IN THE COURT OF APPEALS
STATE OF GEORGIA

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| HATCHER MANAGEMENT HOLDINGS, LLC<br><br>Appellant,<br><br>v.<br><br>ALSTON & BIRD LLP,<br><br>Appellee. | Case No. A20A0218 |

# AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF EN BANC RECONSIDERATION


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## I. INTRODUCTION

The panel's decision in this case ("the Decision") holds that nonparty fault may not be considered when apportioning damages in a case "involving only one defendant." *See Alston & Bird LLP v. Hatcher Management Holdings, LLC*, Case No. A202018 (May 21, 2020), 2020 WL 2569714 at *7. Relying on subsection (b) of O.C.G.A. § 51-12-33, the Decision holds that the sole defendant here is liable for 92% of the damages even though the jury apportioned just 32% fault to it—and that the jury's apportionment of 60% fault to a nonparty is simply irrelevant. *Id*. at *5-7. The Georgia Defense Lawyers Association ("GDLA") submits that en banc reconsideration of the Decision is needed because:

1. The Decision's focus on the multiple-defendant wording in O.C.G.A. § 51-12-33(b) fails to give weight to O.C.G.A. §§ 51-12-33(c) and (d) and to the statutory scheme itself, which require apportionment of damages even in single-defendant cases; indeed, the Decision conflicts with prior decisions of this Court. This conflict in precedent calls out for en banc consideration. *See* COA Rule 33.3;

2. The Decision not only renders O.C.G.A. § 51-12-33(c) and (d) mere surplusage, it also upsets the statutory relationship between O.C.G.A. § 51-12-32 and O.C.G.A. § 51-12-33, which distinguishes between the right to contribution and the right to apportionment when there are multiple wrongdoers; and

3. The Decision has far-reaching and likely unintended consequences.

## II. STATEMENT OF INTEREST

The GDLA is an association of nearly 1,000 lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The 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. Though its membership is diverse, GDLA members frequently represent their respective clients in various tort actions involving apportionment issues.

The GDLA and its members share a common interest in ensuring basic principles of Georgia tort law are clearly defined and that the desire of plaintiffs to recover ever-increasing damages awards in tort lawsuits does not override the lawful intent and actions of the legislature, including the General Assembly's intent that tort damages be apportioned according to the percentage of fault of the parties and non-parties alike. The GDLA respectfully contends that the Decision in this case seriously undermines that legislative intent—and prior precedent of this Court as well as the Georgia Supreme Court—such that reconsideration en banc is needed. At a minimum, reconsideration en banc is needed to clarify Georgia apportionment law which, as discussed below, has been ruptured in several respects by the Decision.

## III. ARGUMENT

### A. The Decision to remove nonparty fault from the apportionment of damages in single-defendant cases conflicts with existing precedent.

This is the second appeal in this case. The first reversed an order striking the defendant's notice of apportionment regarding nonparty tortfeasors, including Maury Hatcher, who was central to the wrongdoing alleged by the Plaintiff. *See Alston & Bird LLP v. Hatcher Management Holdings, LLC*, 336 Ga. App. 527 (2016) ("*Hatcher I*"). But the Decision in this appeal cannot be reconciled with *Hatcher I*. In *Hatcher I*, the trial court struck the defendant's notice of nonparty fault on the ground that apportionment is not proper in this single-defendant case because O.C.G.A. § 51-12-33(b) applies only where there are multiple defendants. *See Hatcher I* at 528-29. Reversing, *Hatcher I* looked to the entirety of O.C.G.A. § 51-12-33, not just Subsection (b), and held that O.C.G.A. § 51-12-33(c), which is not limited to multiple-defendant cases, requires juries to "*consider the fault of all persons or entities who contributed to the alleged injury or damages." Hatcher I*, 336 at 544 (quoting *Zaldivar v. Pritchett*, 297 Ga. 589 (2015)) (emphasis supplied by *Hatcher I*).

*Hatcher I* stressed that *Zaldivar* "was a single-defendant case" and its holding "was not limited to cases involving more than one defendant." *Hatcher I*, 336 Ga. App. at 531 n. 3. *Hatcher I* also cited to *Barnett v. Farmer*, 308 Ga. App.

358, 362 (2011) (physical precedent), and noted that *Barnett* "revers[ed] the trial court's refusal to instruct the jury to apportion the *award of damages* to the plaintiff according to the percentage of fault of the single defendant and the plaintiff's husband, a nonparty." *Id.* n. 4 (emphasis added). *See also Lowndes Cty. Health Servs., LLC v. Copeland*, 352 Ga. App. 233, 233 (2019) (affirming reduction of damages based on apportionment of fault between sole defendant and nonparties); *Brown v. Tucker*, 337 Ga. App. 704, 704 (2016) (affirming 40% apportionment to nonparty in single-defendant case).

This Court's prior case law applied the straightforward principle espoused in *Zaldivar* and *Couch v. Red Roof Inns, Inc*. 291 Ga. 359 (2012). "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." *Couch*, 291 Ga. at 362 (emphasis added). In no way did *Couch* limit its analysis to multiple-defendant cases. *Zaldivar* reiterated this principle in a single-defendant case which, as shown by the dissent in that case, approved reduction of a defendant's *damages* by the percentage of non-party fault. *See Zaldivar*, 297 Ga. at 604–05. This principle also is central to the pattern charge on apportionment that is routinely given in single-defendant apportionment cases like this one—a point never addressed by plaintiff's opposition to the motion for reconsideration.

Thus, the Decision's focus on O.C.G.A. § 51-12-33(b) without giving weight to Subsections (c) and (d) conflicts with this Court's prior precedent. But a single division of this Court cannot override prior precedent unless it is after consultation with all other nondisqualified judges of this Court:

> Prior decisions of the Court may be overruled by a single division of the Court *after consultation with the other nondisqualified judges on the Court*, provided the decision of the division is unanimous. *Otherwise, prior decisions of the Court may be overruled after en banc consideration of all nondisqualified judges of the Court by a majority of the participating judges*. See OCGA § 15-3-1 (d) (authorizing the Court of Appeals to provide by rule the manner in which prior decisions of the Court may be overruled).

COA Rule 33.3 (emphasis added).

It makes sense to allow a single division of the Court to overrule by unanimous decision an outlier decision, stray dicta, or material set out in a footnote, as long as it has received input from "the other nondisqualified judges on the Court." *See* COA Rule 33.3. That is not the case here, however. The Decision squarely conflicts with and thus implicitly overrules prior mainstream precedents addressing apportionment of damages in single-defendant cases. It cannot even be reconciled with *Hatcher I*, which relied on *Barnett's* reversal of a "refusal to instruct the jury to apportion *the award of damages* to the plaintiff according to the percentage of fault of the single defendant and the plaintiff's husband, a nonparty." *Hatcher I*, 336 Ga. App. at 531 n.4 (emphasis added).

Accordingly, en banc review is needed to resolve this rift in the law.

### B. The Decision muddles the statutory scheme embodied in both the apportionment statute and the contribution statute.

Neither the Decision nor the response to the motion for reconsideration provides any reason why nonparty apportionment was required in this case if it has no impact on the defendant's damages. The purpose must be for apportionment of damages, not just fault. *See supra* at III.A*; see also* Georgia Law 2005 SB 3 (stating in synopsis that intent of what is now O.C.G.A. § 51-12-33 was "to change provisions relating to apportionment of award according to degree of fault").

Plaintiff's opposition to reconsideration suggests that, even under the Decision, nonparty fault is still relevant to a potential contribution claim by the Defendant against the at-fault nonparties. But that notion is frivolous. It is well established that apportionment of fault by a jury displaces any right to contribution. *See, e.g.*, *District Owners Ass'n, Inc. v. AMEC Environmental & Infrastructure, Inc*., 322 Ga. App. 713, 717 (2013). This is the only possible conclusion given the express language of O.C.G.A. § 51-12-32, which limits contribution to cases that are not covered by the apportionment statute. *See* O.C.G.A. § 51-12-32(a) ("*Except as provided in Code Section 51-12-33*, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly") (emphasis added); *see also McReynolds v. Krebs*, 290 Ga. 850, 852-53 (2012) (observing that right to contribution under O.C.G.A. § 51-12-32 "cannot trump the rules set forth in

OCGA § 51-12-33"). Moreover, contribution rights are determined on a pro rata basis whereas apportionment is assessed based on a percentage of fault. *See F.D.I.C. v. Loudermilk*, 305 Ga. 558, 576 n. 19 (2019). The two remedies are inconsistent and mutually exclusive. *Id*. at 575.

In sum, this case is indeed covered by the apportionment statute, specifically by O.C.G.A. §§ 51-12-33(c) and (d)—as *Hatcher I* held. This undeniable conclusion further demonstrates why the Decision must be revisited. Nothing in our case law or the statutory scheme codified in Sections 51-12-32 and 51-12-33 allows a defendant to be held liable for the percentage of damages attributable to the fault of a nonparty tortfeasor—as apportioned by a jury under O.C.G.A. § 51-12-33(c)—with no possible right to contribution. "There is nothing inherently fair about a defendant who is, for example, 10% at fault paying 100% of the loss." *Walker v. Tensor Machinery Ltd*., 298 Ga. 297, 301 (2015) (internal citations omitted). But the Decision never considers the interplay between apportionment and contribution law—or the havoc and injustice that will come about in single-defendant apportionment cases if this oversight is not corrected.

Thus en banc reconsideration is needed because the Decision not only renders superfluous O.C.G.A. §§ 51-12-33(c) and (d), it thwarts the legislative intent to replace contribution with apportionment of damages where, as here, a jury has allocated fault among multiple wrongdoers. *See Loudermilk*, 305 Ga. at 575.

### C. The panel's decision has far-reaching and unintended consequences for single-defendant apportionment cases.

The defendant's motion for reconsideration notes that pending cases already are being impacted by the Decision. But the consequences of the Decision are even more far-reaching than described in the defendant's filing. These additional ramifications are yet another reason why en banc review should be granted.

One example is *Carmichael v. Georgia CVS Pharmacy, LLC*., Fulton County State Court Civil Action No. 16EV005617, a case in which undersigned counsel represents the defendant. In *Carmichael*, on the day before the May 28, 2020 hearing on the defendant's post-trial motion addressing a substantial premises liability verdict, the plaintiff emailed the trial court a copy of the Decision. Then, at the hearing, the plaintiff's counsel expressed his view that the Decision moots the defendant's argument that the verdict cannot be sustained because the jury apportioned 0% fault to the criminal who shot and seriously injured the plaintiff whereas O.C.G.A. § 51-12-33(c) mandates that the finder of fact "shall" consider the fault of all nonparties.

Notably, however, the Georgia Supreme Court granted certiorari on this very issue in another single-defendant case involving 0% apportionment to the criminal that inflicted the harm on the plaintiff—though the Court did not actually rule on the issue because it reversed on other grounds. *See Goldstein, Garber & Salama v. J.B.*, Case No. S16G0744 (Ga. May 9, 2016) (granting certiorari on proximate

cause and apportionment issues); *see also Goldstein, Garber & Salama v. J.B.*, 300 Ga. 840 (2017) (reversing on proximate cause grounds).

Of course, the 0% apportionment question is not now before the Court. But the proceedings in *Carmichael* demonstrate the potential impact of the Decision on other cases. Can it really be the case that apportionment of fault in a single-defendant case involving multiple wrongdoers, while required, is meaningless? Does the Decision really stand for the proposition that error in nonparty apportionment does not matter if the plaintiff named only one defendant instead of two? The Court should grant reconsideration to ensure that the Decision does not have possibly unintended consequences like rendering superfluous large parts of the apportionment statutory scheme and mooting an issue that is sufficiently meritorious to warrant certiorari—such as the issue in *Goldstein Garber*, a single-defendant case where the Supreme Court was interested in a verdict that apportioned 0% fault to the nonparty criminal who injured the plaintiff.

## IV. CONCLUSION

There is no legal or rational reason why nonparty fault matters if the plaintiff names more than one defendant but does not matter if the plaintiff names only a single defendant. That is not what O.C.G.A. § 51-12-33(c) says, and it is not what the Georgia Supreme Court said in *Zaldivar*, which was a single-defendant case.

In holding that O.C.G.A. § 51-12-33(c) requires the trier of fact to apportion fault to all wrongdoers who contributed to the plaintiff's injury, *Zaldivar* rejected the argument that the plaintiff's damages should not be reduced by the percentage of nonparty fault allocated by a jury.

Accordingly, en banc review should be granted because: the Decision (1) conflicts with prior precedent; (2) muddles both apportionment and contribution law; and (3) has far-reaching and possibly unintended consequences.

Respectfully submitted this 11th day of June, 2020.

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

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## CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2020 I have this date served the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** in the above-listed case on all counsel via electronic filing and by depositing a copy of the same in the United States Mail with sufficient postage thereon to ensure delivery, addressed as follows:

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