

IN THE SUPREME COURT OF GEORGIA  
STATE OF GEORGIA

NO.: S19G1478

ADRIAN JOHNS AND GWEN JOHNS  
APPELLANTS

v.

SUZUKI MOTOR CORPORATION AND SUZUKI MOTOR OF  
AMERICA, INC.  
APPELLEES.

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**AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE  
LAWYERS ASSOCIATION**

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## INTRODUCTION

The question is whether the apportionment statute can be used to reduce a plaintiff's award by his or her percentage of fault in a strict liability case. Here, Appellants Adrian and Gwen Johns sued Suzuki Motor Corporation and Suzuki Motor of America, Inc., seeking to hold those companies strictly liable for injuries Mr. Johns ("Johns") sustained in a motorcycle accident. *Suzuki Motor of Am., Inc. v. Johns*, 351 Ga. App. 186, 186 (2019). Appellants alleged a defect in Johns's motorcycle caused the injury. *Id.* At trial, the court instructed the jury on subsection (a) of Georgia's apportionment statute, which requires the trier of fact, in all cases involving claims "for injury to person or property," to determine whether "the plaintiff is to some degree responsible for the injury or damages claimed," and if so, "the percentage of fault of the plaintiff." *See* O.C.G.A. § 51-12-33(a). Once that percentage is established, "the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault." *Id.* The jury found Johns was 49 percent responsible for his own injuries, and the trial court reduced the damages award accordingly. *Id.*

On appeal, Appellants argued the court's reduction of damages was improper because the apportionment statute cannot be used to reduce a plaintiff's award in a strict liability case. The Court of Appeals, in a succinct and well-reasoned opinion applying the plain meaning of the statute and this Court's precedents, disagreed and

held the determination of a plaintiff's fault and the attendant reduction of damages are appropriate in strict liability cases. *Id.* at 198.

Appellants ask this Court to reverse that decision. But Appellants' arguments rely on misguided narrow interpretations of cases decided before the enactment of the current apportionment statute and misconstrue this Court's holdings. Appellants want to argue about "negligence" and "liability," but this Court has definitively held the apportionment statute deals with "fault," that is, *any* wrongful conduct. The statute's mandate that the amount of a plaintiff's damages are subject to his relative responsibility for his injury is not a radical departure from the way strict liability suits have always been handled—considerations of a plaintiff's conduct have always been appropriate for determining a plaintiff's entitlement to damages. Finally, interpreting subsection (a) of the apportionment statute to apply in all tort cases, including cases involving strict liability claims, is the only reading that faithfully furthers the intent of the General Assembly as expressed in the plain text of the statute: "to divide responsibility for an injury among all of those who contributed to it..." *Zaldivar v. Prickett*, 297 Ga. 589, 590 (2015). This Court should affirm the decision of the Court of Appeals allowing apportionment of fault to plaintiffs in strict liability cases.

## **STATEMENT OF INTEREST**

The Georgia Defense Lawyers Association (“GDLA”) is an association of almost 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 the courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice.

The GDLA is interested in interpretation of Georgia’s apportionment statute, O.C.G.A. § 51-12-33, which applies in a substantial proportion of the cases in which GDLA’s members and clients are involved, and especially concerned with the particular issue presented in this appeal: whether a trier of fact may apportion fault to a plaintiff in a strict liability case. Many of the GDLA’s clients (and prospective clients) are manufacturers who produce the products we all use every day. The GDLA is justifiably concerned with promoting their fair treatment in litigation. In accord with that concern and the GDLA’s interest in ensuring the basic principles of Georgia tort law are clearly defined, the GDLA seeks an interpretation of the apportionment statute consistent with its plain meaning, its context, and the General Assembly’s intent to apportion fault among all who are responsible for a plaintiff’s injury—including, when appropriate, the plaintiff.

## ARGUMENT AND CITATION OF AUTHORITIES

In every case of statutory interpretation, the courts' role is to apply the statute in accord with the legislature's intent as expressed in "the text of [the] statute and the statute's context within the larger legal framework." *Gibson v. Gibson*, 310 Ga. 622, 631–32 (2017) (quoting *State v. Riggs*, 301 Ga. 63, 67 n.6 (2017)). The plain text of subsection (a) of the apportionment statute and its context lead to the inescapable conclusion that it must apply in strict liability cases the same as it does in all other tort cases.

On its face, the statute applies in any action "brought against one or more persons for injury to person or property." O.C.G.A. § 51-12-33(a). Since a products liability suit, by statute, is one for "injury to...person or property," *see* O.C.G.A. § 51-1-11(b)(1), the apportionment statute applies, and a plaintiff's damages must be reduced by the percentage of fault the trier of fact assigns to him.

Appellants oppose this straightforward approach, arguing the pre-enactment history of excluding consideration of a plaintiff's negligence in strict liability suits forbids ascribing fault to a plaintiff and reducing his damages. They claim ascribing fault in a strict liability case will eradicate the very concept of strict liability. However, Appellants get the statutes and the history wrong. The apportionment statute refers to "fault," not "negligence" or "liability." This Court has consistently held fault is a distinct concept. Properly understood, the apportionment statute's

system of ascribing fault to a plaintiff is simply the General Assembly’s way of naturally extending an inquiry that has always been part of strict liability suits. A plaintiff’s ability to recover in a strict liability case has always been subject to whether he caused (i.e., was at fault for) his own injury. *See, e.g., Deere & Co. v. Brooks*, 250 Ga. 517, 518–19 (1983) (holding “the careless act of the plaintiff” or his assumption of the risk of his own injury could prevent him from recovering in a strict liability action); *Ray v. Ford Motor Co.*, 237 Ga. App. 316, 321 (1999) (“[A]ssumption of the risk is a defense to strict liability.”); *Firestone Tire & Rubber Co. v. Pinyan*, 155 Ga. App. 343, 350 (1980) (noting “the question for resolution” in a strict liability case is “whether the injuries were the proximate result of the defect or some other fact, such as the unreasonable acts of the injured party”). The apportionment statute broadened that inquiry to cover all wrongdoing that causes injury. *See Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 361–62 (2012). This interpretation, consistent with the text of the statute and this Court’s precedents, is in full accord with the General Assembly’s intent to hold accountable all parties at fault for an injury. This is how the Court of Appeals interpreted the statute, and its decision should be affirmed.

**A. DETERMINING A PLAINTIFF’S FAULT DOES NOT ALTER THE STRICT LIABILITY SCHEME.**

Appellants argue assigning fault to a plaintiff and reducing his damages in proportion to that assignment of fault will eviscerate strict liability. But “fault” and “liability” are completely separate concepts. Strict liability deals with the latter, and the apportionment statute with the former. They are not incompatible.

To be liable is to be “[r]esponsible or answerable in law.” *Liable*, BLACK’S LAW Dictionary (11th ed. 2019). In Georgia, a manufacturer is liable, that is, answerable in law, for injuries caused by its defective product regardless of whether it acted with all reasonable care in manufacturing that product. *See* O.C.G.A. § 51-1-11; *S K Hand Tool Corp. v. Lowman*, 223 Ga. App. 712, 714 (1996). Assigning “fault” to parties who caused an injury does not alter that doctrine because “fault” in no way requires a determination of liability. A party need not be “answerable in law” to have fault ascribed to it.

For example, in *Walker v. Tensor Machinery Ltd.*, 298 Ga. 297 (2015), this Court held an employer, though completely immune from suit because of the Workers’ Compensation Act, could still have “fault” assigned to it under the apportionment statute. *Id.* at 299 (“[T]here is no reason to imagine that the Legislature did not intend fault to be allocated against immune parties...”). In *I.A. Grp., Ltd. v. RMNANDCO, Inc.*, 336 Ga. App. 461 (2016), the Court of Appeals held

a defendant in default, although absolutely liable because of the default, could argue it was not solely at fault for the plaintiff's injury. The court noted, "While it is correct that a 'default concludes the defendant's liability and estops him from offering any defenses which would defeat the right of recovery'...assessment of fault for purposes of apportioning damages between the defendants in the instant context does not violate that rule." *Id.* at 463–64. In precisely the same way, the inability of a manufacturer of a defective product to avoid liability by pointing to the reasonableness of its actions does not prevent the assessment of fault to other parties, including the plaintiff.

The Court has already acknowledged this can be done. In *Georgia-Pacific v. Fields*, 293 Ga. 499 (2013), this Court reversed summary judgment for a plaintiff in a strict liability asbestos case after concluding a genuine issue of material fact existed concerning whether third parties bore some measure of fault for the plaintiff's injury. While that case dealt with subsection (c) of the apportionment statute, there is no principled reason why assigning "fault" should not be treated the same way when applying subsection (a). *See Lathrop v. Deal*, 301 Ga. 408, 442 (2017) ("[W]hen the same words are used in different parts of a single constitutional or statutory enactment, the courts generally assume—absent some clear indication otherwise—that the words are used in the same sense."); ANTONIN SCALIA AND BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 170 (2012) ("[I]t has long

been considered a ‘sound rule of construction that where a word has a clear and definite meaning when used in one part of a...document, but has not when used in another, the presumption is that the word is intended to have the same meaning in the latter as in the former part.’” (alteration in original)). Assigning fault to a plaintiff and reducing his damages in proportion to that fault takes nothing away from strict liability.

**B. THE APPORTIONMENT STATUTE REQUIRES A DETERMINATION OF A PLAINTIFF’S FAULT IN STRICT LIABILITY CASES.**

Appellants argue applying the apportionment statute to strict liability cases amounts to a cataclysmic break from the way courts have traditionally adjudicated such cases by impermissibly injecting negligence principles into the inquiry. Their argument misreads the statute and misconstrues its relation to the case law. Determining whether a plaintiff’s conduct contributed to his own injury has always been a necessary and legitimate consideration in strict liability cases. The apportionment statute simply extends that long-held understanding to encompass all forms of wrongdoing.

**1. A Plaintiff’s Conduct Has Always Been a Consideration in Strict Products Liability Cases.**

Georgia enacted its products liability statute in 1968. J. KENNARD NEAL & CATHERINE PAYNE, *GEORGIA PRODUCTS LIABILITY LAW*, § 1:3 (4th ed.). Seven years later, this Court held the statute eliminated “questions of negligence” in products

liability cases and “impose[d] a degree of strict liability upon manufacturers.” *Ellis v. Rich’s Inc.*, 233 Ga. 573, 576–77 (1975). In *Ford Motor Co. v. Carter*, 239 Ga. 657 (1977), and *Deere & Co. v. Brooks*, 250 Ga. 517 (1983), this Court expanded on that point, holding the common-law defense of contributory negligence is not a defense to strict liability. *Brooks*, 250 Ga. at 518; *Carter*, 239 Ga. at 660.

While these cases barred consideration of whether a plaintiff acted negligently, they did not proscribe all inquiries into a plaintiff’s conduct. Neither this Court nor the Court of Appeals has ever held a plaintiff’s conduct is irrelevant to determining whether a plaintiff could recover in a products liability case. Instead, the cases uniformly hold the opposite: a plaintiff whose own conduct causes his injury is barred from recovery. *See Brooks*, 250 Ga. at 518 (holding contributory negligence is not a defense to strict liability only “where the actual cause of the injury arises from an unanticipated defect in the product itself, *and not from the careless act of the plaintiff*” (emphasis added)); *Firestone Tire & Rubber Co.*, 155 Ga. App. at 350 (“[I]n a strict liability case, assuming there is a defect in the product, the question for resolution is one of causation only—whether the injuries were the proximate result of the defect or some other factor, such as the unreasonable acts of the injured party.”).

Indeed, it is axiomatic that assumption of the risk—which asks whether the plaintiff had knowledge of a risk of harm but nevertheless voluntarily encountered

that risk—is a valid defense to a strict liability claim. *See, e.g., Brooks*, 250 Ga. at 518–19 (“[T]he cases, and the Restatement, are agreed that strict liability recovery is barred by evidence establishing assumption of the risk.”); *Ray*, 237 Ga. App. at 321 (“[A]ssumption of risk is a defense to strict liability”); *Bodymasters Sports Indus., Inc. v. Wimberley*, 232 Ga. App. 170, 173 (1998) (“[A]ssumption of the risk remains a valid defense to a design defect action.”); *Parzini v. Ctr. Chem. Co.*, 136 Ga. App. 396, 399 (1975) (“[A]ssumption of risk applies to the strict liability theory.”). Under these cases, considering a plaintiff’s responsibility for his own injury under the statute’s broad umbrella of “fault”—whether negligent or not—cannot be off limits.

**2. The Apportionment Statute Expanded the Limitations on a Plaintiff’s Ability to Recover to Include All Situations Where a Plaintiff Is at Fault for the Injury.**

Subsection (a) of Georgia’s apportionment statute represents the General Assembly’s modest expansion of the rule, universally acknowledged in Georgia case law, that a plaintiff’s ability to recover for an injury is subject to the extent he was at fault for that injury. Georgia first enacted an apportionment statute in 1987. 1987 Ga. Laws p. 915, § 8. That statute dealt primarily with apportioning a damages award among parties held liable to the plaintiff. *See* O.C.G.A. § 51-12-33(a) (1987) (“[T]he 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...according to the degree of fault of each person.”). Because a plaintiff cannot be liable to himself, no damages could be apportioned to him under the statute. However, the plaintiff’s responsibility for his injury was a factor for the trier of fact to consider because the trier of fact could only apportion fault to a liable person if that person’s “degree of fault [was] greater than that of the injured party.” *Id.*<sup>1</sup>

In 2005, the General Assembly enacted a major overhaul of the apportionment statute, adding multiple subsections, including subsection (a), which is at issue in this appeal. *See* O.C.G.A. § 51-12-33(a) (2005). Also pursuant to the amendments, if the trier of fact concludes the plaintiff is 50 percent or more at fault, recovery is completely barred. O.C.G.A. § 51-12-33(g). Critically, both subsections speak in broad terms of a plaintiff’s “fault” or “responsibility.”

The General Assembly’s enactment of the 2005 amendments was intended to replace the common-law concepts of apportionment and contributory negligence. *See Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 364 (2012) (noting “[t]he General Assembly’s intent to displace the common law of apportionment”). By requiring the trier of fact to determine plaintiff’s “fault” or “responsibility” for the injury and damages, rather than his “negligence” or “liability,” subsection (a) takes the

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<sup>1</sup> This fault/liability distinction further evidences the uniqueness of those concepts.

longstanding principle that a plaintiff cannot recover to the extent he causes his own injury and applies that principle in all situations, whether a plaintiff’s conduct is classified as negligent or not. *See Couch*, 291 Ga. at 362 (concluding there was “no doubt that fault is not simply negligence”). To the extent the pre-enactment cases conflict with that legislatively enacted expansion, they are null. *See Ramirez v. State*, 837 S.E.2d 328, 332 n.2 (Ga. 2019) (noting a rule stated in an earlier case “should no longer be the law because it originates from case law interpreting a former version of the statute” that was materially different from the current version); *Couch*, 291 Ga. at 364 (“[S]tatutes trump cases.”).

Accordingly, Appellants’ argument that apportioning fault to a plaintiff in a strict liability case would be “an eradication of a core tenet of Georgia’s strict liability law” (Appellant’s Brief at 22) is patently incorrect. The law has always recognized the ability (and the duty) of judges and juries to consider a plaintiff’s conduct in strict liability cases. The apportionment statute simply provides that a plaintiff cannot recover in a strict liability suit (or any other suit for injury to person or property) to the extent he caused his own injury, whether negligently or not.

**3. The Holding in *FDIC v. Loudermilk* Is Inapplicable to Interpretation of O.C.G.A. § 51-12-33(a).**

Apart from being wrong on the interaction of pre-enactment law and the apportionment statute, Appellants’ argument also relies on too broad a reading of this Court’s opinion in *FDIC v. Loudermilk*, 305 Ga. 558 (2019). The Court held in

*Loudermilk* that assignment of fault under O.C.G.A. § 51-12-33(b) among defendants was not possible in cases involving “traditional concerted action” because “fault in such scenarios is not divisible.” *Id.* at 576. The Court reached this conclusion after noting that, in some cases, “the fault of one person is legally imputed to another person,” in which case all the members of the tortious enterprise are equally at fault. *See Id.* at 572–73 (discussing “common-law concerted action” theory). When that is the case, there is no fault to assign as all defendants are equally at fault as a matter of law. The Court itself acknowledged the narrowness of its holding, noting it “encompasses only traditional concerted action, as it was understood at common law, for the basic reason that fault in such scenarios is not divisible.” *Id.* at 576.

That limited holding has no effect on application of O.C.G.A. § 51-12-33(a) in strict liability cases. *Loudermilk* was addressing the application of subsection (b) of the apportionment statute, which requires “the trier of fact...[to] apportion its award of damages among the persons who are *liable* according to the percentage of fault of each person.” 305 Ga. at 561 (emphasis added) (quoting O.C.G.A. § 51-12-33(b)). In light of the common law rule on concerted action, such apportionment was impossible because each defendant would have, as a matter of law, the same percentage of fault.

In contrast, subsection (a), which is at issue here, requires the trier of fact to assign *fault* to the *plaintiff*. See O.C.G.A. § 51-12-33(a). Unlike in *Loudermilk*, here there is no rule that would proscribe such an assignment. The Court should affirm.

**C. APPLYING THE APPORTIONMENT STATUTE IN STRICT LIABILITY CASES FURTHERS THE GENERAL ASSEMBLY’S INTENT.**

Apportioning fault to a plaintiff in a strict liability case furthers the General Assembly’s intent to hold those responsible for an injury, in whatever way, responsible. See *Couch*, 291 Ga. at 362 (“[T]he statutory scheme is designed to apportion damages among ‘all persons or entities who contributed to the alleged injury or damages’ ...”). This Court has explained how the apportionment statute is ultimately about fairness. In holding that an immune employer could be apportioned a measure of fault in *Walker*, the Court expounded on the negative consequence of not assigning fault and apportioning damages to the employer:

The result of immunizing employers from fault as well as from liability is that third parties pick up the tab for the employer’s fault, potentially paying more than their share in order to make up for the excluded employer.... The question becomes whether the injured plaintiff must see his potential recovery diminished by assignment of fault to his immune employer or whether a third party defendant may be made to respond in damages in an amount that exceeds that defendant’s proportionate share of fault in causing the injury.... [T]he more equitable result is to permit allocation of fault to the exempt employer.

298 Ga. at 300 (alterations in original) (quoting *Mack Trucks, Inc. v. Tackett*, 841 So. 2d 1107, 1115 (Miss. 2003)). In essence, the other defendants should not be liable for any damages the employer caused, even if the employer itself could not be liable for those damages. *See id.* at 301 (quoting *Mack Trucks*, 841 So. 2d at 1115) (“[T]hird parties should not be assessed to supplement our system of workers’ compensation.”).

The same negative consequence applies to failing to apportion fault to a plaintiff who causes his own injury. If a plaintiff is not made to account for his fault for his own injury, a defendant must pay for damages in an amount disproportionate to its fault. “There is nothing inherently fair about a defendant who is[, for example,] 10% at fault paying 100% of the loss.” *Sullivan v. Scoular Grain Co. of Utah*, 853 P.2d 877, 882 (Utah 1993) (alteration in original) (quoted with approval in *Walker*, 298 Ga. at 301). Defendants, even strictly liable defendants, should not be made to bear the burden of a plaintiff’s own fault. Certainly, the General Assembly had the power to enact a different rule that would expressly exclude strict liability cases from the apportionment statute’s scope, but it did not do so. *Cf. Couch*, 291 Ga. at 362 (“If the Legislature intended for an exclusion for intentional torts to apply to the apportionment statute, it would have expressly said as much.”). In the absence of such an express exclusion, and in light of the statute’s plain language and the history of strict liability in Georgia, O.C.G.A. § 51-12-33(a) must apply in strict liability

cases. Any other result would not conform to the General Assembly’s clear intent. *See Couch*, 291 Ga. at 359 (noting “the intent of [the apportionment statute] is easily discernable from the straightforward text of the statute”).

## II.

### **CONCLUSION**

The Court of Appeals interpreted the apportionment statute in accord with its text and context to faithfully enforce the General Assembly’s intent to fairly apportion damages among all those at fault for an injury, including to plaintiffs for their fault in strict liability cases. Therefore, in accordance with the foregoing, the GDLA respectfully requests this Court affirm the opinion of the Court of Appeals and hold subsection (a) of the apportionment statute applies in strict liability cases.

Respectfully submitted this 5th day of March, 2020.

[Signatures appear on following page]

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**CERTIFICATE OF SERVICE**

It is hereby certified that on this 5th day of March 2020, the foregoing  
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