

## FROM OUR EVENT SPONSORS

### One is the Loneliest Number: Apportionment After *Hatcher*

By Brannon J. Arnold, Matthew Marrone and William D. Ortiz, attorneys at Weinberg, Wheeler, Hudgins, Gunn & Dial

Georgia appellate courts have recently removed several arrows from the quiver of the last remaining defendant in a civil case. On August 10, 2021, the Supreme Court of Georgia held that under Georgia's Apportionment Statute, O.C.G.A. § 51-12-33, no allocation of fault or apportionment of damages to non-parties will be permitted where the action is "brought against" only one named defendant. See *Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC*, 862 S.E.2d 295 (2021). On November 1, 2021, the Court of Appeals of Georgia further limited the Apportionment Statute's application and held that *Hatcher's* preclusion on apportionment didn't just apply to actions initially "brought against" one defendant, but also applied to cases with only one named defendant "in the case by the time the case proceed[s] to trial." See *Georgia CVS Pharmacy, LLC v. Carmichael*, A21A0677, at 25 (Ga. App.) (Nov. 1, 2021).



Brannon J. Arnold

#### How Were Fault Allocated and Damages Apportioned Before *Hatcher*?

Prior to *Hatcher*, once a defendant's liability was established and the plaintiff's damages calculated, the jury could then assess the relative fault of all those who contributed to the plaintiff's injury—including the plaintiff—and apportion damages based on this assessment of relative fault. For example, in a negligent security case, in which the defendant is the owner of the premises where a shooting

occurred, the owner could request that the non-party shooter be listed on the verdict form. This allowed the jury to allocate fault to the non-party shooter which would proportionately reduce the amount of fault allocated to the owner. However, *Hatcher* changed the game.



Matthew Marrone

#### How did *Hatcher* Change Fault Allocation and Damages Apportionment?

Now, damages cannot be apportioned in single-defendant cases, even where a jury expressly determines that a non-party to the case was also at fault. In practical terms, single defendants in Georgia 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. The Supreme Court's landmark ruling stemmed from a legal

malpractice case against *Alston & Bird*, where a non-party individual engaged the firm to form and represent a holding company for the individual's family's assets. The individual subsequently served as the holding company's manager and embezzled substantial amounts of company funds. Following the embezzlement, the plaintiff holding company sued the defendant law firm for legal malpractice and breach of fiduciary duty. At trial, the jury awarded the plaintiff \$2 million but found that the plaintiff was 8% at fault and that the non-party individual was 60% at fault. So, the trial court proportionally reduced the amount of damages awarded by 68%. Prior to *Hatcher*, this allocation of fault and apportionment of damages occurred in almost every action taken to trial. However, the Georgia Supreme Court, applying a strict textualist interpretation of the Apportionment Statute, held that fault allocation did not apply to this case, as it applies "in cases brought against more than one person, not in single-defendant lawsuits like this one."

### How did *Hatcher* Change Fault Allocation and Damages Apportionment?

To prevent apportionment arguments, plaintiffs are already electing to file multiple individual lawsuits with single defendants instead of single cases with multiple defendants. In these scenarios, corporate counsel will need to consider consolidating cases when necessary to preserve these apportionment rights. Further, dismissals of settling co-defendants will no longer be as simple as they have ordinarily been. Often, a remaining defendant would agree to dismissal of a settling co-defendant with the caveat that the remaining defendant could argue allocation of fault at trial as to the settling defendant. Under the Georgia Supreme Court's new framework, a single remaining defendant should now object to the dismissal of a settling defendant if that remaining defendant wants to argue for the allocation of fault to the settling defendant – or to any non-party for that matter.



William D. Ortiz

#### What Can Corporate Defendants Do Now In Lieu of Apportionment?

While *Hatcher* and *Carmichael* have stripped lone defendants of many of the apportionment arguments and strategies that they enjoyed in Georgia for decades, such defendants are not totally without recourse. Notably, these decisions do not appear to have disturbed apportionment for the plaintiff's fault, nor do they seem to eliminate the argument that a non-party is liable to some extent. Defendants can

still argue the "empty chair" defense at trial, or adamantly pursue a causation defense that a non-party's superseding and intervening act was the cause of the plaintiff's injuries and damages. Also, defendants may still be able to pursue a right of contribution against a non-party under certain circumstances. As litigants and trial courts grapple with the unintended consequences of these new rulings, many questions remain unanswered. However, one conclusion is clear: legislative action is required to bring any semblance of certainty back to fault allocation in Georgia. Until that occurs, corporations and their counsel should be prepared to address this uncertain landscape.

*Brannon J. Arnold is a partner at Weinberg, Wheeler, Hudgins, Gunn & Dial in Atlanta, Ga. Her practice focuses on civil litigation with an emphasis on product liability, catastrophic injury and professional liability. She can be reached at (404) 832-9569 or barnold@wwhgd.com.*

*Matt Marrone is a partner at Weinberg, Wheeler, Hudgins, Gunn & Dial in Atlanta. His practice focuses on complex design and construction litigation and pre-litigation services. He can be reached at (404) 832-9585 or mmarrone@wwhgd.com.*

*William D. Ortiz is an associate at Weinberg, Wheeler, Hudgins, Gunn & Dial in Atlanta. His practice focuses on complex civil litigation with an emphasis on catastrophic injury, products liability, premises liability and mass torts. He can be reached at (404) 832-9545 or woritz@wwhgd.com.*

## MEMBER NEWS & UPDATES

We want to celebrate our ACC Georgia members on LinkedIn and beyond! ACC Georgia recognizes that our community of in-house counsel is more than just the outstanding work they do every day, and we want to acknowledge those personal milestones and achievements.

From birth announcements to volunteer recognitions, if you have news to share, we invite you to email [georgia@accglobal.com](mailto:georgia@accglobal.com) so we can celebrate you.