Case No. A23A0005

In The
Court of Appeals of Georgia

DEATON HOLDINGS, INC.

Defendant-Appellant

v.

TIFFANY REID et al.

Plaintiffs-Appellees,

APPEAL FROM THE SUPERIOR COURT OF FLOYD COUNTY
CASE NO. 22CV00218

BRIEF OF AMICUS CURIAE GEORGIA DEFENSE LAWYERS ASSOCIATION

On Behalf Of:

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INTRODUCTION AND SUMMARY

No one likes messy, drawn-out litigation. The Georgia Civil Practice Act admonishes that it "shall be construed to secure the just, speedy, and inexpensive determination of every action." O.C.G.A. § 9-11-1. Mandatory-party joinder under O.C.G.A. § 9-11-19 is emblematic of this notion. The rule was imported from equity practice where the evils of piecemeal litigation and multiplicity of suits were to be avoided at all costs. *See* WRIGHT & MILLER, FEDERAL PRAC. & PROC., § 1601 n.7 (3rd ed.). Those evils are certainly present in this case: Plaintiffs-Appellees are pursuing separate suits against different defendants, alleging inconsistent theories of liability while arguing the alleged tortfeasors are jointly liable. A plaintiff's right of election should not allow this. But that is what Appellees and their Amicus claim.

Fortunately, this case presents the Court with an opportunity to examine freshly its mandatory-party-joinder jurisprudence. This Court previously held that joint tortfeasors were not necessary parties under O.C.G.A. § 9-11-19 because their liability was joint. But those holdings—which were premised on a tort system radically different from today's—no longer make sense.

Even if the Court does not revisit its mandatory-party-joinder jurisprudence, however, it should still clarify that impleader under O.C.G.A. § 9-11-14 allows apportionment. Indeed, this Court previously held as much, though it later questioned its reasoning. At bottom, though, the plaintiff's right to initially define the scope of litigation is not a warrant for reimposing joint and several liability where it has otherwise been abolished.

STATEMENT OF INTEREST

The Georgia Defense Lawyers Association ("GDLA") is an association of more than 1,000 Georgia 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.

ARGUMENT

I. The Court should re-examine its mandatory-party-joinder jurisprudence.

William Prosser observed nearly a century ago that the phrase "joint tortfeasors" is "one of those unhappy phrases of indeterminate meaning, whose repetition has done so much to befog the law." William L. Prosser, *Joint Torts and Several Liability*, 25 Calif. L.Rev. 413, 413 (1935). The problem with the phrase, Prosser noted, was that it

> means radically different things to different courts, and often to the same court; that much of the existing confusion is due to an entire failure to distinguish the different senses in which the term is used; and that the separate problems of joinder of parties in the same action, as a matter of procedure, and the substantive liability of two or more defendants for the same result, require separate consideration, and have very little in common.

Proser, 25 Calif. L. Rev. at 413. The English common-law courts understood this. Multiple tortfeasors could face joint liability only when they acted in "concert." *See Fed. Deposit Ins. Corp. v. Loudermilk*, 305 Ga. 558, 570 (2019). And in such circumstances, the strict rules of joinder were relaxed, permitting (though not requiring) such tortfeasors to be sued jointly. *Loudermilk*, 305 Ga. at 569 n.9; Prosser, 25 Calif. L. Rev. at 414.

On the other hand, those courts never considered concurrent tortfeasors producing an indivisible injury joint tortfeasors. *See Posey v. Med. Ctr.-West, Inc.*, 257 Ga. 55, 57 (1987). But it "was the procedural device which came into our law allowing anyone who claims an interest contrary to plaintiff's interest to be named a defendant which has clouded the matter considerably." *Id.* at 58. Thus, by "careless usage," American courts soon began calling these types of tortfeasors "joint tortfeasors," and in the process they began "to confuse joinder of parties" with the concept of "liability for entire damages." Prosser, 25 Calif. L. Rev. at 420; *id.* at 421 ("There is no essential connection between joinder and entire liability. Joinder is a matter of procedural convenience."). As *Loudermilk* explained, this Court's decision in *Gilson v. Mitchell,* 131 Ga. App. 321 (1974), was emblematic of this confusion. *See* 305 Ga. at 570.

A. An indivisible injury no longer triggers joint liability.

Gilson, however, is no longer good law. *See ALR Oglethorpe, LLC v. Fid. Nat'l Title Ins. Co.*, 361 Ga. App. 776, 786 (2021) (explaining that joint and several liability is limited "to instances when fault is legally or factually indivisible."). This has likely been true for nearly 40 years. *See* 1987 Ga. Laws 915, § 8 (amending O.C.G.A. §§ 51-12-31—33). In *Union Camp Corp. v. Helmy*,

the Supreme Court explained that, following the 1987 statutory changes to O.C.G.A. § 51-12-31 and 51-12-33, joint and several liability "can be disregarded," requiring "several separate judgments rendered." 258 Ga. 263 (1988).

Loudermilk confirmed this. *See* 305 Ga. at 571 ("*Gilson* was, of course, decided 30 years before the current version of the apportionment statute was enacted."). There, the Supreme Court concluded that joint and several liability remains available among tortfeasors *only* for claims based on "the narrow and traditional common-law doctrine of concerted action" and thus where "fault is indivisible." *Loudermilk*, 305 Ga. at 560, 575. *Loudermilk* made clear that an indivisible *injury* caused by tortfeasors does not trigger joint liability and thus rejected *Gilson*'s reasoning. *See id.* at 575; *see also Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 366 (2012) ("While the injury may be singular, the damages flowing from that injury may be apportioned . . . among the tortfeasors for causing it."). And if *Loudermilk* did not end the discussion, then *Quynn v. Husley* did. 310 Ga. 473, 480 n.7 (2020) ("But the language of OCGA § 51-12-33 shifted the paradigm from damages analysis based on injury to damages analysis based on fault, requiring damages to be

apportioned in cases where separate negligent acts by separate persons combined to cause a single injury.").

B. The prohibition on mandatory-party joinder for joint tortfeasors under *Gilson*'s paradigm no longer makes sense.

In cases like *N. Carolina Nat. Bank v. Peoples Bank of LaGrange*, 127 Ga. App. 372 (1972), it therefore made sense for this Court to hold that O.C.G.A. § 9-11-19 provided a defendant with no right to compel the joinder of a joint tortfeasor under *Gilson*'s paradigm. Complete relief among the parties (the touchstone inquiry under O.C.G.A. § 9-11-19) could always be fashioned without mandatory joinder. Under *Gilson*, those tortfeasors' liability was necessarily a joint liability. *See Freeman v. Low X-Ray Corp.*, 130 Ga. App. 856, 857 (1974). Mandatory joinder, moreover, made little sense because juries were prohibited from entering several verdicts—even if the defendants would have urged them to do so. *See Gazaway v. Nicholson*, 190 Ga. 345, 348 (1940) ("The rule that where several defendants are shown to be liable as tortfeasors the jury shall assess damages against all of them jointly in one amount is a common-law origin, and remains of force where it has not been changed by statute.").

There was no risk of inconsistent judgments or competing obligations: the plaintiff's right to proceed severally against the joint tortfeasors was extinguished as soon as the first judgment was satisfied, settled, or released. *Gilmore v. Fulton-DeKalb Hosp. Auth.*, 132 Ga. App. 879, 883 (1974). Furthermore, the defendant's right to proceed on an action for contribution did not ripen until the judgment itself was entered. *Marchman & Sons, Inc. v. Nelson*, 251 Ga. 475, 476 (1983) ("Even though the 1966 amendment did away with the necessity of a joint judgment, there remained the requirement that a judgment, as opposed to a joint judgment, in the underlying suit be entered against the party seeking contribution, before the right of contribution arose.").

All these rules worked in tandem, but Georgia's tort system no longer operates under that delicately balanced scheme. The General Assembly rejected the notion that damages are incapable of apportionment for singular injuries. *See Couch*, 291 Ga. at 366. So the only question is whether fault is divisible. *See Loudermilk*, 305 Ga. at 575; *Quynn v. Husley*, 310 Ga. at 480 n.7.

The General Assembly similarly rejected the notion that a judgment must be entered jointly against several defendants. *See* O.C.G.A. § 51-12-31 ("Judgment in such a case must be entered severally."). And the Supreme

Court has receded from the rule that a release entered in favor of one joint tortfeasor released the claim against all other joint tortfeasors, though still "adher[ing] to the principle that plaintiff is entitled to but one satisfaction." *Posey v. Med. Ctr.-West, Inc.*, 257 Ga. 55, 58 (1987). Finally, "a right of contribution without the necessity of a judgment in the underlying suit" now exists. *See Marchman & Sons, Inc.* 251 Ga. at 477 (referring to 1972 amendment to O.C.G.A. § 51-12-32).

In short, then, prohibiting mandatory-party joinder for concurrent tortfeasors makes little sense today. All the *other* rules that supported the underlying rationale for *that rule* are largely gone. Appellees' Amicus worries that a contrary holding could impact venue, but O.C.G.A. § 9-11-19(a) already provides that the joined party must be dismissed if "the joined party objects to venue." Appellees and their Amicus similarly suggest that adhering to this rule respects the plaintiff's right of election. Like most legal principles, however, there are always exceptions to a general rule, and the mandatory joinder of parties is one of them. WRIGHT & MILLER, FEDERAL PRAC. & PROC. § 1602 (3d ed.) ("Compulsory joinder is an exception to the general practice of giving the plaintiff the right to decide who shall be the parties to a lawsuit."). Finally, they claim that revisiting this rule "would

have limited application," given "the General Assembly's 2022 revision of O.C.G.A. § 51-12-33 that once again modifies apportionment law." Amicus GTLA at 13 n.7. But this assumes the recent amendment will be effective and that it even reaches the circumstances here.[1]

C. The Supreme Court's mandatory-party-joinder jurisprudence in related contexts indicates that joinder should be required.

The Supreme Court's analysis of O.C.G.A. § 9-11-19 in other contexts supports joinder here. For example, in *Stenger v. Grimes*, the Supreme Court held that mandatory joinder is required when there are separate claims "which derive from personal injuries by a *single* individual." 260 Ga. 838, 839 (1991) (emphasis in original). Thus, a plaintiff cannot split "wrongful death and survivors' actions." *Id.* at 838. Nor can spouses split their claims for personal injuries and loss of consortium; the inherent risk of "inconsistent obligations" is too great. *Stapleton v. Palmore*, 250 Ga. 259, 260 (1982). As the Supreme Court has explained, "complete relief" under O.C.G.A. § 9-11-19 "embraces the desirability of avoiding repetitive lawsuits on essentially the

[1] In *Zaldivar v. Prickett*, the Supreme Court explained that 51-12-33(b)'s reference to "those 'who are liable" . . . necessarily must be limited to *named defendants* with liability." 297 Ga. 589, 600 n.7 (2015) (emphasis added).

same facts or subject matter, as well as the desirability of joining those in whose absence there might be a grant of hollow or partial relief to the parties before the court." *Gardner v. Gardner*, 276 Ga. 189, 190 (2003) (quotation omitted).

That reasoning applies here. Even if contribution is still available, for example, there will still be repetitive lawsuits on the same facts with the potential for inconsistent results. Suppose Deaton prevails while NFI loses significantly. Those tortfeasors would likely have to re-litigate their fault, the Appellees' fault, and Byers's fault in a separate contribution action. So why prolong the inevitable?

II. Alternatively, the Court should clarify that Deaton's third-party complaint triggers apportionment.

To the extent the Court rejects Deaton's mandatory-party-joinder arguments, it should nevertheless clarify that apportionment is still proper. Indeed, the Supreme Court has indicated as much. *See Union Camp Corp.* 258 Ga. at 265. If Appellees and their Amicus are correct—and Deaton and the non-parties are still considered joint tortfeasors under *Gilson*—then O.C.G.A. § 9-11-14(a) allows apportionment. In *Union Camp*, the Supreme Court noted that O.C.G.A. § 9-11-14(a), in conjunction with O.C.G.A. § 9-11-

49, authorizes a singular proceeding in which "each joint tortfeasor's respective negligence" is "easily ascertainable." *Union Camp Corp.*, 258 Ga. at 255.[2]

Hatcher does not preclude apportioning fault in such cases. Otherwise, § 9-11-14(a) would be rendered incompatible with the "plain language of O.C.G.A. § 51-12-33(b)" that *Hatcher* interpreted. *See Murray v. Patel*, 304 Ga. App. 253, 255 (2010). As this Court previously held, when a defendant impleads a third party for contribution, the jury must "apportion liability between the defendant and the third-party defendant." *Id.* at 255; *Hyde v. Klar*, 168 Ga. App. 64, 65 (1983) (similarly approving of a "third-party action so that the court and jury could determine *in one action* the merits of the plaintiff's claim in light of the third-party action for contribution" (emphasis added)); *see also Gosser v. The Diplomat Restaurant, Inc.*, 125 Ga. App. 620 (1972) ("Thus, the effect of impleader practice is to accelerate liability.")

To be sure, this Court later questioned *Murray*'s holding. *See Dist. Owners Ass'n, Inc. v. AMEC Env't & Infrastructure, Inc.*, 322 Ga. App. 713, 718

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[2] Even here, no one disputes that the jury *could* apportion fault in a post-*Hatcher* framework had Appellees not split their claims. The only dispute is whether there presently exists a mechanism to do so, given that Appellees did split their claims.

(2013). The Court noted that O.C.G.A. § § 51-12-33 appeared to have "supplanted claims for common-law contribution and apportionment" *Dist. Owners*, 322 Ga. App. at 718. But that was before *Hatcher* suggested otherwise in dictum. *See Hatcher*, 312 Ga. at 356 n.2. So if O.C.G.A. § 9-11-19 does not apply, then the Court should clarify that *Murray* remains good law.

CONCLUSION

For the reasons above, the trial court's order should be REVERSED.

Respectfully Submitted this 7th day of December 2022.

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

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CERTIFICATE OF SERVICE

I certify that I served a copy of this Brief of Amicus Curiae Georgia Defense Lawyers Association upon the below contemporaneously with filing via U.S. mail.

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