

**Insights**

## **THE SUPREME COURT OF GEORGIA SHEDS NEW LIGHT ON APPORTIONMENT OF DAMAGES**

Aug 17, 2021

The Supreme Court of Georgia issued another decision in its recent line of cases opining on the scope and availability of Georgia's apportionment statute – O.C.G.A. § 51-12-33. This latest decision, *Alston & Bird, LLP v. Hatcher Management Holdings, LLC*, provides two significant holdings:

First, damages cannot be apportioned under Section 51-12-33 to non-parties in cases where there is only one named defendant. This limitation applies even where a jury or trier-of-fact expressly determines that a non-party to the case was also at fault. In practical terms, single-named-defendants in Georgia litigation may now be obligated to cover the entirety of a damage award, minus any proportion attributable to the plaintiff's fault, regardless of a non-party's liability.

Second, an award of attorneys' fees and expenses of litigation under O.C.G.A. § 13-6-11 – typically reserved only for instances of bad faith, stubborn litigiousness, or unnecessary trouble and expense – is subject to apportionment under Section 51-12-33.

### **Georgia's Apportionment Statute**

Georgia's apportionment statute, enacted as part of the Tort Reform Act of 2005, governs the reduction of damages awarded by a jury based upon the proportion of fault attributed to others. Subsection (a) of the statute focuses on the proportion of fault attributed to plaintiffs. Subsection (b) concerns the fault of non-party entities and individuals.

O.C.G.A. § 51-12-33 (a) provides:

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.

O.C.G.A. § 51-12-33 (b) provides:

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.

## **The Georgia Supreme Court's *Hatcher Management* Decision**

### ***Background and Trial***

The underlying dispute in *Hatcher Management* arose from a non-party individual's engagement of a law firm to form and represent a holding company for the individual's family assets. The individual subsequently served as the holding company's manager and embezzled substantial amounts of company funds. The plaintiff holding company sued the defendant law firm for legal malpractice and breach of fiduciary duty following the embezzlement. The plaintiff obtained a jury award for over two million dollars inclusive of attorneys' fees and litigation expenses. Consistent with its duty to apportion fault, the jury found the defendant law firm 32% at fault, the plaintiff holding company 8% at fault, and the non-party individual 60% at fault. The trial court then reduced the amount of damages awarded by 68%, combining the amount of fault allocated to both the plaintiff holding company and the non-party individual, and thereby ordered the law firm to pay only 32% of the total award.

### ***Georgia Court of Appeals***

On appeal, the Georgia Court of Appeals reversed the trial court and held that the total award should have been reduced only 8%, commensurate with the amount of fault attributable to the plaintiff holding company, but did not include the 60% apportioned to the non-party. In so doing, the court explained that the damages attributed to a non-party under Section 51-12-33(b)—such as 60% of the fault determined by the jury here—could not be reduced from the award where there is only one named defendant. Accordingly, the Court of Appeals ordered the defendant law firm to pay 92% of the total damages awarded.

### ***Supreme Court of Georgia***

The Supreme Court of Georgia granted certiorari on the issue of whether Section 51-12-33 allows for a reduction of damages against a defendant based on the jury's allocation of fault to a non-party in a case brought against only one defendant. In answering that question in the negative, the court explained that, while subsection (a) of the apportionment statute allows for the reduction of damages in proportion to the plaintiff's fault "[w]here an action is brought against one or more persons for injury to person or property," subsection (b), which governs similar reductions of damages in proportion to the fault of a non-party, contains a "critical textual difference." Subsection

(a) applies “where an action is brought against **one or more** persons,” but subsection (b) applies only “[where] an action is brought against **more than one** person . . . .”

Although the Supreme Court of Georgia acknowledged that “[a]pplying subsection (b) to single-defendant cases may well advance some of the intentions behind the Tort Reform Act better than the statute as we interpret it today[,]” it must nonetheless “follow the path of the text, not the apparently different path of the ‘purpose.’” As such, the Supreme Court concluded that “the Court of Appeals was correct on the scope of application of the apportionment directed by subsection (b): it applies only in cases ‘brought against more than one person,’ not in single-defendant lawsuits like this one.”

## Potential Impact on Future Litigation

The decision in *Hatcher Management* has important implications for tort defendants, including strategic decisions for whether non-parties should be joined and the utility of filing a notice of non-party fault. Under this decision, single-named defendants may now be held disproportionately liable for the amount of damages awarded in a case, even where a jury or the trier-of-fact expressly determines that a non-party was primarily at fault.

## RELATED PRACTICE AREAS

- Litigation & Dispute Resolution
- Class Actions
- Appellate

## MEET THE TEAM



### Christian Bromley

Atlanta / Los Angeles

[christian.bromley@bcplaw.com](mailto:christian.bromley@bcplaw.com)

[+1 404 572 6841](tel:+14045726841)

---

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon ([kathrine.dixon@bclplaw.com](mailto:kathrine.dixon@bclplaw.com)) as the responsible attorney.