Mercer Law Review

Volume 74
Number 2 *Articles Edition*

Article 11

3-2023

I am not my Brother's Keeper: A Brief History of Georgia's Apportionment Statute and the Future of Tort Reform

Jordan S. Lipp

I am not my Brother's Keeper: A Brief History of Georgia's Apportionment Statute and the Future of Tort Reform

Jordan S. Lipp*

I. INTRODUCTION

Imagine approaching a stop sign in Hamilton, Georgia and illegally rolling through it. After you make your rolling stop and pull out into the road, a driver T-bones your car, and your gas tank erupts into flames. Can you recover anything for your injuries, and if so, from whom?

The answer could turn on the jurisdiction in which you live and, in Georgia, the number of people you name as parties to the lawsuit. Can you sue the car manufacturer, even though the driver probably sparked the fire? Can you recover damages, even though you could have avoided the accident by stopping at the stop sign? If you can recover, do you recover less because you are partially to blame?

As to the first question, you can sue whomever you please. However, states split on the second and third questions: your rolling stop might bar any recovery, and the number of people you sue might diminish or enhance the chances of your recovery.

Until 2022, Georgia did not allow a lone defendant to reduce damages by pointing to people who might be responsible but were not parties to the lawsuit. For example, assume a jury finds the driver 20% at fault, the manufacturer 40% at fault, and you 40% at fault. If the driver were the only named defendant to the lawsuit, the driver would be responsible for 60% of the damages—all the fault not attributable to

*Thank you to my wife, Sam T. Lipp, wonderful parents, and family who have supported and encouraged me throughout law school. Thank you, Lord, for your Providence over my life. Professor Longan, I am forever grateful for your mentorship and edits. I could not have finished this Comment—much less the first two years of law school—without you all in my life.

you. Before 2022, then, Georgia tort law—with proper strategy on the plaintiff's part—was extremely pro-plaintiff.

This Comment will examine the history of multi-party fault and apportionment under Georgia law. To begin, Part II traces the history of Georgia's joint and several liability, which determines who must satisfy the judgment and in what percentage. Then, Parts III and IV examine tort reform and Georgia's apportionment statute to explain how an at-fault plaintiff can recover. Part V compares Georgia's 2005 apportionment law to similar statutes from other states. Part VI considers future tort reform legislation in Georgia.

II. SHIFT AWAY FROM COMMON LAW CONTRIBUTORY NEGLIGENCE

When both the person suing and the person being sued are at fault, the law must decide whether, and to what degree, the at-fault plaintiff can recover damages. Historically, an at-fault plaintiff recovered nothing. Now, most states allow at least some recovery when the plaintiff is responsible for their own injuries.

A. Initial Terminology

To aid the discussion below, some preliminary definitions are helpful. The terminology comes in three steps: negligence, apportionment, then liability.

Contributory negligence means that if a plaintiff's own conduct did not meet the standard of care—how a reasonably prudent person in the same or similar circumstances would have behaved—the law bars the plaintiff from recovering.[1] This doctrine dictates that if the plaintiff is even 1% at fault, they cannot recover anything.[2] Put another way, the plaintiff must be 100% blameless. From the T-bone hypothetical, you could not recover anything because you made a rolling stop into the intersection.

In contrast, pure comparative negligence means that a plaintiff recovers the percentage of their damages that were caused by the defendant.[3] That is, a plaintiff who is 99% at fault can recover 1% of their damages.[4] In your situation, you can recover at least some money so long as the driver or manufacturer is partially to blame.

---

1. "A plaintiff's own negligence that played a part in causing the plaintiff's injury and that is significant enough (in a few jurisdictions) to bar the plaintiff from recovering damages." *Contributory Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

2. *Id.*

3. *Pure-Comparative-Negligence Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

4. Placek v. City of Sterling Heights, 275 N.W.2d 511, 520 (Mich. 1979) (explaining pure comparative negligence upon its adoption in Michigan).

Striking a balance in the middle, modified comparative negligence means that a plaintiff recovers damages unless the plaintiff was responsible for less than (A) 51% of the blame or (B) 50% of the blame, depending on the jurisdiction.[5] After your wreck, you can recover unless you are more to blame than the defendants.

Second, apportionment means dividing liability for an injury among tortfeasors and the plaintiff.[6] In short, the factfinder fills in a number next to each tortfeasor's and the plaintiff's name on the verdict form that corresponds to that person's proportional blame. The numbers should add up to 100%.

Last, the liability regime dictates from whom a plaintiff can recover when multiple tortfeasors are apportioned blame. Joint and several liability, which Georgia common law followed, means each defendant is liable for the full amount of damages (but can seek contribution from the other defendants).[7] Several liability means that each defendant is only liable for damages up to its proportional amount of fault—the fault apportioned to that defendant.[8] The plaintiff must recover each defendant's individual share of harm from each individual defendant.[9]

B. Contributory Negligence as Common Law Rule

At common law, contributory negligence was the rule. From 1809, *Butterfield v. Forrester*[10] is the seminal English case on contributory negligence. Forrester was repairing his house and placed a pole in the road. Later that day near dusk, Butterfield rode his horse down the road at breakneck speed and, not seeing the pole, crashed into it. Had Butterfield been careful, he would have seen the pole and avoided it.[11] The King's Bench affirmed a directed verdict and held that Forrester—as a matter of law—could not recover because he was to blame for his

5. *Comparative-Negligence Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019). Some states allow recovery if the plaintiff is 50% liable; others only allow the plaintiff to be 49% liable and still recover. *50-Percent Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019).

6. *Apportionment of Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

7. Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 162, 256 S.E.2d 916, 923 (1979); Dan B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, DOBBS' LAW OF TORTS § 488 (2d ed.) ("The plaintiff can obtain a judgment against all defendants and then enforce it against any one of them, or partly against one and partly against another."); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 (2000).

8. *See Several Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

9. Thomas A. Eaton, *Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. § 51-12-33*, 64 MERCER L. REV. 15, 16 (2012) (observing that several liability "increase[es] the transaction costs of securing recovery").

10. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

11. *Id.*

injuries: "One person being in fault will not dispense with another's using ordinary care for himself."[12]

In American law, *Smith v. Smith*[13] is the leading contributory negligence case. Fourteen years after *Butterfield*, the defendant piled wood on the road at the bottom of a hill and left a stick protruding out of the pile. The plaintiff incorrectly hitched an overloaded wagon to his horse and traveled the road. When the wagon and horse struck the woodpile, the horse was injured.[14] The Massachusetts Supreme Judicial Court initially noted that its sense of justice pointed toward holding the defendant liable: "[H]e who does an unlawful act, such as incumbering the highway, should be answerable for any direct damages which happen to any one who is thereby injured."[15] However, the court followed *Butterfield* and held that someone who helps cause their own injury is barred from recovering in tort.[16] The court held that the plaintiff could not recover because "he might have avoided the obstruction, if he had managed his horse with ordinary skill and care."[17]

Other American courts followed suit. For example, Vermont adopted contributory negligence in *Washburn v. Tracy*.[18] As the plaintiff rode his horse along the road past the defendant on his wagon, the defendant "so carelessly and negligently managed his said wagon and horse . . . that the shaft of the said defendant's wagon was then and there thrust into the side of the plaintiff's said mare."[19] The Vermont Supreme Court reversed a jury verdict for the plaintiff because the trial judge did not instruct the jury that the plaintiff could not recover if he was at fault.[20] Reflecting broad agreement in American law at that time, the court held that "where the injury arises from the plaintiff's own misconduct, or want of ordinary caution, notwithstanding the defendant's neglect, . . . the plaintiff cannot recover."[21] Indeed, during the nineteenth century, states were so uniform in adopting contributory negligence that in 1854 the

12. *Id.*

13. 19 Mass. 621 (1824).

14. *Id.* at 622–23.

15. *Id.* at 623.

16. *Id.* at 625.

17. *Id.*

18. 2 D. Chip. 128 (Vt. 1824).

19. *Id.* at 128–29.

20. *Id.* at 136 ("It was further the duty of the Court . . . to have instructed [the jury] at least, that if, but for the want of ordinary care and diligence in [the plaintiff], the injury would not have happened, it would be [the jury's] duty to find for the defendant.").

21. *Id.*

Supreme Court of Pennsylvania predicted that contributory negligence "is not likely to be changed in all time to come."[22]

Georgia also initially followed a contributory negligence regime. In 1855's *Branan v. May*,[23] May's mules drowned in a river that he was forced to cross after Branan obstructed the roadway. After checking a nearby bridge that also seemed unsafe, May crossed what he thought was only ankle-deep water. But the mules' heads got stuck below the surface, drowning them. May sued Branon for the mules' value.[24]

The Supreme Court of Georgia allowed May to recover only because he had exercised ordinary care.[25] That is, May had zero fault. The court made a policy choice to be lenient to defendants: "[N]otwithstanding the defendant be in fault, it does not dispense with another's using ordinary care and caution for himself."[26] *Branan*'s underlying policy choice encourages people to take care of themselves.[27] The court reasoned that the law is more efficient if people look after their own safety than try to predict how their conduct might harm others.[28]

So, at least through the mid-1800s, most jurisdictions agreed that a plaintiff who was partially to blame for his own injuries recovered nothing.

C. Three-Way Split of Authority Among States Today

Today, states follow three approaches when a plaintiff is to blame for his injuries: contributory negligence, comparative negligence, and modified comparative negligence.

Only a few states still follow the contributory negligence common law rule. Maryland, Alabama, North Carolina, Virginia, and Washington D.C. preserve the contributory negligence doctrine.[29] All other states either follow comparative or modified comparative negligence.

---

22. Pa. R. Co. v. Aspell, 23 Pa. 147, 149–50 (1854).

23. 17 Ga. 136 (1855).

24. *Id.* at 137–38.

25. *Id.* at 138.

26. *See id.*

27. *See id.*

28. *See id.*

29. Coleman v. Soccer Ass'n of Columbia, 69 A.3d 1149, 1158 (Md. 2013); Golden v. McCurry, 392 So. 2d 815, 817 (Ala. 1980); Davis v. Hulsing Enters., LLC, 810 S.E.2d 203, 207 (N.C. 2018); Rascher v. Friend, 689 S.E.2d 661, 664 (Va. 2010); Asal v. Mina, 247 A.3d 260, 271 (D.C. 2021); Donald G. Gifford, *The Death of the Common Law: Judicial Abdication and Contributory Negligence in Maryland*, 73 MD. L. REV. ENDNOTES 1, 3 (2014).

D. Georgia's Shift to Modified Comparative Negligence

Today, Georgia follows the modified comparative negligence rule by statute.[30] More specifically, Georgia applies the 50% rule.[31]

Just one year after the *Branan* decision, *Macon & Western Railroad Co. v. Winn*[32] began to lay the groundwork for comparative negligence in Georgia. The deceptively simple opinion seemed to follow *Branan* but said in dicta that "[h]e who is *most* negligent, can never ask a Court for compensation; he who is *least so*, may or may not, according to the facts and circumstances of the case."[33] Indeed, modern cases recognize *Winn* as a turning point in Georgia's contributory negligence system.[34]

Three years after *Winn*, in a short, four-page opinion, *Flanders v. Meath*[35] recast the *Winn* decision as the wholesale adoption of comparative negligence in Georgia.[36] There, a young girl ran out in front of the defendant's horse-drawn cart. With the mules running at full speed, the defendant could do nothing to avoid running over the girl. The girl's parents were negligent, reasoned the Supreme Court of Georgia, because they knew their daughter took dangerous risks and acted strangely in the past.[37] Nonetheless, the jury awarded the girl's parents partial damages.[38] The court approved the dicta in *Winn* and held that "where both parties are in fault, but the defendant most so; the fault of

30. O.C.G.A. § 51-12-33 (2022); *see also* O.C.G.A. § 51-11-7 (2022). Although some contemporary Georgia cases use the term "contributory negligence" to discuss a reduction of a plaintiff's recovery by the amount of fault attributable to the plaintiff, that label is a misnomer. Johns v. Suzuki Motor of Am., Inc., 310 Ga. 159, 163 n.5, 850 S.E.2d 59, 63 (2020). Likewise, commentators assert that Georgia cases mischaracterized the law they apply: "Although referred to as 'contributory negligence' instead Georgia has long applied modified comparative fault, under which a plaintiff could recover unless the plaintiff was as, or more, at fault in causing its injury." DAVID HRICIK & CHARLES R. ADAMS III, GA. LAW OF TORTS § 18:17 (2021 ed.). Put another way, Georgia follows contributory negligence in that a plaintiff's own negligence only bars recovery to the extent of the plaintiff's negligence.

31. *See* O.C.G.A. § 51-12-33(g) (2022) (barring recovery "if the plaintiff is 50 percent or more responsible"); *see also* Bridges Farms, Inc. v. Blue, 267 Ga. 505, 505, 480 S.E.2d 598, 599 (1997).

32. 19 Ga. 440 (1856).

33. *Id.* at 446 (emphases added).

34. *See* Yellow Cab Co. v. Adams, 71 Ga. App. 404, 412–13, 31 S.E.2d 195, 200 (1944) (noting that *Winn* adopted comparative negligence before the legislature did so by statute).

35. 27 Ga. 358 (1859).

36. *Id.* at 362. Notably, the same justice wrote both the *Winn* and—three years later—*Flanders* opinions. One might well infer a strategic plan to overrule contributory negligence on the part of that jurist.

37. *Id.* at 359–61.

38. *Id.* at 362.

the plaintiff may go in mitigation of damages."[39] Modified comparative negligence was the law in Georgia by 1859.[40] As inconspicuous as the two-step from *Winn* to *Flanders* might have been at the time, modern commentators reflect back on 1859 as a "breakthrough" in the development of Georgia tort law.[41]

At bottom, Georgia law is relatively straightforward. A negligent plaintiff can still recover unless she is more negligent[42] than all the defendants combined.[43] Thus, the first hurdle for you in suing the driver and manufacturer is the contributory versus comparative negligence doctrines. In Georgia, you can leap this hurdle and move on to step two, apportionment.

III. GEORGIA'S APPORTIONMENT STATUTE BEFORE 2022

Apportionment is step two in the analysis because, after concluding that the plaintiff is partially responsible but can still recover, the factfinder must determine each person's degree of responsibility. Damages are reduced proportionately. For example, in Georgia, if the plaintiff is 60% at fault, he recovers nothing. If the plaintiff is 10% at fault, Defendant A is 45% at fault, and Defendant B is 45% at fault, the court will take the total damages and multiply them by 90%.[44]

---

39. *Id.* (acknowledging that the "principle referred to in [*Winn*] . . . did not . . . appl[y] to the facts of that case").

40. The legislature codified *Flanders*'s comparative negligence regime in 1861. *See Yellow Cab Co.*, 71 Ga. App. at 413, 31 S.E.2d at 200 (tracing development of comparative negligence law in Georgia).

41. Joseph A. Ranney, *The Burdens of All: Progressive Origins of Accident Cost Socialization in Tort Law, 1870–1920*, 105 MARQ. L. REV. 397, 406 (2021).

42. Georgia follows the aggregate approach to comparative negligence. *Compare* Union Camp Corp. v. Helmy, 258 Ga. 263, 268, 367 S.E.2d 796, 800 (1988) ("[A] plaintiff's negligence is to be compared to the aggregate negligence of all joint tort-feasors."), *with* Van Horn v. William Blanchard Co., 438 A.2d 552, 554 (N.J. 1981) ("[A] plaintiff's negligence should be compared to the negligence of only one person at a time."). The aggregate approach means that "a plaintiff whose comparative fault exceeds that of one defendant but does not exceed that of another defendant is entitled to judgment against both defendants." Eric J. Hertz & Mark D. Link, GA. LAW OF DAMAGES WITH FORMS § 11:5 (2022–2023 ed.).

43. *Bridges Farms, Inc.*, 267 Ga. at 505, 480 S.E.2d at 598–99 (1997) ("Georgia does not adhere to the common-law principle of contributory negligence whereby any negligence whatsoever on the part of the plaintiff bars his recovery, but follows instead the comparative-negligence doctrine, which merely limits the amount of recovery."); McDowall Transp. v. Gault, 80 Ga. App. 445, 447, 56 S.E.2d 161, 163 (1949) ("[W]here the negligence of the plaintiff and the defendant are equal, or the negligence of the plaintiff is more than that of the defendant, the plaintiff [cannot] recover.").

44. "[I]f the plaintiff's negligence was less than the defendant's, the [plaintiff's] damages shall be diminished . . . in proportion to the degree of fault attributable to him.

Why care? If a plaintiff can recover under comparative negligence, does it really matter how fault is apportioned among the tortfeasors? In Georgia, it could matter a great deal—the defendant with the most assets could end up paying the entire judgment.

A. Tort Reform Movement Sweeps the United States

Beginning in the early 1900s, plaintiffs increasingly garnered larger and larger judgments.[45] To make sure they could collect those judgments, plaintiffs sued businesses, which generally had assets available upon which to levy.

As a result, the cost of liability insurance rose. In fact, medical providers had trouble getting insurance altogether. Leading up to the 1980s, insurers lost money each year because of low premiums and high judgments. In response, insurers raised premiums—or altogether denied risky insureds' insurance applications—in order to turn profits. Businesses, in turn, began charging higher prices.

But what led to this insurance crisis? In the early to mid-1900s, plaintiffs and academics criticized the tort system for failing to compensate injured citizens.[46] As a result, the law began to change to make it easier for plaintiffs to obtain judgments.[47] Tort law swelled during the 1900s to create new liabilities: expanding strict liability to more contexts, adopting comparative negligence, and eliminating immunities.[48]

On the other hand, some argue that the insurance crisis was simply a rebalancing toward market equilibrium. The expansion of liability was a natural and predictable response to cheap, widespread liability insurance.[49] Assuming firms act rationally on the margin, firms that can

---

Thus, a tort plaintiff cannot recover if his negligence is greater than or equal to the negligence of the defendant." *Union Camp Corp.*, 258 Ga. at 267, 367 S.E.2d at 800.

45. For example, in August 2022, Gwinnett County citizens returned a record-setting $1.7 billion verdict against Ford Motor Company. Juby Babu, *Georgia jury awards $1.7 billion in Ford truck crash case, AP reports*, REUTERS (Aug. 21, 2022), https://www.reuters.com/legal/georgia-jury-awards-17-billion-ford-truck-crash-case-ap-2022-08-21 [https://perma.cc/XTT7-BGN3].

46. Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1766–67 (1996).

47. *See, e.g.*, Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 701 (1993) (discussing the expansion of pro-consumer products-liability law).

48. Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 629–31 (1988).

49. *Id.* at 629.

externalize the downside risk of their negative actions will do more of those negative actions. Thus, with cheap insurance premiums, the marginal benefit of committing torts exceeds the marginal cost of complying.[50] Put another way, future insurance premiums discounted to present dollars, minus the extra savings from tortious behavior, is less than the cost of acting non-tortiously.[51]

If non-compliance is profitable, one might expect a reform from private actors and from the government. Privately, for equilibrium in the insurance market, the price of premiums must rise and reduce the incentive to act tortiously.[52] Publicly, to increase the cost of torts, courts must expand the scope and degree of liability firms face. In the end, both outcomes work toward reducing the likelihood of rational tortious behavior.

All the dissatisfaction with massive tort liabilities and high insurance premiums came to a climax in 1986. In that year alone, more than three-fifths of states passed tort reform bills.[53] Two of the most common forms of legislation in 1986 involved revising joint and several liability and capping non-economic damages.[54] Moreover, the other two-fifths of states created committees to study tort reform, introduced tort reform bills but failed to pass them, or did not have a legislative session at all.[55]

B. Georgia's Apportionment Originates in 1987

Georgia's apportionment statute, section 51-12-33 of the Official Code of Georgia Annotated,[56] was originally enacted in 1987 as part of a series of tort reforms.[57] Indeed, tort reform characterized the entire 1987 legislative session.[58] But the beginning of § 51-12-33 starts much earlier.

---

50. *See* Hilary M. Schwartzberg, Note, *Tort Law in Action and Dog Bite Liability: How the American Legal System Blocks Plaintiffs from Compensation*, 40 CONN. L. REV. 845, 875 (2008).

51. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 136–37 (8th ed. 2011); Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 239 (1996); Gideon Parchomovsky & Peter Siegelman, *Third-Party Moral Hazard and the Problem of Insurance Externalities*, 51 J. LEGAL STUD. 93, 94 (2022).

52. *See* Posner, *supra* note 51, at 137.

53. Manzer, *supra* note 48, at 628.

54. *Id.* at 633.

55. *Id.* at 628 n.1.

56. O.C.G.A. § 51-12-33 (2022).

57. Ga. H. Bill 1, Reg. Sess., 1987 Ga. Laws 915, § 8 (codified at O.C.G.A. § 51-12-33 (1987)).

58. *See* D. Gresham, *TORTS Tort Reform*, 3 GA. ST. U.L. REV. 519, 519 (1987).

In 1975, the reform wave cascaded into Georgia. Governor George Busbee appointed a council to study liability in the medical industry.[59] In 1983, Governor Joe Frank Harris renewed Governor Busbee's efforts and created the Governor's Medical Malpractice Advisory Council in response to the "significantly increased . . . cost of medical care."[60] The Medical Malpractice Advisory Council reported that malpractice claims had doubled since 1977 in the state and, furthermore, that individual claims had increased in value.[61] These changes, in turn, raised the cost of insurance premiums.[62]

By 1985's end, concerns about tort liability broadened from just medical care providers to small businesses and local governments.[63] Thus, in 1986, lobbyists came in droves for "old-fashioned arm-twisting at the Capitol."[64] Trial lawyers, insurance companies, consumer groups, businesses, and the medical industry swarmed on Atlanta.[65] The House and Senate each passed a tort reform bill; however, the bill died in conference committee.[66] In the end, the Georgia General Assembly could not agree on the tort reform measures to take.[67]

To expedite a compromise the following year, Governor Joe Frank Harris created the Governor's Advisory Committee on Tort Reform, composed of representatives from law, medicine, business, insurance, and the General Assembly.[68] Governor Harris tasked the committee with studying the "liability insurance crisis" and recommending policy proposals for the legislature.[69] By an eight-to-one vote, the committee recommended a sweeping change: abolish joint and several liability.[70] Doug Smith, president of the Georgia Trial Lawyers Association, stood deserted as the only "no" vote on the committee.[71] Similarly, in 1986, Lieutenant Governor Zell Miller promised to introduce a tort reform bill during the 1987 session that would abolish joint and several liability.[72]

---

59. *TORTS Tort Reform and Insurance Regulation*, 2 GA. ST. U. L. REV. 240, 240 (1986).
60. *Id.*
61. *Id.* at 241.
62. *Id.*
63. *Id.* at 244.
64. *Id.* at 245 n.31.
65. *Id.* at 245.
66. *Id.*
67. *See id.*
68. Gresham, *supra* note 58, at 519.
69. *Id.*
70. *Id.*
71. *Id.* at 520.
72. *TORTS Tort Reform and Insurance Regulation*, *supra* note 59, at 250.

Thus, the 1987 introduction of a tort reform bill was bound to happen. The only question was how far the House and Senate would go. Plaintiffs' lawyers vociferously lobbied against the legislation but lost the political battle.[73]

In its final compromise, the General Assembly aimed "[t]o provide substantive and comprehensive civil justice reforms affecting tort claims litigation."[74] The 1987 apportionment statute provided:

> (a) Where an action is brought against more than one person for injury to person or property and the plaintiff is himself to some degree responsible for the injury or damages claimed, the 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 and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if apportioned by the trier of fact as provided in this Code section, shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.[75]

What are the major modifications to the common law? First, the factfinder could—but had no obligation—to apportion fault. Thus, a jury might well choose to not assign proportional fault and just fill in the verdict form by saying nothing more than which defendants are liable.

Second, the factfinder did not even have the discretion to apportion fault unless the plaintiff named more than one defendant in the lawsuit.[76]

Third, the General Assembly opted for several liability: but merely at the jury's discretion and only when the plaintiff is also at fault. The statute thus abrogated Georgia common law, which applied joint and several liability.

The Georgia House and Senate initially disagreed on the several liability issue.[77] The Senate adopted the committee's proposal and passed S.B. 1 by a vote of 52 to 2, which would have abolished joint and several liability.[78] By contrast, the House's version of the tort reform bill, passed 160 to 12, would have left joint and several liability intact.[79] Lieutenant

---

73. J. Farrell, *INSURANCE Insurance Reform*, 3 GA. ST. U. L. REV. 448, 448 (1987).

74. Ga. H. Bill 1, § 8.

75. O.C.G.A. § 51-12-33 (1987).

76. The "against more than one person" language would raise serious problems for litigants in 2021, which is discussed below.

77. Gresham, *supra* note 58, at 522.

78. *Id.*

79. *Id.*

Governor Miller and House Speaker Murphy quickly recognized the significant disagreement and appointed an informal conference committee to find a compromise.[80] One potential compromise was to retain joint and several liability for defendants that were at least 25% at fault but instituting several liability for defendants with 25% or less fault.[81] The committee rejected that proposal.[82]

Eventually, the House's plaintiff-friendly position mostly prevailed in both the informal conference committee and legislature.[83] The General Assembly adopted a bifurcated regime: where the plaintiff was 0% at fault, joint and several liability remained; where the plaintiff was partially at fault, the trier of fact had discretion to institute joint and several liability, or use several liability by apportioning damages for each defendant.[84]

Thus, with this change, the legislature made the policy choice of placing the risk on the plaintiff that a defendant would be insolvent and thus unable to pay that portion of the plaintiff's damages.[85] For example, assume the total damages for a negligence claim are $10,000, that Defendant A is 60% liable, and that Defendant B is 40% liable. In a joint and several liability jurisdiction, either defendant could have to pay the entire $10,000. In a several liability jurisdiction (like Georgia), the plaintiff can only recover Defendant A's percentage of fault from Defendant A and Defendant B's percentage of fault from Defendant B. If Defendant A is insolvent or otherwise has no non-exempt assets from which to recover, the plaintiff is limited to a $4,000 recovery.[86]

What are the implications for apportionment? If the common law still applied, the apportionment of fault would not matter: the plaintiff could recover 100% of its damages from any defendant it chose. If the jury chose to use several liability, however, the apportionment effectively capped the amount of each defendant's liability and reduced the likelihood of recovery.[87] Several liability in apportionment of fault is a "tort reform"

---

80. *Id.* at 523.

81. *Id.*

82. *Id.*

83. *Id.* at 523–24.

84. *See* § 51-12-33 (1987) (applying a rule for "this Code section" and stating what the factfinder "may" do).

85. Eaton, *supra* note 9, at 31 (discussing the "risk of the uncollectible share" that plaintiffs face under § 51-12-33).

86. *See* Michael K. Newman, Note, *The Elephant Not in the Room: Apportionment to Nonparties in Georgia*, 50 GA. L. REV. 669, 672–73 (2016).

87. *See* Hricik & Adams, *supra* note 30, at § 18:16 ("Georgia's legislature radically altered Georgia's common law approach to comparative fault and joint and several liability.").

because the new statutory regime decreased the incentive to file lawsuits: why sue if you will not be able to collect on your judgment?

C. 2005 Amendments

Once again, to understand the 2005 amendments, one must first look backward. In 2004, the legislature failed to pass H.B. 1028 which would have, among other things, eliminated joint and several liability altogether.[88] Both chambers agreed on swapping to several liability but reached an impasse in the conference committee over maximum caps on non-economic damages.[89]

In 2005, the Georgia General Assembly passed the Tort Reform Act of 2005[90] (Act). The legislature's findings focused on "a crisis affecting the provision and quality of health care services" due to "health care providers . . . having increasing difficulty in locating liability insurance."[91]

Proponents such as the Medical Association of Georgia argued that without more tort reform, doctors would simply not practice in the state, creating a healthcare desert.[92] More generally, the Georgia Chamber of Commerce argued that reducing plaintiff recoveries would build a "better business climate."[93]

Opponents urged the General Assembly that any further action would unnecessarily close the courthouse doors to colorable claims and leave plaintiffs without adequate compensation for their injuries.[94] Indeed, firms focused solely on economics might choose to risk acting tortiously if that would be cheaper (by discounting the present value of a judgment) than following the law (the present value of strict compliance). Likewise, opponents pointed to other states that had passed even more tort reform without a resultant reduction in insurance premiums: why put in the

88. *TORTS AND CIVIL PRACTICE Civil Practice and Procedure Generally*, 22 GA. ST. U. L. REV. 221, 223 (2005).

89. *Id.*

90. Ga. S. Bill 3, Spec. Sess., 2005 Ga. Laws 1, § 12 (codified at O.C.G.A. § 51-12-33 (2005)).

91. *Id.* Consistent with the healthcare reform theme, Governor Sonny Perdue signed the bill into law while sitting in a hospital. Office of Communications, *Governor Perdue Signs Civil Justice Reforms*, GEORGIA (Feb. 16, 2005), https://sonnyperdue.georgia.gov/00/press/detail/0%2C2668%2C78006749_79688147_93010391%2C00.html [https://perma.cc/8LML-CV73].

92. *TORTS AND CIVIL PRACTICE Civil Practice and Procedure Generally*, *supra* note 88, at 224.

93. *Id.*

94. *Id.*

inputs if the favorable outputs do not come, but the evils do?[95] On balance, tort reform hurts but does not help, opponents argued.

Ostensibly, the legislature merely aimed to reduce tort liability for hospitals and thus increase the likelihood of hospitals obtaining insurance coverage. However, the seemingly narrow focus of the statute had much broader implications for Georgians beyond "the provision of health care liability insurance by insurance providers."[96] Indeed, the legislature itself recognized its changes would be far-reaching: its legislative findings acknowledge that "certain needed reforms affect . . . other civil actions and accordingly provides such *general reforms* in this Act."[97]

Among other amendments,[98] the Act added a new section to O.C.G.A. Title 51.[99] The updated apportionment statute provided:

> (a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.
>
> (b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.
>
> (c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or

95. *Id.*

96. Ga. S. Bill 3 § 1.

97. *Id.* (emphasis added).

98. The Act also amended O.C.G.A. § 51-12-31, which deals with several liability. Emily R. Boness, Note, *The Effect (or Noneffect) of the 2005 Amendments to O.C.G.A. Sections 51-12-31 and 51-12-33 on Joint Liability in Georgia*, 44 GA. L. REV. 215, 229 (2009).

99. Title 51 of the O.C.G.A. outlines Georgia statutory law concerning torts. *See* O.C.G.A. tit. 51 (2022).

> damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.[100]

Three changes affected the fault allocation and apportionment analysis. First, the General Assembly fractured what was previously subsection (a) into subsections (a) and (b). Thus, presumably, the two subsections carried different applications, or at least had different meanings when applied in tandem.[101]

Second, the new version allowed apportionment of fault even as to non-parties, whereas the earlier version only divided fault among parties.[102] After 2005, to include non-parties in the apportionment breakdown, the defendant needed to file a notice pleading at least 120 days before trial, unless the non-party was someone with whom the plaintiff had settled.[103]

Third, subsection (b) completely adopted the several liability regime that the 1987 Senate desired.[104] That is, whereas previously the factfinder "may" apportion damages, as of 2005, the factfinder "shall" do so—no discretion.[105] The legislature again chose a pro-defendant rule that tends to make a plaintiff's recovery more difficult.

---

100. Ga. S. Bill 3 § 12.

101. The rule against surplusage is a canon of statutory interpretation that directs courts to assign meaning to each word in a statute, based on the assumption that the legislature intended every word it wrote and that no words were inserted accidentally. 2A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2021). More specifically concerning the apportionment statute subsections:

> Where a legislature includes particular language in one section of a statute but omits it from another section of the same or a related act, it generally acts intentionally and purposely in the disparate inclusion or exclusion. The omission of the same term or phrase from a similar section is significant to show different legislative intent for the two sections.

Singer & Singer, *supra*.

102. Brief of the Georgia Chamber of Commerce and Georgians for Lawsuit Reform as Amici Curiae in Support of Appellant Alston & Bird LLP, Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC, 312 Ga. 350, 862 S.E.2d 295 (2021) (No. S20G1419). Cases applying the 1987 statute refused to allow the jury to apportion fault as to non-parties. Fraker v. C.W. Matthews Contracting Co., 272 Ga. App. 807, 810, 614 S.E.2d 94, 97 (2005); Schriever v. Maddox, 259 Ga. App. 558, 561–62, 578 S.E.2d 210, 213–14 (2003). *Fraker* is a 2005 case applying the 1987 text because the 2005 amendments only applied to claims that accrued after the statute's effective date. *See* Ga. S. Bill 3 § 15.

103. O.C.G.A. § 51-12-33(d)(2) (2005); Atlanta Women's Specialists, LLC v. Trabue, 310 Ga. 331, 340, 850 S.E.2d 748, 756 (2020) (explaining instances in which non-parties are apportioned fault).

104. *See* O.C.G.A. § 51-12-33(b) (2005).

105. *Id.*

In short, although the Tort Reform Act of 2005 may have been couched in terms of addressing healthcare services, the Act had much broader implications.[106]

1. Judicial Interpretations

After the 2005 revisions, Georgia's courts went to work interpreting the new version. In *Zaldivar v. Prickett*,[107] the Supreme Court of Georgia interpreted § 51-12-33 to require apportionment of fault even among tortfeasors who have affirmative defenses to liability. Imelda Zaldivar turned left through an intersection, colliding with Daniel Pricket. Zaldivar blamed Prickett for disobeying a traffic light, who in turn blamed Zaldivar for not yielding. At the time of the wreck, Prickett was driving an Overhead Door Company vehicle, assumedly within the scope of employment.[108] Zaldivar asserted the affirmative defense of non-party fault: namely, that Zaldivar could not be liable for injuries that Overhead Door caused by negligently entrusting Prickett with the vehicle or that Prickett caused himself by driving without reasonable care.[109]

The parties disputed on appeal whether considering the "fault of all persons or entities who contributed to the alleged injury or damages" includes persons or entities who cannot be held liable because of an affirmative defense or immunity.[110] The court answered "yes," that anyone who breaches a legal duty and proximately causes the plaintiff injury is someone whose "fault" must be considered.[111] "Fault" means doing something wrong, which is separate from the question whether someone can be forced to pay money damages for a wrong the person committed.[112]

However, in a footnote, the court pretermitted the issue of whether damages should be reduced in a single-defendant case.[113] Punting the

106. Indeed, courts have explained that one of the principal purposes of the Act was to eliminate joint and several liability in Georgia and replace it with several liability, a pro-business rule. *See* Renaissance Recovery Sols., LLC v. Monroe Guar. Ins. Co., No. CV 1:14-102, 2017 U.S. Dist. LEXIS 147521, at *11 (S.D. Ga. Sept. 12, 2017); McReynolds v. Krebs, 290 Ga. 850, 852, 725 S.E.2d 584, 587 (2012). That is, the statute would cut down on "deep-pocket" litigation in which a single tortfeasor with many assets—such as a business—is held liable to pay damages for all of the tortfeasors' acts or omissions.

107. 297 Ga. 589, 774 S.E.2d 688 (2015).

108. *Id.* at 589–90, 774 S.E.2d at 690.

109. *See* Zaldivar v. Prickett, 328 Ga. App. 359, 360, 762 S.E.2d 166, 167 (2014), *rev'd*, 297 Ga. 589, 774 S.E.2d 688 (2015) (explaining the non-party fault affirmative defense).

110. *Zaldivar*, 297 Ga. at 591, 774 S.E.2d at 691.

111. *Id.* at 600, 774 S.E.2d at 697.

112. *Id.* at 598, 774 S.E.2d at 695.

113. *Id.* at 593 n.3, 774 S.E.2d at 692.

apportionment question, the court reduced the plaintiff's damages because the parties had not raised that issue on appeal.[114] On remand, then, the named defendant could prove other tortfeasors' proportional blame and reduce its share of the damages compensation.[115]

Sixteen years later, *Alston & Bird, LLP v. Hatcher Management Holdings, LLC*[116] addressed the distinction between § 51-12-33(a) and (b). In the case, Mary Hatcher hired Alston & Bird to form Hatcher Management, a holding company for Hatcher family assets. The manager of the trust later embezzled money from the Hatchers. Hatcher Management obtained a judgment against the manager, but he was insolvent. Attempting to find a defendant from which it could collect, Hatcher Management sued Alston & Bird for legal malpractice and breach of fiduciary duty.[117]

Writing for a unanimous panel of six justices on the Supreme Court of Georgia,[118] Justice Peterson held that a defendant is not entitled to a reduction of damages via apportionment to non-parties when only one defendant is named in the case.[119] Instead, harkening back to footnote three in *Prickett*, damages can only be reduced according to the plaintiff's fault in a single-defendant case.[120] Although the factfinder must allocate fault among the plaintiff, named defendant, and unnamed tortfeasors, the court will only reduce the plaintiff's recovery by the proportion of the plaintiff's own negligence, not the negligence of unnamed tortfeasors.[121] Damages are only reduced in multi-defendant cases.[122]

First, Justice Peterson analyzed the text. The court reasoned that only subsection (b) authorizes a reduction of the plaintiff's damages among other tortfeasors.[123] Textually, subsection (a)—which requires the jury to apportion fault—applies when there are "one or more persons" that are defendants at trial.[124] By contrast, subsection (b)—which requires the judge to reduce a plaintiff's damages—only applies when "more than one

114. *Id.*

115. *See id.* at 604, 774 S.E.2d at 699 ("To the extent that Zaldivar can prove that Overhead Door [was negligent], the trier of fact in this case may be permitted under O.C.G.A. § 51-12-33(c) to assign 'fault' to Overhead Door.").

116. 312 Ga. 350, 862 S.E.2d 295 (2021).

117. *Id.* at 351–52, 862 S.E.2d at 297.

118. "All the Justices concur, except Boggs, P. J., not participating, and McMillian and Colvin, JJ., disqualified." *Id.* at 362, 862 S.E.2d at 304.

119. *Id.* at 358–59, 862 S.E.2d at 301–02.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 356, 862 S.E.2d at 300.

124. *Id.* at 355, 862 S.E.2d at 299.

person" is sued.[125] In the court's words, "[b]y its plain language," subsection (b) only applies when multiple defendants are in the lawsuit.[126]

Second, the court acknowledged that its interpretation might be strange, in light of the statute's purpose to only hold a defendant liable for the proportional amount of damages it caused.[127] However, the court maintained that "when we interpret unambiguous statutory text that appears not to serve the purpose we imagine the statute to have, we must follow the path of the text, not the apparently different path of the 'purpose.'"[128] Indeed, the court went to great lengths to defer to the legislature because the "doctrine of separation of powers is an immutable constitutional principle," which the court would violate if it ignored the text of a statute.[129] The text, said the court, is the best barometer of legislative intent.[130]

Third, the court explored but rejected the similar statutes canon of interpretation. In one of its varied applications, this canon instructs a court to interpret a statute similarly to another jurisdiction's statute concerning the same subject with similar wording.[131] The canon applies even if the statute under examination was not modeled after the other jurisdiction's law.[132] The court noted that O.C.G.A. § 51-12-33 is very similar to Colorado's apportionment statute.[133] And the Colorado law allows apportionment of damages even when only one defendant is involved in the lawsuit.[134] Nevertheless, the court refused to follow the canon's presumption, reasoning that the similar statutes canon is inapplicable when the statutes' text differs.[135]

---

125. *Id.* at 356, 862 S.E.2d at 300.

126. *Id.*

127. *Id.* at 358, 862 S.E.2d at 301.

128. *Id.* at 350, 862 S.E.2d at 296.

129. Allen v. Wright, 282 Ga. 9, 12, 644 S.E.2d 814, 816 (2007).

130. *Cf.* Brief of Amicus Curiae Georgia Trial Lawyers Association in Support of Appellee, Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC, 312 Ga. 350, 862 S.E.2d 295 (2021) (No. S20G1419) ("It would be anomalous and inconsistent with prior precedent for this Court to look past the plain language of the apportionment statute in search of a scheme that allows for the apportionment of damages to a nonparty in a single defendant case.").

131. Singer & Singer, *supra* note 101, at § 52:3.

132. LINDA D. JELLUM & DAVID C. HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 328–29 (2d ed. 2009).

133. *Hatcher*, 312 Ga. at 357, 862 S.E.2d at 300–01 (citing COLO. REV. STAT. § 13-21-111.5(1) (2021)).

134. *Id.*

135. *Id.*

Fourth, the court again noted that its interpretation was in tension with the purpose of tort reform.[136] If the entire purpose of the statute was to limit liability, opening the door for large liabilities—even liability for harm a person did not cause—seems wrong. However, the court remained mindful of its judicial—not legislative—role and refused to apply subsection (b) to single-defendant cases.[137] Moreover, the court suggested that perhaps the legislature waffled on the statutory text and really did intend to draw such a distinction. After all, it took four years of negotiations (1986, 1987, 2004, and 2005) to enact only two versions (1987 and 2005) of the bill. The court drew upon the words of Justice Thomas, stating that "'[l]egislators may compromise on a statute that does not fully address a perceived mischief, accepting half a loaf to facilitate a law's enactment.'"[138]

Why did Alston & Bird care? Why litigate so long and so hard if the jury had already said the embezzler was mostly to blame? Money. If subsection (b) did not reduce the plaintiff's damages, Alston & Bird would be liable for all the $2,136,006.48 in damages except those attributable to the plaintiff. The jury had found Alston & Bird 32% at fault, the plaintiff to blame for 8% of damages, and the absent embezzler responsible for 60% of the damages. Because subsection (b) did not activate to reduce the damages beyond what the plaintiff caused, Alston & Bird was liable for 92% of the damages, which amounted to $1,965,125.96.[139] Alston & Bird litigated the issue because it could have avoided $1,281,603.89 in damages.[140] The court, in a footnote, advised that Alston & Bird's remedy was to seek contribution from the absent tortfeasors.[141]

But what if the court took a different interpretive approach? Would the outcome have been different? What would the 2005 amendments mean? Would legislative action in 2022 have been necessary?

Statutory interpretation requires a court to "look diligently for the intention of the [legislature], keeping in view at all times the old law, the

---

136. *Id.* at 358, 862 S.E.2d at 301.

137. "[T]he *judicial* power we exercise today does not permit us to make a different choice." *Id.* at 359, 862 S.E.2d at 301–02 (emphasis added).

138. *Id.* at 358, 862 S.E.2d at 301 (quoting Wyeth v. Levine, 555 U.S. 555, 601–02 (2009) (Thomas, J., concurring)).

139. "[B]ecause subsection (a) requires a reduction of damages proportional to the percentage of a plaintiff's fault, the trial court should have reduced the compensatory damages award only by 8% (HMH's share of fault) rather than 68% (HMH and Maury's combined share of fault)." *Id.* at 352, 862 S.E.2d at 298.

140. ($2,136,006.48 * 0.92) – ($2,136,006.48 * 0.32) = $1,965,125.96 – $683,522.074 = $1,281,603.89

141. *Hatcher*, 312 Ga. at 356 n.2, 862 S.E.2d at 300.

evil, and the remedy."[142] The Supreme Court of Georgia generally follows a textualist approach to statutory interpretation. That is, interpretation begins with the words' "plain and ordinary meaning," searching for the language's "most natural and reasonable [meaning], as an ordinary speaker of the English language would."[143] The court's favorite maxim is that "the General Assembly meant what it said and said what it meant."[144] The statute means what an ordinary Georgian would think it does.[145] Additionally, the court may move beyond the words and look to "other provisions of the same statute, the structure and history of the whole statute, and . . . constitutional, statutory, and common law . . . that forms the legal background of the statutory provision in question."[146]

The first available approach is textualism. Textualism follows the ordinary meaning of the words at issue unless, among other exceptions, the text leads to an absurd result.[147] Absurdity means the text leads to a conclusion that is "manifestly" at odds with what the legislature intended.[148] Although generally a textualist court follows the words, "when . . . the literal sense of words of the statute leads to absurdity, [the

142. O.C.G.A. § 1-3-1 (2022). Although the General Assembly has enacted this statutory directive as to a court's construction of statutes, the vague directive does not exclusively endorse any of the three theories discussed below.

143. Oconee Cnty. v. Cannon, 310 Ga. 728, 732, 854 S.E.2d 531, 535 (2021).

144. *E.g.*, *Hatcher*, 312 Ga. at 358, 862 S.E.2d at 301; Deal v. Coleman, 294 Ga. 170, 172, 751 S.E.2d 337, 341 (2013); Arby's Rest. Grp., Inc. v. McRae, 292 Ga. 243, 245, 734 S.E.2d 55, 57 (2012).

145. Kemron Env't Servs., Inc. v. Prospira Paincare, Inc., 362 Ga. App. 727, 730, 870 S.E.2d 53, 55–56 (2022) ("[W]e must afford the statutory text its plain and ordinary meaning, consider the text contextually, read the text 'in its most natural and reasonable way, as an ordinary speaker of the English language would,' and seek to 'avoid a construction that makes some language mere surplusage.'").

146. Thornton v. State, 310 Ga. 460, 462–63, 851 S.E.2d 564, 567 (2020). Georgia courts tend not to stray toward extrinsic sources. *See id.*

147. de Paz v. de Pineda, 361 Ga. App. 293, 298–99, 864 S.E.2d 134, 139 (2021) (discussing the "duty" of the court to avoid an interpretation that "will result in unreasonable consequences or absurd results not contemplated by the legislature"); Haugen v. Henry Cnty., 277 Ga. 743, 746, 594 S.E.2d 324, 327 (2004). Indeed, there is some authority in older cases that a court should turn to the "spirit" of a statute when a particular textual interpretation raises absurdity questions. Gen. Elec. Credit Corp. v. Brooks, 242 Ga. 109, 112, 249 S.E.2d 596, 599 (1978).

148. Boyles v. Steine, 224 Ga. 392, 395, 162 S.E.2d 324, 327 (1968); Labovitz v. Hopkinson, 271 Ga. 330, 336, 519 S.E.2d 672, 677 (1999). *Undercofler v. Capital Automobile Co.* is a good example of a court applying the absurdity doctrine in the context of retail automobile sales taxes. 111 Ga. App. 709, 712, 143 S.E.2d 206, 209 (1965).

court has] authority to depart from them."[149] Text is king unless the king dwindles into insanity, in which event the court will wage a coup.

Even within the textualism paradigm that the Supreme Court of Georgia follows, one could make a convincing argument that refusing to apportion damages leads to an absurd result. Why would the legislature write an apportionment statute—and require apportionment of fault in all cases—if it intended to restrict apportionment of damages to only some cases? After all, the entire scheme of the 1987 and 2005 amendments was to reduce plaintiffs' recoveries and disincentivize tort litigation.[150]

A second framework is purposivism. Generally, purposivism seeks to divine the aim behind a statute and interpret the statutory language so as to further that purpose.[151] Put another way, purposivism looks for the spirit of the law.[152]

How would this theory apply to § 51-12-33? The purpose behind the 2005 Tort Reform Act was to promote the availability of liability insurance for healthcare providers.[153] For example, the swap from joint and several to several liability tends to reduce the likelihood of a healthcare facility having to satisfy the entire judgment. Under a several liability regime, the maximum the facility would pay is its proportional fault.

As applied to the single-defendant fact pattern like *Hatcher*, the purpose could lead to multiple interpretations. On one hand, the defendant could have argued that the purpose was to appropriate liability in dollars to fault and that subsection (b) should still apply to reduce the plaintiff's damages. In keeping with the spirit of several liability (payment in dollars follows fault), the court could ignore the text and apportion damages, anyway.

On the other hand, the plaintiff could have argued that a breach of fiduciary trust claim against a law firm has nothing to do with healthcare providers' liability insurance. Apportioning damages on these facts would not serve the purpose of increasing access to medical malpractice insurance. Applying subsection (b) would not further the purpose in any way, so the factfinder should not reduce the plaintiff's damages.

---

149. Undercofler v. Veterans of Foreign Wars Post 4625, 110 Ga. App. 711, 715, 139 S.E.2d 776, 778 (1964).

150. Alston & Bird made this argument in *Hatcher* but was unsuccessful. Nonetheless, the court stuck to the text. Thus, just how high a bar the court sets for absurdity dictates when the court will go beyond the text.

151. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–72 (2006).

152. *Id.* at 71.

153. Ga. S. Bill 3 § 2.

Another possible contender for the legislative purpose is to ensure that only those responsible for a plaintiff's damages are responsible for paying those damages—to provide general reforms to tort law. For example, the 2005 amendment to § 51-12-33 was, after all, part of a package of tort reforms. Indeed, in 2012 the Supreme Court of Georgia reasoned that the purpose behind the statute is to ascertain who all may be responsible for the plaintiff's injures and to determine their individual liability to the plaintiff.[154] Each individual defendant should not pay any more or any less than its respective portion of blame.[155]

Again, though, the defendant in a single-defendant lawsuit could have argued that no matter what the text says, the clear purpose is to dole out dollars according to blameworthiness. The purpose is fairness, which is not met if a defendant pays a disproportionate share of damages. The entire purpose behind getting rid of joint and several liability[156] was to avoid that outcome.

Statutes often have competing purposes, so it is difficult to predict which purpose and which interpretation purposivism would follow.[157] In any event, the theory raises interesting questions as to logic, judicial economy, time costs, and separation of powers. As to logic, "[c]ommon sense suggests that if the plaintiff had sued only one defendant, the legislature did not intend to permit that defendant to turn a simple case into a complex nightmare by pointing to the alleged fault of numerous tenuously associated parties."[158] As to judicial economy, it wastes time not to apportion damages and, thus, require a separate lawsuit where the lone defendant sues the other tortfeasors for contribution. As to time, the legislature wasted efforts amending the statute if it obviously intended that result in 2005 and the court knew as much but refused to follow that interpretation. But separation of powers hangs in the balance and counsels in favor of judicial restraint. The judiciary is not a policymaking body and is ill-suited to make policy choices, even if it wanted to do so:

> The constitutional principle of separation of powers is intended to protect the citizens of this state from the tyranny of the judiciary, insuring that the authority to enact the laws will be exercised only by

154. Couch v. Red Roof Inns, Inc., 291 Ga. 359, 365, 729 S.E.2d 378, 383 (2012).

155. Wade v. Allstate Fire & Cas. Co., 324 Ga. App. 491, 494, 751 S.E.2d 153, 156 (2013) ("The purpose of the apportionment statute . . . is to ensure that each tortfeasor responsible for the plaintiff's harm, including the plaintiff himself, be held responsible only for his or her respective share of the harm.").

156. Eaton, *supra* note 9, at 26; *see also* Wright v. Watson, No. 4:15-CV-34 (CDL), 2017 U.S. Dist. LEXIS 151180, at *1 (M.D. Ga. Sept. 18, 2017).

157. *See, e.g.*, Daigle v. Shell Oil Co., 972 F.2d 1527, 1533, 1536 (10th Cir. 1992).

158. Hricik & Adams, *supra* note 30, at § 18:16.

> those representatives duly elected to serve as legislators. The General Assembly "being the sovereign power in the State, while acting within the pale of its constitutional competency, it is the province of the Courts to interpret its mandates, and their duty to obey them, however absurd and unreasonable they may appear."[159]

Therefore, while purposivism might have reached the same result as the 2022 Amendments faster, one might prefer a route that maintains the separation of powers in the Georgia Constitution—especially if it comes just a few months later and without much legislative effort.

Third, the court could have adopted an intentionalist framework. Intentionalism searches for the enacting legislature's intent on the precise interpretive question at issue.[160] Like purposivism, intentionalism does not constrain itself strictly to the text.[161] Some older Georgia cases endorse this theory of interpretation: "To ascertain the intention of the Legislature, after examining the words of the Act itself, [a court considers] . . . . what the law was before; the mischiefs against which the law did not provide; the nature of the remedy proposed; the true reason of the remedy."[162]

How does intentionalism play out for Georgia's apportionment statute? Perhaps the legislature's intent was to divvy responsibility based on fault. That is, if the 2005 legislature were asked the question of whether apportionment of damages should apply in a single-defendant lawsuit when other tortfeasors are not parties, the 2005 Georgia General Assembly would answer "yes." After all, why else would the legislature have written an apportionment statute in the first place if it did not intend to hold each person responsible for that person's (and only that person's) share of liability?

On the other hand, a plaintiff could argue for an opposite result. Because the 2005 amendments broke subsection (a) into subsections (a) and (b), because subsection (b) is the subsection that apportions damages, and because the legislature limited subsection (b) to multi-defendant lawsuits, the 2005 legislature probably intended to only allow apportionment of damages in multi-defendant cases. Otherwise, why else would it have divided the old subsection that previously allowed

159. Fullwood v. Sivley, 271 Ga. 248, 254, 517 S.E.2d 511, 517 (1999).

160. Miranda O. McGowan, *Against Interpretation*, 42 SAN DIEGO L. REV. 711, 712 (2005).

161. *See* Steven Knapp & Walter B. Michaels, *Not A Matter of Interpretation*, 42 SAN DIEGO L. REV. 651, 658 (2005) (arguing textualism is unfaithful to the legislature and blindly looks for words' meanings rather than searching the mind of the statutory author).

162. Swan v. State, 29 Ga. 616, 621 (1860).

apportionment in all cases? Presumably, the legislature wanted to limit the application of subsection (b) to multi-defendant cases.

Why not follow intentionalism? First, as a practical matter, intentionalism prefers divining legislative intent from legislative history. But legislative history is sparse for the Georgia General Assembly.[163] Without the tools, it is hard to employ the theory. Second, the same separation of powers issues regarding purposivism apply to intentionalism, too.

Of course, one could make many arguments that point opposite directions for each paradigm. But perhaps the most important point of these inquiries is to make them: statutory interpretation has long divided academics and jurists,[164] and knowing how Georgia courts do (and do not) operate helps understand what a court will say a statute means. In Georgia, text is king.

2. O.C.G.A. § 51-12-33 After *Hatcher*

Hatcher sets up a two-part analytical process. First, for the apportionment of fault phase, the factfinder must compare the plaintiff's blameworthiness to every single other person who might be to blame. Second, at the apportionment of damages phase, the factfinder considers whether (A) one or (B) more than one defendant is named in the lawsuit. If only one is named, the factfinder must stop after subsection (a), only reducing the damages by the plaintiff's fault. If more than one is named, the factfinder must go on to apply subsection (b), reducing the damages for the plaintiff's fault and every other defendant's fault.

Other cases also followed this interpretation of the apportionment statute. In *Georgia CVS Pharmacy, LLC v. Carmichael*,[165] a jury apportioned 0% of the fault to a non-party shooter in a single-defendant case. The plaintiff stopped at a CVS in Atlanta and was attacked and shot by an unknown assailant. Appealing a premises liability verdict against it, CVS claimed that no evidence supported the 0% apportionment—how could the person who shot the plaintiff not deserve

163. Researching Legislative Intent or Legislative History, GEORGIA ARCHIVES, https://www.georgiaarchives.org/research/legislative_intent [https://perma.cc/DW7C-WTEN] (last visited July 27, 2022) (observing that "it is extremely difficult, if not impossible to prove legislative intent in Georgia" because committee reports and other legislative materials are rarely published).

164. "It is a truth universally acknowledged that a judge should interpret statutes, not rewrite or impose her own preferred meaning upon them. As with most universally acknowledged truths, we all merrily embrace it on a theoretical level, but we bash swords when time comes to apply it." McGowan, *supra* note 160, at 711.

165. 362 Ga. App. 59, 865 S.E.2d 559 (2021).

any blame?[166] Nevertheless, the Georgia Court of Appeals affirmed by making a no-cause-in-fact argument.[167] Even if the jury had assigned fault to the shooter, as the defendant requested, the trial court would still have entered 100% of the judgment against CVS because the plaintiff's damages would not have been apportioned as to the non-party.[168] CVS would still have been severally liable for the entire amount of damages except those attributable to the plaintiff.[169]

Likewise, litigants acquiesced to the *Hatcher* interpretation. For example, in *Giusto v. International Paper Co.*,[170] the United States District Court for the Northern District of Georgia denied as moot a defendant's earlier motion to apportion damages to non-parties in a single-defendant tort case.[171] The plaintiff withdrew its apportionment affirmative defense that it asserted while *Hatcher* was on appeal, instead of trying to convince the federal court that *Hatcher*'s commitment to the text was erroneous as a matter of state law.[172]

D. Incentives under the 2005 Amendments

Knowing that § 51-12-33 prohibits apportionment of damages to non-parties in single-defendant lawsuits, how should litigants strategize their lawsuits?

For plaintiffs, if there are multiple possible people to sue, sue only the one from whom the plaintiff is most likely to collect a judgment. The factfinder will not be able to reduce the plaintiff's damages proportionally to reflect the non-party's faults.

Nor is it advantageous to join the two most wealthy tortfeasors. If two or more are joined, the plaintiff's damages will decrease based on non-parties' proportional blame. For example, Hadden and Gautreaux, in their practitioner's guide on Georgia tort law, note that *Hatcher* "presents a significant consideration regarding how the complaint is drafted."[173] Indeed it does: do not name multiple defendants.

166. *Id.* at 59–60, 60 n.1, 865 S.E.2d at 562–63.

167. *Id.* at 71, 865 S.E.2d at 570.

168. *Id.*

169. *Id.*

170. 571 F. Supp. 3d 1346 (N.D. Ga. 2021).

171. *Id.* at 1363.

172. *Id.* ("[The defendant] acknowledged the controlling authority of *Carmichael* in an email to the Court, which the Court appreciates. Thus, [the defendant] shall not raise its apportionment defense at trial with respect to anyone other than [the plaintiff].").

173. JOHN D. HADDEN & JAROME E. GAUTREAUX, GA. LAW OF TORTS–TRIAL PREPARATION AND PRACTICE § 7:14 (2022 ed.).

On the flip side, if one finds themselves as a lone defendant in a lawsuit, join the other tortfeasors as necessary parties.[174] Do not be left holding the checkbook like Alston & Bird or CVS Pharmacy was. Similarly, if trial is nearing and the other defendants get out on summary judgment or settlement, settle. Do not be the single defendant in a tort trial.[175]

For example, in *Erdman v. United States*,[176] a United States Postal Service Driver conversed with Chris Inman about a lost package in Chris's driveway. Meanwhile, two-year-old Arlo Inman, Chris's son, came out to the driveway, too. After the conversation, the USPS driver pulled out of the driveway but, not seeing Arlo, hit him. Arlo died instantly. Thereafter, Lauren Erdman, Arlo's mother, sued the United States government under the Federal Tort Claims Act. The United States sought to join Chris—who the government argued should have been supervising Arlo—as a necessary party. The United States planned to argue at trial that Chris was negligent and responsible for Arlo's injuries because he should have been supervising Arlo.[177] The United States District Court for the Middle District of Georgia granted the United States' motion to join Chris.[178]

At bottom, *Erdman* provides a nice playbook for escaping the *Hatcher* doom: join the third-party tortfeasor as a necessary party. Indeed, the court rejected Erdman's argument that Chris was not a necessary party if the United States could sue Chris afterward for contribution.[179] Under Rule 19(a)(1), the court reasoned, leaving Chris out of the lawsuit would deprive the United States of "complete relief."[180]

The incentives under the 2005 amendments are straightforward: plaintiffs only want one party at trial; defendants want a crowd of tortfeasors at the defendant table.

---

174. Only joinder under Federal Rule of Civil Procedure Rule 19—not 14—would be proper. *See also* O.C.G.A. § 9-11-14 (2022); O.C.G.A. § 9-11-19 (2022). Rule 14 would be the wrong strategy because there is no right of contribution among multiple tortfeasors in several liability jurisdictions.

175. For purposes of the apportionment statute, the number of defendants is measured at trial, not at the time of the complaint or summary judgment. *Schriever*, 259 Ga. App. at 561–62, 578 S.E.2d at 213–14.

176. No. 3:21-CV-75 (CAR), 2022 U.S. Dist. LEXIS 97028 (M.D. Ga. May 31, 2022).

177. *Id.* at *1–3.

178. *Id.* at *8.

179. *Id.*

180. *Id.* at *5–8. The United States would be left without complete relief because if Chris was not joined in that lawsuit, the United States could not later seek contribution and thus would be paying Chris's fair share.

IV. 2022 AMENDMENTS TO § 51-12-33

In line with the Supreme Court of Georgia's view of separation of powers, the Georgia General Assembly stepped in after *Hatcher* and *Carmichael* to amend § 51-12-33(b). On January 24, 2022, Representative Efstration sponsored House Bill 961,[181] a bill to amend § 51-12-33(b), providing for apportionment to non-parties in single-defendant lawsuits.[182] Favorably reported out of the House Committee on Judiciary on January 26, the House passed the bill on March 1.[183] Likewise, the Senate Committee on Judiciary reported the bill out on March 29.[184] The bill was enrolled on March 30, and on May 13, Governor Brian Kemp signed the bill into law.[185] H.B. 961 became effective as of May 13, 2022.[186] *Hatcher*, *Carmichael*, and other cases following the single-defendant bar to a reduction in damages are now obsolete.

H.B. 961 changed subsection (b) from applying to "an action . . . against more than one person" to lawsuits against "one or more persons."[187] Likewise, the factfinder is to apportion damages "among the *person or* persons who are liable according to the percentage of fault of each person."[188]

So, as of May 13, 2022, the same apportionment of fault and of damages rules apply no matter the number of defendants in a case. Revisiting the two-step analysis discussed above, first, the factfinder must compare the plaintiff's blameworthiness to every single other person who might be to blame—the apportionment of fault phase. Second, the factfinder must reduce each individual defendant's liability by all other tortfeasors' and the plaintiff's proportionate fault. H.B. 961 removes the incentive to litigate against one defendant to strategically avoid a reduction of the plaintiff's damages.

Why do the amendments matter? The legislature acted to prevent the savvy complaint-drafting techniques described above: only suing one person and making the lone defendant pay a disproportionate amount of harm than the person caused.

---

181. Ga. H. Bill 961, Reg. Sess., 2022 Ga. Laws 802 (codified at O.C.G.A. § 51-12-33 (2022)).

182. *HB 961*, GEORGIA GENERAL ASSEMBLY, https://www.legis.ga.gov/legislation/61237 [https://perma.cc/2WUW-KQNM] (last visited July 27, 2022).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Ga. H. Bill 961 § 1.

188. *Id.*

V. 2022 AMENDMENTS ALIGN § 51-12-33'S MEANING WITH SISTER STATES' SIMILARLY PHRASED STATUTES

The changes to Georgia law did not occur in a vacuum. To better understand the rule within Georgia, looking about is helpful. Georgia has consistently noted § 51-12-33's textual similarity to Colorado's, Florida's, and Arizona's apportionment statutes. Indeed, Georgia cases sometimes decipher § 51-12-33 based on those other jurisdictions' statutory interpretations.[189]

In Colorado, the corresponding statute provides:

> In an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant. . . . [T]he finder of fact in a civil action may consider the degree or percentage of negligence or fault of a person not a party to the action, based upon evidence thereof, which shall be admissible, in determining the degree or percentage of negligence or fault of those persons who are parties to such action.[190]

Courts applying this statute impose only several liability and, furthermore, apportion fault as to non-parties.[191]

For example, in *Barton v. Adams Rental, Inc.*,[192] the Supreme Court of Colorado held that a jury may attribute fault to a non-party so long as the lone-named defendant provides some evidence from which a reasonable jury could find the non-named party was at fault.[193] Steven Barton rented a Burton Power auger from Adams Rental, Inc. and was injured while using it. But Barton only sued Adams Rental, not the manufacturer, Burton Power.[194] The court held that Adams Rental could have apportioned damages as to Burton Power if Adams Rental had produced evidence that Burton Power contributed to Barton's injury.[195] More specifically, the court reasoned that the legislature must have

189. *See, e.g.*, *Atlanta Women's Specialists, LLC*, 310 Ga. at 341, 850 S.E.2d at 757 (Colorado statute); *Zaldivar*, 297 Ga. at 599, 774 S.E.2d at 696 (Colorado, Florida, Kansas, Michigan, California, New Hampshire, and Wyoming statutes).

190. COLO. REV. STAT. § 13-21-111.5 (2021).

191. "In 1986, the Colorado General Assembly passed legislation to reform Colorado tort law. Certain portions of that legislation abrogated the doctrine of joint and several liability of joint tortfeasors in civil actions and established a system of proportionate liability based on proportionate fault for multiple tortfeasors." Resol. Tr. Corp. v. Heiserman, 898 P.2d 1049, 1054 (Colo. 1995).

192. 938 P.2d 532 (Colo. 1997).

193. *Id.* at 536.

194. *Id.* at 534.

195. *Id.* at 536.

meant to require an evidentiary threshold because of the language "the finder of fact . . . may consider the . . . fault of a person not a party to the action, *based upon evidence thereof*."[196] Thus, Colorado takes a middle ground—apportionment as to non-parties is fine if the defendant offers admissible evidence supporting the non-party's fault that the jury may consider.[197] Or, phrased as a negative, "where a defendant designates a non[-]party at fault and presents no evidence of liability, the court should not submit that claim to the jury."[198]

Likewise, in *Fairfield Development, Inc. v. J.D.I. Contractor & Supply, Inc.*,[199] Axis Surplus Insurance Company insured an apartment development that Dry Creek was building. JDI sub-contracted with Fairfield Development to hang drywall. On a workday when only JDI had been occupying the third floor, a fire broke out there. Axis and Fairfield Development (who Axis mistakenly believed owned the property but was actually just the contractor) sued JDI. Later, after discovery ended, Axis realized that Dry Creek was the actual property owner, so the plaintiffs moved to substitute Dry Creek for Fairfield Development.[200] The United States District Court for the District of Colorado granted the plaintiffs' motion because there would be no prejudice to JDI.[201] The court reasoned that that Colorado allows fault to be attributed to non-parties, so swapping people in and out of the lawsuit did not change JDI's ability to point the finger at Fairfield Development.[202] More specifically, even though Dry Creek was substituted in as a party, JDI could still attribute fault to Fairfield Development as a non-party.[203]

In Florida, the legislature specifically contemplates allocating fault to non-party tortfeasors:

> (a) 1. In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure.

196. *Id.* (emphasis added).
197. *See id.*; *see also* Inland/Riggle Oil Co. v. Painter, 925 P.2d 1083, 1086 (Colo. 1996).
198. *Barton*, 938 P.2d at 536.
199. 782 F. Supp. 2d 1205 (D. Colo. 2011).
200. *Id.* at 1206–07.
201. *Id.* at 1209.
202. *Id.* at 1210.
203. *Id.*

> 2. In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries.[204]

Indeed, Florida courts do not even question the ability of a lone defendant to blame non-named parties. For example, *Birge v. Charron*[205] involved a car wreck. Crystal Charron was riding as a passenger on a motorcycle that flipped as the driver tried to avoid crashing into Warren Birge's car. But Charron settled with the motorcycle driver and proceeded to trial against Birge as the lone defendant.[206] In its discussion, the court simply included § 768.81 in a string cite for the routine proposition that a lone defendant can "plead [the] fault of [a] nonparty to diminish [a] plaintiff's recovery."[207] The court was not even concerned with the issue from *Hatcher* or *Carmichael* that caused the Georgia General Assembly to amend O.C.G.A. § 51-12-33 again in 2022.

In Arizona, the legislature once again removed all doubt about non-party apportionment in single-defendant lawsuits: "In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit."[208]

Arizona courts routinely allow a lone defendant to allocate fault and damages to a non-party. The statute is clear on its face. For example, *Pooley v. National Hole-In-One Ass'n*[209] involved a claim for invasion of a golfer's right of publicity. In 1986, Don Pooley hit a hole-in-one at a golf tournament. Afterward, the National Hole-in-One Association used a videotape of Pooley's shot in a marketing campaign. Pooley sued for an infringement of his property right of publicity but did not name other potential defendants, such as the parties that purportedly gave consent to National on Pooley's behalf.[210] Instead of worrying about whether National could apportion damages, however, the court simply noted that "a jury considers the blame of all persons regardless of whether the person was named as a party to the suit" and moved on to discuss other

204. FLA. STAT. ANN. §§ 768.81(3)(a)(1)–(2) (2011).
205. 107 So. 3d 350 (Fla. 2012).
206. *Id.* at 353–54.
207. *Id.* at 356.
208. ARIZ. REV. STAT. § 12-2506 (2001).
209. 89 F. Supp. 2d 1108 (D. Ariz. 2000).
210. *Id.* at 1110–11, 1114.

statutory interpretation questions.[211] Arguing that Arizona prohibits apportionment to non-parties in single-defendant cases would be a non-starter.[212]

Accordingly, the 2022 Amendments realign § 51-12-33 with other jurisdictions.

VI. WHERE MIGHT THE LEGISLATURE TAKE THE LAW?

In the main, Georgians seeking changes in tort law must turn to the Georgia General Assembly. Georgia appellate courts are extremely deferential to the statutory text.[213] Indeed, other than the initial shift from contributory to modified comparative negligence, nearly every change in Georgia tort law has come from the legislature. Legislatively, there has been a smooth progression toward rules that "level the playing field" for defendants.[214] What might be next beyond apportionment?

First, the legislature could cap punitive damages in product liability claims. Currently, unlimited punitive damages are allowed for product liability claims.[215] The legislature might consider capping punitive damages on product liability claims at the normal $250,000, like most other claims.[216]

Similarly, the General Assembly might allow punitive damages in agency cases—but only against the employee, not the employer. Currently, punitive damages are available in tort actions where the defendant's conduct was willful or wanton, among other things; nonetheless, if the employee's conduct meets that characterization, that finding is automatically imputed to the employer. However, for cases involving torts by employees, the General Assembly might require the

---

211. *Id.* at 1114.

212. *E.g.*, Sanchez v. City of Tucson, 953 P.2d 168, 173 (Ariz. 1998) (noting that a defendant "can name non[-]parties at fault and have the trier of fact apportion liability among them, thus reducing the amount recoverable from the [defendant]"); Natseway v. City of Tempe, 909 P.2d 441, 443 (Ariz. Ct. App. 1995) ("[T]he legislature intended that the trier of fact consider the fault of all persons who contributed to the harm . . . ."); Rosner v. Denim & Diamonds, Inc., 937 P.2d 353, 355 (Ariz. Ct. App. 1996) (remarking that Arizona factfinders "apportion fault among all tortfeasors based on the facts presented at trial").

213. *See, e.g.*, Cooper Tire & Rubber Co. v. McCall, 312 Ga. 422, 437, 863 S.E.2d 81, 92 (2021) (applying plain language of Georgia's long-arm statute, observing that statute likely to be invalidated pursuant to the Federal Constitution, and urging the legislature to amend the language).

214. Beau Evans, *Sweeping tort-reform bill stumbles in Georgia Senate*, AUGUSTA CHRONICLE (Mar. 10, 2020), https://www.augustachronicle.com/story/news/2020/03/10/sweeping-tort-reform-bill-stumbles-in-georgia-senate/1549929007/ [https://perma.cc/39A9-JN2T].

215. O.C.G.A. § 51-12-5.1(e) (2022).

216. O.C.G.A. § 51-12-5.1(g) (2022).

jury to make a separate finding that the *principal*—not just the agent acting on its behalf—was willful or wanton.[217] Thus, the agent's individual conduct would not always be imputed to the entity-defendant. Punitive damages against the principal would require showing that senior management participated in or acquiesced to the misconduct.[218] Lower-level employees and middle management acting up would not move the needle.[219]

Would those measures unconstitutionally infringe on plaintiffs' rights? Although the Supreme Court of Georgia has struck down a statute limiting noneconomic damages in medical malpractice cases, it has intimated that punitive damages caps are constitutional.[220] In March of 2023, the Supreme Court of Georgia addressed the issue and upheld the $250,000 cap, at least with respect to a premises liability claim where the defendant "acted only with an 'entire want of care'" but not intentionally.[221] Other states disagree,[222] but the door is open in Georgia. Indeed, in 2020, a proposed bill would have barred *any chance* to recover punitive damages against a defendant more than once for a single act or omission.[223]

Third, the General Assembly might get rid of "phantom damages." Under the collateral source rule, a defendant cannot offer evidence that the plaintiff has been compensated for her losses by extra-judicial means

---

217. Other jurisdictions have adopted this rule, drawing a distinction between moral judgment via punitive damages and reparations via compensatory damages. Compensatory damages are automatically imputed to the principal, but punitive damages are not. *E.g.*, Merrimack Coll. v. KPMG LLP, 108 N.E.3d 430, 443 (Mass. 2018) ("To support an award of punitive damages, a jury must find the employer itself to be morally blameworthy, and that requires a finding that a member of the employer's senior management was morally blameworthy.").

218. *See id.*

219. *See id.*

220. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 736, 691 S.E.2d 218, 223 (2010) (reasoning that jury awards of punitive damages are not findings of fact and can thus be limited without offending Seventh Amendment to Federal Constitution or violating the Georgia Constitution); *see also* Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 543, 436 S.E.2d 635, 639 (1993) (statute requiring 75% of punitive damages to be paid to state did not contradict Georgia Constitution).

221. Taylor v. Devereux Found., Inc., Nos. S22A1060, S22X1061, 2023 Ga. LEXIS 63, at *62 (Mar. 15, 2023).

222. *See, e.g.*, Bayer CropScience LP v. Schafer, 385 S.W.3d 822, 831 (Ark. 2011); Lewellen v. Franklin, 441 S.W.3d 136, 144 (Mo. 2014).

223. Ga. S. Bill 415, Reg. Sess. (2020) (unenacted) (allowing only one award of punitive damages to be awarded against a defendant for each act or omission, no matter how many claims arose from that act or how many plaintiffs subsequently sued).

such as insurance.[224] Thus, if the plaintiff has a medical bill of $50,000, $30,000 of which the plaintiff's insurer covered, the $30,000 of "phantom damages" are awarded to the plaintiff as part of the total $50,000 in medical costs. Opponents of the collateral source rule argue that the plaintiff gets a double recovery. Thus, if the legislature abolishes the collateral source rule, juries will ostensibly not award phantom damages—costs other than what the plaintiff paid out-of-pocket—because the defendant could show that the plaintiff has already been partially compensated. A 2021 legislative proposal would have done exactly this.[225]

But would it be constitutional? In 1987, the General Assembly abolished the collateral source rule, but *Denton v. Con-Way Southern Express, Inc*.[226] invalidated the statute as violating equal protection.[227] One year later, however, in *Grissom v. Gleason*,[228] the Supreme Court of Georgia criticized *Denton*'s analytical method as "an aberration" and rejected it.[229] Thus, there is a good chance that the legislature could abolish the rule today without offending the Georgia Constitution.

As the General Assembly continues to shift tort law in ways that limit large recoveries, changes to punitive damages and evidentiary rules might be coming.

VII. CONCLUSION

At bottom, as the law stands now, you can recover for your injuries against both the driver and manufacturer. Your ability to sue is not dependent on whether you are partially (though less than half) to blame. Nor does it matter if you sue just the driver or manufacturer, or both. No matter the party lineup, the factfinder will decide how much you, the driver, and the manufacturer are to blame. The defendants will only be liable for the proportional amount of harm they caused you, if any.

---

224. PAUL S. MILICH, GA. RULES OF EVIDENCE § 9:3 (2021 ed.).

225. J. Robb Cruser, **POOF* Legislation On Phantom Damages Vanishes In 2021 Georgia General Assembly*, CRUSER MITCHELL, https://cmlawfirm.com/poof-legislation-on-phantom-damages-vanishes-in-2021-georgia-general-assembly-by-j-robb-cruser [https://perma.cc/JJ2R-CSGF] (last visited Sept. 13, 2022). The drafters removed the language just before the final vote in the Senate. *See supra*. Similarly, model statutes exist that would have the same effect. *The Phantom Damages Elimination Act*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, https://alec.org/model-policy/the-phantom-damages-elimination-act/ [https://perma.cc/WLC3-2PUQ] (last visited Sept. 13, 2022).

226. 261 Ga. 41, 402 S.E.2d 269 (1991), *disapproved of by* Grissom v. Gleason, 262 Ga. 374, 418 S.E.2d 27 (1992).

227. *Denton*, 261 Ga. at 46, 402 S.E.2d at 272.

228. 262 Ga. 374, 418 S.E.2d 27 (1992).

229. *Id.* at 376, 418 S.E.2d at 29.

Thus, equity returns to the law—injured plaintiffs should be entitled to recover, but only in the amount that the defendant proportionally and legally caused the harm.

Moreover, Georgia law is back on track with other states and, as a result, brings more predictability. Whether a defendant causes a wreck in Georgia—or Colorado or in any other state—should not arbitrarily determine how much of the judgment that defendant must satisfy.

Last, and most importantly, the history of Georgia's fault and apportionment regimes offer a microcosm into the fundamental separation of powers between legislatures and courts. As to the comparative negligence fault regime, the judiciary pressed its foot to the policy throttle, propelling the law forward. However, today the Supreme Court of Georgia seems more restrained and deferential to the Georgia General Assembly.

The law is always changing—the legislature will meet again in 2023, and tort reform remains a hot issue. But Georgia citizens can be sure that activist judges will not take the reins of legislation in their hands. If Georgians want (or want to do away with) tort reform, the Gold Dome is the place to look, not the courthouse on Capitol Avenue.