

IN THE SUPREME COURT  
STATE OF GEORGIA

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S20C1419

Georgia Court of Appeals No. A20A0218

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ALSTON & BIRD LLP,

*Appellant,*

v.

HATCHER MANAGEMENT, HOLDINGS, LLC,

*Appellee.*

**AMICUS CURIAE BRIEF OF**  
**THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF**  
**APPELLANT ALSTON & BIRD, LLP**

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On Behalf of the Georgia  
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## INTRODUCTION

The Court has granted certiorari to determine whether “(1) When an action involves a single defendant, does OCGA § 51-12-33 allow a reduction of damages against that defendant in accordance with the jury’s allocation of fault to a nonparty?”; and “(2) Is an award for attorney fees and expenses of litigation under OCGA § 13-6-11 subject to apportionment under OCGA § 51-12-33?” The Georgia Defense Lawyers Association (“GDLA”) writes to help demonstrate that the first question should be answered in the affirmative.

The Court of Appeals panel below determined that no reduction of damages is available to a single defendant under O.C.G.A. § 51-12-33. As GDLA wrote in its brief in support of certiorari, this outcome is wrong. It contradicts the language and purpose of the apportionment statute. It defies this Court’s understanding of the apportionment statute as “set[ing] up a comprehensive process for the apportionment of damages according to relative ‘fault’” and thus as a law that is to be understood holistically, not fractured into several if/then conditional scenarios with very different results. *Zaldivar v. Prickett*, 297 Ga. 589, 592 (2015). It resurrects joint and several liability in cases to which the statute applies, again in defiance of the plain language of the statute and Georgia precedent.

In short, the panel’s decision is incorrect, constitutes a fundamental misinterpretation of the apportionment statute, threatens to upend the

apportionment scheme, and sows discord in cases currently and soon-to-be pending in courts across the state. The GDLA thus urges the Court reverse the decision below with respect to whether Defendant/Appellee Alston and Bird LLP (“A&B”) should be held liable for only its percentage of fault with respect to compensatory damages.

#### I. STATEMENT OF INTEREST

GDLA is an association of more than 950 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice. It is part of the GDLA’s policy to file amicus briefs where the issue or issues involved are of peculiar significance to the administration of justice. The holding below undermines Georgia law and policy of liability in accordance with fault and accordingly threatens inequitable outcomes, unnecessary delay and expense litigating this error, and confusion over the current state of the law. Accordingly, GDLA submits this brief.

## II. BACKGROUND

Briefly summarized, this case concerns Plaintiff/Appellee Hatcher Management Holdings, LLC's ("the Company") efforts to recover against A&B on legal malpractice and breach of fiduciary duty claims. Maury Hatcher ("Hatcher") employed A&B to create the Company as holding company for his family fortune. "According to the Company, Maury secretly liquidated and redeemed his interest in the Company, personally valuing his interest, which constituted a breach of his fiduciary duty, and he embezzled a large portion of the Company's assets." *Alston & Bird LLP v. Hatcher Mgmt. Holdings, LLC*, 336 Ga. App. 527, 527 (2016). Hatcher resigned, but A&B continued to act at his direction despite its continued representation of the Company.

The Company sued Hatcher individually in 2009 and obtained a judgment following a trial on damages. Three years later, the Company sued A&B, naming it as the only Defendant. A&B filed a notice of nonparty fault announcing its intention to ask the trier of fact to apportion fault among A&B, Hatcher, and other parties. Ultimately, the jury found in the Company's favor and awarded the Company more than \$2.1 million in compensatory damages, interest, and attorney's fees, but allocated fault as follows: the Company at 8%, A&B at 32%, Hatcher at 60%, and the other nonparties identified in A&B's notice at 0%. The trial court thus reduced the judgment to \$683,522.07. Pertinent to this appeal, the

Company appealed the trial court's reduction of the damages consistent with the jury's allocation of fault.

The Court of Appeals panel reversed. Interpreting the statute, the panel determined that because the Company sued only one party in this case (A&B), subsection (a) "is the applicable portion of the statute." *Alston & Bird LLP v. Hatcher Mgmt. Holdings, LLC*, 355 Ga. App. 525, 534 (2020). The court further concluded that the apportionment statute "obligates [it] to distinguish between the trier of fact's determination of **damages** and that of **fault**." *Id.* (emphasis added). The court then relied on precedent construing a previous version of the apportionment statute (as it existed prior to its expansion and revamping in the 2005 Tort Reform Act) to determine that OCGA § 51-12-33(a) does not permit apportionment of damages to nonparties. Accordingly, the panel held that the \$697,614 award of compensatory damages should have been reduced by 8% only (representing the percentage of fault allocated to the Company as plaintiff) instead of 68% (the amount of fault allocated to all entities and individuals other than A&B). *Id.* at 534-35.

Division 3 of the panel's decision was erroneous for the reasons identified in A&B's brief and those discussed here below.

### III. ANALYSIS

The panel’s error stems from its misinterpretation of O.C.G.A. § 51-12-33, and GDLA thus begins by

[r]ecall[ing] the familiar and settled principles that inform our consideration of statutory meaning. As [the Court] recently acknowledged, a statute draws its meaning . . . from its text. When we consider the meaning of a statute, we must presume that the General Assembly meant what it said and said what it meant, and so, we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would. The common and customary usages of the words are important, but so is their context. For context, we may look to other provisions of the same statute, the structure and history of the whole statute, and the other law — constitutional, statutory, and common law alike — that forms the legal background of the statutory provision in question.

*Zaldivar*, 297 Ga. at 591 (quotation and citations omitted). “In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.” O.C.G.A. § 1-3-1(a).

#### **A. Enacting the new scheme**

Given these principles, a brief discussion of the statute’s history is appropriate. Prior to the Tort Reform Act of 2005, O.C.G.A. § 51-12-33 pertinently provided that

[w]here an action is brought against more than one person for injury to person or property and the plaintiff is himself 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, may apportion its award of damages among the persons who are liable

and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if 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.

O.C.G.A. § 51-12-33(a) (2004). The prior statute

preserved joint and several liability with rights of contribution and indemnity as the default rule in tort cases; permitted, but did not require, the trier of fact to apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person; and specified that damages, if 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.

*Reid v. Morris*, 309 Ga. 230, 233 (2020) (quotation of old law omitted).

The pre-tort-reform apportionment scheme limited the availability of apportionment and forbade allocation of fault to nonparties entirely. As construed, the prior statute even forbade apportionment of fault to nonparties that had previously been parties in the suit. *See Schriever v. Maddox*, 259 Ga. App. 558, 562 (2003) (“[W]e hold that since the company doctor was no longer a party to the action, an instruction on apportionment with him would have been inappropriate O.C.G.A. § 51-12-33 (a) applies only ‘where an action is brought against more than one person for injury to person or property. . . .’”); *see also Fraker v. C.W. Matthews Contracting Co.*, 272 Ga. App. 807, 810 (2005) (“[W]e have consistently held that O.C.G.A. § 51-12-33(a) does not authorize a jury to

apportion damages against a nonparty.”). Additionally, the prior statute only applied where the plaintiff bore some responsibility for its own injuries. *McReynolds v. Krebs*, 290 Ga. 850, 852 (2012). Under the old scheme, the remedy for defendants that felt they had borne a disproportionate share of fault was an action for contribution. *See DOT v. Blair*, 220 Ga. App. 342, 345 (1996) (“[B]ecause Jamie Blair is not a party to this lawsuit, such a charge [of damage apportionment] would have been erroneous. The trial court properly determined that the DOT may be held individually liable, just like a private entity, for the full amount of Ms. Blair's damages. If the DOT believes that it is entitled to contribution from Jamie Blair, its remedy is to seek such contribution, not to have the jury in this case, in which Jamie Blair is not a named party, reduce Ms. Blair's recovery.” (citations omitted)).

The architects of the Tort Reform Act of 2005 (“SB 3”) apparently found this scheme untenable in their efforts to combat “the rising cost of hospital and medical liability insurance while also addressing the need for general reform regarding civil actions.” *See* Hannah Yi Crockett et al., *Peach Sheets, Torts and Civil Practice*, 22 Ga. St. U.L. Rev. 221, 225 (Fall 2005).<sup>1</sup> The current version of

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<sup>1</sup> Georgia courts often look to the Peach Sheets for purposes of ascertaining legislative purpose. *See Mannato v. SunTrust Banks, Inc.*, 308 Ga. App. 691, 692 n.1 (2011) (“While this publication colloquially known as the ‘Peach Sheets’ is an unofficial source for legislative history, it has been cited for this purpose both by this court and by the Georgia Supreme Court.”). In fact, the Court has relied on

O.C.G.A. § 51-12-33 materialized as part of SB 3, which was passed in part “to change provisions relating to **apportionment of award according to degree of fault.**”<sup>2</sup> Georgia Tort Reform Act of 2005, 2005 Ga. ALS 1, 2005 Ga. Act 1, 2005 Ga. SB 3 (codified in part at O.C.G.A. § 51-12-33) (emphasis added); *see also* Crockett, 22 Ga. St. U.L. Rev. at 223 (noting that SB 3 “eliminate[d] joint and several liability in favor of apportionment of damages according to degree of fault.”). SB 3 as originally drafted provided that “[t]he fact-finder **will** apportion the damages among the defendants who are actually liable according to the degree of fault for each party, thus eliminating joint and several liability and any right of contribution. Further, if the plaintiff [wa]s 50% or more liable, the bill eliminate[d] the plaintiff’s ability to recover any damages.” Crockett, 22 Ga. St. U.L. Rev. at 223 (emphasis added). Consideration of nonparty fault was not originally part of the bill.

SB 3, however, was substituted by the Georgia Senate Committee to permit such consideration. The pertinent section was changed “by allowing the

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this particular Peach Sheet on other occasions to ascertain the intent of other parts of the Tort Reform Act of 2005. *See Hankla v. Postell*, 293 Ga. 692, 695 (2013) (noting general intent of reducing the cost of liability insurance for health care providers and ensuring continued access to care in the context of expert witness requirements); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 739 n.9 (2010) (regarding constitutional concerns on damages caps).

<sup>2</sup> Preambles of acts creating code sections are valuable for determining legislative intent. *See Brown v. Earp*, 261 Ga. 522, 523 (1991).

consideration of all involved in the event, even nonparties, in apportioning fault.”  
*Id.* at 231.

The bill went to the full Senate. On February 1, 2005, Senator Preston Smith (one of the bill’s sponsors) moved to engross SB 3 as substituted so as to prevent amendments that might clog the floor with debate and destroy the bill, as had occurred with the prior year’s tort reform bill. The Georgia Senate voted to engross the bill *See id.* at 231.

That same day, Senator Smith also spoke in support of the substituted SB 3’s passage to the entire Senate and discussed the impact of each section. With respect to Section 12 (the section dealing with apportionment), he described the purpose and function of the law as follows:

Section 12 deals with joint and several liability. Many people outside these walls don’t know, but in Georgia if you are sued and found to be 5% liable or 1% liable, a plaintiff can collect 100% of the verdict against you. **This section provides that there should be fairness, that a person who is found to be liable should pay exactly their share of the liability. In other words, to the extent they are liable for causing damage, they should pay those damages, but they should not be required to pay for somebody else’s negligence or liability.**

There is also a section on this that allows the court to require the jury to apportion those damages, and then to allow consideration of the fault of nonparties if the litigants have provided the appropriate notice in allowing the court, the jury, and the litigants to consider who those nonparties are.

Feb 1, 2005 Georgia Senate Debate on SB 3 (emphasis added).<sup>3</sup> Consistent with the broad statement of intent above, there was no discussion of limiting the right of apportionment to single-defendant cases.

The Senate passed SB 3 on February 3, 2005. Ultimately, the House of Representatives passed its own substituted bill that contained changes to sections irrelevant to this case, and the Senate would go on to pass the substituted House version. *Crockett*, 22 Ga. St. U.L. Rev. at 237-39.

### **B. The current apportionment scheme**

The most relevant parts of the statute as currently constructed provide as follows:

**O.C.G.A. § 51-12-33. Reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties.**<sup>4</sup>

(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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<sup>3</sup> Debate footage is available through the Georgia Archives. For the sake of convenience, the quoted footage is available at <https://epra-law.sharefile.com/d-se5467ca444344505b47d34a51bdfead7>. The quoted excerpt begins at 1:23:20 of the video.

<sup>4</sup> “[T]he descriptive headings or catchlines immediately preceding or within the text of the individual Code sections of this Code . . . do not constitute part of the law and shall in no manner limit or expand the construction of any Code section.” O.C.G.A. § 1-1-7. The statute’s descriptive heading, however, is consistent with its purpose as explained above.

(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.**

O.C.G.A. § 51-12-33 (emphasis added). Consistent with its explicit focus of “apportionment of award according to degree of fault” (Georgia Tort Reform Act of 2005, 2005 Ga. ALS 1, 2005 Ga. Act 1, 2005 Ga. SB 3), “[t]he statute sets up **a comprehensive process for the apportionment of damages according to relative ‘fault,’ of which subsection (c) is only a part,**” *Zaldivar*, 297 Ga. at 592 (emphasis added). The provisions of O.C.G.A. § 51-12-33 are to be read in the context of the other provisions of the statute, and “it is important to consider the apportionment statute as a whole.” *See id.*

The Court has on multiple occasions explained how the subsections of the statute work together with respect to the fault of plaintiffs, defendants, and

nonparties and the corresponding impact on damages. “Subsection (a) specifies exactly what is to be done with the ‘fault’ of the plaintiff . . . .” *Id.* at 593. “The dominant purpose of this subsection is to instruct the jury on how and when to reduce the amount of damages otherwise awarded to the plaintiff in proportion to plaintiff’s percentage of fault.” *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 360 (2012) (quotation omitted). Because the General Assembly uses the terms “responsible” and “fault” interchangeably here, “[f]ault’ means that the damages are reduced, where appropriate, based on the degree to which plaintiff’s actions contributed to the damages.” *Id.* at 360.

“Subsection (b) of the apportionment statute is addressed to the ‘fault’ of defendants ‘who are liable’ for the injury to the plaintiff, and it specifies that the ‘fault’ of such a defendant — relative to the ‘fault’ of all — is the measure and limit of [its] liability . . . .” *Zaldivar*, 297 Ga. at 594. “[S]ubsection (b) addresses **the full universe of tortfeasors, whether parties or not**, and addresses what happens to ‘the total amount of damages to be awarded, if any, . . . after a reduction of damages pursuant to subsection (a)’ related to plaintiff’s responsibility or fault. *Couch*, 291 Ga. at 361 (emphasis added).

Because of its comprehensive nature, O.C.G.A. § 51-12-33 does not construct a series of hypotheticals based on the arrangement and number of parties with different results accorded to each; its application is much more streamlined.

“OCGA § 51-12-33 addresses the two classes of people, the plaintiff(s) and tortfeasor(s), including non-parties, who are responsible for these damages and instructs the jury what to do in each scenario.” *Couch*, 291 Ga. at 360. “[S]ubsections (a) through (c) direct the jury to apportion fault among all persons who contributed to the damages . . . .” *Id.* at 365. More particularly,

OCGA § 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.

*Zaldivar*, 297 Ga. at 600 (emphasis added). “[A]ll tortfeasors should be considered at the same time.” *Couch*, 291 Ga. at 361 n.4.

The language of the statute embodies the legislative purpose of liability coterminous with degree of fault and envisions apportionment of responsibility (and thus, damages). “The statute uses ‘fault’ synonymously with ‘responsibility’ and ‘liability’ for and ‘contribution’ to the damages claimed, all words whose ordinary meaning encompasses intentional as well as negligent acts.” *Id.* at 362. Joint and several liability is abrogated in cases to which the statute applies, as are actions for contribution. *See McReynolds*, 290 Ga. at 852 (“OCGA § 51-12-33(b) flatly states that apportioned damages shall not be subject to any right of

contribution. And the statute reiterates this point by saying that damages shall not be a joint liability among the persons liable.”).

As such, the statute functions in the following manner. In the event the statute applies, a verdict must first be reduced by the percentage of fault apportioned to the plaintiff under subsection (a), if any. Under subsection (b), the defendants found liable are then held responsible for the remaining amount of the verdict in an amount proportionate to their apportioned fault. *See id.* (“Damages are apportioned among tortfeasors according to their percentages of fault, regardless of whether the total amount of damages was first reduced under subsection (a) to account for the plaintiff's share of liability.”). Subsections (c) and (d) **require** apportionment of responsibility to appropriate nonparties during this exercise. *Cf. id.* at 853 (determining that claim of entitlement to apportionment under these subsections was defeated by lack of evidence of fault of nonparty).

**C. The trial court properly applied the apportionment statute.**

The trial court here properly applied the statute. Given the clear application of the foregoing principles, the language of the statute, and the intent of the General Assembly, the compensatory damages verdict was due to be reduced by the Company's fault (8%) and then apportioned among defendants found to be liable by their respective percentages of fault (A&B alone at 32%), with due

consideration given to the fault of nonparties if any (Hatcher at 60%). This is the way the statute should work, and this is what the trial court did.

The panel decision, however, reversed the trial court's proper application of the statute, apparently on the grounds that subsection (b) permits apportionment of "damages" (as opposed to apportionment of "fault") only in multiple-defendant cases and that apportionment of damages was inappropriate in this case because there was only one named defendant. *See Alston & Bird*, 355 Ga. App. at 534-35. As the discussion above illustrates, this conclusion was faulty for several reasons.

First, the holding does not comply with the plain language of the statute, as the statute does not speak of apportionment of fault separately from apportionment of damages. Again, this Court has recognized that "[t]he statute uses 'fault' synonymously with 'responsibility' and 'liability' for and 'contribut[ion]' to the damages claimed, all words whose ordinary meaning encompasses intentional as well as negligent acts." *Couch*, 291 Ga. at 362; *see also Zaldivar*, 297 Ga. at 595 & n.5 (explaining that this close connection between these terms is not meant to equate "fault" with a literal meaning of the word "liability" and showing that the intended meaning is more synonymous with "responsibility"). Neither the statute, nor its context, nor its history (which all envision in ways explicit and implicit liability concordant with percentage of fault alone) contemplate apportionment without a corresponding divvying of damages. In fact, the statute expressly forbids

it insofar as it bars joint liability. *See* O.C.G.A. § 51-12-33(b) (“Damages apportioned by the trier of fact . . . shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.”). The statute was amended specifically to change provisions relating to **apportionment of award according to degree of fault,**” 2005 Ga. ALS 1, 2005 Ga. Act 1, 2005 Ga. SB 3 (emphasis added), and to “eliminate[] joint and several liability in favor of **apportionment of damages according to degree of fault,**” Crockett, 22 Ga. St. U.L. Rev. at 223 (emphasis added).

Second, the determination that subsection (b) establishes multiple-defendant cases as the only scenario under which an apportionment of responsibility for portion of the reduced verdict is permissible also defies the language of the statute, this Court’s precedent, and the legislative history. The statute does not limit its mandate regarding the apportionment of nonparty fault. O.C.G.A. § 51-12-33(c) and (d) **require** consideration of nonparty fault in all cases to which the statute applies, not just to multiple-defendant cases. It cannot be emphasized enough that the Court has recognized that “fault” is used interchangeably with “responsibility” and “liability” in the statute, and subsection (b) explicitly forbids joint liability and contribution. *See Couch*, 291 Ga. at 360; *see also* O.C.G.A. § 51-12-33(b) (recognizing that damages are apportioned “as provided in **this Code section**” more generally, not subsection (b) alone (emphasis added)). These provisions

considered together mandate consideration of nonparty fault and corresponding apportionment of responsibility for damages in all cases where the statute is properly invoked. Subsection (b) itself recognizes that the primary purpose of the entire section itself is apportionment consistent with percentages of fault. *See* O.C.G.A. § 51-12-33(b) (“Damages apportioned by the trier of fact as provided **in this Code section** [not subsection] 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.”). A&B properly triggered application of the statute by filing a notice of nonparty fault, requiring the consideration of nonparty fault and allocation of responsibility for damages here.

More generally, this Court has repeatedly recognized that apportionment of **damages** is the purpose of the statute, even in a single-defendant case. *See Zaldivar*, 297 Ga. at 590 (stating in single-defendant case that “[t]he statute . . . requires the trier of fact to apportion **any award of damages** among the defendants with liability, limiting the liability of each to the extent to which she was assigned responsibility.”); *Couch*, 291 Ga. at 362 (“The statutory scheme is designed to apportion **damages** among all persons or entities who contributed to the alleged injury or damages — even persons who are not and could not be made parties to the lawsuit — a scheme that makes no sense if persons whose intentional acts that contributed to the damages are excluded.” (emphasis added) (quotation omitted)).

The entire statute speaks to apportioning responsibility for damages, and holding otherwise either impermissibly renders large swaths of the statute functionally useless or adds qualifying language to its provisions regarding nonparty fault limiting the application of nonparty apportionment to cases involving multiple defendants. *See Zaldivar*, 297 Ga. at 592 (“The statute sets up a comprehensive process for the apportionment of damages according to relative ‘fault,’ of which subsection (c) is only a part.”); *see also Riley v. State*, 305 Ga. 163, 169 (2019) (rejecting a potential interpretation of a statute on the grounds that it would have rendered a part of the statute “functionally useless”); *Brooks v. Brooks*, 185 Ga. 549, 554 (1938) (“A court should never by construction add to, take from, or vary the meaning of unambiguous words in a statute.”).

It was the clear intention of the General Assembly, effected through the language of the current version of the statute, to make apportionment under O.C.G.A. § 51-12-33 the default rule (transitioning away from joint and several liability), to ensure generally that responsibility for verdicts would be tied to fault or responsibility as determined by the trier of fact, and to allow more specifically for consideration of nonparty fault in this new scheme. *See* 2005 Ga. ALS 1, 2005 Ga. Act 1, 2005 Ga. SB 3; *see also* Crockett, 22 Ga. St. U.L. Rev. at 223 (noting that SB 3 “eliminate[d] joint and several liability in favor of apportionment of damages according to degree of fault.”); Feb 1, 2005 Georgia Senate Debate on SB

3 (“This section provides that there should be fairness, that a person who is found to be liable should pay exactly their share of the liability. In other words, to the extent they are liable for causing damage, they should pay those damages, but they should not be required to pay for somebody else’s negligence or liability.”). Compare O.C.G.A. § 51-12-33(a) (2004) (providing that the trier of fact “may” apportion its award in the limited cases where the plaintiff is partially at fault and there are multiple defendants), with O.C.G.A. § 51-12-33(b) (providing that the trier of fact “shall” apportion its award among multiple defendants), and *id.* § 51-12-33(c)-(d) (providing that the trier of fact “shall consider the fault” of all who contributed to the alleged injuries or damages and that nonparty negligence or fault “shall be considered” if the statute is properly invoked). SB 3 was substituted precisely for this purpose. As this Court’s decisions have shown, the statute both as a matter of its express language (through the lack of any limitations in subsections (c) and (d) and in subsection (b)’s recognition that the code section generally speaks to apportionment of damages) and through the intent more generally as expressed in the legislative history above was passed to permit apportionment of damages consistent with the fault attributed to non-parties, even in single-defendant cases.

Third, the Court of Appeals erred by relying on pre-tort-reform case law to interpret the post-tort reform version of the statute. The Court of Appeals relied on

pre-tort reform cases simply for the proposition that the old statute did not permit apportionment of **damages** (ostensibly as opposed to **fault**) to nonparties. *Alston & Bird LLP*, 355 Ga. App. at 534 (“As we construed a former version of the statute and reversed a trial court's ruling that a jury could apportion damages concerning a non-party, we made clear that OCGA § 51-12-33 does not authorize a jury to apportion damages against a nonparty. By contrast, we emphasized in *Hatcher I* that ‘fault’ would determine the identity of those included in Alston & Bird's notice of nonparty fault.” (quotation and citations omitted)). As explained above, SB 3 (which would become the current version of the apportionment statute) was explicitly amended to permit the apportionment of fault (used synonymously in the statute with “responsibility” and “liability” for and “contribution” to the damages claimed) to nonparties as part of an overall scheme to ensure that defendants were only responsible for their fair share of damages. Pre-tort-reform case law provides no guidance here, as the old and new apportionment statutes share neither the same operative language nor common purpose.

Fourth, the panel’s decision leads to absurd results. According to subsection (b), any apportionment of fault under the statute negates the defendant’s right to contribution. Consider the following scenario: in a simple negligence case, a plaintiff sues two defendants, but settles with one prior to trial. According to subsection (d)(1), the settling defendant’s fault “shall be considered” by the trier of

fact. The remaining defendant may additionally decide to notice its intention to argue the fault of additional nonparties under the same subsection. The jury then reaches a verdict, finding the defendant nominally liable, maybe allocating 1% fault. The jury allocates no fault to the plaintiff and 99% of fault split between the settling defendant and any nonparties identified by the remaining defendant.

The outcome of this scenario, construed according to the panel's decision, cuts completely against the apportionment statute's language, applicable precedent, and the General Assembly's intent. The remaining defendant, despite being found only 1% at fault, will be responsible for the entire judgment, despite joint and several liability having been abrogated in cases falling under the statute. It also will have lost its right to contribution against any other party (its remedy under the old law) pursuant to subsection (b), either because of nothing within its power (because of the co-defendant settling out) or through the decision to use a mechanism that now may only serve to hurt it (noticing non-party fault in a single-defendant case). This type of outcome is exactly the type of harm the General Assembly intended to remedy with SB 3. This result is rationally and legally untenable. *See* O.C.G.A. § 1-3-1 ("In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy."); *City of Marietta v. Summerour*, 302 Ga. 645, 654 (2017) ("It is a settled principle of our law of statutory interpretation

that, when confronted with ambiguities in a remedial statute, and in the absence of contrary indicia of meaning, we commonly construe the statutory provisions broadly to apply to all cases consistent with the remedial purpose which, under a fair construction of their terms, they can be made to reach.” (quotation omitted)); *Gen. Elec. Credit Corp. v. Brooks*, 242 Ga. 109, 112 (1978) (“It is the duty of the court to consider the results and consequences of any proposed construction and not so construe a statute as will result in unreasonable or absurd consequences not contemplated by the legislature.” (quotation and emphasis omitted)).

The panel’s decision was erroneous, and the example above shows the potential impact this ruling may have if not corrected by the Court. The decision has left defendants in single-defendant cases more likely to be saddled with a disproportionate share of a verdict. This patently is not what was intended in either the plain language of the statute or the intent of the General Assembly. This is also not how Georgia courts have understood the statute to operate. The decision below is due to be corrected.

## CONCLUSION

The Court of Appeals panel below has misconstrued O.C.G.A. § 51-12-33 in a way that will have unjustified, unfair, and unintended results in single-defendant cases for the foreseeable future. The language of the statute does not bear the

panel's interpretation, precedent does not support it, and the General Assembly did not intend it. Accordingly, the Court should reverse the decision below.

Respectfully submitted this 4<sup>th</sup> day of March, 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day filed the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT ALSTON & BIRD, LLP** with the Clerk of Court using the SCED online system and served all of the parties below by depositing a copy of the same in the United States Postal Service with adequate First-Class Mail postage thereon and addressed as follows:

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