Non-Party Apportionment:
Where We Started and Where We are Now

PRESENTED TO:

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O.C.G.A. § 51-12-33 – Apportionment of damages in actions against more than one person according to the percentage of fault of each person

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

2005 – Where We Started

On February 16, 2005, Governor Sonny Perdue signed into law Senate Bill 3 which encompassed numerous "tort reform" measures. When Governor Purdue signed Senate Bill 3, he stated, "Due to the rising costs of lawsuits, many of our state's OB/GYN physicians have been forced to leave their practice. These reforms will help our medical community continue to provide and care for expectant mothers in our state." "They will also ensure that frivolous litigation does not further limit the availability of quality medical care for all Georgians."

The 2005 tort reform package changed the landscape of civil litigation in Georgia. One significant and wide-reaching change involved the amendments to O.C.G.A. § 51-12-33. The 2005 amendments split subsection (a) of the old statute into subsections (a) and (b).

The new subsection (a) applies to cases brought against *one or more persons* where the plaintiff is some degree responsible for his or her own damages. The old version of subsection (a) only applied to cases brought against "more than one person." With the change to subsection (a), the jury is now required to assign a percentage of fault to the Plaintiff in single and multi-defendant cases if it finds the Plaintiff has any responsibility for his or her on damages. Once the jury assigns percentages of fault, the judge reduces the total award accordingly.

The new subsection (b) applies to actions against *more than one person*. If multi-defendant cases, subsection (b) requires the finder of fact to apportion its award of damages among the persons who are liable according to the percentage of fault of each person. It goes on to clarify that the apportioned damages are the liability of the party to which they are assigned and that all defendants are not jointly liable for the total damage award.

Subsections (c) through (f) were new additions addressing apportionment of fault to non-parties. Subsection (c) requires the trier of fact to consider the fault of all persons who contributed to the damages regardless of whether they are named in the suit. Subsection (d) specifies that the trier of fact shall consider the negligence or fault of a nonparty if the Plaintiff settled with the non-party or if a defending party gives notice of the nonparty's fault at least 120 days prior to trial. Subsection (e) simply preserves a defendant's ability to present other defenses that may be available. Subsection (f) clarifies that percentages of fault assigned to non-parties will not subject the non-party to liability in the action and that the assigned percentage will not be admissible in any other action against the non-party. Subsection (g) confirmed that Georgia is a modified comparative negligence jurisdiction where the Plaintiff cannot recover if he or she is 50% or more responsible for their own injuries or damages.

Significant Apportionment Cases by Year

2010

***Cavalier Convenience, Inc. v. Sarvis*, 305 Ga. App. 141, 144-145 (2010):** Cavalier involved a car crash where Sarvis, the injured driver, brought a personal injury claim against a teenage driver and two stores that sold alcohol to the teenager. Sarvis argued that the apportionment statute mandated apportionment only in cases where the plaintiff bears some responsibility for his or her own injuries or damages.

The Court of Appeals rejected Sarvis' argument reasoning that the "if any" clause in O.C.G.A § 51–12–33(b) makes it clear that the legislature did not intend for apportionment to be limited to those cases wherein the plaintiff was to some degree at fault.

Holding: "[W]here damages are to be awarded in an action brought against more than one person for injury to person or property—*whether or not such damages must be reduced pursuant to OCGA § 51–12–33(a)*—the trier of fact "shall ... apportion its award of damages among the persons who are liable according to the percentage of fault of each person."

2011

***Barnett v. Farmer*, 308 Ga. App. 358 (2011) (physical precedent only)**: Barnett's vehicle collided with a vehicle being driven by Mr. Farmer at an intersection in Bibb County. Mrs. Farmer was a passenger in the vehicle driven by her husband. Both the Farmers and Barnett claimed that the traffic light was green in their respective direction as they proceeded through the intersection. The Farmers brought a personal injury action against Barnett and a jury awarded damages to the Farmers on each of their individual claims.

The Farmers argued that the application of apportionment to the case violated the interspousal tort immunity doctrine and that the jury should not be allowed to apportion fault to Mr. Farmer for purposes of reducing Mrs. Farmer's ultimate recovery. The Court of Appeals disagreed and held that the jury should have been instructed to apportion the award of damages to Mrs. Farmer according to its determination of the percentage of fault of Barnett and her husband, if any. The Court reasoned that there was evidence from which the jury could have concluded that both Barnett and Mr. Farmer were negligent and it was a reasonable conclusion, based on the verdict, that the jury apportioned Mr. Farmer's award based on his own percentage of fault.

The Court went on to say it would be contrary to the clear intent of the legislature to require Barnett to pay for the full amount of Mrs. Farmer's damages for the same collision simply because she was a passenger in the car her husband was driving. Thus, Mrs. Farmer would be precluded from recovering from Barnett that portion of her damages, if any, that a trier of fact concluded resulted from the negligence of her husband.

2012

***McReynolds v. Krebs*, 290 Ga. 850, 850 (2012):** In *McReynolds v. Krebs*, Plaintiffs scored one of the most significant victories in the battle against Defendants who

don't prove every element of liability against a non-party.[1] The *McReynolds* decision made it clear that a defendant may not simply blame a non-party without proving that the non-party is liable.

McReynolds was a products liability car wreck case where Plaintiff Krebs sued Defendants McReynolds and General Motors for personal injuries sustained when McReynolds' car struck the General Motors vehicle driven by Krebs. Krebs settled the products liability claim against General Motors and proceeded to trial against McReynolds. McReynolds sought to have damages apportioned to General Motors on the ground that General Motors was a nonparty which was partially at fault for Kreb's injuries. However, McReynolds did not meet her burden of proving that General Motors was liable for Kreb's damages. The Supreme Court held there can be no set-off unless the non-party is liable, at least in part, for the injuries. The Court went further and held that the lack of evidence on which apportionment could be based defeated McReynolds' claim that she was entitled to apportionment under O.C.G.A. § 51-12-33.

***Couch v. Red Roof Inns, Inc.*, 291 Ga. 359 (2012):** In *Couch v. Red Roof Inns*, Inc. the Supreme Court of Georgia held that (1) the jury is allowed to apportion damages pursuant to O.C.G.A. § 51-12-33 between a criminal assailant and the defendant property owner in a premises liability action, and (2) a jury instruction or special verdict form to that effect does not violate the plaintiff's constitutional rights to a jury trial, due process, or equal protection.

First, the Court ruled that because the intentional tortfeasor was at least partially at "fault" for the attack under a plain reading of O.C.G.A. § 51-12-33, his liability should be apportioned with the defendant property owner's liability. The Court reasoned that "Fault" is used in O.C.G.A. § 51-12-33 without limitation and thus includes all wrongdoing--whether intentional or otherwise.

Second, the court found a jury instruction or special verdict form allowing for apportionment between intentional and negligent tortfeasors would be constitutional because (1) the right to a jury trial would not be violated as the jury is not abdicating its normal function in apportioning damages, (2) the statutory scheme is "discernible" and gives "adequate guidance" consistent with due process, and (3) the statute, by requiring fault to be apportioned among all tortfeasors, is supported by a rational basis consistent with the equal protection clause.

Woods v. Allied Van Lines, Inc., 316 Ga. App. 548 (2012): Woods was a wrongful death car wreck case involving a multi-vehicle collision in Bartow County. A service van owned by B & W Mechanical Contractors ("B & W") and driven by its employee, Jason Lee Green, crossed the centerline and collided with a box truck owned by Budget Rental and driven by Wayne Ramey, an employee of Berger Transfer & Storage, Inc. Ramey's truck then crossed the centerline and struck the car driven by Woods, who was killed. Green was charged with failure to maintain lane and second-degree vehicular homicide. He pled guilty to those charges.

The Plaintiff settled her wrongful death claims against Green and B & W and then filed an action against Ramey, Allied Van Lines, Berger Transfer & Storage, Inc., Berger Atlanta,

[1] *See also Union Carbide Corp. v. Fields*, 315 Ga. App. 554, 558-559 (2012) (defendants carry the burden of providing competent evidence to permit a jury to apportion fault).

Inc., and their insurers. The Berger defendants then filed a notice of apportionment pursuant to O.C.G.A. § 51–12–33(d). Woods filed a motion in limine seeking to exclude 34 instances of evidence or testimony, including the traffic citations received by Green and his guilty pleas to those charges. The trial court denied those motions, ruling that "the traffic ticket issued to and the guilty plea therefrom by Jason Lee Green are admissible under O.C.G.A. § 51–12–33."

The Court held that Green's guilty plea was admissible under O.C.G.A. § 24–3–35(2) as a third-party admission and that the admission was admissible as a third-party admission because of the apportionment mandated by O.C.G.A. § 51–12–33.

2014

***Double View Ventures, LLC v. Polite*, 326 Ga. App. 555, 561-62 (2014):** *Polite* was a premises liability "negligent security" case where Polite was walking to his apartment complex from a nearby Chevron gas station when he was attacked by two assailants. The attack occurred near a fence that separated the gas station property from the apartment complex property. Polite sued the apartment complex and the complex sought to have the name of the Chevron gas station on the verdict form.

Even though the defendants were unable to establish the true owner of the gas station, the trial court found the non-party apportionment notice to be adequate. Still, the trial court did not include the gas station on the verdict form because it found that the Defendants failed to produce any evidence creating a jury question as to whether the gas station was responsible for the allegedly hazardous condition in and around the fence where the attack occurred.

The Court of Appeals reversed reasoning that the attack occurred in a high crime area and that there were factual questions concerning whether the Chevron owners knew or should have known about the dangerous condition caused by the high level of crime.

Perhaps the most significant portion of the Court's opinion, was its holding that the apportionment statute *does not require precise identification of the non-party to whom fault may be apportioned*. The Court found that the notice requirements of O.C.G.A. § 51–12–33(d)(1) "shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or *the best identification of the nonparty which is possible under the circumstances,* together with a brief statement of the basis for believing the nonparty to be at fault." O.C.G.A. § 51–12–33(d)(2).

"Consequently, although establishing the exact identity of the Chevron station owner would be necessary to subject that owner to liability, to apportion fault, the Defendants were required, at a minimum, to designate the nonparty's identification as much as they could under the circumstances." O.C.G.A. § 51–12–33(d).

2015

***Zaldivar v. Prickett*, 297 Ga. 589, 598 (2015):** *Zaldivar* involved a disputed liability car crash case. Prickett was driving his employer's vehicle at the time of the collision and Zaldivar sought to apportion fault to the employer based on a theory of negligent entrustment. Prickett objected and argued that negligent entrustment of a vehicle can never be the proximate cause of

the injuries to whom the vehicle was entrusted. The trial court agreed with Prickett and granted Prickett's motion for partial summary judgment of Zaldivar's apportionment claims.

The Supreme Court of Georgia disagreed and held that "negligent entrustment of an instrumentality can be the proximate cause of an injury to the person to whom the instrumentality was entrusted." The Court went further, "[T]he apportionment statute permits consideration, generally speaking, of the 'fault' of a tortfeasor, notwithstanding that he may have a meritorious affirmative defense or claim of immunity against any liability to the plaintiff.

In other words, a non-party may be placed on the verdict form for purposes of apportionment even if the non-party could never be liable to the Plaintiff for the damages it allegedly caused. Perfect examples would be non-parties protected by an immunity defense or worker's compensation bar.

***Walker v. Tensor Mach. LTD*, 298 Ga. 297 (2015):** In Walker, an employee settled a worker's compensation claim with his employer and subsequently sued a designer and manufacturer of the machine that caused his injuries in a products liability case.

On a certified question form the 11th Circuit, the Supreme Court of Georgia was asked to answer the following question:

> Does O.C.G.A. § 51–12–33(c) allow the jury to assess a percentage of fault to the non-party employer of a plaintiff who sues a product manufacturer and seller for negligence in failing to warn about a product danger, even though the non-party employer has immunity under OCGA § 34–9–11?

Just a few months after its *Zaldivar* decision, the Supreme Court answered yes stating, "Unless there is a compelling reason to treat nonparty employers with immunity under the Workers' Compensation Act differently than nonparties with other defenses or immunities against liability, *Zaldivar* requires an affirmative answer to the certified question. We see no such compelling reason, and so, we adhere to *Zaldivar* and respond to the District Court in the affirmative."

2016

***I.A. Grp. Co. v. RMNANDCO, Inc.*, 336 Ga. App. 461, 463-64 (2016):** This case involved a default judgment that was entered against four defendants as a sanction for discovery abuse. A judgment was entered against the defendants, jointly and severally, and the defendants appealed arguing that the judgement could not stand because the apportionment statute required the trial court to apportion damages among them.

The Court of Appeals agree with the defendants and held that even though a default concludes the defendant's liability and estops him from offering any defenses which would defeat the right of recovery and any argument that goes to liability for the damages and not the amount of damages awarded is not permitted, assessment of fault for purposes of apportioning damages between the defendants in the instant context does not violate that rule.

2017

***Robles v. Yugueros*, 343 Ga. App. 377, 390 (2017):** In *Robles*, the plaintiff's attorney attempted to explain the effect apportionment would have on the amount ultimately awarded to the Plaintiff. The defense objected and argued that it was improper to tell the jury that nonparties are not responsible to pay any portion of a damage award. The trial court sustained the defense's objection and the Plaintiff appealed.

The Court of Appeals held that it was unnecessary for the jury to consider that the nonparties would have no responsibility to pay any damages awarded and that the trial court did not err in curtailing the cited portion of the closing argument. However, the Court of Appeals did not hold that it would be error to allow such arguments. Presumably, this decision is left to the sound discretion of the trial court.

***Martin v. Six Flags Over Georgia II, L.P.*, 301 Ga. 323 (2017):** *Martin* is yet another negligent security case involving non-party apportionment of fault to criminal assailants. First, the Court held that Six Flags could not evade liability for the foreseeable consequence of its failure to exercise ordinary care in keeping its premises safe, simply because its patron had moved off those premises in an attempt to distance himself from his attackers.

At trial, the jury apportioned 92% fault to Six Flags and 2% to each of the four named defendants, all of whom had criminal convictions in connection with the attack on Martin. Six Flags argued that the jury should be entitled to apportion damages among other individuals who, though not named as defendants, were alleged to have been involved in the attack on Martin. The Court of Appeals agreed that two non-parties should have been included on the verdict form and reversed the entire judgement.

The Supreme Court agreed that the two non-parties should have been on the verdict form but held where correction of an apportionment error involves only the identification of tortfeasors and assessment of relative shares of fault among them, there is no sound reason to disturb the jury's findings on liability or its calculation of damages sustained by the plaintiff.

Therefore, the Court concluded that the apportionment error required a retrial only as to apportionment and not for liability of total damages awarded.

2018

***Southwestern Emergency Physicians, P.C. v. Quinney*, 347 Ga. App. 410 (2018):** Plaintiff brought a medical malpractice action involving care in an emergency department. Defendants sought to apportionment fault to a radiologist who allegedly missed a hematoma that compressed the Plaintiff's spine causing him to be paralyzed.

The defendants wanted the jury to assess the non-party radiologist's negligence under an ordinary standard of care analysis. The plaintiff's argued that the ER statute's "gross negligence" standard of care applied for purposes of non-party apportionment and the trial court agreed with the Plaintiff.

The Court of Appeals held that the trial Court did not err in instructing the jury that the gross-negligence standard of care applied regarding apportionment of fault to the non-party

radiologist. The Court also laid the foundation for a 2020 Supreme Court of Georgia opinion, *Quynn v. Hulsey*, by holding that apportionment was not appropriate to the hospital because there was no evidence on which to base apportionment to the hospital as an entity separate and apart from its role as an employer of the named nurse defendants.

2019

***Federal Deposit Insurance Corporation v. Loudermilk*, 305 Ga. 558 (2019):** Loudermilk came to the Supreme Court of Georgia on a certified questions from 11th Circuit. The Supreme Court held that Georgia's apportionment statute did not abrogate Georgia's common-law rule imposing joint and several liability on persons who act in concert.

In comparing the statute's directive to apportion fault "according to the percentage of fault of each person" to civil conspiracies, the court observed that: true concerted action is predicated on the idea that wrongdoers "in pursuance of a common plan or design to commit a tortious act ... are equally liable," and that through "joint enterprise" and "mutual agency ... the act of one is the act of all." Under that legal theory, where the act (and thus the fault) of one person is imputed to all other members of the same joint enterprise, "liability for all that is done is visited upon each." Where the fault of one person is legally imputed to another person who is part of the same joint enterprise, the Court found no legal means of dividing fault "among the persons who are liable." Because the entirety of the "fault" of tortfeasors who "act in concert" was imputed to each bad actor, the court concluded there was no way to divide that fault among them.

Apparently, joint and several liability was not completely abolished by the apportionment statute.

***Atlanta Women's Specialists, LLC v. Trabue*, 349 Ga. App. 223 (2019):** *Trabue* was a medical malpractice case related to a catastrophic brain injury suffered during childbirth. The plaintiffs sued Atlanta Women's Specialists on vicarious liability principles based solely on its employee's negligence.

The Court held that AWS's liability to the plaintiffs "was purely vicarious in nature for the acts of [Dr. Simonsen]," and that apportionment was not proper between AWS and Dr. Angus. The Court went further and explained that notwithstanding the defendants' attempts to characterize their request for apportionment as between parties, they actually seek to apportion between Dr. Angus and Dr. Simonsen, a non-party under OCGA § 51-12-33 (b). By failing to give the mandatory notice required by that Code section, the defendants waived their right to apportion damages in that manner. Thus, the trial court erred by granting a new trial as to apportionment.

2020

***Quynn v. Hulsey*, 310 Ga. 473 (2000):** The Supreme Court of Georgia granted certiorari in this wrongful death and personal injury case to consider whether the Court of Appeals erred by holding that the employer of the driver whose truck struck and killed the decedent, was entitled to summary judgment on the estate's claims of negligent entrustment, hiring, training,

and supervision because the employer admitted the applicability of respondeat superior and the estate was not entitled to punitive damages.

The Court held that the apportionment statute abrogated the "Respondeat Superior Rule" on which the Court of Appeals relied in affirming the trial court's grant of summary judgment.

Recently, Defendants have used this decision to argue that Georgia's cause of action under respondeat superior has been abolished. This argue is bogus. The Respondeat Superior Rule, as defined by the *Husley* Court, was a judicially created rule that prevented the Plaintiff from pursuing negligent hiring, retention, or entrustment claims when a defendant employer admitted vicariously liability for its employee's negligence.

The Supreme Court held that the apportionment statute is inconsistent with the "Respondeat Superior Rule" because the respondeat superior rule prevented the jury from considering the relative fault of all parties (i.e., The employer's negligence for negligent hiring is separate from the employee's negligence is harming another. Although the employer may be liable for its employee's negligence, the employee is not liable for the employer's own negligence acts such as negligent hiring, retention, supervision, and entrustment).

Quynn v. Hulsey may abrogate the "Respondeat Superior Rule" but it does not abrogate respondeat superior.

***Pneumo Abx, LLC v. Long,* 357 Ga. App. 17 (2020):** *Long* was an asbestos case where defense alleged that treating doctors committed malpractice and should be included on the verdict form for apportionment purposes.

The Court of Appeals held that because the defendants alleged that the non-party tortfeasors—*i.e.*, the treating physicians—committed the tort of medical malpractice, they can only be included on the verdict form for purposes of apportionment if there is some competent evidence that they did, in fact, commit such malpractice and it proximately caused or contributed to causing Plaintiff's injuries and damages.

In order for evidence of treating physician malpractice to be competent, the defendant must show the same thing a Plaintiff would be required to show in a medical malpractice action. To recover in a medical-malpractice case, a plaintiff must "show not only a violation of the applicable medical standard of care but also that the purported violation or deviation from the proper standard of care is the proximate cause of the injury sustained." Additionally, to meet this burden, the plaintiff must "use expert testimony because the question of whether the alleged professional negligence caused the plaintiff's injury is generally one for specialized expert knowledge beyond the ken of the average layperson."

Of course, the Defendant's expert must pass muster under *Daubert.*

2021

***Alston & Bird, LLP v. Hatcher Management Holdings, LLC*, 2021 WL 3501075 (Ga. August 10, 2021):** This is a legal malpractice and breach of fiduciary duty case. Certiorari was granted on the question of whether subsection (b) of the apportionment statute applies in single-

defendant cases and also on the question of whether an expenses-of-litigation award under O.C.G.A. § 13-6-11 is subject to apportionment.

Single Defendant Cases: O.C.G.A. § 51-12-33 does not allow a reduction of damages against a defendant based on the jury's allocation of fault to a nonparty in a case brought against only one defendant. "The General Assembly chose to exclude single-defendant cases from apportionment among non-parties. A&B does not argue that such a choice was beyond the legislative power the Georgia Constitution vests in the General Assembly. And the judicial power we exercise today does not permit us to make a different choice."

O.C.G.A. § 13-6-11: An award for expenses of litigation under O.C.G.A. § 13-6-11 is subject to apportionment under O.C.G.A. § 51-12-33 because it constitutes "damages," and § 51-12-33 requires an apportionment of the "total damages."

The Court reasoned that "the element of bad faith, stubborn litigiousness, or unnecessary trouble 'must relate to the acts in the transaction itself prior to the litigation, not to the motive with which a party proceeds in the litigation.'" The plaintiffs argued that bad faith damages were only awarded against Alston & Bird; therefore, those damages should not be reduced by any allocation of fault to Plaintiff under subsection (a) of the apportionment statute. The Supreme Court seemed to disagree but stopped short of holding anything more that "an award under O.C.G.A. § 13-6-11 is not categorically exempt from apportionment."

EMERGING ISSUE

Defendants seem to be pushing the idea that prior tortfeasors, from wholly separate incidents, are subject to non-party apportionment if they injured the Plaintiff in a prior or subsequent incident. This argument misses the mark because it conflates two distinct legal principles: liability and proximate cause. The apportionment statute was intended to eliminate joint and several liability among multiple joint tortfeasors. A prior to subsequent tortfeasor is not a "joint tortfeasor."

When faced this argument from the defense, consider arguing that it is a causation issue, not an apportionment issue.