

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

AU MEDICAL CENTER, INC.,)	
)	
<i>Appellant,</i>)	
)	Appeal No. A24A1027
vs.)	
)	
DOROTHY DALE, Individually,)	
And as Executor of the Estate of)	
JOHN J. DALE,)	
)	
<i>Appellee.</i>)	

**AMICUS CURIAE BRIEF OF GEORGIA DEFENSE LAWYERS
ASSOCIATION IN SUPPORT OF
APPELLANT AU MEDICAL CENTER, INC.**

Pamela Lee, President
Philip Thompson, Co-Chair
Elissa Haynes, Vice Chair

Amicus Curiae Brief Committee
**GEORGIA DEFENSE LAWYERS
ASSOCIATION**
Post Office Box 67
Rossville, GA 30741
706-956-4848

Prepared by:

Matthew D. Friedlander
Georgia Bar No. 416707
WEBB DANIEL
FRIEDLANDER LLP
75 14th St. NE, Suite 2450
Atlanta, Georgia 30309
t: (414) 712-0282
matthew.friedlander@webbdaniel.law

On Behalf of the Georgia Defense
Lawyers Association

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STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (GDLA) is an association of more than 1,000 lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, mainly for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, strengthening the adversary system of jurisprudence in our courts, and otherwise promoting improvements in the administration of justice.

GDLA members routinely represent businesses and individuals who—like the Appellant here—are one of several defendants initially named in a complaint alleging injury to person or property whereby the named defendants (and often nonparties) are alleged to share divisible alleged fault for the tortious conduct contributing to the plaintiff’s injuries. In these cases, apportionment of fault under O.C.G.A. § 51-12-33 is often a critical defense presented by the defendant at trial.

Following the Georgia Supreme Court’s opinion in *Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC*, 312 Ga. 350, 358 (2021)—which held that a trial court should only reduce a damages award by the percentage of the jury’s apportionment of non-party fault in cases “brought against more than one person”—GDLA members experience a common tactic whereby a plaintiff dismisses all but the most deep-pocketed defendant prior to trial, hoping this procedural maneuver will deprive that last-remaining defendant of a critical

apportionment defense.

The GDLA, its members, and their clients have a significant interest in ensuring clear, consistent, and fair standards of law are correctly applied by both our trial and appellate courts. The dismissal of all defendants but one in a multi-defendant action does not deprive the last-remaining defendant of an apportionment defense for a simple reason: “brought” means “commenced.” And in an action initially “brought” (i.e. “commenced”) against multiple defendants, the subsequent dismissal of those co-defendants does not retroactively render the action one “brought” against a single defendant.

GDLA members often find themselves facing abusive *Hatcher*-based dismissal tactics, which, as is the case here, are condoned by trial courts without adhering to the plain language of O.C.G.A. § 51-12-33. Accordingly, GDLA submits this brief in support of Appellant AU Medical Center, Inc. (AUMC).

INTRODUCTION

The GDLA fully supports AUMC’s well-reasoned brief and aims not to repeat what has already been said. Rather, the GDLA supplements AUMC’s brief with three discrete arguments. First, courts around the country recognize universally that to “bring” an “action” means to file a lawsuit. Second, plaintiffs often argue—as Appellee Dorothy Dale is likely to do here—that the General Assembly’s tense choice in O.C.G.A. § 51-12-33(b) indicates some non-standard

usage of the word “brought.” But the tense of the phrase “is brought” does not alter the temporal quality denoted by the verb “brought” when modifying the subject “action.” Third, subsection (d) of the apportionment statute comports with the plain-language interpretation endorsed by AUMC and the GDLA.

ARGUMENT

I. Courts nationwide have long held that to “bring” an action means to file a lawsuit.

According to this Court, “[t]o ‘bring’ an action has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit.” *See CL SNF, LLC v. Fountain*, 355 Ga. App. 176, 183 (2020). This “settled customary meaning” finds support in legal and non-legal dictionaries, which define “bring”—when modifying or acting on the word “action”—as denoting the temporal quality of instituting, initiating, beginning, and commencing a lawsuit. *See Black’s Law Dictionary* 239 (11th ed. 2019) (“bring an action. (16c) To sue; institute legal proceeding.); *see also* *Black’s Law Dictionary* 174 (5th ed. 1979) (“To ‘bring’ an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit. . . . A suit is ‘brought’ at the time it is commenced. . . .”); *Bring*, *Random House Unabridged Dictionary*, <https://www.dictionary.com/browse/bring> (“Law. To commence: to bring an action for damages.”) (last visited February 14, 2024); *Bring*, *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/bring> (“to cause to exist or occur:

such as . . . INSTITUTE bring legal action.”) (last visited February 14, 2024); *see also Raffensperger v. Jackson*, 316 Ga. 383, 395 n.14 (2023) (“When looking for the commonly understood meaning of a word in statutory text, we generally look to dictionaries and, if relevant, legal dictionaries from the time the statute was passed.”).

Other courts nationwide, including the United States Supreme Court, agree that to “bring” a lawsuit or action refers to instituting, commencing, or initiating a legal proceeding. *See, e.g. Hoffman v. Blaski*, 363 U.S. 335, 344 (1960) (holding that the language of 28 U.S.C. § 1404(a)—which permits the transfer of “any civil action to any other district or division where it might have been brought”—unambiguously means at the time the lawsuit was filed); *Goldenberg v. Murphy*, 108 U.S. 162, 163-64 (1883) (“We see no significance in the fact that in the legislation ... the word ‘commenced’ is sometimes used, and at other times the word ‘brought.’ In this connection the two words evidently mean the same thing, and are used interchangeably.”); *Maldonado v. Baker Cnty. Sheriff’s Off.*, 23 F.4th 1299, 1304 (11th Cir. 2022) (“To ‘bring’ an action has long meant to initiate or commence it, not to prosecute or to continue it.”); *Hogan v. Pilgrim’s Pride Corp.*, 73 F.4th 1150, 1157 (10th Cir. 2023) (“To begin with, we think that the natural reading of the language ‘bring a right of action that involves a claim’ is to *initiate* or *commence* a claim. That is the meaning long ascribed to *bring an action*, and

when Congress uses words in a statute without defining them, and those words have a judicially settled meaning, it is presumed that Congress intended them to have that meaning in the statute.”); *Soileau v. Smith True Value and Rental*, 144 So.3d 771, 778, 2012-1711 La. 6/28/13, 9 (La. 2013) (“[T]he legislature used the word ‘brought’ as in ‘initially filed’ or ‘commenced.’”); *People v. Spring Val. Co.*, 109 Cal. App. 2d 656, 670, 241 P.2d 1069, 1077 (1952) (“Whenever an action is brought by a county’ means initiated, started or commenced.”); *Turley v. Hulick*, No. CIV. 08-CV-377-MJR, 2008 WL 3850260, at *1 (S.D. Ill. Aug. 14, 2008) (“It is axiomatic that a civil action is ‘brought’ when the action is ‘commenced.’”).

And where a legislature intends to use the word “brought” to indicate commencement of trial, it should specify such non-standard use. *See, e.g. In re Marriage of Flack*, 200 Cal. App. 3d 18, 21, 245 Cal. Rptr. 745, 746 (Ct. App. 1988) (holding action is “brought to trial” when trial commences, but action is “brought” when the complaint is filed). Of course, the General Assembly here did not modify the word “brought” with the propositional phrase “to trial.” *See* O.C.G.A. § 51-12-33(b).

II. The General Assembly’s use of the present tense “is” indicates prospective application and does not change the temporal denotation of the word “brought.”

“Bring” is an irregular verb that uses “brought” to form the simple past tense (i.e. “I brought my lunch to work yesterday”) *or* to form a past participle. *See*

Brought, *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/brought> (last visited February 14, 2024). “Brought” can also serve as a participial adjective—i.e. “[a]n adjective that has the same form as the participle of the verb to which it is related.” 2 *Oxford English Dictionary* 590 (2d ed. 1989); Bas Aarts, Sylvia Chalker & Edmund Weiner, *Oxford Dictionary of English Grammar* 290 (2nd ed. 2014). “Action” means a lawsuit or legal proceeding. *See State v. SASS Grp., LLC*, 315 Ga. 893, 899 (2023).

An author may use verb tense to express the grammatical “voice” of a sentence, which is often “active” or “passive.” *See Oxford Dictionary of English Grammar* at 437. In an active voice construction, the sentence subject typically carries out an action, expressed by a verb, on an object (i.e. “John ate the apple”). *Id.* at 7-8. Conversely, in a passive voice construction—formed by combining the passive auxiliary verb “be” with a past participle—the sentence subject undergoes, rather than performs, the action (i.e. “The apple was eaten by John”). *Id.* at 294-95; Bryan A. Garner, *Garner’s Modern English Usage* 1229 (5th ed. 2022). When employing a passive construction, the author, for rhetorical purposes, may omit the “agent” or “doer” of the action (i.e. “The apple was eaten”). *Id.* at 295. Such passive construction is known as an “agentless” or “truncated” passive voice. *See id.*; Garner’s *Modern English Usage* at 807, 1229.

An author may also use a participial adjective as the subject complement of

a sentence with a linking verb (e.g. “My homework is finished”), which superficially resembles a passive voice construction. This “pseudo-passive” construction—also known as a “statal passive,” a “stative passive,” a “false passive,” or an “adjectival passive”—entails use of the copular (i.e. linking) verb “is” followed by a past participle verb form that “resembles a passive construction, but does not have an active counterpart.” Oxford Dictionary of English Grammar at 340-41. Rather, the past participle functions as a participial adjective and refers to a present resultant “state” of the sentence subject. *Id.*; *see also id.* at 296. It is sometimes ambiguous whether a clause employs a true passive or pseudo-passive construction *Id.*

Here, the introductory clause of O.C.G.A. § 51-12-33(b)—“Where an action is brought against more than one person for injury to person or property”—operates as a conditional clause that, if satisfied, “indicate[s] that the percentage of fault of a nonparty must be considered when apportioning damages to party defendants.” *Hatcher*, 312 Ga. at 356; *see also* Oxford Dictionary of English Grammar at 88.

There are two ways to interpret this conditional clause: 1) as a “pseudo-passive” or “stative passive” construction describing a resultant state or quality of an “action,” or (2) as an agentless passive voice construction in which the noun “action” receives the action of the verbal phrase “is brought.” Neither construction

negates the temporal denotation of the word “brought.”

The General Assembly may have employed a pseudo-passive construction where the word “action” is the subject and noun; the word “is” constitutes a stative copular verb indicating a present resultant state of the “action”; the word “brought” is the participial adjective describing the resultant state of the “action”; and the phrase “against more than one person for injury to person or property” is an adverbial prepositional phrase that modifies the adjective “brought.” Interpreted as such, the introductory clause of Section 51-12-33(b) creates a condition applying to instances where the “action” has the present quality of having been previously brought—i.e. commenced or initiated—against more than one person for injury to person or property. Under this construction, the present tense of the verb “is” does not modify the temporal quality of the word “brought,” but merely serves as a copular verb indicating the type of action to which the conditional statement applies.

Alternatively, the General Assembly may have employed an agentless passive voice construction where the subject “action” undergoes the action indicated by the auxiliary phrase “is brought” by an unknown agent. Like the pseudo-passive construction, an alternative passive voice construction does not suggest that the tense of the word “is” changes the temporal denotation of the word “brought.”

Georgia Courts will often rephrase a statute written in the passive voice into the active voice to ascertain its meaning. *See, e.g. Aldrich v. City of Lumber City*, 273 Ga. 461, 464 (2001). Where a passive construction does not reference an acting agent, “[a text’s] grammatical and structural logic often point to particular, identifiable . . . actors.” Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 *Stan. L. Rev.* 1005, 1012 (2011); *see also Atlanta Gas Light Co. v. Slaton*, 117 Ga. App. 317, 321 (1968) (holding use of passive voice did not render statute vague or indefinite when logic and context of statute would refer to certain individuals).

Context and logic point to the unnamed actor in the introductory clause of Section 51-12-33(b) being some person, petitioner, or plaintiff. *Id.* And use of the present tense “is” as an auxiliary verb—far from indicating that the word “is” references party status at the time of trial—simply means that the active-voice-equivalent would use a present tense verb. Thus, rephrased in the active voice, the introductory clause of Section 51-12-33(b) would state, “Where a plaintiff brings an action against more than one person for injury to person or property.” In this active construction, it is clear that the General Assembly used a present tense verb form to indicate prospective application of the apportionment statute—not to alter the definition of the word “brings.” *See Carr v. United States*, 560 U.S. 438, 449 (2010) (“[A] statute’s undeviating use of the present tense [i]s a striking indicator

of its prospective orientation.”) (cleaned up); *Undercofler v. Swint*, 111 Ga. App. 117, 119 (1965) (“Statutes framed in general terms and not plainly indicating the contrary will be construed prospectively, so as to apply to persons, subjects, and things within their purview and scope coming into existence subsequent to their enactment.”).

“In discussing tense, labels such as ‘present tense’ . . . are misleading, since the relationship between tense and time is often not one-to-one.” Oxford Dictionary of English Grammar at 414. For example, “[p]resent and past tenses” in conditional clauses “can be used . . . to refer to a future time (i.e. *If he comes home tomorrow . . . ; If he came home tomorrow . . .*.)” *Id.* And “present tenses can refer to the past (as in newspaper headlines, e.g., *Minister resigns.*)” *Id.* Here, the General Assembly’s tense choice does not undermine its word choice. The General Assembly imposed an unambiguous condition on the availability of non-party apportionment—actions “brought” (i.e. “commenced”) against more than one person for injury to person or property—stated in the present tense to indicate prospective application to future litigants.

And in any event, the Court should not permit a tortured use of the word “is” to override either the plain meaning of the term “brought” or the accepted use of the passive or pseudo-passive constructions discussed above.

[C]ourts sometimes refer to the rules of English grammar, inasmuch as those rules are the guideposts by which ordinary speakers of the

English language commonly structure their words, and the legislature is presumed to know the rules of grammar. Applying these principles, if the statutory text is clear and unambiguous, we attribute to the statute its plain meaning, and our search for statutory meaning is at an end.

Crowe v. Scissom, 365 Ga. App. 124, 130 (2022) (quotation omitted).

Ultimately, it is the temporal quality of initiation denoted by the word “brought” when used in conjunction with “action” that reveals the unambiguous meaning of the statute—not the tense of the verb. That is true regardless of whether the General Assembly employed a true passive or pseudo-passive construction. Substituting the words “brings” and “brought” with the substantively equivalent terms “commences” and “commenced” illustrates this point. In the present tense active voice, the statute would read “where a plaintiff commences an action against more than one person.” In the past tense active voice, the statute would read “where a plaintiff commenced an action against more than one person.” Both phrases refer to the initiation, not continuing prosecution, of legal proceedings.

III. Subsection (d) bolsters Appellant’s and the GDLA’s textual interpretation.

Subsection (d) of the apportionment statute provides:

- (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.

O.C.G.A. § 51-12-33(d). If the General Assembly intended the word “brought” to denote the prosecution or maintenance of a lawsuit, then subsection (d) makes no sense. A defendant should not be required to put the plaintiff on notice of non-party fault if it cannot determine whether an individual or entity is a non-party—or whether the defense of apportionment is even available—until the trial begins. “If a provision is susceptible of (1) a meaning that . . . deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012); *see also Gwinnett Cnty. Sch. Dist. v. Cox*, 289 Ga. 265, 271 (2011) (“Established rules of constitutional construction prohibit us from any interpretation that would render a word superfluous or meaningless.”). This Court should prefer an interpretation of Subsection (b) that does not deprive Subsection (d) of its practical and operative effect.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted this 4th day of April, 2024.

This submission does not exceed the word count limit imposed by Rule 24.

**GEORGIA DEFENSE LAWYERS
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Pamela Lee, President
Philip Thompson, Co-Chair
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Amicus Curiae Brief Committee
Post Office Box 67
Rossville, GA 30741
706-956-4848

/s/Matthew D. Friedlander

Matthew D. Friedlander
Georgia Bar No. 416707
WEBB DANIEL FRIEDLANDER
LLP
75 14th St. NE, Suite 2450
Atlanta, Georgia 30309
t: (414) 712-0282
matthew.friedlander@webbdaniel.law

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CERTIFICATE OF SERVICE

I hereby certify that there is a prior agreement with counsel for the parties to allow documents in a .pdf format sent via email to suffice for service, and that, on April 4, 2024, I served a copy of the foregoing by e-mail on the following counsel of record:

Benjamin H. Brewton
Jena C. Lombard
BALCH & BINGHAM LLP
801 Broad Street, Suite 800
Augusta, GA 30901
bbrewton@balch.com
jlombard@balch.com

Robert P. Marcovitch
SINTON SCOTT MINOCK &
KEREW
3438 Peachtree Road, Suite 925
Atlanta, GA 30326
bmarcovitch@ssmklaw.com

Minerva A. Steele
STEELE LAW, LLC
3340 Peachtree Road
Suite 1800
Atlanta, GA 30326
msteele@steeleinjurylaw.com

Michael K. Watson
WATSON LAW FIRM
3270 Walton Riverwood Lane SE
Suite 2025
Atlanta, GA 30339
mike@watsonlawga.com

W. Michael Smith
LAW OFFICE OF W. CALVIN
SMITH II PC
3560 Lenox Road NE
Suite 3020
Atlanta, GA 30326
wmsmith@calvinsmithlaw.com

Maxwell K. Thelen
ASHBY THELEN LOWRY
445 Franklin Gateway SE
Marietta, GA 30064
max@atllaw.com

s/Matthew D. Friedlander
Matthew D. Friedlander
Ga. Bar No. 416707