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A Run for Your Money: The Supreme Court of Georgia in *Taylor v. Devereux Foundation, Inc.* Upholds the Constitutionality of the Statutory Cap on Punitive Damages

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I. INTRODUCTION

The sky is the limit! This idiom rings true, except for plaintiffs in many states who dream of million-dollar punitive damage awards. Many states have statutorily capped punitive damage awards,[1] despite their role as "quasi-criminal . . . private fines" to punish defendants for their wrong-doing, and to deter future similar conduct by others.[2] Challenges to statutory caps have plagued both federal and state courts for decades.

In 2023, the Supreme Court of Georgia in *Taylor v. Devereux Foundation, Inc.*[3] addressed whether O.C.G.A. § 51-12-5.1(g),[4] Georgia's

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1. *See* ALA. CODE § 6-11-21 (1999); IND. CODE ANN. § 34-51-3-4 (1998); N.J. STAT. ANN. § 2A:15-5.14 (2006).

2. Cooper Industries Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

3. 316 Ga. 44, 885 S.E.2d 671 (2023).

4. O.C.G.A. § 51-12-5.1(g) (2010).

statutory cap on punitive damages, violates the right to trial by jury,[5] separation of powers,[6] and equal protection[7] provisions of the Georgia Constitution.[8] Despite the compelling facts of the case—a fifteen-year-old suffering from mental health issues, a traumatic history, and a sexual assault[9]—the court upheld the cap on punitive damages against the plaintiff's constitutional challenges.[10] In doing so, the court applied originalism and textualism, basing its decision on the original public meaning of the Georgia Constitution.[11] After all, Taylor's main constitutional argument required a thorough analysis of what rights Georgians had at the time of the enactment of the Georgia Constitution and the incorporation of English common law.[12] Without adherence to our state's guiding constitutional principles, *Taylor* easily could have buried centuries of fundamental legal and state constitutional concepts.

II. FACTUAL BACKGROUND

Fifteen-year-old Tia McGee was admitted to a behavioral health facility operated by Devereux Foundation, Inc. (Devereux) on April 16, 2012.[13] McGee had been admitted because of her history of self-harm, suicidal threats, sexual abuse, and sexual reactivity. Within the first month of admission, McGee had three sexual incidents with other male patients, ranging from over-the-clothes touching to penetration—which resulted, in part, from her history of sexual abuse.[14]

On May 17, 2012, two direct-care professionals, Ms. Akeavia Mays and Mr. Jimmy Singleterry, were assigned to supervise the female cottage where McGee was staying from the hours of 3:00 to 11:00 p.m.[15] At about 10:30 p.m., Singleterry left the cottage for twelve minutes. Singleterry approached McGee's open bedroom window, stuck his penis inside, and had McGee perform oral sex on him. Unaware of what McGee and Singleterry were doing, Mays left the cottage around 10:50 p.m. to go to

5. GA. CONST. art. I, § 1, para. 11(a).
6. GA. CONST. art. I, § 2, para. 3.
7. GA. CONST. art. I, § 1, para. 2.
8. *Taylor*, 316 Ga. at 44, 885 S.E.2d at 676.
9. *Id.* at 46, 885 S.E.2d at 678.
10. *Id.* at 45, 885 S.E.2d at 677.
11. *See generally* Nels S.D. Peterson, *Principles of Georgia Constitutional Interpretation*, 75 MERCER L. REV. 1 (2023).
12. *Taylor*, 316 Ga. at 57–58, 885 S.E.2d at 685.
13. *Id.* at 46, 885 S.E.2d at 677.
14. *Id.* at 45–46, 885 S.E.2d at 677–78.
15. *Id.* at 46, 885 S.E.2d at 678.

the bathroom before leaving her shift. Singleterry then entered McGee's room and engaged in sexual intercourse with the fifteen-year-old.[16]

Two days later McGee reported her encounters with Singleterry to Mr. Tony Foster, another direct-care professional.[17] McGee was administered a rape-kit. Police were notified, and they began an investigation that included interviewing McGee. Ultimately, Singleterry pled guilty to child molestation, statutory rape, and sexual assault against a person in custody in October 2013.[18]

Meanwhile, Devereux conducted an internal investigation, which included a "root cause analysis" that identified a proximate factor of Singleterry's crimes was that he had been assigned to a female cottage and had "opportunities to be alone with [McGee] by taking an unauthorized break and his co-worker leaving the shift early."[19] McGee continued her treatment at Devereux and was given one-on-one supervision, but was not moved from the cottage where she had been sexually assaulted.[20]

McGee was discharged from the Devereux facility on June 29, 2012.[21] McGee's discharge summary noted that her work with a therapist had allowed her to overcome her trauma, she acted more appropriately with peers and staff, and she displayed better coping skills. However, the discharge summary also stated she would "need ongoing therapy to focus on sexual trauma history and sexual acting out behaviors."[22]

In 2017, McGee sued Devereux and the executive director of Devereux, Ms. Gwendolyn Skinner, alleging "general negligence; negligent hiring, training, and supervision; professional negligence; respondeat superior; and failure to keep the premises safe."[23] In addition, McGee demanded

16. *Id.* at 46–47, 885 S.E.2d at 678.

17. *Id.* at 47, 885 S.E.2d at 678.

18. *Id.*

19. *Id.* at 47, 885 S.E.2d at 678. Mays testified that she had left her shift early before and never been reprimanded. *Id.* at 49, 885 S.E.2d at 679–80. Further, Foster testified that "people did turn a blind eye to a lot of things at Devereux." *Id.* at 49, 885 S.E.2d at 680.

20. *Id.* at 47, 885 S.E.2d at 678. Dr. Nancy Aldridge, a psychotherapist who interviewed McGee years after the assault, testified that "generally speaking," it is "not a good idea" to not move the victim from where the assault occurred "because it causes them . . . to think about [the incident], to relive it." *Id.* Dr. Aldridge also testified that therapists at Devereux never specifically addressed what Singleterry did to McGee in her therapy. *Id.*

21. *Id.* at 48, 885 S.E.2d at 678.

22. *Id.* at 48, 885 S.E.2d at 678–79.

23. *Id.* at 45–46, 885 S.E.2d at 677; Taylor v. The Devereux Foundation, Inc., No. 17-A-277, 2022 WL 1198659, at *3 (Ga. State Ct. Feb. 08, 2022). At the close of Taylor's case, Ms. Skinner moved for a directed verdict, which was granted "on the ground that she was a corporate officer who did not directly participate in employee training." *Taylor*, 316 Ga. at 46 n.3, 885 S.E.2d at 677 n.3.

punitive damages under O.C.G.A. § 51-12-5.1[24] and expenses of litigation damages under O.C.G.A. § 13-6-11.[25]

Devereux conceded negligence before trial.[26] Accordingly, a jury trial was held in November 2019 on the issues of damages and attorneys fees.[27] The trial court instructed the jury, in part, based on the parties' stipulation:

> Devereux breached the legal duty of ordinary care owed to Tia McGee for her safety from sexual assault and that the breach of Devereux's legal duty contributed to Jimmy Singleterry's sexual assault of Tia McGee. Defendant also admits that Devereux is legally responsible for any harm which it proximately caused Tia McGee to suffer. And Devereux further admits that Tia McGee should receive some compensatory damages.[28]

The jury found that McGee had suffered $10,000,000 in compensatory damages and that Devereux was 50% at fault, with the other 50% apportioned to Singleterry individually.[29] The jury further found that Devereux was liable for punitive damages and attorneys fees, finding that it had "acted in bad faith in the underlying transaction" and "[had] been stubbornly litigious or caused unnecessary trouble or expense."[30] At trial, the jury heard evidence presented by Taylor revealing other similar incidents at Devereux facilities nationwide. Specifically, there were three incidents before 2012 and five incidents after 2012 that involved a Devereux staff member sexually assaulting a patient in some capacity. Regarding the Devereux facility McGee had resided in, evidence was presented of a therapist being arrested for child pornography. This same therapist admitted to "grooming" two patients. The trial court issued a limiting instruction for this evidence to be considered only in the context of showing knowledge, intent, or notice of Devereux for the issue of punitive damages. After hearing additional evidence of Devereux's

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24. O.C.G.A. § 51-12-5.1; *Taylor*, 316 Ga. at 46, 885 S.E.2d at 677. Specifically, McGee alleged that Devereux's conduct "was such as to evince an entire want of care and indifference to the consequences of such conduct." *Taylor*, 316 Ga. at 46, 885 S.E.2d at 677.

25. O.C.G.A. § 13-6-11 (1984); *Taylor*, 316 Ga. at 46, 885 S.E.2d at 677. For expenses of litigation damages, McGee alleged that the Defendants "[had] acted in bad faith, [had] been stubbornly litigious, and/or [had] caused [McGee] unnecessary trouble and expense." *Taylor*, 316 Ga. at 46, 885 S.E.2d at 677.

26. *Taylor*, 316 Ga. at 46, 885 S.E.2d at 677.

27. *Id.*

28. *Id.* at 50–51, 885 S.E.2d at 680.

29. *Id.* at 51, 885 S.E.2d at 681.

30. *Id.*

financial condition, the jury found Devereux liable for punitive damages in the amount of $50,000,000.[31]

McGee passed away a few months after the trial.[32] After McGee's death, Jo-Ann Taylor, the executor of McGee's estate, represented her interests in the action.[33]

In July 2021, the trial court held a hearing over the jury verdict of $50,000,000 in punitive damages.[34] Specifically, the trial court discussed Georgia's statutory punitive damages cap, codified at O.C.G.A. § 51-12-5.1(g),[35] which limits punitive damage awards to a maximum of $250,000, absent some exceptions.[36] Among other things, the trial court rejected Taylor's argument that the statutory cap violated the Georgia Constitution.[37]

Taylor appealed to the Supreme Court of Georgia raising three arguments that the $250,000 cap was unconstitutional.[38] Specifically, Taylor argued it was "unconstitutional because it violates three rights protected by the Georgia Constitution: (1) the right to trial by jury,[39] (2) the guarantee of separation of powers,[40] and (3) the guarantee of equal protection."[41]

The court rejected these challenges to O.C.G.A. § 51-12-5.1(g).[42] In doing so, it affirmed the trial court ruling and upheld the constitutionality of the statutory cap on punitive damages.[43]

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31. *Id.* at 50–51, 885 S.E.2d at 680–81.

32. *Id.* at 48, 885 S.E.2d at 679.

33. *Id.* at 44, 885 S.E.2d at 676.

34. *Id.* at 51, 885 S.E.2d at 681

35. O.C.G.A. § 51-12-5.1(g).

36. *Taylor*, 316 Ga. at 51, 885 S.E.2d at 681.

37. *Id.* at 51–52, 885 S.E.2d at 681; Taylor v. The Devereux Foundation, Inc., No. 17-A-277, 2022 WL 1198660, at *1 (Ga. State Ct. Feb. 08, 2022).

38. *Taylor*, 316 Ga. at 52, 885 S.E.2d at 681. Taylor's appeal went directly to the Supreme Court of Georgia as it involved assessing the constitutionality of a state statute. *Supreme Court of Georgia*, GEORGIA.GOV, https://georgia.gov/organization/supreme-court-georgia [https://perma.cc/ZW6Q-TPZ6] (last visited Oct. 24, 2023).

39. GA. CONST. art. I, § 1, para. 11(a).

40. GA. CONST. art. I, § 2, para. 3.

41. *Taylor*, 316 Ga. at 52, 885 S.E.2d at 681. *See also* GA. CONST. art. I, § 1, para. 2.

42. *Taylor*, 316 Ga. at 45, 885 S.E.2d at 677.

43. *Id.*

III. LEGAL BACKGROUND

A. The Right to Trial by Jury in Georgia

The Georgia Constitution of 1983 provides that "[t]he right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party."[44] The word "inviolate" means "the right as it existed at common law at the time of the incorporation of this provision into our Constitution."[45] The Supreme Court of Georgia has interpreted this provision to mean that "[t]he people of this State . . . are entitled to the trial by jury, *as it was used in the State prior to the Constitution of [17]98.*"[46] The roots of this are found in textualism and originalism, as a constitutional provision is interpreted "according to the original public meaning of its text."[47] The phrase "original public meaning" conveys the principle that a provision should be interpreted according to what it meant to ordinary speakers of the English language at the time it was enacted.[48] This coincides with the fact that the Georgia General Assembly adopted the common law of England and all statutes in force of it as the law of Georgia prior to the adoption of the Georgia Constitution of 1798.[49]

Thus, the "consequence of this well-settled 1798 cutoff is significant":[50] the claim must have existed and carried with it a right to trial by jury on or before 1798 for the Georgia constitutional right to attach.[51] In other words, there is no constitutional right to a trial by jury for claims that were only created by statute after the Constitution's adoption in 1798.[52]

In a series of cases the Georgia Supreme Court has defined how courts should determine whether a jury right existed in 1798. This Note now turns to those cases.

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44. GA. CONST. art. I, § 1, para. 11(a).

45. Wright v. Davis, 184 Ga. 846, 852, 193 S.E. 757, 760 (1937).

46. Tift v. Griffin, 5 Ga. 185, 189 (1848) (emphasis in original).

47. Olevik v. State, 302 Ga. 228, 235, 806 S.E.2d 505, 513 (2017).

48. *Id.*; *see also* Lathrop v. Deal, 301 Ga. 408, 428, 801 S.E.2d 867, 882 (2017) ("[w]hen [Georgia courts] inquire into the meaning of a constitutional provision, [they] look to its text" and "ascertain 'the meaning of the text at the time it was adopted.'") (citing Georgia Motor Trucking Ass'n v. Dept. of Revenue, 301 Ga. 354, 357, 801 S.E.2d 9, 12 (2017)).

49. Warlick v. Great Atlantic & Pacific Tea Co., 170 Ga. 538, 542, 153 S.E. 420, 422–23 (1930).

50. *Taylor*, 316 Ga. at 57, 885 S.E.2d at 685.

51. *Id.* at 57–58, 885 S.E.2d at 685.

52. Kelley v. Georgia Dept. of Hum. Res., 269 Ga. 384, 384–85, 498 S.E.2d 741, 743 (1998).

1. The Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt Framework

Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt[53] sets up the framework for addressing whether statutes violate the right to trial by jury in the Georgia Constitution.[54] The analysis begins with examining whether the challenged claim existed at common law.[55] If said claim did exist, the inquiry turns to whether the statute unconstitutionally infringes on this right.[56]

The court in *Nestlehutt* addressed a challenge to "the constitutionality of O.C.G.A. § 51-13-1, which limit[ed] awards of noneconomic damages in medical malpractice cases to a predetermined amount."[57] In analyzing the constitutionality of that cap, the court first turned to whether a claim of medical malpractice existed in Georgia in 1798.[58] After concluding claims for medical malpractice did exist,[59] the court next considered "the scope of the jury-trial right" for that claim in or before 1798.[60] The key questions were "whether Georgia juries in 1798 determined damages in tort cases involving medical negligence, and whether those damages included the non-economic damages that were sought by the plaintiff (and restricted by [the] modern statute [in question]) in *Nestlehutt*."[61] The court answered both questions in the affirmative, holding that Georgia juries in 1798 determined such damages and that those damages included non-economic damages.[62]

Finally, the court turned to whether the statutory cap was an unconstitutional infringement of that right.[63] The court held that it was because "[b]y requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, O.C.G.A.

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53. 286 Ga. 731, 691 S.E.2d 218 (2010).

54. *Id.*

55. *Id.* at 733, 691 S.E.2d at 221.

56. *Id.* at 735, 691 S.E.2d at 223.

57. *Id.* at 731, 691 S.E.2d at 220.

58. *Id.* at 733, 691 S.E.2d at 221.

59. *Id.* at 734, 691 S.E.2d at 222.

60. *Id.* at 734–35, 691 S.E.2d at 222–23; *Taylor*, 316 Ga. at 59, 885 S.E.2d at 686.

61. *Taylor*, 316 Ga. at 59, 885 S.E.2d at 686.

62. *Nestlehutt*, 286 Ga. at 735, 691 S.E.2d at 223. Specifically, the court said:

> [W]e conclude 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.

63. *Nestlehutt*, 286 Ga. at 735, 691 S.E.2d at 223.

§ 51-13-1 clearly nullifie[d] the jury's finding of fact regarding damages and thereby undermines the jury's basic function."[64] Therefore, O.C.G.A. § 51-13-1 was an unconstitutional infringement on the right to trial by jury.[65]

Thus, *Nestlehutt* established the framework to analyze whether a statute violates the right to trial by jury in the Georgia Constitution.

2. Teasley v. Mathis and State v. Moseley Are Not Applicable

The Georgia Supreme Court in *Teasley v. Mathis*[66] and *State v. Moseley*[67] held that certain statutes limiting punitive damages did not violate the right to trial by jury in the Georgia Constitution.[68]

Teasley addressed the plaintiff's claim that a Georgia no-fault automobile insurance law violated his right to a jury trial "because it disallows an accident victim who does not sustain 'serious injury' from suing for exemplary damages."[69] The court rejected that argument noting that "[t]he legislature . . . may modify or abrogate common law rights of action as well as statutorily created rights" and thus "eliminating the right to sue for exemplary damages where there are no serious injuries is well within the province of the legislature."[70] *Mosely* addressed a plaintiff's challenge to O.C.G.A. § 51-12-5.1(e)(2)'s "apportionment of 75 percent of a punitive damages award . . . in a products liability case" as a violation of the right to trial by jury.[71] Similarly, the court rejected the argument based on *Teasley*'s reasoning.[72]

64. *Id.*; *see* Lakin v. Senco Prods., Inc., 329 Or. 62, 79 (1999) ("[T]o the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect"). It is important to note that *Lakin* was overruled in 2016. Horton v. Oregon Health and Science University, 359 Or. 168, 250 (2016) (holding that civil jury trial provision does not impose "a substantive limit on the legislature's authority to define the elements of a claim or the extend of damages available for a claim.").

65. *Nestlehutt*, 286 Ga. at 735, 691 S.E.2d at 223.

66. 243 Ga. 561, 255 S.E.2d 57 (1979).

67. 263 Ga. 680, 436 S.E.2d 632 (1993).

68. *See Teasley*, 243 Ga. at 564, 255 S.E.2d at 59; *Moseley*, 263 Ga. at 681, 436 S.E.2d at 634; *see also Taylor*, 316 Ga. at 60, 885 S.E.2d at 686–87. However, it is important to note that both *Teasley* and *Moseley* address different statutory provisions than the case at bar. *Taylor*, 316 Ga. at 60, 885 S.E.2d at 686.

69. *Teasley*, 243 Ga. at 561, 255 S.E.2d at 57.

70. *Id.* at 564, 255 S.E.2d at 58–59.

71. *Taylor*, 316 Ga. at 60, 885 S.E.2d at 687.

72. *Moseley*, 263 Ga. at 681, 436 S.E.2d at 634; *see Teasley*, 243 Ga. at 564, 255 S.E.2d at 59.

Both *Teasley* and *Moseley* have been noted as "only cursory analysis to the right to jury trial issue"[73] and as such were rejected in *Nestlehutt*.[74] Specifically, the analysis in both cases has been described as "fatally incomplete."[75]

B. Guarantee of Separation of Powers

Punitive damage caps imposed by the legislature implicate separation of powers concerns because the limiting of awards for damages is a subject traditionally decided by the judiciary. The Georgia Constitution addresses separation of powers: "The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided."[76] Thus, "[t]he Georgia Constitution, unlike the United States Constitution, contains an express provision requiring the separation of powers."[77]

In challenges to the guarantee of separation of powers, the Supreme Court of Georgia has held "that the Legislature generally has the authority to define, limit, and modify available legal remedies[.]"[78] Further, the court has made clear that "the General Assembly properly can enact legislation that departs from the common law. And, in fulfilling that legislative function, the General Assembly has not invaded the province of the judiciary."[79] It is therefore well established that creating legal remedies and defining the parameters of such remedies is a legislative power.[80]

C. Guarantee of Equal Protection

Punitive damage caps also involve equal protection. The Georgia Constitution of 1983 provides: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."[81] Specifically,

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73. *Nestlehutt*, 286 Ga. at 736, 691 S.E.2d at 223.

74. *Taylor*, 316 Ga. at 62, 885 S.E.2d at 688.

75. *Id.* at 62, 885 S.E.2d at 687.

76. GA. CONST. art. I, § 2, para. 3.

77. Premier Healthcare Inv., LLC v. UHS of Anchor, L.P., 310 Ga. 32, 49 n.17, 849 S.E.2d 441, 454 n.17 (2020).

78. *Nestlehutt*, 286 Ga. at 737, 691 S.E.2d at 224; *Taylor*, 316 Ga. at 82, 885 S.E.2d at 700.

79. Dion v. Y.S.G. Enterprises, Inc., 296 Ga. 185, 189, 766 S.E.2d 48, 51 (2014); *Taylor*, 316 Ga. at 82, 885 S.E.2d at 700–01.

80. *Taylor*, 316 Ga. at 82, 885 S.E.2d at 701.

81. GA. CONST. art. I, § 1, para. 2.

punitive damages caps are implicated as a violation of equal protection by treating similarly situated plaintiffs differently based on the amount of damages the jury awards.[82]

When confronted with an equal protection challenge, the Supreme Court of Georgia said in *Harvey v. Merchan*[83] "the first step is deciding what level of scrutiny to apply to the statute."[84] "If neither a suspect class nor a fundamental right is implicated, the most lenient level of judicial review—'rational basis'—applies."[85]

Under rational basis review, the challenging party bears the burden of establishing that he, she, or they are treated differently than "similarly situated" individuals and that "there is no rational basis for such different treatment."[86] In fact, under federal rational basis review, a state "has no obligation to produce evidence to sustain the rationality of a statutory classification."[87] Further, the challenging party "must negate every conceivable basis that might support it."[88]

D. Punitive Damages in Georgia

It is important to note that "[d]uly enacted statutes enjoy a presumption of constitutionality."[89] To rebut such a presumption, it must be shown that the statute "manifestly infringes upon a constitutional provision or violates the rights of the people."[90]

Regarding punitive damages in Georgia, O.C.G.A. § 51-12-5.1(a) explains "[a]s used in this Code section, the term 'punitive damages' is synonymous with the terms 'vindicative damages,' 'exemplary damages,' and other descriptions of additional damages awarded because of aggravating circumstances in order to penalize, punish, or deter a defendant."[91] Further, subsection (b) of the same provision says:

> Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness,

82. *Taylor*, 316 Ga. at 85, 885 S.E.2d at 703.

83. 311 Ga. 811, 860 S.E.2d 561 (2021).

84. *Id.* at 825, 860 S.E.2d at 575.

85. *Id.* at 825–26, 860 S.E.2d at 575 (quoting *Harper v. State*, 292 Ga. 557, 560, 738 S.E.2d 584, 588 (2013)).

86. *Id.* (quoting *Harper*, 292 Ga. at 560, 738 S.E.2d at 588).

87. *Heller v. Doe,* 509 U.S. 312, 320 (1993).

88. *Harvey*, 311 Ga. at 826, 860 S.E.2d at 575 (citing *Heller*, 509 U.S. at 320–21).

89. *Nestlehutt*, 286 Ga. at 732, 691 S.E.2d at 221 (citations omitted).

90. *Id.*

91. O.C.G.A. § 51-12-5.1(a) (2010); *Taylor*, 316 Ga. at 53–54, 885 S.E.2d at 682.

> oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.[92]

Subsection (c) clarifies that "[p]unitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant."[93] The specific subsection at issue here, O.C.G.A. § 51-12-5.1(g), states: "For any tort action not provided for by subsection (e) 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."[94] In sum, punitive damages available presently under O.C.G.A. § 51-12-5.1 "(1) are awarded 'solely to punish, penalize, or deter,' and (2) may be awarded only if the defendant's actions showed a state of mind indicating some extra degree of culpability . . . ."[95]

IV. COURT'S RATIONALE

Taylor v. Devereux Foundation, Inc. was decided by the Supreme Court of Georgia on March 15, 2023, in an opinion authored by Justice Warren.[96] The court rejected each of Taylor's challenges to O.C.G.A. § 51-12-5.1(g) and affirmed the trial court's reduction of the punitive damage award in compliance with the statutory cap.[97]

A. Taylor's Main Contention

In the trial court, Taylor argued for punitive damages based on the "entire want of care" state of mind, specifically arguing that Devereux "just didn't care" and acted with an "entire want of care" and "a total lack of disregard."[98] Taylor argued that Devereux's "entire want of care" regarding McGee resulted in McGee's sexual assault.[99] Each of Taylor's individual arguments effectuated this contention of culpability.

B. Punitive Damages Based on an "Entire Want of Care" Are Not

92. O.C.G.A. § 51-12-5.1(b) (2010); *Taylor*, 316 Ga. at 54, 885 S.E.2d at 682.

93. O.C.G.A. § 51-12-5.1(c) (2010); *Taylor*, 316 Ga. at 54, 885 S.E.2d at 682.

94. O.C.G.A. § 51-12-5.1(g); *Taylor*, 316 Ga. at 54, 885 S.E.2d at 682. Subsections (e) and (f) discuss products-liability cases and defendants acting under the influence of certain intoxicants. O.C.G.A. § 51-12-5.1(e)(1), (f) (2010); *Taylor*, 316 Ga. at 54, 885 S.E.2d at 682. Such cases and defendants are not applicable in the present case.

95. *Taylor*, 316 Ga. at 55, 885 S.E.2d at 683.

96. 316 Ga. 44, 885 S.E.2d 671 (2023).

97. *Id.* at 45, 885 S.E.2d at 677.

98. *Id.* at 55, 885 S.E.2d at 683.

99. *Id.*

Encompassed by Georgia's Right to Trial by Jury

The court began by applying *Nestlehutt*'s framework to consider whether "any of Taylor's underlying claims existed in Georgia in 1798" and whether "the scope of a jury trial on that claim includes damages to punish" based on Taylor's argument that Devereux acted with an entire want of care.[100] The court agreed with Taylor's contention that at least one of her underlying claims, premises liability, was available at common law in England.[101] This provided an easy transition to the next step of deciding if the scope of the jury trial included punitive damages based on an entire want of care.[102]

Taylor cited six cases that she alleged were pre-1776 English cases in which juries awarded the sort of damages she sought.[103] The court agreed that in all six of the cases the jury decided the damages award—"which suggests that the question of damages was a jury question[.]"[104] These damages were large, and thus allowed the court to move on and decide whether the damages were designed to punish the defendant.[105] Devereux argued against Taylor's contention that the damages that existed were for purposes of punishment, and argued that only compensation for non-economic damages existed at the relevant time.[106] The court rejected Devereux's argument and agreed that "the six English cases discussed . . . show that some of the damages English juries awarded served 'as a punishment to the guilty, to deter from any such proceeding for the future.'"[107]

Nevertheless, the court held that the crux of Taylor's argument failed because no English cases provided support for awarding punishment damages for actions manifesting an entire want of care.[108] Since Taylor had the burden to show a "clear and palpable" conflict between O.C.G.A. § 51-12-5.1(g) and the right to trial by jury, she needed to show that

100. *Id.* at 63, 885 S.E.2d at 688; *see Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218. The court clarifies that since the jury rendered a general verdict and was not asked to decide which theory of liability was the basis of such award, it need only be determined if one of Taylor's claims existed in Georgia in 1798. *Taylor*, 316 Ga. at 64, 885 S.E.2d at 689.

101. *Taylor*, 316 Ga. at 64, 885 S.E.2d at 689 (citations omitted).

102. *Id.*

103. *Id.* at 65, 885 S.E.2d at 689–90; *see Huckle v. Money*, 95 Eng. Rep. 768 (1763); *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763); Beardmore v. Carrington et al., 95 Eng. Rep. 790 (1764); *Grey v. Grant*, 95 Eng. Rep. 794 (1764); *Benson v. Frederick*, 97 Eng. Rep. 1130 (1766); *Tullidge v. Wade*, 95 Eng. Rep. 909 (1769).

104. *Taylor*, 316 Ga. at 68, 885 S.E.2d at 691–92.

105. *Id.* at 69, 885 S.E.2d at 692.

106. *Id.*

107. *Id.* at 70, 885 S.E.2d at 693 (quoting *Wilkes*, 98 Eng. Rep. at 498.).

108. *Id.* at 77, 885 S.E.2d at 697.

English common law cases authorized juries to award damages, not based on the harm to McGee, but on the state of mind of Devereux that she alleged.[109] Thus, Taylor's presentation of cases showing only an "intentional misconduct" state of mind, rather than an entire want of care, were insufficient.[110] The court ultimately held that "[Taylor] has therefore failed to show that the kind of punitive damages she seeks were within the scope of the jury-trial right in Georgia in 1798."[111]

C. Statutory Caps on Punitive Damage Awards Do Not Violate the Separation of Powers

The court began by stating that the legislature has the power to provide for, and so limit, the award of punitive damages.[112] However, Taylor argued that that the cap infringed on the judiciary's power of "determining whether and when to grant a new trial."[113] Specifically, Taylor argued that O.C.G.A. § 51-12-5.1(g) violated the separation of powers as an improper legislative remittitur.[114] The court recognized that the power to "grant new trials on legal grounds" rested with the judicial branch.[115] Further, "'[j]udicial remittitur, the power to reduce a damages award deemed clearly excessive, is a corollary of the courts' constitutionally derived authority to grant new trials.'"[116]

Even so, the court was not persuaded that the statutory cap constituted a remittitur.[117] The court distinguished between judicial remittitur and damage caps because damage caps "are automatically triggered when a damages award exceeds the threshold amount" while judicial remittitur is only authorized when "the jury's award of damages is clearly so . . . excessive as to any party as to be inconsistent with the

109. *Id.* at 71, 885 S.E.2d at 693 (citing Barnhill v. Alford, 315 Ga. 304, 311, 882 S.E.2d 245, 252 (2022) (citations omitted)).

110. *Id.*; *see Huckle*, 95 Eng. Rep. at 768 ("[t]respass, assault, and imprisonment"); *Wilkes*, 98 Eng. Rep. at 489 ("trespass, for entering the plaintiff's house, breaking his locks, and seizing his papers"); *Beardmore*, 95 Eng. Rep. at 790 ("trespass and false imprisonment"); *Grey*, 95 Eng. Rep. at 794 ("assault and battery"); *Benson*, 97 Eng. Rep. at 1130 ("order[ing] [an] innocent man to be flogged"); *Tullidge*, 95 Eng. Rep. at 909 ("[t]respass" and "assault").

111. *Taylor*, 316 Ga. at 77, 885 S.E.2d at 697.

112. *Id.* at 82, 885 S.E.2d at 700.

113. *Id.* at 82, 885 S.E.2d at 701.

114. *Id.*

115. *Id.* (citing GA. CONST. art. VI, § 1, para. 4).

116. *Id.* (quoting *Nestlehutt*, 286 Ga. at 737, 691 S.E.2d at 224).

117. *Id.*

preponderance of the evidence."[118] The court reasoned that because statutory caps do not require judges to weigh the credibility of evidence on an individual case basis, but instead turned on whether an award was within the cap, a cap did not violate the guarantee of separation of powers.[119]

D. Statutory Caps on Punitive Damage Awards Do Not Violate the Georgia Constitution's Guarantee of Equal Protection

Taylor argued that because "O.C.G.A. § 51-12-5.1(g) established a fixed amount as the cap on punitive damages, it treat[ed] similarly situated tort plaintiffs differently based on the amount of punitive damages the jury awards."[120] Taylor compared two scenarios: a jury awarding a plaintiff $250,000 in punitive damages, thus allowing the plaintiff to recover 100 percent of the award, and a jury awarding McGee $50,000,000 but only being able to recover 0.5% of the award because of the cap.[121]

The court rejected this argument, reasoning that even if those two plaintiffs were similar for purposes of an equal protection analysis, and even if recovering different percentages of a jury's award is a legally significant difference under equal protection, there was an identifiable "conceivable basis that might support" this different treatment.[122] The court reasoned that the Georgia legislature may have concluded a flat-rate was more appropriate than a percentage-based approach.[123]

Additionally, Taylor argued that the $250,000 cap was an arbitrary amount.[124] Yet, the court determined that Taylor failed to show how the chosen amount treats similarly situated plaintiffs differently.[125] The court noted that this threshold requirement—showing that the statutory cap treats similarly situated plaintiffs differently—was also missing from another of Taylor's arguments that the cap was not adjusted to inflation.[126] This resulted in a failure as to the additional argument.[127] Thus, the court concluded that Taylor failed to carry her burden of

118. *Id.* at 83, 885 S.E.2d 701 (quoting *Nestlehutt*, 286 Ga. at 737–38, 691 S.E.2d at 224) (citations omitted)).

119. *Id.*

120. *Id.* at 85, 885 S.E.2d at 702–03.

121. *Id.* at 85, 885 S.E.2d at 703.

122. *Id.* (quoting *Harvey,* 311 Ga. at 826, 860 S.E.2d at 575).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 86 n.53, 885 S.E.2d at 703 n.53.

127. *Id.* at 85, 885 S.E.2d at 703.

showing that O.C.G.A. § 51-12-5.1(g) infringed on the guarantee of equal protection.[128] The court affirmed the trial court's reduction of punitive damages.[129]

E. Concurrences and Partial Dissent

1. Justice Bethel's Concurrence

Justice Bethel concurred to state that the majority's consideration of sister state cases decided prior to 1798 was of limited value compared to cases in Georgia.[130] Specifically, Justice Bethel noted that none of the cases relied on pre-1776 English cases nor provided any meaningful analysis of Georgia authority.[131]

2. Justice Colvin's Special Concurrence

Justice Colvin concurred specially to disagree with the majority's extension of *Nestlehutt* in the case.[132] Justice Colvin pointed out that the court in *Nestlehutt* stated that its analysis did not apply in the context of punitive damages.[133] Justice Colvin believed the challenge to the cap was easily resolved under *Teasley* and *Moseley*.[134] Thus, Justice Colvin concurred only in the result.[135]

3. Justice Ellington's Partial Dissent

Justice Ellington, while agreeing with much of the majority's discussion on the right to trial by jury, ultimately disagreed with the court's conclusion that O.C.G.A. § 51-12-5.1(g) did not violate that right.[136] Initially, Justice Ellington took issue with the majority using 1798 as the cut-off date for deciding whether a claim existed at common law.[137] Instead, Justice Ellington argued that the correct date should be February 5, 1777, which is when Georgia first enshrined the right to trial

128. *Id.*

129. *Id.* at 86–87, 885 S.E.2d at 703.

130. *Id.* at 98, 885 S.E.2d at 711 (Bethel, J., concurring). Discussion of these cases was not included within the Court's Rationale section of this Note. To read the majority's discussion, *see Taylor*, 316 Ga. at 697, 885 S.E.2d at 77.

131. *Id.* at 98, 885 S.E.2d at 711 (Bethel, J., concurring).

132. *Id.* at 99, 885 S.E.2d at 711 (Colvin, J., concurring specially).

133. *Nestlehutt,* 286 Ga. at 736, 691 S.E.2d at 223.

134. *Taylor*, 316 Ga. at 62–63, 885 S.E.2d at 688.

135. *Id.* at 99, 885 S.E.2d at 712 (Colvin, J., concurring specially).

136. *Id.* at 104, 885 S.E.2d at 715 (Ellington, J., concurring in part).

137. *Id.* at 105, 885 S.E.2d at 716 (Ellington, J., concurring in part).

by jury in its constitution.[138] Next, Justice Ellington cited that when Georgia was founded as a sovereign state, "the people felt strongly about the government's duty to provide trial by jury for almost any legal dispute."[139] Thus, Justice Ellington argued that the "plain terms" of the Georgia Constitution show that "a jury was empowered to decide whether a plaintiff had proved a right to recover and what total damages the defendant should pay."[140]

Finally, Justice Ellington heavily disagreed with the majority's framing of the pre-English cases that Taylor cited.[141] The majority held that all of the cases Taylor cited had an intentional state of mind, and thus failed because Taylor had argued on the basis of an entire want of care.[142] Yet, Justice Ellington pointed out that none of the cases cited by Taylor "describe[ed] the tortious conduct as 'intentional' or address[ed] in any way the defendants' mental state."[143] Justice Ellington argued that the majority erred in holding that English juries awarded punitive damages only in intentional misconduct cases, and had " . . . avoid[ed] the broader question of whether the right to a jury trial in Georgia inheres in awards for punitive damages generally, such that the punitive damages cap . . . is unconstitutional."[144] Justice Ellington would answer this question in the affirmative and hold that "even under the *Nestlehutt* framework, the right to a jury trial in Georgia inheres in awards for punitive damages generally, including for cases involving an entire want of care."[145]

V. IMPLICATIONS

Taylor v. Devereux Foundation illustrates the Supreme Court of Georgia's application of originalism and textualism when interpreting the state constitution.[146] Focusing on Taylor's main argument, the right to trial by jury, the court's analysis focused on both the text of the provision and the meaning of the provision at the time it was enacted.[147]

138. *Id.* at 106–07, 885 S.E.2d at 716–17 (Ellington, J., concurring in part).

139. *Id.* at 108, 885 S.E.2d at 717 (Ellington, J., concurring in part).

140. *Id.* at 108, 885 S.E.2d at 717–18 (Ellington, J., concurring in part).

141. *Id.* at 110, 885 S.E.2d at 718–19 (Ellington, J., concurring in part).

142. *Id.* at 110, 885 S.E.2d at 719 (Ellington, J., concurring in part).

143. *Id.*

144. *Id.* at 114, 885 S.E.2d at 721 (Ellington, J., concurring in part).

145. *Id.*

146. 316 Ga. 44, 57–58, 885 S.E.2d 671, 685. For more information regarding originalism and textualism in the Georgia Constitution, *see generally* Peterson, *supra* note 11.

147. *Taylor*, 316 Ga. at 56, 885 S.E.2d at 684.

These interpretative principles have guided the court since 1854 when it held, "the Constitution, like every other instrument made by men, is to be construed *in the sense in which it was understood by the makers of it at the time when they made it*."[148] Justice Warren's majority opinion underscores the duty of state courts to follow the Georgia Supreme Court's methodology when interpreting the state constitution.

Nevertheless, Georgia trial lawyers are divided on the implications of the decision in *Taylor*.[149] Some have characterized the court as having acquiesced in a "parking ticket" function for well-off defendants who want to avoid a jury hearing about their wrongful conduct.[150] Others applaud the court's ruling, asserting that it is "appropriate under the law."[151]

The court's upholding of the statutory cap may help alleviate the growing belief that Georgia has become a state to obtain high-dollar verdicts.[152] This belief has resulted in Georgia being coined a "Judicial Hellhole," which comes from data from the American Tort Reform Foundation.[153] Between 2010 and 2019, Georgia juries awarded fifty-three verdicts totaling more than $3 billion.[154] And, between January 2018 and April 2023, jurors awarded thirty-nine verdicts at or above $10,000,000.[155] Many of these verdicts include punitive damage awards—the largest being an August 2022 award of $1.7 billion against Ford Motor Company.[156]

Reducing high-dollar, or "nuclear" verdicts,[157] seems to be a crux of tort reform. For instance, runaway verdicts could reduce the influx of business in the state of Georgia. After all, why would corporations looking for states to do business in want to deal with unpredictable and

148. Padelford, Fay & Co. v. Savannah, 14 Ga. 438, 454 (1854) (emphasis in original).

149. *'That's The Rub': Georgia Punitive Damages Caps Ruling Divides Lawyers*, THE DAILY REPORT, https://plus.lexis.com/api/permalink/0c0a12b3-e5d8-40fc-a9e1-19ab1b1b4f02/?context=1530671 [https://perma.cc/9VPY-APFE] (last visited Oct. 3, 2023).

150. *'That's The Rub': Georgia Punitive Damages Caps Ruling Divides Lawyers*, *supra* note 149, at 2.

151. *Id.*

152. *Georgia Is a Leader in Big Verdicts: Here's How Often Jurors Awarded $10M-or More*, THE DAILY REPORT, https://plus.lexis.com/api/permalink/265b77fc-f310-4754-b6a9-02c9bd4073bc/?context=1530671 [https://perma.cc/HXP4-TRNY] (last visited Oct. 4, 2023).

153. *Georgia*, AMERICAN TORT REFORM FOUNDATION JUDICIAL HELLHOLES, https://www.judicialhellholes.org/hellhole/2022-2023/georgia/ [https://perma.cc/FRM7-4M5G] (last visited Oct. 4, 2023).

154. *Georgia Is a Leader in Big Verdicts: Here's How Often Jurors Awarded $10M—or More*, *supra* note 152, at 1.

155. *Id.* at 2.

156. *See* Hill v. Ford Motor Co., No. 16-C-04179-S2, 2022 Ga. State LEXIS 4120 (Ga. State Ct. Aug. 26, 2022).

157. AMERICAN TORT REFORM FOUNDATION JUDICIAL HELLHOLES, *supra* note 153.

extravagant awards by Georgia juries based on preconceived notions or biases towards big corporations? This argument was advanced by an amici curiae brief filed in *Taylor* by the United States Chamber of Commerce, Georgia Chamber of Commerce, and American Tort Reform Association (collectively, "Amici").[158] The Amici sought to "promote fairness, balance, and predictability in civil litigation."[159] In doing so, they urged the court that failure to uphold the cap's constitutionality would create "too lax and unpredictable a damages regime" which would harm the state of Georgia by "discouraging the offering of products, jobs, and services that the state and its people need."[160]

Nevertheless, there can be cons to punitive damage caps. Specifically, the court may have held that O.C.G.A. § 51-12-5.1(g) did not violate the right to trial by jury, but the cap arguably deprives the jury of its power. If twelve impartial jurors were selected to evaluate and award punitive damages based on the egregious or reprehensible conduct of a defendant, capping damages prevents jurors from effectuating the purpose for which they serve. This is especially prevalent when one considers the cap's history. O.C.G.A. § 51-12-5.1(g) was enacted as part of the Georgia Tort Reform Act of 1987.[161] The chosen cap of $250,000 is an arbitrary number, with no basis for the choice found within the statute's text.[162] In 1987, $250,000 may have seemed like a large number, but it does not reflect the value of the dollar in 2023. The amount of $250,000 in 1987 would be around $650,000 in today's economy.[163] Thus, not only is the present cap arguably arbitrary, but it also fails to reflect the present value of the dollar.

Some may argue that the Georgia General Assembly should scrap the current statutory punitive damages cap and instead adopt the caps or

158. Brief for United States Chamber of Commerce et al. as Amici Curiae Supporting Appellee-Defendants, Taylor v. Devereux Foundation Inc., 316 Ga. 44, 885 S.E.2d 671 (2023) (No. S22A1060).

159. *Id.* at 2.

160. *Id.* at 5.

161. *See* Eric J. Hertz & Mark D. Link, Punitive Damages in Georgia, § 2-14 (2d ed. 2022).

162. *See* O.C.G.A. § 51-12-5.1(g).

163. *Inflation Calculator*, SMART ASSET, https://smartasset.com/investing/inflation-calculator [https://perma.cc/2NWK-BKC8] (last visited Oct. 5, 2023); *Inflation Calculator By Year: The Dollar's Value Since 2013*, NERDWALLET, https://www.nerdwallet.com/article/investing/inflation-calculator [https://perma.cc/TGW8-KQEW] (last visited Oct. 5, 2023); *Inflation Calculator*, FEDERAL RESERVE BANK OF MINNEAPOLIS, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator [https://perma.cc/3SB3-N2MX] (last visited Oct. 5, 2023).

systems employed by other states.[164] Whatever the lawmakers under the gold dome decide, it is clear that Georgia lawyers and citizens want change—albeit a consensus as to what change currently seems impossible to reach. Yet, with Governor Brian Kemp recently announcing tort reform as a major priority for the 2024 legislative session,[165] it would be unsurprising to see the cap being heavily argued and litigated over in the coming months. What may come of this—if anything—will certainly be a run for your money, too.

164. The state of Montana limits punitive damages to $10 million or 3% of a defendant's net worth. MONT. CODE ANN. § 27-1-220 (2003). North Carolina offers either a $250,000 cap or three times the amount of compensatory damages limitation, the maximum being whichever is greater. N.C. GEN. STAT. § 1D-25(b) (1995). Kansas caps punitive damages at the lesser of a defendant's annual gross income (or if inadequate, 50% of a defendant's net worth) or $5 million. KAN. STAT. ANN. § 60-3702(e) (1988). Oregon takes an entirely different approach, having no cap and instead basing a punitive damages award on a review of " . . . whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole . . . ." OR. REV. STAT. § 31.730(2) (2023). Finally, some states have no punitive damages caps or limitations at all. W. McDonald Plosser, *Sky's the Limit? "A 50-State Survey of Damages Caps And The Collateral Source Rule*, MONDAQ, https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule [https://perma.cc/U2AQ-M5A2] (last visited Oct. 7, 2023).

165. Abby Kousouris, *Months Before Georgia's Legislative Session, Tort Reform Made Major Priority*, ATLANTA NEWS FIRST, https://www.atlantanewsfirst.com/2023/10/02/months-before-georgias-legislative-session-tort-reform-made-top-priority/ [https://perma.cc/WFX4-VMQ4] (last visited Oct. 7, 2023).