# APPORTIONMENT OF DAMAGES

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## INTRODUCTION

The current apportionment statute, codified at O.C.G.A. § 51-12-33 (the "Statute"), was adopted in 2005 as a part of Senate Bill 3 (S.B. 3), the wide-reaching "tort reform" bill. Ga. L. 2005, p. 1, § 12. Since its adoption, Georgia's appellate courts have had occasion to expound upon the purpose, structure, and interpretation of the Statute. The discussion below outlines the Statute and key decisions interpreting and applying the Statute.

## DISCUSSION

### I. The Apportionment Statute

O.C.G.A. § 51-12-33, in its entirety, states:

> (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.
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> (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.

a. Purpose of the Statute

"The purpose of the apportionment statute is to have the jury consider all of the tortfeasors who may be liable to the plaintiff together, so their respective responsibilities for the harm can be determined." *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 365 (2012). Of course, this ignores the fact that apportionment to non-parties has no effect in future cases. O.C.G.A. § 51-12-33(f). Thus, apportionment actually "determines" responsibility only of the parties. In other words, apportionment can reduce the "responsibility" of the defendant, but cannot establish or "determine" responsibility of a non-party tortfeasor.

b. Framework of the Statute

The first step in apportioning fault pursuant to the Statute is to determine whether "the plaintiff is to some degree responsible for the injury or damages claimed." O.C.G.A. § 51-12-33(a). If comparative fault is asserted and supported with adequate evidence, the trier of fact must determine whether the plaintiff is at fault, and if so, what percentage of fault is attributable to the plaintiff. *Id.* If the jury finds that the plaintiff is at fault, the court must then reduce the damages to the plaintiff in proportion to the plaintiff's level of fault. *Id.* Note that if the trier of fact determines that the plaintiff is 50 percent or more responsible for the injury or damages claimed, the plaintiff will not be able to recover any damages for the injury. *Id.* § 51-12-33(g); *see also Reed v. Carolina Cas. Ins. Co.*, 327 Ga. App.

130, 132 (2014) (noting that the Statute does not abrogate a trial court's obligation to grant summary judgment where it is "plain and indisputable" that a plaintiff is 50 percent or more at fault for his own injuries).

After determining the percentage of fault, if any, attributable to the plaintiff, the trier of fact must determine what percentage of fault is attributable to other "persons who are liable," and "the percentage of fault of each person," O.C.G.A. § 51-12-33(b), "regardless of whether the person or entity was, or could have been, named as a party to the suit." *Id.* § 51-12-33(c).[1] Apportionment among defendants is required even when a plaintiff is not at all responsible for his or her injuries. *McReynolds v. Krebs*, 290 Ga. 850, 852 (2012). "In simplest terms, take the total amount of damages to be awarded to the plaintiff, identify the persons who are liable, and apportion the damages to each liable person according to each person's percentage of fault." *Couch*, 291 Ga. at 361. Any damages award to the plaintiff must be reduced by the percentage of fault attributed to all persons other than the defendant. O.C.G.A. § 51-12-33(c).

If the fault of a nonparty is to be considered for apportionment, the defendant must provide notice that a nonparty is at least partially at fault no later

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[1] The trier of fact's determination that a person other than the defendant(s) was at least partially at fault does not have any applicability beyond the action in which that determination is made, cannot be introduced in a separate proceeding against the nonparty to which fault was attributed, and will not subject that nonparty to liability in any other action. *Id.* § 51-12-33(f).

than 120 days prior to the date of trial. *Id.* § 51-12-33(d)(1).[2] The defendant must provide this notice by filing and serving a pleading that sets forth: (1) the nonparty's name and last known address, or the "the best identification of the nonparty which is possible under the circumstances"; and (2) "a brief statement of the basis for believing the nonparty to be at fault." *Id.* § 51-12-33(d)(2).

## II. Applying the Statute

### a. The Statute is Strictly Construed

The Statute is in derogation of the common law. *Couch*, 291 Ga. at 364. And "statutes in derogation of the common law must be limited strictly to the meaning of the language employed, and not extended beyond the plain and explicit terms of the statute." *Id.* (quoting *Delta Airlines, Inc. v Townsend*, 279 Ga. 511 (2005)). In *Monitronics International, Inc. v. Veasley*, the Court of Appeals strictly construed subsection (d) of the Statute to strike the defendant's notices of apportionment. 323 Ga. App. 126, 138 (2013). In that case, the defendant filed a notice of apportionment with regard to one nonparty almost two weeks after the close of discovery (filed July 12, 2011) and against another nonparty almost a month after the close of discovery (filed July 27, 2011). *Id.* at 137. On August 2,

[2] Note that this notice is not required for any nonparty with which the plaintiff has entered into a settlement agreement. O.C.G.A. § 51-12-33(d)(1) ("Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty....").

2011, after the defendant had filed the notices of apportionment, the court set the trial for November 7, 2011. *Id.* The plaintiff subsequently moved to have the defendants' notices of apportionment struck as failing to comply with the 120-day requirement of subsection (d)(1). *Id.* The trial court struck the notices as untimely, and the Court of Appeals affirmed that decision, rejecting the defendant's argument that when filed, the notices were timely because no trial date had been set. *Id.* at 137-38. The Court stated:

> [W]e are not at all persuaded by Monitronics's argument that its notices of apportionment should not have been struck because it substantially complied with the statute. The statutory deadline is what it is, and the plain and unambiguous meaning of O.C.G.A. §51-12-33(d)(1)'s text mandates *strict* compliance – *i.e.*, "negligence or fault of a nonparty shall be considered ... 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." As such, a defending party either complies with the 120-day notice requirement or it does not. And here, there is no question that Monitronics failed to comply with this statutory requirement.

*Id.*; *see also Ingles Mkts., Inc. v. Kempler*, 317 Ga. App. 190, 193 (2012) (affirming trial court's refusal to allow "jury to deliberate on the liability of *all* potential nonparties," where defendants provided notice pursuant to O.C.G.A. § 51-12-33(d) that only one nonparty may be at fault). Thus, it is clear, that the provisions of the Statute are to be strictly construed.

b. The Statute Applies to Intentional Torts

The common law rule of apportionment did not apportion fault as to intentional tortfeasors. *Couch*, 291 Ga. at 364. The Statute alters this paradigm. In *Couch*, the Supreme Court stated that

> Because the ordinary meaning of the word "fault" as used in O.C.G.A. § 51-12-33 includes intentional torts, and the other language used in the statute reinforces that meaning, construing O.C.G.A. § 51-12-33 to apply to intentional torts requires no extension beyond its "plain and explicit terms."

*Id.* Accordingly, the court held, "proper statutory construction mandates a finding that 'fault,' as used in O.C.G.A. § 51-12-33, encompasses intentional torts." *Id.* at 365.

c. The Statute Uses "Fault" and "Liability" Interchangeably

In *Zaldivar v. Prickett*, 297 Ga. 589 (2015), the Supreme Court confronted the relationship between "fault" and "liability" as used in the Statute. In *Zaldivar*, as set forth in the Court of Appeals opinion, a plaintiff driving a company car was involved in a motor vehicle accident. *Zaldivar v. Prickett*, 328 Ga. App. 359, 359-60 (2014). The defendant filed a notice of nonparty fault, asserting that the plaintiff's employer was negligent in entrusting him with the company car and therefore partially at fault for his injuries. *Id.* at 360. The trial court granted plaintiff's motion for summary judgment on the nonparty fault issue, and the Court of Appeals affirmed. *Id.* at 362-63. The Court of Appeals held that the plaintiff's

employer could not, as a matter of law, have "contributed" to or been "at fault" for his alleged injuries. *Id.* at 360-61. The court reasoned that contribution, by its plain language, requires a causal connection, and in the case of a negligent entrustment action brought by an injured driver against the person who supplied the vehicle, "the driver's own negligence breaks the causal connection between the entrustor's negligent act and the driver's injury." *Id.* at 362 (citing *Ridgeway v. Whisman*, 210 Ga. App. 169, 170 (1993)). *Compare PN Express, Inc. v. Zegel*, 304 Ga. App. 672, 680 (2010) (holding that where an employer's liability is solely vicarious, such that it "and the actively-negligent [employee] are regarded as a single tortfeasor," there is no error in refusing to allow jury to consider the fault of the nonparty employee).

The *Zaldivar* Court of Appeals dissent was critical of the way the majority decision appeared to "equate the concept of 'fault,' as that term is used in the apportionment statute, with tort liability." 328 Ga. App. at 364 (Branch, J., dissenting). The dissent argued that because the Statute prevents assessments of fault against nonparties from being used other than to determine "the percentage of fault of *named parties*," O.C.G.A. § 51-12-33(f)(1) (emphasis added), and allows assessments of fault against nonparties "whether the person or entity was, or *could have been*, named as a party to the suit," *id.* § 51-12-33(c) (emphasis added), it distinguishes fault from liability. 328 Ga. App. at 364. Thus, according to the

dissent, "the statute considers two fundamentally different concepts: percentages of fault, in its general sense, for all who contributed to the plaintiff's injuries; and legal liability for named parties." *Id.* at 365. If that is true, it would be error to prevent the jury from assessing the degree to which the *Zaldivar* plaintiff's employer can be said to have contributed to his injuries simply because it cannot be liable to him. The Supreme Court granted certiorari and agreed with the majority.

> In summary, we hold that O.C.G.A. § 51-12-33 (c) requires the trier of fact in cases to which the statute applies to "consider the fault of all persons or entities who contributed to the alleged injury or damages," meaning all persons or entities who have breached a legal duty in tort that is owed with respect to the plaintiff, the breach of which is a proximate cause of the injury sustained by the plaintiff. That includes not only the plaintiff himself and defendants with liability to the plaintiff, but also every other tortfeasor whose commission of a tort as against the plaintiff was a proximate cause of his injury, regardless of whether such tortfeasor would have actual liability in tort to the plaintiff....
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> The dissent notes that O.C.G.A. § 51-12-33(b) directs the apportionment of an award of damages "among the persons who are liable," and so, the dissent reasons, the statute must be understood to limit the assignment of "fault" to those who "may be liable" to the plaintiff. There are a couple of problems with this reading of the statute. In the first place, the plain terms of subsection (b) speak of persons "who *are* liable," not those who "*may* be liable," and we are not at liberty to simply rewrite statutes. Second, we know from paragraph (f)(2) that a finding of nonparty "fault" does not subject the nonparty to liability, and for that reason, those "who are liable" – the subjects of subsection (b) – necessarily must be limited to named defendants with liability. Subsection (b) simply does not concern nonparties. Reading the apportionment statute as a whole, it seems quite clear that subsection (b) is instead concerned with damages

> awarded in cases in which there is more than one named defendant with liability, providing that the award must be apportioned among the liable defendants according to their respective fault, and clarifying that "[d]amages apportioned ... shall be the liability of each person against whom they are awarded [and] shall not be a joint liability among the persons liable." O.C.G.A. § 51-12-33(b). *See also McReynolds v. Krebs*, 290 Ga. 850, 851-53(1)(a) (2012). The assignment of "fault" is the mechanism by which the "liability" of a named defendant is measured, but "fault" does not literally mean "liability." To the extent that the dissent reads our decision in *Couch* as holding that "fault" literally means "liability," the dissent misreads *Couch*.

*Zaldivar*, 297 Ga. at 600 and 600 n.7.

d. The Precise Identity of a Nonparty is Unnecessary to Apportion Fault

As set forth in § 51-12-33(d)(2), in the absence of knowledge of the name and/or last known address of a nonparty, a defendant's notice of apportionment need only contain "the best identification of the nonparty which is possible under the circumstances." In both *GFI Management Services, Inc. v. Medina*, 291 Ga. 741 (2012), and *Hickory Lake, L.P. v. A.W.*, 320 Ga. App. 389 (2013), the defendant sought to apportion fault to an intentional tortfeasor whose identity was unknown. Both decisions, citing the decision in *Couch*, 291 Ga. 359, held that the trier of fact should be allowed to apportion fault to the unidentified intentional tortfeasor. *Medina*, 291 Ga. at 742; *A.W.*, 320 Ga. App. at 389.

In *Double View Ventures, LLC v. Polite*, 326 Ga. App. 555, 557 (2014), inaccurate identifications of a nonparty were sufficient to satisfy the notice

requirement under § 51-12-33(d)(2). The defendant in that premises liability action, an apartment complex owner, sought to have the jury apportion damages to an adjacent property owner. 326 Ga. App. at 557. Although the defendant claimed to have repeatedly contacted the adjacent property's owner to ask it to repair the security fence at issue, it also claimed that it did not know which entity owned or controlled the property. *Id.* Ultimately, the defendant submitted three notices of apportionment, naming at least three different potential owners of the adjacent property. *Id.* The trial court concluded that although the defendant had failed to identify the true owner of the adjacent property as proved at trial, the notices were legally adequate for the purpose of allowing the jury to apportion fault to the owner of the property. *Id.*

The Court of Appeals affirmed, stating that "[t]he statute does not require precise party identification," rather it simply requires, "at a minimum," that defendants "designate the nonparty's identification as much as they [can] under the circumstances." *Id.* at 562. The Court concluded that the plaintiff had presented no basis to reverse the trial court's ruling that the notices were adequate. *Id.*

The Supreme Court denied the *Double View* plaintiff's petition for certiorari, *Polite v. Double View Ventures, LLC*, S14C1092 (June 30, 2014), suggesting it found no error in the conclusion that an incorrect identification of an owner of real property can satisfy the requirement to provide, at a minimum, "**the best**

**identification of the nonparty which is possible under the circumstances....**" O.C.G.A. § 51-12-33(d)(2) (emphasis added). That interpretation may be vulnerable, however, given that one could presumably discern the actual identity of a real property owner from public records, and that in other circumstances parties have been charged with knowledge of deed records which they could have retrieved.[3]

e. A Jury Must Have the Opportunity to Apportion Fault to a Nonparty if Admissible Evidence Supports Apportioning Fault to that Nonparty

"Defendants have a burden to establish a rational basis for apportioning fault to a nonparty." *Polite*, 326 Ga. App. at 562. A plaintiff may move for summary judgment or directed verdict if there is insufficient evidence of fault of a nonparty for the issue to be submitted to the jury.[4] Where there is evidence from which a reasonable jury could find that a nonparty may be responsible for the plaintiff's injuries, the court must submit the question to the jury. *Id.* at 560.

A defendant need not present its own evidence to create a question of fact on the potential fault of nonparties; a plaintiff's evidence or pleadings may create such questions of fact. *Id.* In *Georgia-Pacific*, the Supreme Court held that named defendants could rely on plaintiffs' allegations in original pleadings (later

[3] *George v. Dortch*, 149 Ga. 20, 22 (1919) ("she is chargeable with knowledge of the recitals in the deed").

[4] *Georgia-Pacific, LLC v. Fields*, 293 Ga. 499, 503-04 (2013) (summary judgment); *Polite*, 326 Ga. App. at 558 (directed verdict).

amended) and admissions, identifying nonparties allegedly at fault, to create jury question on apportionment. 293 Ga. at 503. Accordingly, it reversed the trial court's grant of summary judgment in the plaintiff's favor on the apportionment issue. *Id.*

Similarly, in *Polite*, the Court of Appeals reversed the trial court's directed verdict, which precluded the jury from considering the percentage of fault of the nonparty adjacent property owner. 326 Ga. App. at 561. Plaintiff, who was attacked crossing through a fence between a convenience store and his apartment complex, presented evidence that the convenience store owner built the fence, its porousness was an ongoing problem, and many violent crimes and robberies had occurred on the convenience store's property. *Id.* at 559. Moreover, evidence tended to show that the attack actually took place on the convenience store's property, rather than the apartment complex's, and it was unknown whether the assailants entered the area from the convenience store or the apartment complex side of the fence. *Id.* Taken together, this evidence and the inferences therefrom established a jury question regarding whether the convenience store owner "knew or should have known about the dangerous conditions on its premises which might subject it to a determination of fault." *Id.* at 561. Accordingly, the Court of Appeals reversed the jury's verdict because the jury did not have the opportunity to

consider whether the convenience store owner, a nonparty, should have been apportioned fault. *Id.*

When the jury is given the opportunity to consider whether the nonparty should be apportioned fault, the role of the court shifts dramatically. When a jury is apportioning fault among defendants and/or nonparties it is not bound by any specific mathematical formula; rather, relative fault is to be "determined according to the enlightened conscience of the fair and impartial jury." *Royalston v. Middlebrooks*, 303 Ga. App. 887, 893 (2010) (citation omitted). Thus, the trial court must not substitute its judgment for that of the jury as to the relative fault of the defendants and non-parties.

f. Scope of New Trial for Apportionment Error

The Court of Appeals held in *Six Flags Over Georgia II, L.P. v. Martin*, 335 Ga. App. 350 (2015) that an error as to apportionment required a complete new trial:

> [T]he trial court erred by removing from the jury's consideration the issue of whether those individuals should be apportioned fault. As a result, the jury's verdict must be reversed and remanded for a new trial. In her thoughtful concurrence, Judge Miller agrees that the trial court erred in denying Six Flags's apportionment request, but she would remand the case for a trial solely on damages. But this Court has already held that an apportionment error entitles a defendant to a new trial. In *Double View Ventures, LLC v. Polite*, this Court held that the trial court erred by refusing to allow the jury to consider whether a certain nonparty was partially at fault for injuries sustained by the victim during a shooting. Specifically, this Court held that

> "[s]ince there is some evidence showing that the [nonparty] may have contributed to [the victim's] injuries, we [were] constrained to reverse the jury's verdict because the jury did not have the opportunity to consider whether the [nonparty] should be apportioned fault." In doing so, we expressed our desire to honor the jury's "substantial" verdict, but explained that it must be reversed due to the apportionment error. Finally, in Division 3 of that opinion, we declined to address any challenges to the trial court's evidentiary rulings that were "not likely to recur during retrial of the case." While we understand and appreciate the concerns expressed by Judge Miller in her special concurrence, we are unable to agree with her conclusion that Six Flags is only entitled to relitigate damages, when the defendant in *Double View* was entitled to a new trial. And while Judge Miller is correct that nothing in the text of O.C.G.A. § 51-12-33 mandates a new trial, it is likewise true that the statute does not authorize a different jury from the one who found liability to determine the respective fault of those involved. To the contrary, O.C.G.A. § 51-12-33 provides that 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 ... apportion its award of damages among the persons who are liable according to the percentage of fault of each person.... Thus, under the plain language of the statute, a jury may apportion fault only after hearing the evidence and determining whether any damages should be awarded at all.

*Six Flags Over Georgia II, L.P. v. Martin*, 335 Ga. App. 350, 365-66 (2015) (footnotes omitted). The Supreme Court granted certiorari on the scope of the grant of a new trial for an apportionment error. That case has been briefed and orally argued and we are awaiting a decision.

g. Apportionment Does Not Require Multiple Defendants

In *Alston & Bird LLP v. Hatcher Mgmt. Holdings, LLC*, 336 Ga. App. 527 (2016), the Court of Appeals dealt with the argument, accepted by a trial court, that

the apportionment statute required multiple defendants to come into play. This argument is based on O.C.G.A. § 51-12-33 (b), which limits apportionment of damages to cases "[w]here an action is brought against more than one person...." The Court of Appeals rejected that argument, distinguishing between apportionment of damages and apportionment of fault.

> In December 2009, the Company sued Maury in Fulton County and, following a trial on damages, obtained a judgment against him in the amount of $4,046,937. In May 2012, the Company filed the instant case against the Firm, asserting claims of legal malpractice and breach of fiduciary duty; the Firm was the only named defendant. The Firm moved for summary judgment, and the trial court denied the motion.
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> Thereafter, the Firm filed a notice of nonparty fault pursuant to O.C.G.A. § 51-12-33, informing the Company that the Firm intended to ask the trier of fact to apportion fault for the Company's alleged damages among the Firm and several non-parties, including Maury Hatcher, Jerry B. Hatcher, Alan B. Hatcher, and Caldwell & Watson, LLP. In the notice, the Firm alleged that Jerry and Barry Hatcher caused and contributed to the Company's damages by, *inter alia*: improperly claiming to be managers when they were not; failing to investigate Maury's actions after his questionable accounting; failing to provide financial statements when they were managers; delaying taking legal action against Maury to preserve Company assets; failing to take sufficient action to collect the judgment against Maury; and wasting Company money on legal fees, loans, and compensation for themselves without member approval. The Firm alleged that Caldwell & Watson, counsel for the Company, caused and contributed to the Company's damages by: failing to advise Company members of Jerry and Barry Hatcher's mismanagement and improper actions, including withholding financial information; delaying filing suit against Maury; and failing to diligently pursue claims and the judgment against Maury. Finally, with regard to Maury, the Firm referred to the various documents in the record alleging his wrongdoing, including embezzlement of Company assets.

> The Company moved to strike the Firm's notice of nonparty fault, arguing that (1) apportionment of damages was available only under subsection (b) of O.C.G.A. § 51-12-33, which the Company alleges applies only to cases brought against multiple defendants; and (2) there was no evidence upon which to apportion damages. In a brief order, lacking explanation for its ruling, the trial court struck the Firm's apportionment notice. This appeal followed.
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> The Firm argues that the trial court erred by striking its notice of nonparty fault. In response, the Company contends that Georgia's apportionment statute, O.C.G.A. § 51-12-33(b), clearly and unambiguously limits apportionment of damages to cases "[w]here an action is brought against more than one person...." While this assertion is correct, apportioning fault, not damages, is the issue in this case....
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> To the extent that [the Firm] can prove that [the nonparties identified in the apportionment notice] breached a legal duty in tort that it owed [the Company], the breach of which is a proximate cause of the injury that [the Company] sustained, the trier of fact in this case may be permitted under O.C.G.A. § 51-12-33(c) to assign "fault" to [the nonparty]. Given the assertions in this case alleged by the Firm regarding the nonparties' actions, the trial court erred by striking the Firm's notice of nonparty fault.

*Alston & Bird LLP v. Hatcher Mgmt. Holdings, LLC*, 336 Ga. App. 527, 527-30 (2016).

h. Defendant Must Prove Apportionment by Preponderance of Evidence

In *Brown v. Tucker*, 337 Ga. App. 704 (2016), the Court of Appeals addressed the argument that proof of fault for purposes of apportionment only required providing a "rational basis" rather than proof by a preponderance of the evidence. The Court of Appeals made it clear that preponderance of the evidence was the correct standard.

The affirmative defense that the jury should apportion fault against someone other than the defendant is no different analytically from the defense of contributory negligence. Once the plaintiff establishes her prima facie case, the defendant seeking to establish that someone else bears responsibility for the damages has the burden of proving that defense. *See Pembrook Mgmt. v. Cossaboon*, 157 Ga. App. 675, 679 (1981).

Brown's only support for her proposition that the defendant need only show a rational basis for apportioning fault is *Levine v. SunTrust Robinson Humphrey*, 321 Ga. App. 268, 272-73 (2013). But the issue decided in *Levine* was whether the trial court erred in granting summary judgment to the defendant on the plaintiff's count seeking damages for the total destruction of the business. The trial court granted this motion on the ground that the plaintiff had failed to establish how its damages should be apportioned between the defendant and the non-party defendants with whom the plaintiff had settled. *Id.* at 271(1). In reversing, this court held that, while the apportionment statute directs the jury to consider the negligence or fault of a nonparty that had settled with the plaintiff, O.C.G.A. § 51-12-33(d)(1), at the summary judgment stage, the plaintiff need only establish that the defendant's "alleged actions were the proximate cause of an approximate amount of damage." *Levine*, 321 Ga. App. at 272(1).

Further, **charging the jury that the defendant must establish only a "rational basis" for finding a non-party at fault would give the jury no guidance about how much evidence the defendant must produce to meet her burden of assigning fault to a non-party.** The "rational basis" test is most often applied when analyzing whether a statute violates a constitutional right to substantive due process and equal protection.... This is, of course, not the context applicable to this case involving apportionment of fault between a defendant and a non-party defendant.

Additionally, the Georgia Supreme Court case to which *Levine* cites for its "rational basis" proposition addressed only the threshold question of whether a jury could even consider the "fault" of a criminal nonparty defendant in a premises liability case. *Couch v. Red Roof Inns*, 291 Ga. 359 (2012). The Supreme Court in *Couch* did

> not hold that the defendant's burden at trial was to show a rational basis for the apportionment of damages to a nonparty; it simply noted that the plaintiff's argument that a negligent landowner could show no rational basis for apportioning damages between itself and a criminal assailant was a factual issue, not a legal one. *Id.* at 366(1). While *Levine* further states that "it is the defendant's burden to establish a rational basis for apportioning fault to a nonparty," to the extent that statement can be read to mean that the trial court should charge a jury that the defendant's burden of proof is the "rational basis" test, it is dicta. 321 Ga. App. at 272.
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> In sum, Brown's apportionment claim was an affirmative defense. She therefore had the burden of showing by a preponderance of the evidence that the nonparty tractor-trailer driver was negligent and that his negligence proximately caused all or some portion of damages to the plaintiff. Accordingly, the trial court committed no error in charging the jury to that effect.

*Brown v. Tucker*, 337 Ga. App. 704, 716-17 (2016) (emphasis added).

i. Apportionment Available After Default

In *I.A. Group, Ltd. v. RMNANDCO, Inc.*, 336 Ga. App. 461 (2016), the Court of Appeals held that apportionment could still be sought by a defendant after a default.

> [C]ontrary to RMNANDCO's contention, the plain language of O.C.G.A. § 51-12-33(b) and (c)'s apportionment mandate does not omit from its purview either damages or the assessment of percentages of fault springing from a default judgment. At trial, the lower court declined to apportion damages, reasoning that O.C.G.A. § 51-12-33(b) would not apply unless RMNANDCO, as plaintiff, could be assigned some liability under O.C.G.A. § 51-12-33(a) and that the default precluded the assignment of such responsibility. This was error; in *McReynolds v. Krebs*, 290 Ga. 850, 852(1)(a) (2012), our Supreme Court clearly determined that the statute's plain language in no way limited its application to cases involving a plaintiff's fault.

> Similarly, while it is of course true that no trier of fact determined the defendants' respective fault in the entry of the default judgment as to liability, the statute's plain language and our case law "directs the trier of fact in certain cases to 'consider the fault of all persons or entities who contributed to the alleged injury or damages[.]' " *Walker v. Tensor Machinery, Ltd.*, 298 Ga. 297 (2015), citing O.C.G.A. § 51-12-33(c) (finding that it is not legally inconsistent to allocate fault while shielding immune parties from liability for that fault). The statute further provides that the trier of fact "assess[ ] percentages of fault," O.C.G.A. § 51-12-33(c), and "apportion its award of damages among the persons who are liable according to the percentage of fault of each person." O.C.G.A. § 51-12-33(b). While it is correct that a "default concludes the defendant's liability and estops him from offering any defenses which would defeat the right of recovery," and that any argument that "goes to liability for the damages and not the amount of damages awarded[ ] is not permitted[,]" *Broadcast Concepts, Inc. v. Optimus Financial Svcs., LLC*, 274 Ga. App. 632, 635(2) (2005) (citation omitted), assessment of fault for purposes of apportioning damages between the defendants in the instant context does not violate that rule.
>
> Because apportionment is mandated, the trial court erred in instructing the jury on joint and several liability, and I.A. Group and Fitch are entitled to a new trial.

*I.A. Grp., Ltd. v. RMNANDCO, Inc.*, 336 Ga. App. 461, 462-64 (2016). However, a different result might have occurred had the plaintiff affirmatively pleaded in the complaint that no other party was negligent, responsible or at fault. Presumably, the admission of that allegation by virtue of default would have precluded apportionment.

j. Employer's Subrogation Right Affected by Apportionment

*In Walker v. Tensor Machinery Ltd.*, 298 Ga. 297 (2015), the Supreme Court held that a trier of fact may consider assigning fault to a nonparty employer that has immunity under the provisions of the Workers' Compensation Act, even though this might impact the employer's right to subrogation.

> No doubt, the right of subrogation may be further limited in some cases by an allocation of fault to a nonparty employer. After all, if fault is assigned to the nonparty employer, it will reduce the amount that the injured employee recovers in tort, thereby lessening the likelihood that the employee will receive enough compensation (apart from his workers' compensation benefits) to give the employer a subrogation claim. There is nothing, however, about this reality that is so inequitable for employers that it would lead us to conclude that O.C.G.A. § 51-12-33(c) was not meant to permit the allocation of fault to nonparty employers. After all, the idea that an employer should bear some cost (still limited, of course, to its liability for workers' compensation benefits) for its own fault – as opposed to that cost being borne by another tortfeasor – is not an inherently unfair one. And for employers without fault, the allocation of fault to employers under O.C.G.A. § 51-12-33 (c) does not affect their right of subrogation in the least. The allocation of fault to nonparty employers is not inconsistent with the limited right of subrogation under the Workers' Compensation Act.
>
> We conclude that assignment of responsibility under the apportionment statute to either an at-fault employer or a negligent plaintiff, and the corresponding effect on the employer's right to subrogation, is consistent with the requirements of both the apportionment and the workers' compensation statutes, resulting in a balanced and substantial justice in keeping with the purposes of the workers' compensation system. *See Southern R.*, 223 Ga. at 830(6); *North Bros.*, 236 Ga. App. at 840.
>
> We concede that an employer not really at fault might still be assigned fault in a tort case brought by the employee against a third party – a

> case to which the employer is not a party – and that the employer may suffer a limitation of its right of subrogation as a result. The possibility that the right of the employer to subrogation might be effectively impaired by proceedings to which the employer is not a party exists whether or not fault can be allocated to a nonparty employer. Indeed, that is exactly why the employer or its insurer has a statutory right to intervene in the proceedings for the purpose of protecting its right to subrogation. *See* O.C.G.A. § 34-9-11.1(b).
>
> We also observe that the enactment of O.C.G.A. § 51-12-33(c) did not affect the subrogation rights of employers in cases in which the plaintiff's recovery is reduced by his own comparative negligence. It is true that, under O.C.G.A. § 51-12-33(a) and (g), the plaintiff's negligence reduces or eliminates his recovery in tort, thereby reducing the amount of the employer's subrogation in the same way that assignment of fault to the employer effectively limits its subrogation rights. But comparative negligence had the same effect on the employer's right to subrogation before the apportionment statute was enacted in 2005. Under *Homebuilders Assn. of Ga. v. Morris*, 238 Ga. App. 194, 196-97 (1999), comparative negligence could not be considered when determining whether the plaintiff had been fully and completely compensated for his losses pursuant to O.C.G.A. § 34-9-11.1(b), and so the amount of the employer's subrogation normally was less than it would have been if there had not been any comparative negligence and instead a higher percentage of fault had been assigned to the non-employer defendant.

*Walker v. Tensor Mach., Ltd.*, 298 Ga. 297, 302 and 302 nn.4-5 (2015).

k. Apportionment to Agent or Employee of a Defendant

The recent Georgia Court of Appeals decision in *Camelot Club Condominium Association, Inc. v. Afari-Opoku*, Nos. A16A2069, A16A2070, --- Ga. App. ----, 2017 Ga. App. LEXIS 111, 2017 WL 950219 (March 9, 2017) dealt

peripherally with whether one party can be vicariously liable for the amount apportioned by the jury to that party's agent

In *Camelot*, the plaintiff sought to have an apartment complex owner, Camelot, held vicariously liable for the negligence of the company it hired to provide security, Alliance, after three assailants breached the complex's guarded gate and murdered her husband. *Id.* at *1. The plaintiff asserted two theories of liability – a premises liability claim under O.C.G.A. § 51-3-1 and a nuisance claim under O.C.G.A. § 41-1-1. *Id.* at *2. The jury found for the plaintiff and awarded her $3.25 million in damages, apportioning 25% each to Camelot and Alliance and the remaining 50% to the three assailants. *Id.* at *1. The *Camelot* jury did not, however, employ a special verdict form. Their general verdict gave no indication under which theory the jury found for the plaintiff, nor did it include a special interrogatory asking whether the security company was an agent or employee of the apartment complex. *Id.* at *8, n.12.

The absence of these specific findings left the Court of Appeals uncertain about the basis for the jury's award and required it to reverse the trial court's judgment making the apartment complex vicariously liable for the damages apportioned to the security company. *Id.* at *8. Had the Court been certain the jury's award was based on premises liability, "any negligence on the part of Alliance would be charged to Camelot, and Camelot would be vicariously liable

for Alliance's actions." *Id.* at *7. Similarly, had the Court been certain the jury's award was based on nuisance, it could have made Camelot vicariously liable, but only if there was also a special finding that Alliance was Camelot's employee. *Id.*

l. Jury Instructions and Verdict Form

Jury instructions and verdict forms that require a jury to apportion its award of damages among all of the parties at fault, pursuant to O.C.G.A. § 51-12-33, do not violate a plaintiff's constitutional rights to a jury trial, due process or equal protection. *Couch*, 291 Ga. at 366-67. Sample verdict forms for the apportionment of damages are included in the appendix hereto.

## CONCLUSION

In enacting O.C.G.A. § 51-12-33, the General Assembly established that the fault for a plaintiff's injuries is to be apportioned among all of the persons at fault for those injuries, regardless of whether those persons are parties to the action, regardless of whether the identities of some parties at fault are unknown, and regardless of whether some at-fault parties were intentional wrongdoers. The jury should be allowed the opportunity to apportion fault to a nonparty as long as there is sufficient evidence to support such apportionment, applying normal summary judgment and directed verdict standards, just as would be used to remove any issue from consideration by the jury. Finally, because the Statute is in derogation of the common law, it must be strictly construed, strictly complied with, and limited to its

express terms.

## Appendix A

**IN THE STATE COURT OF COBB COUNTY**
**STATE OF GEORGIA**

| | |
|---|---|
| JO-ANN TAYLOR, as Conservator for JOSHUA L. MARTIN,<br><br>Plaintiff,<br><br>v.<br><br>SIX FLAGS OVER GEORGIA II, LP, SIX FLAGS OVER GEORGIA, LLC, WILLIE GRAY FRANKLIN, JR., BRAD MCGAIL JOHNSON, DEANDRE EVANS, CLAUDE MOREY III, and JOHN DOES NOS. 1-15,<br><br>Defendants. | CIVIL ACTION<br>FILE NO. 09-A-55-4 |

**VERDICT**

_____ We, the jury, in the above-entitled matter, find for the Plaintiff, and against the Defendants and award total damages in the sum of $_____ for Joshua Martin.

If you find that the Plaintiff is entitled to receive damages, then you must determine the percentage of responsibility attributable to each of the parties. You should only give a percentage to those Defendants who you find at fault.

(a) We find Defendant Six Flags Over Georgia _____% at fault;

(b) We find Defendant Willie Franklin _____% at fault;

(c) We find Defendant Brad Johnson _____% at fault;

(d) We find Defendant Deandre Evans _____% at fault;

(e) We find Defendant Claude Morey _____% at fault;

The total of these percentages must equal 100%

OR

_____ We, the jury, in the above-entitled matter, find for the Defendants and against the Plaintiff.

This ____ day of _____, 20__.

_____
FOREPERSON

## Appendix B

**IN THE STATE COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

| | |
|---|---|
| NICHOLAS C. MORAITAKIS as Guardian ad Litem of the Property of TREVOR CLEMONS, a minor,<br><br>Plaintiff,<br><br>v.<br><br>GREGORY SYSYN, M.D. and NEONATOLOGY ASSOCIATES OF ATLANTA, P.C.,<br><br>Defendants. | CIVIL ACTION FILE<br>NO. 12-VS-195119D |

**VERDICT FORM**

WE THE JURY in the above-referenced case find as follows:

(1) As to the allegations of medical negligence against Defendants Gregory Sysyn, M.D. and Neonatology Associates of Atlanta, P.C.:

_____ We the jury find in favor of the Plaintiff.

OR

_____ We the jury find in favor of the Defendants Gregory Sysyn, M.D. and Neonatology Associates of Atlanta, P.C.

**If you have found in favor of the Defendants, STOP HERE. Sign the verdict form. You do not need to answer any further questions.**

(2) If you have found in favor of the Plaintiff, please indicate the total amount of damages you award to Plaintiff.

$ _____.

(3) If you find that any of the individuals listed below was negligent and thereby caused or contributed to the Plaintiff's injury and damages, then it is necessary for you to determine the percentage of fault for each. If you find no fault, then you should place a "0" by that name. Your allocation of fault must add up to 100%.

_____% Dr. Gregory Sysyn

_____% Dr. Margaret Adam

_____% Dr. Paul Fernhoff

Please have the foreperson sign and date below.

This ____ day of June, 2013.

_____
FOREPERSON

## Appendix C

**IN THE STATE COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

| | |
|---|---|
| JAN POTTER,<br><br>Plaintiff,<br><br>v.<br><br>SREEKANTH REDDY, M.D. and SILPA REDDY, M.D.<br><br>Defendants. | CIVIL ACTION FILE<br>NO. 11-EV-011761D |

**VERDICT FORM**

WE THE JURY in the above-referenced case find as follows:

(1) As to the allegations of medical negligence against Defendant Sreekanth Reddy, M.D.:

_____ We the jury find in favor of the Plaintiff

OR

_____ We the jury find in favor of the Defendant Sreekanth Reddy, M.D.

(2) As to the allegations of medical negligence against Defendant Silpa Reddy, M.D.:

_____ We the jury find in favor of the Plaintiff

OR

_____ We the jury find in favor of the Defendant Silpa Reddy, M.D.

**If you have found in favor of both of the Defendants, STOP HERE. You may sign the verdict form and you need not answer any further questions.**

If you have found in favor of the Plaintiff, please indicate the amount of damages you award to Plaintiff.

$ _____

If you find that any of the individuals or the hospital listed below was negligent and thereby caused or contributed to the Plaintiff's injury and damages, then it is necessary for you to determine the percentage of fault for each. If you find no fault, then you should place a "0" by their name. Your allocation of fault must add up to 100%.

_____% Dr. Sreekanth Reddy

_____% Dr. Silpa Reddy

_____% Jan Potter

_____% Dr. Kenneth Kress

_____% St. Joseph's Hospital

Please have the foreperson sign and date below.

This ___ day of March, 2013.

_____
FOREPERSON

## Appendix D

**IN THE STATE COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

| | |
|---|---|
| RONALD KEITH DAVIS AND NOEL RAY DAVIS, INDIVIDUALLY AND AS CO-EXECUTORS OF THE ESTATES OF DORIS A. DAVIS AND HILLERY R. DAVIS, DECEASED,<br><br>Plaintiffs,<br><br>v.<br><br>PANIAGUA'S ENTERPRISES, INC., CLIVE B. ALLEN AND HENRY BRYAN,<br><br>Defendants. | CIVIL ACTION FILE<br>NO. 10-EV-011026D |

**VERDICT FORM**

1. As to the Plaintiffs' claims based on the injuries and death of **Doris Davis**:

_____ We, the Jury, find in favor of the Plaintiffs and against the Defendants in the amount of $_____.

OR

_____ We, the Jury, find in favor of the Defendants.

2. As to the Plaintiffs' claims based on the injuries and death of **Hillery Davis**:

_____ We, the Jury, find in favor of the Plaintiffs and against the Defendants in the amount of $_____.

OR

_____ We, the Jury, find in favor of the Defendants.

**If you find in favor of the Defendants on all claims <u>OR</u> if you find no negligence by Hillery Davis, <u>stop here and have the foreperson sign and date the Verdict Form</u>.**

3. If you find in favor of the Plaintiffs on any claims but find the negligence of Hillery Davis contributed to his and/or Doris Davis's injuries and damages, then you should determine how much he and the Defendants were at fault. Your allocation of fault must add up to 100%.

_____% Hillery Davis

_____% Defendants

This _____ day of June, 2012.

_____
FOREPERSON