IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

AU MEDICAL CENTER, INC.,	)	
	)	
Petitioner,	)	Case No. S25C0507
	)	
vs.	)	
	)	
DOROTHY DALE, Individually,	)	Ga. Ct. App. Case No. A24A1027
And as Executor of the Estate of	)	
JOHN J. DALE,	)	
	)	
Respondent.	)	

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

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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 Petitioner 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 that 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—and now the Court of Appeals—without adhering to the plain language of O.C.G.A. § 51-12-33. Accordingly, GDLA submits this brief in support of the Petition for Writ of Certiorari of AU Medical Center, Inc. (AUMC).

INTRODUCTION

The GDLA fully supports AUMC's well-reasoned petition and aims not to repeat what has already been said. Rather, GDLA supplements AUMC's petition with three discrete arguments. First, despite the 2022 amendments to the apportionment statute, there are likely dozens, if not hundreds, of cases in active litigation that involve the important question presented in AUMC's petition.

Second, Respondent's counsel and the Georgia Trial Lawyers Association (GTLA) *agree* that the question presented in AUMC's petition is one of gravity and public importance that warrants this Court's certiorari review. Third, the minimal reasoning of the Court of Appeal's majority opinion calls out for this Court to engage in a rigorous statutory analysis regarding the meaning of an important remedial statute.

ARGUMENT

I. GDLA members have identified at least a dozen pending matters in active litigation that are affected by the meaning of the word "brought," and there are likely dozens more.

GDLA sent a blast email to its members requesting identification of any cases in active litigation that are affected by the question presented in AUMC's petition. Responding GDLA members identified the following cases:

- *Hammond v. AU Medical Center*, Richmond County Superior Court, Civil Action File No. 2020 RCCV 00483.
- *Samuel Jenness and Leah Jenness, Individually and Leah Jenness, as the Administrator of the Estate of Miles Jenness vs. Toyota Motor Corporation; Toyota Motor North America, Inc.; Toyota Motor Sales, U.S.A., Inc.; Toyota Motor Engineering & Manufacturing North America, Inc.; and Michelle Wierson,* DeKalb County State Court, Civil Action File No.19A75448.
- *Hughes v. Venetian Hills*, Dekalb County State Court, Civil Action File No. 19A73694.
- *Azariah Lewis v. Coca-Cola Bottling Company United – East LLC, et al.*, Gwinnett County State Court, Civil Action File No. 21-07720-S5.

- *Willie J. Wright, Jr. and Glory Wright v. Augusta Hospital, LLC*, Richmond County Superior Court, Civil Action File No. 2018-RCCV-00344.

- *Turner v. The Honey Baked Ham Company, LLC*, et al. Dekalb County State Court, Civil Action File No. 20A80351.

- *Anya Renee Grant-Malcolm v. Rodney Devel Harris,* Douglas County State Court, Civil Action File No. 22SV00106.

- *Devan Miller v. DBN Mgmt. Group, LLC*, Newton County Superior Court, Civil Action File No. 2022-SU-CV-000372-5.

- *Samayoa v. Tribe Express, Inc.*, Gwinnett County State Court, Civil Action File No. 17-C-04814-S6.

- *Flournoy v. Sharif*, Gwinnett County State Court, Civil Action File No. 20-C-09350-S6.

- *Hall v. Yamaha Motor Manufacturing Company of America*, Cobb County State Court, Civil Action File No. 20-A-1696.

- *Herrera v. Southern Oil, et al*., Gordon County State Court, Civil Action File No. 19CV69025.

Several GDLA members noted that the issue lays "dormant" in many other cases because the plaintiff has not yet dismissed all but a single remaining defendant, though they could in the future.

The cases identified above are a mere sampling of the cases of those GDLA members who chose to respond that identify a single-remaining-defendant apportionment issue. There are likely many other cases in a similar posture faced by non-responding GDLA members and non-GDLA members. And the issue likely remains "dormant" in dozens of other cases where the plaintiff has not yet

dismissed settling defendants to avoid an apportionment defense.

II. Respondent's counsel and the Georgia Trial Lawyers Association agree that the meaning of "brought" is an issue of gravity and public importance.

On August 30, 2024, counsel for Respondent Dorothy Dale filed in this Court an amicus brief on behalf of GTLA in support of the petitioner in *Gloria Jean Price, et al. v. Southern Oil Refinery, LLC, et al.*, Supreme Court Case No. S25C001. The *Price* case is not a good vehicle for certiorari because the Court of Appeals resolved the apportionment issues before it without addressing the temporal meaning of the word "brought." *See* S. *Oil Refinery, LLC v. Price*, 372 Ga. App. 427, 430 (2024) ("[N]o matter whose interpretation of the meaning of the word "brought" we rely upon - either meaning the filing of the original action, as argued by Southern Oil, or meaning the remaining defendants at the time a case is brought to trial, as argued by the Prices - there were numerous named defendants in this lawsuit at all times.").

Nevertheless, counsel for Dale, writing on behalf of the GTLA, urged this Court to grant certiorari in *Price* because the Court *could* address the question presented by AUMC in the petition, which is an issue of gravity and public importance:

> By the [GTLA]'s estimation, there are likely hundreds of cases that have been postured in compliance with this Court's ruling in *Hatcher* and the Court of Appeals' ruling in *Carmichael*. And a disproportionate number of those cases are cases with very serious

> injuries or deaths which will likely require resolution by a jury because of the gravity of the issues and damages. Further, even though the General Assembly amended the apportionment statute in 2022 (and purported to apply those changes to cases filed after the effective date of the amendment), these issues continue to require judicial resolution. Many large cases filed before 2022 are still working their way through litigation toward trials where these issues will arise. Additionally, there will be litigation concerning whether the amendment's attempt to apply the changes retroactively to causes of action that had already accrued was constitutional and, if those challenges are successful, there will be many more cases where *Hatcher* or *Carmichael* will apply. Thus, this is a matter that this Court should resolve now for the benefit of a substantial number of litigants, both now and future.

See Br. of the Georgia Trial Lawyers Association as Amicus Curiae in Support of Certiorari, Supreme Court Case No. S25C0011, at 10. Accordingly, there is bilateral recognition—as between the attorneys in this pending petition and the GDLA and GTLA—that the question presented in AUMC's petition is an issue of gravity and public importance.

III. The Court of Appeals' perfunctory statutory analysis cannot stand.

In its majority opinion, the Court of Appeals disregards the plain and well-settled meaning of what it means to "bring" an "action"—i.e. to commence—because "the phrase 'is brought' is a present tense form of the verb 'bring' written in a passive voice." *See* Op. at 20. The Court of Appeals' analysis is incomplete and incorrect.

A. 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 Grammer 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.

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.

B. Subsection (d) bolsters 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, the Court should grant AUMC's petition for certiorari.

Respectfully submitted this 23rd day of December, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2024, I served a copy of the foregoing **AMICUS CURIAE BRIEF OF GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER AU MEDICAL CENTER, INC.** upon all counsel of record via email and U.S. Mail to:

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