirmative defenses, and has proven losses (or claims under a rule of presumed damages) is entitled to a legal remedy. As Blackstone explained, this rule of tort law is an application of the general principle of *ubi jus, ibi remedium* – where there is a legal right, there is a legal remedy. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *23 (1765-69). In tort law, the remedy to which the plaintiff is entitled as a matter of legal right was and is a compensatory payment in an amount sufficient to restore or vindicate the plaintiff to a rightful position. *Id.* at *137; John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DePaul L. Rev. 435, 439-445 (2006) (discussing Blackstone's understanding of compensatory

damages in tort cases, as well as the understanding of early American commentators such as Nathan Dane and Zephaniah Swift).[1]

Because precise valuations for certain losses, particularly bodily harms, are not possible, the task of determining the amount of money sufficient to compensate the plaintiff was left to the jury. Indeed, in Blackstone's time, a court could not second-guess a jury's assessment of the compensatory amount unless the award was so out of line with the evidence as to indicate that the jury had not set out in good faith to determine adequate compensation, but instead acted out of passion or prejudice. Goldberg, *supra*, at 442-43. As Blackstone explained, when a jury determines the amount of money the plaintiff should receive for his or her losses, it perfects an "incomplete or inchoate right" to adequate compensation that accrued to the plaintiff "the instant he receive[d] the injury [i.e., the instant the tort was committed]." BLACKSTONE, COMMENTARIES, supra, at *116. As today, in order to determine the

[1] In the late 1700s and early 1800s, these types of cases were categorized by reference to the old writ system, rather than within the modern category of tort. But this was merely a nominal difference. Actions brought under the writ of trespass for battery, like actions brought under the writ of trespass on the case for malpractice, were tort suits: i.e., civil suits brought by victims of legally defined injurious wrongs to obtain redress from the wrongdoer.

amount of compensation owed by the defendant to the plaintiff for losses caused by the tort, juries considered evidence of a plaintiff's out-of-pocket expenses (past and future) and lost wages, as well as of distress or pain and suffering experienced by the plaintiff as a result of the injuries giving rise to the tort action.

### B. The Idea of Tort Damages that Punish.

In the late eighteenth and early nineteenth centuries, monetary awards designed to make up for a plaintiff's tort-related losses were not the only kind of relief juries could give to a successful tort claimant. Instead, juries could also issue damages awards that punished the defendant.

Damages of this sort were understood to serve various ultimate purposes. Predominantly, they provided victims of intentional right violations a special type of quasi-compensation – namely, redress for having suffered a grave indignity, as opposed to compensation for losses such as bodily injuries, economic loss or pain and suffering.[2] In short, the

[2] While well-settled and perfectly coherent, the subtlety of the idea that certain non-loss-based monetary damages might compensate *through punishment* understandably sometimes caused confusion in early American law, which helps explain why terms like "vindictive

law was prepared to 'compensate' victims of indignities in the particular manner of empowering them to request jurors to punish the wrongdoer. Alternatively, such damages served policy goals such as norm-reinforcement and general deterrence.

Regardless of whether they were awarded for vindicatory or deterrence purposes, damages that punish, as opposed to damage that compensate for losses, were treated as distinct in kind. In particular, they were understood as damages to which successful tort plaintiffs have no legal right. When a jury awarded such damages it was understood to be doing something very different than when awarding compensation for losses; something much more akin to the issuance of a regulatory or criminal sanction. While there is no dispute that juries have long enjoyed this separate power, there is also no dispute that, because of the type of power it is, it is subject to substantially greater legislative control.

---

damages," "exemplary damages," and "punitive damages" were all used, sometimes without great precision. *See* Eric James Hertz & Mark D. Link, Punitive Damages in Georgia § 1-4 (Nov. 2021 Update) ("Punitive damages law in Georgia did not immediately take clear shape and reflected an ambivalent nature more like the law in England than prevailing American law.") (footnote omitted).

Support for the foregoing claims can again be found in Blackstone, who clearly articulated the notion that damages, in addition to being compensatory of losses, could be "exemplary." BLACKSTONE, COMMENTARIES, supra at *121. As he explained, in tort cases involving highly culpable wrongdoing, the jury's award need not be limited to its best estimate of plaintiff's economic and noneconomic losses. In addition, it could award an amount of money to repair the indignity or insult experienced by the plaintiff. For example, the victim of a malicious, utterly unprovoked attack resulting in a broken arm was understood to have suffered a dignitary insult above and beyond the bodily injury, and thus could request additional compensation beyond that due to a victim who suffered a same broken arm merely as a result of a defendant's negligence. *See* Goldberg, *supra*, at 442.[3]

[3] Early English cases involving actors who treated civil liability as merely a price to pay for the deliberate invasion of property rights illustrate the right to punish as part of the jury's range of options when awarding adequate compensation. *See Sears v. Lyons*, 171 Eng. Rep. 658 (1818) (defendant poisoned plaintiff's chickens; jury was allowed to consider the purpose behind the defendant's trespass and award more than the replacement value of the lost chickens); see also *Emblem v. Myers*, 158 Eng. Rep. 23 (1860) (defendant arranged to have structures on his own property fall on his neighbor's stable so that he could then buy the land in which it stood; jury was allowed to consider the purpose

The money the plaintiff received for these sorts of "exemplary" damages awards was not conceived of as making up for something the plaintiff had lost by substitution. Instead, it was a vehicle through which the victim expressively reversed the wrongful relationship generated by the defendant's tort. As Marc Galanter and David Luban would later put it, damages of this sort operationalize the "expressive defeat" of the defendant by the plaintiff: the jury's imposition of a monetary punishment "reassert[s] the truth about the relative value of wrongdoer and victim by inflicting a publicly visible defeat on the wrongdoer. . . [t]he magnitude of punishment must reflect the magnitude and, if possible, the nature of the asserted inequality between wrongdoer and victim." Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1436, 1432 (1993).

The propriety of juries awarding damages that punish as a way of vindicating the plaintiff's dignity, separate and apart from compensation for any physical, economic, or psychic setbacks, regularly appeared in mid-nineteenth century case law. *See* Anthony J. Sebok, *What Did*

---

behind the defendant's trespass and award more than the replacement value of the lost stable).

*Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matter Today*, 78 Chi. Kent L. Rev. 163, 188 – 190 (2003). Damages of this sort – damages that punished the defendant as quasi-compensation– were described by various phrases in the law of this time, including "vindictive damages," "exemplary damages," "punitory damages" and the like. *See, e.g.*, *Kendrick v. McCrary*, 11 Ga. 603, 603, 606 (1852) (rejecting defendant's objection to the jury's award of a large sum of "vindictive damages" on the ground that the plaintiff was entitled to "compensation" for the "dishonor and disgrace" the defendant's actions cast upon the plaintiff's family and for the invasion of his household peace).

A representative decision is *Chiles v. Drake*, 59 Ky. 146 (1859), a wrongful death suit alleging that the plaintiff's husband had been murdered by the railroad's employee. Given the heinous nature of the tortious conduct, the plaintiff was deemed entitled to request damages that punished the defendant. And it is clear from the context that these damages were not designed to offset the plaintiff's loss of her husband's wages and loss of his companionship: those would have been compensable losses even if he had been killed through mere negligence. Rather, she

was entitled to ask for "punitive damages" as a special kind of "compensation." *Id.* at 146. The extra increment of damages beyond those compensating for losses provided recovery for "the [moral] injury sustained," and, as such, were understood to be "vindictive, or, in other words … punitive." *Id.* at 151. Another decision – *Wilson v. Young*, 31 Wis. 574, 582 (1872) – conveys the same idea, noting that "Compensatory damages are of two kinds: 1st. Those which may be recovered for the actual personal or pecuniary injury and loss [such as] pain and suffering . . . and, 2d. Those which may be recovered for insult, the indignity . . . and the like."[4]

While jury awards of tort damages that punish primarily served in this period as expressive quasi-compensation of the type just described, courts at times also recognized other functions that might be served by damages that punish highly culpable tortfeasors. For example, in the foundational English of case of *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, 498-99 (K.B.), Lord Chief Justice Pratt explained that: "a jury have it in

[4] This same court distinguished between "'the mental suffering produced by the act or omission in question: vexation: anxiety:'" and the "'sense of wrong or insult, in the sufferer's breast from an act dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade, or insult.'" *Craker v. Chi. & N.W. Ry. Co.*, 36 Wis. 657, 677 (1875).

their power to give damages for more than the injury received. Damages are designed not only as satisfaction to the injured person, but likewise as punishment to the guilty to deter from any such proceeding for the future, and as proof of the detestation of the jury of the action itself." A Pennsylvania case, *Bishop v. Stockton*, 3 F. Case. 453, 454-55 (Pa. Cir. Ct. 1843), would later express a similar idea. It noted that, whereas "[c]ompensatory damages" aim to make reparations for a plaintiff's losses, "vindictive or exemplary damages may be given to indemnify the public for past injuries and damages, and to protect the community from future risks and wrongs". These descriptions accord with what is now the dominant modern understanding of "punitive damages" – damages that are entirely extra-compensatory (not even quasi-compensatory) and instead punish to serve public goods, especially general deterrence.[5]

Although the practice of allowing jurors to award damages beyond those sufficient to provide a tort plaintiff with fair compensation for her losses was widespread in early U.S. law, in the mid-1800s a prominent

[5] See *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 437 n.11 (2001) (discussing the "historical shift away from a compensatory—and towards a more purely punitive—conception of punitive damages").

debate arose among jurists concerning whether it really is within the province of civil juries to exercise such a power. Skeptics such as the prominent scholar Simon Greenleaf insisted that punishing wrongdoing for any purposes (as opposed to providing compensation for wrongfully caused losses) is exclusively the province of criminal law and had no place in tort law.[6] Defenders, including Theodore Sedgwick in his highly influential damages treatise, argued that cases like *Wilkes v. Wood* and others had clearly established the power of civil juries to issue damages awards that punish.[7]

Over the course of the nineteenth century, the defenders of the jury's power to issue damages that punish won the debate, and ever since it has been understood that, as a matter of state common law, juries in tort cases involving highly culpable misconduct may award punitive damages. Notably, in offering their defense, the defenders accepted the

---

[6] See 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 240 n.2 (16th ed. 1899) (originally published in 1842). Justice Lumpkin of the Georgia Supreme Court was, of course, in the critics' camp. *See Cherry v. McCall*, 23 Ga. 193, 195-96 (1857) (Lumpkin, J.) (Justice Lumpkin emphasized that he was speaking for himself, and in dictum, when he asserted that Georgia law did not and should not recognize a power in juries to award "vindictive, or punitive, or exemplary damages").

[7] See THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 39 (ARNO PRESS 1972) (originally published 1847).

skeptics' description of punitive damages as aiming in the first instance to punish. They nonetheless insisted that, in such tort cases, juries enjoy a power to punish, separate and apart from their power to specify compensation for losses. And it is precisely because juries, when exercising this distinct power, take on the distinct task of punishment, that the plaintiff was understood to have no right to punitive damages, and instead that the jury has complete discretion to decline to award such damages.

### C. Awarding Damages that Punish as a Distinct Jury Function.

Just as it is clear that early English cases sometimes allowed juries to award damages that punish, it is also clear that these cases "spoke of the power of the jury to award such damages, not of any right of a party to have a jury set them." Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. Chi. L. Rev. 179, 204 (1998). Mid-nineteenth century and later descriptions of the jury's power to award such damages likewise distinguish it from the jury's power to set a value on a tort plaintiff's losses. While juries have always enjoyed, and continue to enjoy, broad discretion to determine the *amount* of compensation that a successful tort plaintiff is entitled to receive, they do not enjoy the

discretion to *decline to award* damages where the plaintiff has offered sufficient evidence of compensable losses. Thus, a trial judge presiding over a tort case would, on proper motion from the plaintiff, be obligated to order a new trial in such a situation (or give the defendant the option to provide an additur conditional on a new trial if that option is rejected). *See, e.g.*, *Bishop & Parsons v. Macon*, 7 Ga. 200, 203-04 (1849) (ordering a new trial on the ground that the jury's verdict was manifestly low given the evidence of plaintiffs' losses). When it comes to damages that punish, however, the law – including Georgia law – has long specified that jurors may choose to award no such damages even where there is a legal basis for doing so. *See* Ga. Code Ch. 5 § 2998 (1861) ("In every tort there may be aggravating circumstances either in the act or the intention, and in that event the jury *may* give additional damages, either to deter the wrong doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff.") (emphasis added);[8] ERIC JAMES HERTZ

[8] Georgia courts recognized that juries would sometimes conflate damages for psychic loss (pain and suffering or emotional distress) with punishment damages, and reversed trial court results where the jury instructions may not have policed the distinction. *See, e.g.*, *Georgia Ry. & Elec. Co. v. Davis*, 6 Ga. App. 645, 65 S.E. 785, 786 (1909):

& MARK D. LINK, GEORGIA PUNITIVE DAMAGES § 6-19 (2d ed. Nov. 2021 Update) ("[I]t is within the exclusive province of the jury to decline to award punitive damages after considering the evidence.") (citing, inter alia, *Keith v. Beard*, 219 Ga. App. 190 (1995)).[9] This is also what the Georgia Supreme Court meant in explaining that, until such time as judgment is entered, a tort plaintiff has no "vested right to punitive damages." *Kelly v. Hall*, 191 Ga. 470, 472 (1941). On this basis, *Kelly* went so far as to suggest that the Georgia General Assembly has complete discretion to enact a statute eliminating punitive damages in tort cases, and even to fashion the law so that it applies to verdicts with punitive awards that have not yet been reduced to judgment. *Id.*

> The law does not allow a man to be compensated twice for his wounded feelings; and the jury cannot, after giving him the sum which their enlightened consciences tell them will fairly compensate for wounded feelings, give an additional sum under the head of punitive damages for the purpose of compensating him for wounded feelings. If, in any event, both compensatory and punitive damages may be recovered for wounded feelings, the punitive damages should be assessed for the purpose of deterring the wrongdoer.

[9] *See also* HERTZ & LINK, GEORGIA PUNITIVE DAMAGES § 6-19 ("A judge commits error by instructing the jury that if it finds for the plaintiff, it must award punitive damages. Such instruction improperly invades the province of the jury, since the question whether to award punitive damages is one for the jury, not the judge.").

There is nothing in American or Georgia legal history to suggest that a different understanding of jury power was at work in 1798. Quite the opposite, the record is one of complete continuity. We are not aware of any evidence, nor has Plaintiff pointed to any evidence, suggesting that there was a time at which Georgia common law recognized that tort plaintiffs have a right to obtain damages that punish, as opposed to a right to request them. Damages that provide redress for dignitary injury and/or general deterrence were never understood as "owed" to the plaintiff in the same way that the defendant owes damages for pain and suffering from the very moment the tort occurred. The historical record indicates quite clearly a steadfast recognition that juries do one thing when they, in their discretion, compensate for losses, and do something entirely different when, in their discretion, they allow plaintiffs to punish in the name of vindication or deterrence.

## II. State Legislatures Have Broad Authority Over Punishment, Whether Criminal or Civil

From a more theoretical perspective, the distinction that has always been observed between the two different jury powers with regard to tort damages – the power to value a tort plaintiff's losses and the power to punish the defendant – makes good sense. A jury is asked to perform several functions within the trial of a tort case. It is the primary factfinder (and, with that, the primary assessor of witness credibility). It also renders determinate the successful plaintiff's indeterminate right to adequate compensation. And, where there is evidence of willful or wanton misconduct, it can, upon proper motion by the plaintiff, choose to administer a kind of punishment on the tortfeasor. There is nothing in the Georgia constitution suggesting that, with respect to the latter task, the legislature lacks the power to regulate when and how juries go about punishing tortfeasors. Unsurprisingly, legislatures have long regulated this power, and this Court in *Nestlehutt* and other decisions has states that such power is well within the General Assembly's authority.[10] This

[10] That state legislatures have the authority to limit punishment by juries may be a proposition of law so obvious that it rarely has been addressed by the courts. However, the Alabama Supreme Court,

position is consistent with the deeply rooted understanding that, except those features of the jury trial entrenched in the constitution, the legislature has the power to add, remove, and modify tort remedies. See *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 207–08 (1848) ("The provision in our State Constitution, that trial by jury, as heretofore used, shall remain inviolate, means that it shall not be taken away, as it existed in 1798, when the instrument was adopted, and not that there must be a jury in all cases. New forums may be erected, and new remedies provided, accommodated to the ever shifting state of society.").

---

interpreting Section 11 of that state's constitution – which preserves the right to jury trial using the same language as Georgia's constitution ("the right of trial by jury shall remain inviolate") – held that the right to jury trial does not prohibit "the Legislature from removing from the jury the unbridled right to punish." *Ex parte Apicella*, 809 So. 2d 865, 873 (Ala. 2001) (abrogated on other grounds by *Betterman v. Montana*, 578 U.S. 437 (2016)). As one commentator has noted, *Nestlehutt* stands for the proposition that the right to a jury in civil cases "exists only where it existed in the late eighteenth century . . . [b]ut this doesn't mean that it necessarily exists in all cases where it did exist then. Alexander Volokh, *Medical Malpractice As Workers' Comp: Overcoming State Constitutional Barriers to Tort Reform*, 67 Emory L.J. 975, 998 (2018). Finally, it should be noted that Plaintiff's position, if accepted, would require this court to not only to strike down O.C.G.A. § 51-12-5.1 (g), but also O.C.G.A. § 51-12-5.1, adopted 13 years earlier, since it removed from the jury's consideration a rationale for awarding punitive damages that had been available to the jury in 1798.

Exemplary damages were an extraordinary tort remedy developed by courts in eighteenth-century England. Their purpose was to allow the plaintiff to do something which, until that point, only the state could do – punish; that is, to take from the defendant not in order to repair a loss, but to make the defendant suffer or 'smart', which was in turn understood to help restore the plaintiff's dignity and discourage future wrongdoing. There is no historical or jurisprudential reason to conflate punitive damages with damages in tort to compensate for losses. Punitive damages have always been (and today are especially clearly) a creature of public policy. The fact that Georgia law in 1798 enabled juries to choose to award damages that punish does not mean that the civil jury trial to which Georgians had a constitutional right included a right to such damages. This is clearly seen in the history of the treatment of punitive damages by the General Assembly.

From 1861 to 1987 the Georgia code provided for the award of damages in the event of "aggravation" and "vindictive" damages. In 1987 the provision which referred to vindictive damages was revised to read:

> § 51-12-6. Damages for injury to peace, happiness, or feelings
>
> In a tort action in which the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages

> can be prescribed except the enlightened consciences of impartial jurors. In such an action, punitive damages under Code Section 51-12-5 or Code Section 51-12-5.1 shall not be awarded.

The reference to "Code Section 51-12-5" was to the section on "aggravation" of damages which ceased to have any effect after 1987, when it was replaced by Code Section 51-12-5.1, the current section on punitive damages. In 2010, Code Section 51-12-5.1, the current section on punitive damages, was amended to include various new rules concerning punitive damages, including the $250,000 limit which is the subject of this appeal.

Until 1987, damages that fell under the heading of "damages resulting from aggravation," "vindicative damages," "exemplary damages," or "punitive damages" could mean one of two things: (1) damages to compensate for insult, humiliation, or degradation, or (2) damages intended to punish for the purpose of retribution and deterrence. For example, in *Hayes v. Irwin*, the court described these damages as "[a]dditional damages [that] may be awarded either to deter the wrongdoer from repeating the tortious act or as compensation for the wounded feelings of the injured plaintiff." 541 F. Supp. 397, 439 (N.D.

Ga. 1982).[11] Both purposes reflect different facets of punishment but this fact was sometimes obscured by, for example, careless jury instructions that, in characterizing vindicatory damages, made mention of compensation for psychic loss such as feelings of mental anguish.[12]This risk of confusion is probably why the Georgia legislature decided it was important to enact statutory law clarifying the state's law of punitive damages. In particular, in 1987 the two functions served by "damages resulting from aggravation," "vindicative damages," "exemplary damages," or "punitive damages" were comprehensively reorganized. "Damages resulting from aggravation" were removed for all tort claims after 1987 and the labels "vindicative damages," "exemplary damages," and "punitive damages" were replaced by the term "punitive damages." Redress for loss was now served by other portions of the code, while redress through punishment is now served exclusively by O.C.G.A. § 51-12-5.1.

---

[11] aff'd, 729 F.2d 1466 (11th Cir. 1984), and aff'd sub nom. *Hayes v. Irwin Trading*, 729 F.2d 1466 (11th Cir. 1984).

[12] See n. 9, supra; see also *Atlantic Coast Line R. Co. v. Thomas*, 14 Ga. App. 619, 82 S.E. 299, 302 (1914) (general damages may include mental suffering and may include (in addition) punitive damages for the "wounded feelings of the plaintiff" resulting from the violation of his right against trespass) (citing *S. Ry. Co. v. Jordan*, 129 Ga. 665 (1907)).

Given that the power to punish is traditionally a legislative power, the proper understanding of this history of punitive damages law in Georgia is that juries have long exercised a conditionally delegated power to administer certain forms of punishment in certain civil actions. Nothing in this history suggests that the legislature is barred from withdrawing this delegation or from imposing further conditions upon it. The contingent fact that the right to compensation for losses coexisted with right to punish in 1798 does not mean that the latter was incorporated into its Constitution in 1798 along with the former.

Respectfully submitted, this the 7th of September 2022.

*/s/ David C. Hanson*
David C. Hanson
Georgia Bar No. 940508
Weathington Firm
191 Peachtree St, NE
Suite 3900
Atlanta, GA 30303
404-524-1600
dhanson@weathington.com

*/s/ Anthony J. Sebok*
Anthony J. Sebok
New York Bar No. 2702959
*Pro Hac Vice Application Pending*
Benjamin N. Cardozo School of Law
55 5th Avenue, Room 403
New York, NY 10003
917-364-9032.
sebok@yu.edu

*/s/ John C. P. Goldberg*
John C. P. Goldberg
Massachusetts Bar No. 558957
*Pro Hac Vice Application Pending*
Harvard Law School
Areeda Hall Rm 232
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 496-2086.
jgoldberg@law.harvard.edu

## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2022, I served the foregoing upon the following counsel of record by filing a true and correct copy thereof with the Clerk of Court using the Court's electronic filing system, as permitted by Supreme Court of Georgia Rule 13, as well as by email, addressed as follows:

Naveen Ramachandrappa
Joshua Thorpe
Bondurant Mixson & Elmore LLP
1201 W Peachtree St, NW, Suite 3900
Atlanta, GA 30309
ramachandrappa@bmelaw.com
thorpe@bmelaw.com

Gilbert Deitch
Andrew Rogers
Kara Phillips
W. Michael D'Antignac
Deithch & Rogers, LLC
1189 S Ponce de Leon Ave, NE
Atlanta, GA 30306
gil@victimattorneys.com
andy@victimattorneys.com
kara@victimattorneys.com
michael@victimattorneys.com

Melvin Hewitt, Jr.
Hilary Wayne Hunter
Isenberg & Hewitt, PC
600 Embassy Row, Suite 150
Atlanta, GA 30328
mel@isenberg-hewitt.com

hilary@isenberg-hewitt.com

Matthew Barr
Hawkins Parnell Thackston & Young, LLP
303 Peachtree St, NE, Suite 4000
Atlanta, GA 30308
mbarr@hpylaw.com

This 7th day of September, 2022.

*/s/ David C. Hanson*
Georgia Bar No. 940508
Attorney for *Amici* Law Professors
Anthony Sebok and John Goldberg