IN THE SUPREME COURT
STATE OF GEORGIA

ALONZO REID, Appellant, v. **LAKENIN MORRIS** and **KEITH STROUD**, Appellees.	Case No.: S20A0107

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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INTRODUCTION

In this case against two defaulting, unrepresented defendants, neither of whom appeared at the bench trial, Appellant asks this Court to rewrite Georgia statutory and common law regarding punitive damages. The case below arose from a motor vehicle collision involving Appellant and Appellee Morris, who was driving while under the influence of alcohol. Appellant also sued Appellee Stroud for negligent entrustment of the vehicle Morris was driving at the time of the collision. The case culminated in a bench trial with a default judgment against Appellee Morris and an Order granting partial summary judgment as to liability for negligent entrustment against co-Appellee Stroud.

Appellant now challenges the trial court's final judgment awarding $50,000.00 in punitive damages against Morris, the "active tortfeasor," and no punitive damages as to Stroud, the purported negligent entrustor, contending the trial court misinterpreted the "active tortfeasor" limitation of O.C.G.A. § 51-12-5.1(f) and interpreted by the Georgia Court of Appeals in *Capp v. Carlito's Mexican Bar & Grill No. 1, Inc.*, 288 Ga. App. 779 (2007). Specifically, Appellant asks this Court to overrule *Capp* and remand this case to the trial court for an entry of punitive damages against Appellee Stroud. Alternatively, Appellant challenges the constitutionality of the active tortfeasor limitation in O.C.G.A. § 51-12-5.1(f), which has been in place for twenty-three years, contending the statutory provision unconstitutionally infringes

on Appellant's right to trial by jury and the doctrine of separation of powers under the Georgia Constitution.[1]

Appellant's arguments below regarding the propriety of the judgment as to Appellee Stroud are easily addressed and rejected by applying the plain language of O.C.G.A. § 51-12-5.1(f). *Capp* was correctly decided because the Georgia Court of Appeals did just that in reaching its decision. This Court should not even reach Appellant's arguments regarding a violation of his right to a jury trial because they were waived. But a review of current and historical jurisprudence regarding punitive damages shows that Appellant's constitutional arguments—even if they are reached by this Court—also must fail.

STATEMENT OF INTEREST

The Georgia Defense Lawyers Association ("GDLA") is an association of nearly 1,000 lawyers, including sole practitioners and members of law firms of all

[1] Though the constitutional arguments in Appellant's Brief often refer generally to the entire punitive damages statute, the substance of Appellant's argument focuses solely on O.C.G.A. § 51-12-5.1(f). Nevertheless, this Court specifically invited the GDLA to express its views on the question of whether O.C.G.A. § 51-12-5.1, as a whole, violates the provisions of the Georgia Constitution protecting the right to a jury trial and providing for the separation of powers. Following Appellant's arguments, the GDLA has focused its Brief on O.C.G.A. § 51-12-5.1(f). The GDLA further notes (and Appellant's Brief concedes) that this appeal can (and should) be resolved without reaching a constitutional question.

sizes, who engage in litigation, primarily for defendants in civil lawsuits.[2] The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice. Though its membership is diverse, GDLA members frequently represent their respective clients in various tort actions in which punitive damages are sought by plaintiffs.

The GDLA and its members share a common interest in ensuring basic principles of Georgia tort law are clearly defined and that the desire of plaintiffs to recover ever-increasing damages awards in tort lawsuits does not override the lawful intent and actions of the legislature. Additionally, the GDLA, its members, and their clients share a common interest in ensuring that jury awards are not inflated through excessive punitive damages awards. The GDLA respectfully contends that Georgia's punitive damages statute, which has withstood the test of time for more than thirty years, remains constitutional and should not be disturbed by this Court.

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[2] The GDLA is grateful for this Court's invitation to submit an Amicus Brief and appreciative of the extension of time provided for it to do so. A copy of this Court's Order granting GDLA's Motion for an Extension of Time is attached hereto as Exhibit A.

I. ARGUMENT AND CITATION OF AUTHORITY

Put simply, the result in this case is controlled by statute. The legislature is the sole branch of government entrusted with enacting statutes, and the courts must interpret statutes according to the "plain and ordinary" meaning of their text, taken in the context in which it appears, and read "in its most natural and reasonable way." *Deal v. Coleman*, 294 Ga. 170, 172 (1)(a) (2013) (internal quotation omitted); *City of Atlanta v. City of College Park*, 292 Ga. 741, 744 (2013); *Hendry v. Hendry*, 292 Ga. 1, 3 (1) (2012). As long as a statute is "clear and unambiguous," courts must apply the plain meaning of the statute without any further "search for statutory meaning." *Deal*, 294 Ga. at 173 (1)(a); *Opensided MRI of Atlanta v. Chandler*, 287 Ga. 406, 407 (2010).

A brief review of the history of O.C.G.A. § 51-12-5.1 helps in viewing subsection (f) within the proper context. As part of the "Tort Reform Act of 1987," the General Assembly enacted O.C.G.A. § 51-12-5.1—known today as the statute governing punitive damages in Georgia. 1987 Ga. Laws 915, § 5. This new statutory provision limited a plaintiff's right to recover punitive damages to $250,000.00 in most cases. O.C.G.A. § 51-12-5.1(g). The statute does, however, provide exceptions to the $250,000.00 punitive damages cap. There is no limitation on the amount of punitive damages awards in tort actions arising from product liability. O.C.G.A. § 51-12-5.1(e)(1). And in tort cases (aside from product liability actions) where it is

found that the defendant acted, or failed to act, with the specific intent to cause harm, a plaintiff is entitled to an "unlimited" or "uncapped" punitive damages award. O.C.G.A. § 51-12-5.1(f).

Ten years later, in 1997, O.C.G.A. § 51-12-5.1(f) was amended to include a second exception to the punitive damages cap for cases involving evidence of a defendant's intoxication. 1997 Ga. Laws 837. With the 1997 amendment also came the "active tortfeasor" limitation to punitive damages awards. *Id*. This limitation provided that in tort cases not arising from products liability, if it is found that a defendant acted, or failed to act, with the specific intent to cause harm, or while under the influence of alcohol, drugs, or other similarly intoxicating substances, "there shall be no limit to the amount of punitive damages awarded **against an active tortfeasor**." *Id.* (emphasis added). The legislature specifically stated in the new statutory provision, however, that "**such damages shall not be the liability of any defendant other than an active tortfeasor**." *Id*. (emphasis added). The legislative intent behind this "active tortfeasor limitation," as outlined in the preamble to what was initially House Bill 572, was to "eliminate a provision relating to liability of third parties as joint tortfeasors" but only in cases where there is evidence of specific intent to harm or of a defendant acting under the influence. *Id.;* O.C.G.A. § 51-12-5.1(f).

With the new punitive damages cap in place under O.C.G.A. § 51-12-5.1(g) and the active tortfeasor limitation in O.C.G.A. § 51-12-5.1(f), attacks from the

plaintiff's bar began almost immediately on numerous fronts. Those attacks have traditionally included arguments that such caps and limitations violate plaintiffs' constitutionally protected right to trial by jury and the doctrine of separation of powers under Georgia's Constitution. This case represents an initial salvo in a new round of such attacks on O.C.G.A. § 51-12-5.1.

Ultimately, as outlined below, the resumed attacks on the constitutionality of Georgia's punitive damages statute are doomed to fail, just as the initial attacks failed thirty years ago. Georgia's punitive damages statute does not infringe upon a plaintiff's constitutionally protected right to jury trial, nor does it infringe upon separation of powers. However, this Court need not decide any constitutional arguments and, instead, should resolve this appeal based purely on statutory interpretation. And in reading and interpreting O.C.G.A. § 51-12-5.1(f), the conclusion at which this Court must arrive is that the Georgia Court of Appeals has already correctly interpreted the "active tortfeasor" limitation in O.C.G.A. § 51-12-5.1(f). *Capp v. Carlito's Mexican Bar & Grill #1*, 288 Ga. App. 779 (2007). Under either analysis, O.C.G.A. § 51-12-5.1 should be upheld in its entirety.

A. *Capp v. Carlito's* Was Correctly Decided

Appellant first contends that nothing within the text of O.C.G.A. § 51-12-5.1(f) supports the Court of Appeals' holding in *Capp* that the "active tortfeasor" limitation applies to punitive awards below the $250,000.00 cap set by O.C.G.A.

§ 51-12-5.1(g). (Appellant's Br. at 10.) Appellant further contends there is "no statutory language to support the idea that there can only be one active tortfeasor who is punitively culpable. . ." (*Id*.) The plain and ordinary meaning of Georgia's punitive damages statute, however, requires precisely the holding reached by the Court of Appeals in *Capp*.

Our courts have provided much guidance when it comes to statutory interpretation:

> A statute draws its meaning, of course, from its text. Under our well-established rules of statutory construction, **we presume that the General Assembly meant what it said and said what it meant**. To that end, we must afford the statutory text its "plain and ordinary meaning," we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would. Though we may review the text of the provision in question and its context within the larger legal framework to discern the intent of the legislature in enacting it, **where the statutory text is clear and unambiguous, we attribute to the statute its plain meaning**, and our search for statutory meaning ends.

Amazing Amusements Group, Inc. v. Wilson, 835 S.E.2d 781, 783 (Ga. 2019) (emphasis added).

Here, the Court does not need to look any further than the statute itself. O.C.G.A. § 51-12-5.1 provides, in pertinent part:

> (f) **In a tort case** in which the cause of action does not arise from product liability, if it is found that the defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol, drugs . . ., or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired,

> there shall be no limitation regarding the amount which may be awarded as punitive damages against an active tort-feasor **but such damages shall not be the liability of any defendant other than an active tortfeasor**.
>
> (g) **For any tort action not provided for by subsection (e)[3] or (f) of this Code section** in which the trier of fact has determined that punitive damages are to be awarded, the amount which may be awarded in the case shall be limited to a maximum of $250,000.00.

(emphasis added).

Despite Appellant's assertion to the contrary, a reading of the plain language of subsections (f) and (g) leads to the conclusion that a punitive damages award—whether capped or uncapped—cannot be assessed against a passive tortfeasor in cases involving an active tortfeasor defendant who is under the influence of alcohol, drugs, or other intoxicating agents, or acting with specific intent to harm. In such cases, including the case below, the court will only reach subsection (f) and the corresponding "active tortfeasor" limitation. Subsection (g) of the statute clearly states that it only applies in tort actions **not** falling under either subsection (e) or (f). Further, nothing in O.C.G.A. § 51-12-5.1(f) states that the active tortfeasor limitation does **not** apply to cases where the punitive award is less than $250,000.00.

[3] O.C.G.A. § 51-12-5.1(e) addresses punitive damages awards in cases involving product liability and states that there shall be no limitation regarding the amount of punitive damages awarded in such cases and that seventy-five percent of any amount awarded as punitive damages, less expenses, shall be paid into the treasury of the state.

In construing statutes, Georgia courts are required to "look diligently for the intention of the General Assembly". O.C.G.A. § 1-3-1(a). The General Assembly certainly could have made the distinction in the statute which Appellant now urges this Court to create. Had the General Assembly intended to carve out this exception, it would have expressly said as much. It is untenable to suggest that the legislature did not contemplate or consider the effect of the preexisting, immediately adjacent subjection, O.C.G.A. § 51-12-5.1(g), when the legislature enacted subsection (f) of the same statute. The legislature did not include the distinction urged by Appellant in writing O.C.G.A. § 51-12-5.1(f), instead providing that in a tort case in which a defendant acts under the influence or with specific intent to harm, punitive damages can only be assessed against the active tortfeasor defendant. By the plain language of the statute, punitive damages awards in those cases are not subject to the $250,000.00 cap in subsection (g).

Applying the plain meaning of O.C.G.A. § 51-12-5.1(f), the Georgia Court of Appeals in *Capp* correctly held that only a drunk driver, and not the **restaurant** who served the alcohol, could be liable for punitive damages. 288 Ga. App. at 784. The Court noted that this interpretation is supported by the legislative intent behind enacting subsection (f), which was "to provide for removing the limitation on punitive damages for tort cases involving the influence of intoxicating or toxic agents

on the defendant **and to eliminate . . . liability [for punitive damages] of third parties as joint tortfeasors**." (*Id*.) (emphasis added).

Ten years after *Capp* was decided, the Georgia Court of Appeals again held that punitive damages can only be assessed against an **active tortfeasor** in tort actions falling under O.C.G.A. § 51-12-5.1(f). *Corrugated Replacements, Inc. v. Johnson*, 340 Ga. App. 364, 372 (2017). In *Corrugated*, Jacob Lee drove a truck owned by Corrugated Replacements, his father's company, while under the influence and caused a fatal collision. *Id*. at 364. Although Jacob was not working for Corrugated at the time of the collision, he had full access to the truck from his father, who allowed him to drive it for personal use. *Id.* at 365.

Relying upon its decision in *Capp*, the Court noted "in cases where a defendant committed a tort while under the influence of alcohol, the statute makes clear . . . that such cases shall not be the liability of any defendant other than the active tort-feasor, that is the defendant acting under the influence of alcohol." *Id*. at 372 (citing *Capp*, 288 Ga. App. at 783-84). Although the Court in *Corrugated* did not reach the issue of whether *Capp* was correctly decided, it did not, as Appellant implies, "tacitly acknowledge *Capp*'s error." (Appellant's Br. at 8). Rather, the Court in *Corrugated* used precisely the same analysis as it did in *Capp* and found that the only active tortfeasor for OCGA § 51-12-5.1(f) purposes was Jacob, who struck another vehicle while driving under the influence. *Id*. Thus, the Court held that

punitive damages could not be assessed against Jacob's father, Robert, who was "at most, a passive tortfeasor under the family purpose doctrine." *Id*.

Seemingly conflating vicarious liability with the active/passive tortfeasor distinction, Appellant contends that the Court in *Capp* "incorrectly interpret[ed] the active tortfeasor limitation in O.C.G.A. § 51-12-5.1(f) to mean that it is legally impossible to have two actors whose punitively culpable conduct authorizes the imposition of punitive damages." But neither *Capp* nor O.C.G.A. § 51-12-5.1(f) expresses this "legal impossibility."

While not addressed by *Capp,* Georgia law provides that an employer who admits vicarious liability is entitled to summary judgment on claims for negligent entrustment, hiring, and retention. *Kelley v. Blue Line Carriers, LLC*, 300 Ga. App. 557, 580 (2009). However, there are exceptions for when a plaintiff has a valid punitive damages claim against the employer "**based on [the employer's] independent negligence in hiring and retaining the employee** or entrusting a vehicle to such employee." *Id*. (emphasis added). In those cases, a plaintiff may offer clear and convincing evidence that the employer's actions "showed willful misconduct, malice, fraud, wantonness, oppression, or the entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). If successfully proven, a case of two punitively culpable "active tortfeasors" may arise under O.C.G.A. § 51-12-5.1(f).

But vicarious liability does not exist in the case before this Court. Rather, this case involves joint tortfeasors (one active and one passive) and the legislature's intent in enacting subparagraph (f) was to eliminate punitive damages for a passive joint tortfeasor. When O.C.G.A. § 51-12-5.1(f) is read as the rules of statutory interpretation require, *Capp*'*s* interpretation of the active tortfeasor limitation is obviously correct. Furthermore, the Court of Appeals' interpretation of the statutory provision is wholly consistent with the General Assembly's documented intent in enacting subsection (f). Not even this Court is empowered to graft onto O.C.G.A. § 51-12-5.1(f) the additional language necessary to reach the conclusion urged by Appellant in this case. *Capp* represented a correct interpretation of O.C.G.A. § 51-12-5.1(f) and should not be overruled by this Court.

B. This Court Should Reject Appellant's Argument that O.C.G.A. § 51-12-5.1(f) Infringes on the Right to Trial by Jury Under the Georgia Constitution

As outlined above, the trial court correctly followed and applied the plain language of O.C.G.A. § 51-12-5.1(f) and binding precedent of the Georgia Court of Appeals in declining to award punitive damages against Appellee Stroud. In a further attempt to modify Georgia law to impermissibly obtain an uncollectable judgment against a non-participating, unrepresented passive tortfeasor, Appellant next argues that O.C.G.A. § 51-12-5.1(f) is unconstitutional on grounds that it violates the right

to trial by jury guaranteed to all Georgia citizens by the Georgia Constitution. For several reasons, however, this argument also must fail.

1. *Appellant Waived the Right to Raise this Constitutional Argument*

Though GDLA will address the constitutional arguments raised in Appellant's Brief, as requested by this Court, it does not appear this Court should reach those issues in this case. To be clear, Appellant is contending his constitutional right to a jury trial was infringed upon in a case in which Appellant **moved for summary judgment** against one defendant and **consented to a bench trial** against the other. Thus, in the case below, Appellant himself ensured that the **judge**, and not a jury, would determine the amount of compensatory and punitive damages to be awarded. It therefore appears that Appellant has waived the right to challenge any alleged deprivation of his constitutional right to trial by jury. *See, e.g.*, *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848) ("Trial by jury is a privilege which may be waived.").

2. *Historical Analysis Does Not Lead to the Conclusion that O.C.G.A. § 51-12-5.1(f) is Unconstitutional.*

Even if this Court considers the constitutionality of O.C.G.A. § 51-12-5.1(f), Appellant's arguments fail. Georgia statutes receive a presumption of constitutionality and the burden is on the party alleging a statute to be unconstitutional to prove that it "manifestly infringes upon a constitutional provision or violates the rights of the people." *Rhodes v. State*, 283 Ga. 361, 362 (2008) (citing *Brodie v. Champion*, 281 Ga. 105, 106 (2006)). This is because "[t]he General

Assembly is presumed to enact laws with full knowledge of the condition of the law and with reference to it, and the courts will not presume that the legislature intended to enact an unconstitutional law." *Brodie*, 281 Ga. at 105.

The Georgia Constitution provides that "[t]he right to trial by jury shall remain inviolate." Ga. Const. Art. 1, § 1, ¶ XI (a). Importantly, though, the right to a jury trial under the Georgia Constitution is not as broad as the Seventh Amendment right under the United States Constitution. *Swails v. State*, 263 Ga. 276, 278 (3) (1993); *Mize v. First Cit. Bank & Trust Co.*, 302 Ga. App. 757, 759 (2010; *Reheis v. Baxley Creosoting & Osmose Wood Preserving Co.*, 268 Ga. App. 256, 261 (2) (2004). Rather, as this Court has previously held, "[t]he provision of our State Constitution regarding the right to jury trial means that it shall not be taken away, as it existed in 1798, when the first [Georgia Constitution] was adopted, and not that there must be a jury in all cases." *Swails*, 263 Ga. at 278 (3) (internal quotation marks omitted). As Justice Lumpkin noted in interpreting the right to jury trial in 1848:

> An act [of the legislature] which merely authorizes a judgment to be rendered, without the intervention of a jury, is not on that account unconstitutional . . . And it is difficult to prescribe the limits to the power of the Legislature in this respect. Cases might arise which would authorize that body to go very far in disregarding the rules and regulations which are ordinarily observed in the enactment of a law for the assertion and defence of rights. There is no invasion or infringement of the Constitution, so long as trial by jury is not directly or indirectly, abolished. I repeat, it is impossible to say at what point the Legislature ought to stop; and if undertaken to be said by the Courts, it must be at some point of great excess, that such a stand can be made.

Flint River Steamboat Co., 5 Ga. at 208.

While Appellant dwells on the historical analysis of the right to jury trial and how determining the amount of punitive damages fits into such right, Appellant has failed to meet his burden of proving O.C.G.A. § 51-12-5.1(f) is unconstitutional. Appellant has presented no authority nor offered any substantive explanation as to how an active tortfeasor limitation infringes upon the right to jury trial. A historical analysis of punitive damages at common law does not support a finding that the active tortfeasor limitation is unconstitutional. The Georgia Constitution preserves the "essential elements"—**not all** elements—of the right to trial as it existed at common law at the date of the adoption of our State's earliest Constitution. *Pollard v. State*, 148 Ga. 447 (1918). As this Court has explicitly recognized, "[n]ew forums may be erected, and new remedies provided, accommodated to the ever shifting state of society." *Swails*, 263 Ga. at 278 (citing *Flint River Steamboat Co.*, 5 Ga. at 207-208). This Court has further held that Art. 1, Sec. 1, Par. 11 does not prohibit the General Assembly from "abrogating or circumscribing common law or statutory rights of action." *State v. Moseley*, 263 Ga. 680, 681 (1993). *See also Teasley v. Mathis*, 243 Ga. 561, 563 (1979) ("The legislature . . . may modify or abrogate common law rights of action, as well as statutorily created rights.")

3. ***Statutory Limitations on Punitive Damages Awards Do Not Impede the Jury's Fact-Finding Role***

Georgia courts and courts around the country, including the United States Supreme Court, have held that the determination of damages—including punitive damages—is not a fact-finding function reserved for the jury. Courts have long recognized the important distinction between compensatory and punitive damages. "Although compensatory damages and punitive damages are typically awarded at the same time by the decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Punitive damages, by contrast, have been described as "quasi-criminal" and are "intended to punish the defendant and deter future wrongdoing." *Id.* Thus, "[a] jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation . . . [that] does not constitute a finding of '"fact."' *Id*. at 432, 437.

This Court has previously held that a plaintiff has no constitutional right to recover punitive damages. *See, e.g., Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 542 (1993); *Kelly v. Hall*, 191 Ga. 470 (1941). Furthermore, this Court has repeatedly held that the General Assembly "may lawfully circumscribe punitive damages." *Conkle*, 263 Ga. at 543 (specifically affirming the legislature's right to enact a cap on

punitive damages as set forth in O.C.G.A. § 51-12-5.1(g)); *Bagley v. Shortt*, 261 Ga. 762, 762 (1)(b) (1991) (holding punitive damages "lawfully may be circumscribed, as by O.C.G.A. § 51-12-5.1(g)"); *See also Moseley*, 263 Ga. at 680 (upholding constitutionality of O.C.G.A. § 51-12-5.1(e)(2) where plaintiff alleged the provision violated the Georgia Constitution's guarantee of the right to trial by jury).

The active tortfeasor limitation in O.C.G.A. § 51-12-5.1(f) does not infringe upon a Plaintiff's right to jury trial. Rather, in enacting this limitation, the General Assembly merely made a policy-based determination as to who can be held punitively liable in cases involving multiple defendants, where one defendant acted while under the influence or with specific intent to harm and the other was merely a "passive" tortfeasor. In practice, this should not be viewed any differently than mandatory apportionment in certain types of cases, which this Court has previously held does not result in a violation of a plaintiff's constitutional right to a jury trial, despite the existence of a common-law rule against apportionment to intentional tortfeasors. *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 364 (2012) (holding jury instructions or special verdict form requiring jury to apportion damages among property owner and criminal assailant under O.C.G.A. § 51-12-33 in negligent security case did not violate plaintiff's constitutional right to a jury trial).

Cases involving mandatory apportionment to nonparties from whom the plaintiff will never be able to recover damages are analogous in that respect. In

mandatory apportionment cases, the jury operates normally, "assess[ing] liability, calculate[ing] damages, and nam[ing] the tortfeasors who are responsible." *Id*. at 367. The only caveat is that the jury is **required** to assess fault against certain parties, and the corresponding portion(s) of the damages awarded to the plaintiff may be uncollectable (if the jury elects to apportion fault to nonparties). Likewise, for cases falling under O.C.G.A. § 51-12-5.1(f), nothing prevents the plaintiff from presenting his or her case to the jury and having the jury determine the facts, including compensatory and punitive damages awards, based on the evidence presented. Once the jury makes its factual determinations, O.C.G.A. § 51-12-5.1(f) provides a limitation as to against whom the plaintiff may recover the punitive damages assessed by the jury.

Mandatory apportionment is not the only comparable act of constitutional legislative intervention in personal injury cases. Our legislature has enacted statutes of limitation and repose, effectively preventing a plaintiff from asserting a cause of action at all in personal injury cases. Further, our General Assembly has enacted several statutes allowing courts to modify a jury's damages award, just as O.C.G.A. § 51-12-5.1(f) modifies the persons liable for punitive damages in certain types of cases. *See, e.g.,* O.C.G.A. § 51-12-33(a) (Georgia's comparative negligence statute which instructs the jury to determine the percentage of fault of the plaintiff before the judge reduces the amount of damages awarded to the plaintiff in proportion to

plaintiff's percentage of fault); O.C.G.A. § 20-3-514(c) (imposing treble damages in certain cases involving contracts for loan or scholarship); O.C.G.A. § 16-15-7 (Georgia's Street Gang Terrorism and Prevention Act which provides for treble damages for any person injured "by reason of criminal gang activity"); O.C.G.A. § 51-12-5.1(g) (capping punitive damages for most cases at $250,000.00); and O.C.G.A. § 51-12-12 (Georgia's remittitur statute which allows the trial court to order a new trial as to damages only when a jury's award of damages is "clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence."). None of those statutory enactments have been found to impermissibly infringe upon a plaintiff's constitutional right to jury trial. It is therefore difficult to see how the active tortfeasor limitation usurps the jury's factfinding role to the extent that it could be deemed unconstitutional.

4. *Georgia Courts and Courts Across the Country Have Recognized the Important Constitutional Distinction Between Statutorily Limiting Awards of Punitive Damages versus Compensatory Damages*

In contending O.C.G.A. § 51-12-5.1(f) unconstitutionally infringes on the right to trial by jury, Appellant relies in large part on this Court's decision in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010). Appellant characterizes *Nestlehutt* as striking down caps on **non-economic** damages in medical malpractice cases "**on a near identical theory**" as that presented in instant case. (Appellant's Br. at 12) (emphasis added). But *Nestlehutt* is easily distinguishable and serves merely as

dicta since this Court did not address the constitutionality of punitive damages in its Opinion. In *Nestlehutt*, this Court held that O.C.G.A. § 51-13-1, which capped **non-economic damages** in medical malpractice cases, was unconstitutional and violated a plaintiff's right to trial by jury. *Id*. at 738.

In reaching its holding in *Nestlehutt*, the Court first noted that "[n]oneconomic damages have long been recognized as an **element of total damages** in tort cases, including those involving medical negligence." *Id*. at 735 (referencing 3 Blackstone, Commentaries, Ch. 8, p. 122) (emphasis added). The Court further noted that "[e]arly reported Georgia case law confirms the recognition of the **right** to recover damages for '"mental sufferings."' *Id*. (citing *Smith v. Overby*, 30 Ga. 241, 245 (1860)) (emphasis added).

This Court ultimately concluded that at the time of our Constitution's adoption in 1798, there was a common law right to jury trial for claims involving medical malpractice, and such claims carried "**an attendant right to the award of the full measure of damages**, **including noneconomic damages, as determined by the jury**." *Id*. (emphasis added). Therefore, a statutory cap on noneconomic compensatory damages in medical malpractice actions was deemed unconstitutional as it "clearly nullifie[d] the jury's findings of fact regarding [the full measure of] damages and thereby undermine[d] the jury's basic function." *Id*. at 735.

Although Appellant attempts to draw comparison to *Nestlehutt*, the Court in that case only addressed a cap on **compensatory** damages, not punitive damages. This Court specifically recognized the indispensable nature of the distinction between compensatory and punitive damages in *Nestlehutt*, declaring its prior decisions in *Moseley*, 263 Ga. at 680 and *Teasley*, 243 Ga. at 561, inapplicable since they addressed statutory limits on **punitive** damages. Justice Hunstein acknowledged that **punitive** damages, "[u]nlike the measure of actual damages suffered . . . [are] not really a 'fact' 'tried' by the jury." *Id*. at 736 (citing *Cooper Indus., Inc.*, 532 U.S. at 424).

Nestlehutt was not the only time this Court acknowledged the critical distinction between statutory limits for compensatory damages and punitive damages in the face of a constitutional challenge. In *Conkle*, 263 Ga. at 544, this Court rejected an attack on the constitutionality of O.C.G.A. § 51-12-5.1(e)(2), the subsection of Georgia's punitive damages statute requiring 75% of any punitive damages award in product liability actions be paid into the state treasury. This Court held that subsection (e) simply did not raise the same constitutional implications that might be raised as to compensatory damages reasoning that because "[p]unishment and deterrence of the defendant being the purposes of the subsection, it is insignificant under the statute that the plaintiff does not receive the full award." *Id*. at

542.[4] Other jurisdictions confronted with constitutional challenges to statutes limiting punitive damages awards have reached a similar conclusion—namely, that the statutes do not violate a plaintiff's state or federal constitutional right to a jury trial.[5]

O.C.G.A. § 51-12-5.1(f) is a permissible exercise of the legislature's constitutional power to modify Georgia's statutory punitive damages scheme. Unlike compensatory damages, claims for punitive damages are not of constitutional dimension and, in any event, it is unnecessary for this Court to reach any constitutional argument in this case. This Court should reject Appellant's arguments to the contrary.

C. O.C.G.A. § 51-12-5.1(f) Does Not Violate the Separation of Powers Doctrine.

Appellant also contends that the active tortfeasor limitation of O.C.G.A. § 51-12-5.1(f) violates the separation of powers doctrine by providing the legislature with

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[4] Although Appellant does not challenge the constitutionality of O.C.G.A. § 51-12-5.1(g), which caps punitive damages in most cases at $250,000.00, GDLA's position as to the constitutionality of subsection (f) would apply equally to subsection (g). The limitations contained in each subsection of the statute were enacted not to compensate plaintiffs, but to punish and deter sufficiently culpable defendants. The limitation in subsection (g) operates no differently than the limitation in subsection (e)(2), which this Court has previously held to be constitutional. *Moseley*, 263 Ga. at 680.

[5] *See, e.g., Rhyne v. K-Mart Corp.*, 358 N.C. 160, 170 (2004) (holding statute capping punitive damages did not violate separation of powers or right to trial by jury); *State v. Doe*, 987 N.E.2d 1066, 1071 (Ind. 2013) (holding statute capping punitive damages awards at the greater of three times the amount of compensatory damages or $50,000.00 does not infringe upon the right to jury trial).

the power to "arbitrarily bar punitive damages against a punitively culpable defendant based only on the fact that there was already another punitively culpable defendant." (Appellant's Br. at 15.) To support his separation of powers argument, Appellant generically contends that "this Court has not been hesitant to protect the courts of this state from legislative interference in judicial functions." (Appellant's Br. at 16) (citing *Parks v. State*, 212 Ga. 433 (1956); *Bradley v. State*, 111 Ga. 168 (1900)). Tellingly in that regard, Appellant does not cite to a single Georgia case to support his contention that the "right to pursue punitive damages in an amount determined by the finder of fact" is of constitutional dimension at all, let alone that such right is constitutionally "guaranteed by the separation of powers [doctrine]." (*Id.* at 16.)

As an initial matter, Appellant's separation of powers argument—like his right to jury trial argument—fails for the simple reason that there is no constitutional right to recover punitive damages. Furthermore, whereas Appellant attempts to invoke the doctrine of separation of powers in support of his constitutional argument in this case, that very principle ultimately dooms Appellant's constitutional arguments to fail. Only the legislature is entrusted with enacting statutory law, and when the courts "consider the meaning of a statute, [they] must presume that the General Assembly meant what it said and said what it meant." *State v. Fielden*, 280 Ga. 444,

448 (2006); *Coleman*, 294 Ga. at 172 (1)(a) (internal quotation omitted). The courts do not have the authority to rewrite statutes. *Fielden*, 280 Ga. at 448.

"While the separation of powers is fundamental to our constitutional form of government, it does not follow that a complete separation is desirable or was intended. The three departments of government are not kept wholly separate in the Georgia Constitution." *Adams v. State*, 282 Ga. App. 819, 821 (2006). As for the legislative and judicial functions, the main distinction between the two is that "the former sets up rights or inhibitions, usually general in character; while the latter interprets, applies, and enforces existing law as related to subsequent acts of persons amenable thereto." *South View Cemetery Ass'n v. Hailey*, 199 Ga. 478, 480 (1945). On the other hand, this Court has explained the proper role of the judiciary as follows:

> There is nothing artificial in judicial deference to the constitutional authority to the General Assembly to enact legislation. The constitutional principle of separation of powers is intended to protect the citizens of this state from the tyranny of the judiciary, insuring that the authority to enact laws will be exercised only by those representatives duly elected to serve as legislatures. The General Assembly "being the sovereign power in the state, while acting within the pale of its constitutional competency, it is the province of the Courts to interpret its mandates, and their duty to obey them, however absurd and unreasonable they may appear."

Fulwood v. Sivley, 271 Ga. 248, 254 (1999) (quoting *Flint River Steamboat Co.*, 5 Ga. at 194).

Just as the legislature, not the courts, has the power to define crimes, set sentencing guidelines, establish statutes of limitation and repose, and create new causes of action, so too can the legislature define and limit who can be held punitively liable in tort. *Cooper Indus.*, 532 U.S. at 432 ("[a]s in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards.") Additionally, while not addressed by Appellant, it cannot be said that O.C.G.A. § 51-12-5.1(f) interferes with the judiciary's power by acting as an unconstitutional "legislative remittitur." O.C.G.A. § 51-12-5.1(f) does not reduce an award. Rather, it provides that only an active tortfeasor who acted while under the influence or with specific intent to harm can be held liable for punitive damages. Nothing within O.C.G.A. § 51-12-5.1(f) infringes upon a trial court's authority to grant a new trial or a remittitur or otherwise impermissibly divests the judiciary of the jurisdiction granted to it by our Constitution.

CONCLUSION

Georgia's appellate courts have correctly interpreted O.C.G.A. § 51-12-5.1(f), in accordance with its plain meaning and the General Assembly's intent in enacting subsection (f). Further, Georgia's punitive damages statute does not impermissibly infringe upon Appellant's constitutionally protected right to a trial by jury (which has already been waived), nor does it violate the separation of powers doctrine. As such,

the GDLA respectfully requests that this Court uphold the constitutionality of O.C.G.A. § 51-12-5.1 and affirm the trial court's ruling.

Respectfully submitted this 21st day of February, 2020.

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On Behalf of the Georgia Defense Lawyers Association

EXHIBIT A

SUPREME COURT OF GEORGIA
Case No. S20A0107

February 12, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

ALONZO REID v. LAKENIN MORRIS et al.

Your request for an extension of time to file the brief of appellee in the above case is granted until February 21, 2020.

A copy of this order **MUST** be attached as an exhibit to the document for which the appellee received this extension.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** in the above-listed case on all counsel via electronic filing and by depositing a copy of same in the United States Mail with sufficient postage thereon to ensure delivery, addressed as follows:

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