

Appeal Case No. A26A0229

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IN THE COURT OF APPEALS  
OF THE STATE OF GEORGIA

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MARQUIZ BARKER,

Appellant

v.

OWAUNISS GRIER,

Appellee

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Appeal from the State Court of DeKalb County  
Civil Action File No. 22A03274-5

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**REPLY BRIEF OF APPELLANT/DEFENDANT MARQUIZ BARKER**

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## ARGUMENT AND CITATIONS OF AUTHORITY

Ms. Grier's brief confirms that the Georgia General Assembly's 2025 amendments to O.C.G.A. § 9-10-184, as enacted (the "2025 Amendment"), require reversal.

This is because Ms. Grier concedes that "the amendments to O.C.G.A. § 9-10-184 are effective as of April 21, 2025, and apply to 'pending cases' even if they accrued before the effective date." (Grier Br. p. 17.) Moreover, Ms. Grier also concedes that her attorney violated the 2025 Amendment by arguing the alleged economic value of her pain and suffering damages for the first time during his second closing argument, leaving Mr. Barker's attorney no opportunity whatsoever to rebut that argument.

When the legislature unambiguously prescribes the reach of a newly enacted statute, courts should give effect to the statute. This principle is even set forth in the cases heavily relied upon by Ms. Grier in her brief. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (when legislature expressly prescribes statute's reach, there is no need to resort to judicial default rules to determine whether statute is retroactive); *Humphrey v. Williams*, 295 Ga. 536, 540 n. 2 (2014) (applying prior version of Evidence Code to appeal where amendments to the Evidence Code expressly "applie[d] to trials beginning on or after January 1, 2013").

Here, by its express text, the 2025 Amendment “appl[ies] to causes of action pending on the effective date” of the 2025 Amendment (April 21, 2025). GA LEGIS 9, § 9, 2025 Georgia Laws Act 9 (S.B. 68). *See also* O.C.G.A. § 9-10-184(b) (effective April 21, 2025).

And here, it is undisputed that this action was pending as of April 21, 2025. Ms. Grier has not cited a single case holding that a court of appeals may ignore the legislature when it clearly and unambiguously states that a new law should apply to “pending” actions. Because the Generally Assembly intended the 2025 Amendment to apply to all pending actions, and Ms. Grier’s counsel employed the very surprise tactics prohibited by the 2025 Amendment, reversal is required.

Reversal is also required for reasons in addition to the 2025 Amendment. For one, Ms. Grier’s counsel wrongfully asked the jury to punish Mr. Barker for defending himself in court even though she had no claim for punitive damages. Ms. Grier has attempted to rebut this argument by cherry-picking a handful of proper statements made during closing regarding “compensating” Ms. Grier for her injuries. But Ms. Grier ignores that the thrust of her argument—in which her counsel implored the jury to make Mr. Barker “take responsibility” for not accepting liability over a dozen times—was an improper invitation to punish Mr. Barker.

Additionally, reversal is required because Ms. Grier cannot point to evidence the jury could use to calculate her damages to any level of certainty. Based on the

evidence introduced at trial (and setting aside Ms. Grier’s improper closing argument), the jury was just as likely to award \$500 as it was \$500,000 or \$5,000,000. This shows Ms. Grier failed to carry her burden at trial.

## **I. Standard of Review**

Whether the trial court properly applied the 2025 Amendment is a question of law. “This Court reviews de novo issues of law decided by the trial court.” *ALR Oglethorpe, LLC et al. v. Fidelity Nat’l Title Ins. Co.*, 352 Ga. App. 363, 364 (2019) (citing *Bearoff v. Craton*, 350 Ga. App. 826, 827 (2019)). “Further, ‘the trial court’s application of the law to the undisputed facts is subject to de novo review.’” *Id.* (quoting *Burchfield v. West Metro Glass Co.*, 340 Ga. App. 324 (2017)).

Ms. Grier argues that this black-letter law should be disregarded because Mr. Barker’s counsel did not object during her offending closing argument. But the 2025 Amendment did not exist at the time the closing was given. And while the legislature made clear that the 2025 Amendment—including its prohibition on the surprise tactics used by Ms. Grier—applied to all cases “pending” on the date of its enactment, Ms. Grier has not cited any case holding that a litigant must object on grounds of a nonexistent law to preserve de novo review of a question of law. Mr. Barker promptly raised his arguments regarding 2025 Amendment promptly after its enactment and at his first opportunity to do so. And the court ruled on it.

In any event, to constitute “plain error” there must be “an error that was not affirmatively waived, the error must have been clear and not open to reasonable dispute, the error must have affected his substantial rights, and the error must have seriously affected the fairness, integrity or public reputation of judicial proceedings.” *State v. Herrera-Bustamante*, 304 Ga. 259, 264 (2018) (quoting *Lupoe v. State*, 300 Ga. 233, 240 (2016)). “[A]n error is plain if it is clear or obvious under current law.” *Id.* “The ‘current law’ considered is the law at the time of appellate review rather than at trial.” *Id.* “[W]here it is apparent that the trial court’s judgment rests upon an erroneous legal theory, a reviewing court cannot affirm.” *SunTrust Bank, Middle Georgia N.A. v. Harper*, 250 Ga. App. 300, 303 (2001).

## **II. By its express terms, the 2025 Amendment applies to this pending litigation.**

It is well settled that courts “presume that the General Assembly meant what it said and said what it meant.” *Georgia Lotter Corp. v. Tabletop Media, LLC*, 346 Ga. App. 498, 502 (2018). Here the General Assembly specifically stated that the 2025 Amendment “shall” apply to all “causes of action pending” as of its effective date. GA LEGIS 9, § 9, 2025 Georgia Laws Act 9 (S.B. 68). Ms. Grier does not dispute that this matter is still pending.

The General Assembly could have made the 2025 Amendment apply only to cases commenced or tried after the effective date, but it did not. Indeed, it did exactly that in other sections of the 2025 Amendment. The General Assembly made clear

that “Sections 6 and 7 of [the 2025 Amendment] shall apply only with respect to causes of action arising on or after the effective date of this Act[.]” GA LEGIS 9, § 9, 2025 Georgia Laws Act 9 (S.B. 68). The General Assembly knows how to make new laws apply to only proceedings that have not yet occurred when it wants to. *Pyatt v. State*, 298 Ga. 742 n. 7 (2016) (noting that new Evidence Code “explicitly applies only to ‘any motion made or hearing or trial commenced on or after January 1, 2013’”) (citing Ga. L. 2011, p. 99, § 101). It decided not to so limit the 2025 Amendment, and instead expressly indicated that the prohibition on surprise tactics “shall” apply to all “pending” actions, including this case.

Faced with nearly identical statutory language as the 2025 Amendment, Georgia courts have held that the “express language” of a statute indicating it “shall apply to causes of action pending on its effective date” “shows that the General Assembly intended that [the statute] be applied to cases pending at the time the law was passed.” *Airasian v. Shaak*, 289 Ga. App. 540, 541 (2008).

Ms. Grier concedes that this case was pending as of the effective date of the 2025 Amendment. Nonetheless, Ms. Grier argues “that a new procedural or evidentiary rule applies to a ‘pending case’ has been interpreted to mean the new rule applies to a new proceeding in the case after the effective date of the rule; it does ‘not invalidate procedures followed before the new rule was adopted.’” (Grier Br. p. 20.) This is wrong.

Ms. Grier relies on two cases—*Humphrey* and *Landgraf*—to argue that the 2025 Amendment does not apply to this pending case. Both of these cases, however, use common law principles to determine whether a newly enacted statute applies to pre-enactment conduct when the statute is silent as to its scope. *Humphrey v. Williams*, 295 Ga. at 540 n. 2; *Landgraf*, 511 U.S. at 273 (determining whether Civil Rights Act applied retroactively “absent specific legislative authorization”).

However, when statutes “specify their temporal reach,” the reach set forth by the legislature is applied. *Landgraf*, 511 U.S. at 245. This includes statutes that, by their clear terms, apply to pre-enactment conduct. *Pyatt*, 298 Ga. at 748 n. 9 (appellate courts should apply law’s scope as prescribed by statute); *Polito v. Holland*, 258 Ga. 54, 55 (1988) (“expressed . . . intention” of legislature regarding scope of statute should be enforced).

Simply put, “where the language of the statute is clear, that statutory mandate is to be followed.” *James v. Am. Int’l Recovery, Inc.*, 799 F. Supp. 1156, 1164 (N.D. Ga. 1992). “When a case implicates a . . . statute (or amendments to a . . . statute) that was enacted after the occurrence of the events giving rise to the suit, the court must first determine whether Congress has expressly prescribed the statute’s proper reach. If Congress has done so, there is no need to resort to judicial default rules.” *Cunningham v. Eyman*, 11 F. Supp. 2d 969, 972 (N.D. Ill. 1998) (citing *Landgraf*, 511 U.S. at 280).

Both *Humphrey* and *Landgraf*—the primary cases cited by Ms. Grier—actually support Mr. Barker’s position that the 2025 Amendment applies to this case because the General Assembly unambiguously indicated that the new rules should apply to all pending cases. In *Humphrey*, the appellate court noted that it was not going to apply newly passed evidentiary rules on appeal because the governing statute clearly stated that the new rules “applie[d] to trials beginning on or after January 1, 2013.” *Humphrey*, 295 Ga. at 540.

And in *Landgraf*, the Supreme Court indicated that appellate courts should “apply the law in effect at the time it renders its decisions . . . even though that law was enacted after the events that give rise to the suit . . . when the statute in question is unambiguous” regarding its temporal scope. *Landgraf*, 511 U.S. at 273-75.

This has been the law for over two hundred years. *United States v. Schooner Peggy*, 2 L.Ed 49 (1801) (“Because a treaty signed on September 30, 1800, while the case was pending on appeal, unambiguously provided for the restoration of captured property ‘not yet definitively condemned,’ we reversed a decree entered on September 23, 1800 condemning a French vessel that had been seized in American waters. Our application of ‘the law in effect’ at the time of our decision in *Schooner Peggy* was simply a response to the language of the statute.”)).

Simply put, the cases cited by Ms. Grier do not apply when, as here, the legislature sets forth a law’s applicability and instead only analyze common law

principles when “there is no clear congressional intent on the [statute’s] application to pending cases.” *Landgraf v. USI Film Prods.*, 968 F.2d 427, 432 (5th Cir. 1992), *aff’d*, 511 U.S. 244. Ms. Grier does not cite a single case where a court ignored the legislature’s express direction to apply a new statute to all pending cases. This Court should not be the first.

Finally, Ms. Grier argues that “it would be an unconstitutional impairment of vested rights to retroactively disturb a **judgment** because of a new evidentiary rule.” Grier Br. p. 21 (emphasis in original). But, under Georgia law, “[i]t is axiomatic that she has acquired no vested right in the judgment of the trial court.” *Dept. of Transp. v. Kendricks*, 244 Ga. 613, 613 (1979) (citing *Calhoun v. State Hwy. Dept.*, 223 Ga. 65 (1967); *City of Valdosta v. Singleton*, 197 Ga. 194 (1944)). That is because “one who has obtained a verdict” does not “have any vested right therein until the judgment thereon becomes absolutely final.” *Wood v. Mobley*, 114 Ga. App. 170, 172 (1966) (citing *Western Union Tel. Co. v. Smith*, 96 Ga. 569 (1895)).

Whether the trial court failed to apply the 2025 Amendment is a question of law reviewed de novo. *ALR Oglethorpe, LLC*, 352 Ga. App. at 364. Ms. Grier argues that the trial court’s misapplication of the law should be reviewed for plain error. However, Mr. Barker raised his arguments on the 2025 Amendments at the first possible time after the statute’s enactment. Ms. Grier has not cited a single case subjecting a litigant to plain error review for not objecting on grounds that did not

exist at the time of trial. Nor has she pointed to any statute or legislative history indicating that was the legislature's intent. In any event, even if plain error does apply to the application of the 2025 Amendment (it does not), reversal is still required because where, as here, "it is apparent that the trial court's judgment rests upon an erroneous legal theory, a reviewing court cannot affirm." *Harper*, 250 Ga. App. at 303.

**III. Ms. Grier's second closing argument violated the plain language of the 2025 Amendment.**

Recognizing a trend in cases seeking pain and suffering damages, the General Assembly prohibited the very kind of surprise tactics used by Ms. Grier at trial.

The 2025 Amendment makes clear that an attorney is only allowed "to argue the worth or monetary value of noneconomic damages" during his rebuttal/second closing statement if the attorney argues the same worth or monetary value during his initial closing statement. O.C.G.A. § 9-10-184(c)(2).

It is undisputed that Ms. Grier's counsel did not argue that her noneconomic damages were valued at \$500/day for over 1,000 days during his opening argument. There was also no evidence introduced during trial regarding the \$500/day figure. And Ms. Grier's counsel also did not argue that her pain and suffering damages were valued at \$500/day during his initial closing document.

Rather, this amount was not presented to the jury or Mr. Baker's counsel until Ms. Grier's rebuttal closing argument, given after Mr. Barker's counsel concluded

her closing argument and no longer had the opportunity to address the jury. V4-159:12-15. These surprise tactics are explicitly prohibited by the 2025 Amendment.

Ms. Grier concedes that this figure was not presented until the second closing argument, in violation of the 2025 Amendment, but states that it was “harmless error” because “Defendant had a full and fair opportunity to argue what should have been awarded, and made that argument.” (Grier Br. p. 25.) In passing the 2025 Amendment, the General Assembly prohibited these surprise tactics because they were so harmful. Ms. Grier did not present the \$500/day figure until after Mr. Barker’s attorney finished her closing argument. There was thus no opportunity for Mr. Barker to rebut that amount in any way. That Mr. Barker was permitted to argue the issue of damages generally during his closing argument without the benefit of knowing the amount Ms. Grier was seeking is, of course, not the same.

Ms. Grier also ignores that the jury was clearly impacted by the \$500/day argument and based its damage amount on that figure. Five-hundred dollars per day, multiplied by the 1,000 days between the accident and the trial, amounts to \$500,000. While not identical, this amount is close to the jury’s \$450,000 award. As noted in Mr. Barker’s original brief, Ms. Grier did not present the jury with any evidence to base their damage award. The \$500/day figure presented in the second closing was the only suggestion of a damages amount. That the jury based its award

on arguments the legislature has explicitly prohibited shows that Mr. Barker was greatly prejudiced in this case.

This is exactly the result the General Assembly seeks to prevent by passing the 2025 Amendment. The 2025 Amendment is designed to ensure that juries have the benefit of hearing from both sides before making their decision, rather than allow a plaintiff to lie in wait and argue for large damage amounts only after the defendant has no opportunity to reply. Had Ms. Grier's attorney argued to the jury in his initial closing argument that Ms. Grier's damages amounted to \$500/day, or had he presented evidence supporting that specific amount, Mr. Barker's attorney would have had the opportunity to rebut such arguments.

Rather, Ms. Grier made the strategic decision to wait until the last opportunity, after defense counsel had rested and had no further opportunity to address the jury, to spring this calculation on the jury knowing full well that there would be no rebuttal. These unfair surprise tactics worked here—the jury awarded Ms. Grier almost exactly what her attorney asked for.

The General Assembly recognized the injustice in such a result and expressly prohibited these surprise tactics by passing the 2025 Amendments. A jury award based on prohibited tactics cannot stand.

**IV. Ms. Grier cannot rewrite history to omit her pleas to punish Mr. Barker for defending himself in court.**

In addition to the 2025 Amendment, the verdict should also be reversed because of the improper closing argument given by Ms. Grier's counsel.

During closing, Ms. Grier told the jury over a dozen times that over one thousand days had passed since the date of the accident and invited the jury to punish Mr. Barker for not "accept[ing] responsibility" for his actions while the litigation transpired. According to Ms. Grier, Mr. Barker should be punished for defending himself in court. *See, e.g.*, V4-133:17-19 ("The defense has refused to accepted responsibility for the last 1006 days. Ladies and gentlemen of the jury, only you have the power to change that and to make them accept responsibility."); V3-149:14-20 ("[T]he defense has been denying any responsibility whatsoever for over two and a half years. You know what? The defense has not listened but I will tell you this, they have to listen to you[.]"); V4-155:17-19 ("I will tell you who did wait 1006 days to come here today and try to trick you. The defendant and his defense."); V4-159:4-6 ("Now remember today is the 1006 day that the defense refuses to accept responsibility for their actions and that is why I am here."); and V4-160:18-20 ("We are here because the defense has denied liability for 1006 day. Help me. Let's make sure it is not 1007 days.").

Ms. Grier argues that these quotes were taken out of context, but the proof is in the transcript. When asking the jury to award her \$500/day, Ms. Grier's counsel

could have said “I am asking you, I am empowering you to give Ms. Grier 500 dollars for every single day she has had to live with this pain.” But he did not.

Rather, Ms. Grier’s attorney directly linked the \$500/day figure to Mr. Barker’s alleged refusal to take responsibility. V4-159:12-15 (“I am asking you, I am empowering you to give Ms. Grier 500 dollars for every single day that the defense has denied taking responsibility.”).

Ms. Grier’s argument that Mr. Barker should have to pay for the fact that trial was not scheduled until over one thousand days after the accident occurred is a bald request that Mr. Barker be punished for defending himself in trial. Indeed, Ms. Grier continues to argue that Mr. Barker should be punished for defending himself in trial. (Grier Br. p. 3 (arguing Mr. Barker wrongfully “fights liability”); p. 4 (noting Mr. Barker “still quibbled with responsibility at trial”). It is black-letter law that a defendant “may not be . . . punished for exercising her constitutionally guaranteed right to a jury trial.” *Arnold v. State*, 228 Ga. App. 470, 472 (1997) (citing *Alabama v. Smith*, 490 U.S. 794 (1989)). But that is exactly what Ms. Grier asked of the jury.

**V. Ms. Grier did not present the jury with evidence it could use to calculate her damages with reasonable certainty.**

Ms. Grier “carrie[d] not only the burden of proving [her] damages, but also furnishing the jury with sufficient data to estimate the damages with reasonable certainty.” *Paul Davis Sys. of Savannah v. Peth*, 201 Ga. App. 734, 735-36 (1991). Ms. Grier’s failed to carry that burden by not providing the jury with any evidence

it could use to tether its award. Based on the evidence introduced during trial, the jury was just as likely to award Ms. Grier \$500 as it was \$5,000,000. This is because rather than provide the jury with some evidence it could use to calculate her damages with reasonable certainty, Ms. Grier asked the jury to pluck a number out of thin air.

Ms. Grier did not introduce a single medical bill or attempt to quantify her medical expenses, past or future, in any way. This is contrary to most negligence cases where damages the award is typically linked to the medical expenses introduced at trial. *See, e.g., Richards v. Davis*, 301 Ga. App. 86, 88 (2009) (jury award of \$15,000 supported by \$3,400 in expenses); *McCormick v. Harris*, 253 Ga. App. 417, 419 (2002) (affirming \$1,500 verdict based on \$729 in medical bills); *AT Sys. Se., Inc. v. Carnes*, 272 Ga. App. 671, 672 (2005) (\$1.25 million verdict supported by \$75,000 in medical expenses).

Indeed, this principle is supported by the case Ms. Grier relies on in her brief. *See, e.g., Grier Br. p. 33* (citing “*Carnes*, 272 Ga. App. at 672 (affirming \$1,250,000 award despite only about \$75,000 in special damages and testimony that pain would not be permanent).”). The only cases cited by Ms. Grier where a large pain and suffering award was upheld without evidence of any medical bills are wrongful death claims where the individual died at the scene. *See Beam v. Kingsley*, 255 Ga. App. 715, 716 (2002); *Chrysler Grp., LLC v. Walden*, 339 Ga. App. 733, 750 (2016). Ms.

Grier has not cited a single case awarding nearly half a million dollar damages in pain and suffering damages based on a record as sparse as this.

Indeed, the **only** tether provided to the jury was the improper, surprise anchoring tactics used by Ms. Grier's counsel during his second closing argument. This closing argument was not evidence as a matter of law, and it was also improper under longstanding Georgia law and the 2025 Amendment. Such an award cannot stand.

#### **VI. At minimum, remittitur should be ordered.**

On October 16, 2024, Mr. Barker moved for a new trial or, in the alternative, a remittitur, arguing that the jury's award was arbitrary, untethered to evidence, against the weight of the evidence, excessive, and punitive. V2-394. This motion was denied on June 5, 2025 following supplemental briefing. V2-644-45. The trial court erred in denying the motion for a new trial for the reasons set forth above. However, at minimum, the trial court erred by not ordering a remittitur based on the lack of evidence supporting Ms. Grier's damages and her improper closing argument.

"As a general rule, 'a remittitur order reducing a jury's award . . . is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence.'" *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1266 (11th Cir. 2008) (quoting *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1448

(11th Cir. 1985)) (ordering remittitur for lack of evidence). Here, the jury's award of nearly half a million dollars based on no medical bills, provider testimony, or expert testimony, far exceeds the amount "established" by the evidence. As such, remittitur is required.

Additionally, Ms. Grier's improper closing argument wherein she wrongfully asked the jury to punish Mr. Barker in this case despite not having a claim for punitive damages is a separate ground for remittitur. *Neal v. Toyota Motor Corp.*, 823 F. Supp. 939 (N.D. Ga. June 9, 1993) (ordering remittitur because of improper closing argument).

### **Conclusion**

For the above reasons, as well as those included in Mr. Barker's opening brief, this Court should remand this case and order a new trial. Alternatively, the case should be remanded for a new trial on the issue of damages, or with instructions to order a remittitur.

Respectfully submitted this 8th day of December, 2025.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this submission does not exceed the word count limit imposed by Rule 24 of the Georgia Court of Appeals Rules.

Respectfully submitted this 8th day of December, 2025.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 8, 2025, I served the foregoing upon the following counsel of record via email per prior agreement of counsel and by filing it with the Clerk of Court using the Court's electronic filing system:

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