Apportionment of Damages:

What We Know and What Remains Unsettled

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The General Assembly enacted Senate Bill 3 in 2005 ostensibly to create "predictability and improvement" in the provision of health care and the resolution of civil claims.[1] One of the provisions attempted to change the economics of tort claims by moving Georgia from a "pure" joint and several liability scheme to an apportionment scheme for adjudicating the financial responsibility of multiple tortfeasors. More than seven years later, this change has yet to yield greater "predictability" for tort litigants. Instead, civil trial participants face unanswered questions and multiple rulings about the mechanics and effect of the statutory scheme. In this article, we highlight the areas that we believe the appellate courts will need to address to help all participants going forward.

We have tried to be fair to the respective positions of plaintiffs and defendants in our assessment of the issues because the uncertainties affect all parties. Although appellate decisions have affirmed the constitutionality and general applicability of the tort-reform statutes, at present, only a few reported decisions address the practical aspects of how apportionment works. With this framework in mind, we examine O.C.G.A. § 51-12-33, the main statute governing "apportionment" of damages. Next, we analyze how other states have approached issues such as which party bears the burden of proof when there is a request to apportion liability among parties (with and without nonparties) and evidentiary issues that arise when a party seeks to apportion damages to a nonparty.

From "Pure" Joint and Several To "Several" Liability

By moving from a "pure" joint and several liability scheme to an apportionment scheme, the General Assembly altered the economics of recovering damages from multiple tortfeasors. Under "pure" joint and several liability, the plaintiff controlled which of several defendants it wanted to sue for an injury. In the underlying lawsuit, the claimant could obtain a single verdict against the named defendant or defendants, regardless of who was more at fault as compared between them or as compared to nonparties, subject only to a common-law right to setoff the verdict by the amount paid in prior settlements for the same claims (if any). As a result, the named defendant(s) bore 100 percent of the economic loss, which was particularly significant if another tortfeasor was insolvent, immune, or otherwise unable to be joined in the lawsuit. In exchange for shifting the risk of insolvency from the plaintiff to the defendant, the General Assembly granted a defendant the right to seek contribution. However, the defendant had to file a separate lawsuit and prove the amount it overpaid as compared to the fault of other tortfeasors.

"Proportional Share" Liability

Now, through a combination of Sections 51-12-31 and 51-12-33 of the Georgia Code, the General Assembly has shifted the economic risk of loss (insolvency, immunity, and inability to be joined) from the defendants to the plaintiff. Under Section 51-12-31, when multiple tortfeasors are sued, the plaintiff may recover for an injury caused by any defendant only from the defendant or defendants liable for the injury and the jury may specify the damages to be recovered from each defendant. Under the circumstances, individual judgments are entered against multiple defendants based on the harm only they caused, or what we will call the defendant's "proportional share."

The role of the factfinder should be to assess (1) whether there is liability at all; (2) if so, the entire amount of the verdict to be awarded as compensation; and (3) the proportional share each individual defendant contributed to the injury. Each defendant pays its share, as adjudicated by the factfinder. For example, assuming a case of plaintiff against three named defendants and a total verdict of $100,000, the factfinder would determine the proportional share for each defendant: A, B, and C. If the factfinder concludes that A was 70 percent liable, B was 30 percent liable, and C was 0 percent liable, then A pays $70,000, B pays $30,000, and C pays $0.

What About Contribution?

In exchange for limiting a tortfeasor's liability to its proportional share of the damages, the tortfeasor gives up its former right to seek contribution. Using our example above, A could not sue B or C, and B could not sue C, for contribution. This makes economic sense: there is no need for contribution because the factfinder has adjudicated the percentages of fault. Although the tortfeasor bearing the biggest share of the verdict may believe that it overpaid, its argument is likely to fall on deaf ears because the judgment is likely to be considered *res judicata* on the issue of its comparative share of the liability.[2]

The Effect of Nonparties on Multiple Tortfeasor Litigation

Together with Section 51-12-31, the General Assembly expressed its intent in Section 51-12-33 that a tortfeasor should only bear the risk of loss related to the injury it causes by empowering the jury to determine the comparative fault of everyone who contributed to the alleged damages. The General Assembly made this clear in subsection (e), which allows apportionment to a nonparty even if that nonparty could not be joined or would be immune from suit. We will look at how the Georgia appellate courts have construed Sections 51-12-31 and 51-12-33 together.

What We Know About How Apportionment Works in Georgia

As of the date of this article, there have been roughly 25 appellate decisions citing Section 51-12-33 following the Tort Reform Act of 2005. Below, we look at how the appellate courts have (and have not) addressed constitutionality, the scope and breadth of the statutes, and some practical applications, such as setoff, burden of proof, and evidentiary issues.

The Apportionment Scheme is Constitutional

There have been attempts to challenge the constitutionality of the new apportionment scheme, but the Supreme Court has upheld the statute.[3] In *Couch v. Red Roof Inns, Inc.*, the Court rejected constitutional challenges based on deprivations of the right to a jury trial, due process, and equal protection in the context of jury instructions and inclusion of nonparties on the verdict form. The Court held that Section 51-12-33 did not violate the right to a jury trial because apportionment does not have an effect on any part of the jury's normal functions (i.e., assessment of fault, calculation of damages, etc).[4] Similarly, Section 51-12-33 does not violate due process or equal protection because it not vague, does not conflict with any other statute and the General Assembly had a rational basis for "apportioning damages among all tortfeasors responsible for harming a plaintiff in an efficient and orderly manner."[5] Now that the Supreme Court of Georgia has upheld the constitutionality of Section 51-12-33, it appears that most efforts to declare it unconstitutional are coming to an end.

Apportionment Does Not Apply When Liability is Purely Derivative

One of the first cases applying apportionment came in the case of *PN Express v. Zegel*, in which the issue was whether an employer-defendant could defend and apportion by claiming that the employee worked for a nonparty entity.[6] The Court of Appeals of Georgia held that a liable but passive tortfeasor may not reduce its proportional share of liability by attempting to shift the loss to a nonparty. In *Zegel*, the plaintiffs sued a truck driver and an entity that plaintiffs alleged employed the driver under a number of alternative theories for injuries arising out of a wreck. PN Express defended by claiming that it did not employ the driver and by giving notice that certain nonparties directed and controlled the driver or negligently supervised him. PN Express asked the trial court to instruct the jury that they could apportion fault to the nonparties. The trial court declined to give the instruction, although the appellate opinion is silent as to why. The Court of Appeals of Georgia held that the trial court did not have to charge the jury on apportionment because the plaintiffs' theory against PN Express was "entirely based on notions of derivative liability."[7] In affirming the decision not to give a jury instruction on apportionment, the Court of Appeals of Georgia held that, "where a party's liability is solely vicarious, that party and the actively-negligent tortfeasor are regarded as a single tortfeasor," and thus comparative fault statutes "do not apply."[8]

Although the conclusion regarding apportionment is consistent with established Georgia precedent regarding the treatment of an employer and employee as one tortfeasor, the *PN Express* case is a little difficult to understand because of the way the opinion presents the facts surrounding the request to apportion. It appears that PN Express was arguing that it did not employ the driver and, for that reason, the "real" employer should be included on the verdict form. The Court of Appeals of Georgia apparently rejected this contention based on the plaintiffs' theory of the case, i.e., the contention that PN Express was vicariously liable. As a matter of procedure, if there was evidence that PN Express did not employ the driver at all, then the trial court could have instructed the jury on apportionment because the jury could have concluded that PN Express was "not liable" at all.

Setting aside the factual nuances of the case, the premise underlying the court's decision is correct: an entity that is truly vicariously liable should not be permitted to apportion damages between it and the person for whom it is derivatively liable. Although the employer may have an indemnification claim against the employee, the employer and employee are properly treated as one entity in the "plaintiff v. defendant" world: either the defendant (regardless of whom he works for) is liable for the injury or he is not. Ultimately, the *PN Express* case appears to be limited to the facts of that particular case, so it is hard to derive any broad lessons from it.

Apportionment Applies When Plaintiff is Not at Fault

Another question that arose early on was whether, under O.C.G.A. § 51-12-33(b), a plaintiff had to be at fault to some degree before a defendant could seek apportionment (either among existing defendants or nonparties). It appeared that there were two plausible interpretations on how to read this subsection. First, subsection (b) could have been read together with subsection (a), meaning that a plaintiff would have to be at fault in some amount before the jury could assess comparative share between any defendants or nonparties. The other interpretation was that subsections (a) and (b) are separate, each providing an avenue for apportionment, and, as a result, the defendants could seek apportionment among themselves or nonparties regardless of whether the plaintiff was at fault.

In *McReynolds v. Krebs*, the Supreme Court recently decided that apportionment is indicated in

all cases involving multiple tortfeasors, regardless of whether the plaintiff is at fault.[9] In *McReynolds*, the Court held that subsection (b) is "plainly meant to apply even if there is no plaintiff fault" because the General Assembly used the phrase "*if any*" when referring to reduction of damages for fault of the plaintiff under subsection (a).[10] There is no doubt that the *McReynolds* decision will have an impact by allowing defendants to apportion fault regardless of plaintiff's conduct.

The only potential remaining argument regarding when a defendant may apportion is the situation in which the plaintiff, who is not at fault, sues *only one defendant*. Because Section 51-12-33 speaks in terms of "defendants" (plural), there is an argument to be made that the sole defendant is not entitled to apportion to nonparties. The counterargument is that Section 51-12-33(c) provides for apportionment to nonparties regardless of the number of defendants; the *McReynolds* court implied that only subsections (a) and (b) determine applicability while the remaining sections address procedural aspects and other concerns.[11]

Apportionment of Fault Applies to Immune Nonparties

An important part of Section 51-12-33(c) relates to apportionment of fault to nonparties. Under the plain language of the statute, this includes parties who are immune from liability, even though the effect may be to reduce the amount of money the plaintiff recovers.[12] In *Barnett v. Farmer*, a driver/husband and passenger/wife brought suit for personal injuries and loss of consortium following a car accident. At trial, there was evidence presented that both drivers were negligent. As a result, the jury apportioned fault to the husband/driver and reduced his recovery against the defendant. However, the jury did not reduce the wife's recovery against the defendant based on the husband's fault.[13] The Court of Appeals of Georgia held this was error because the wife's award of damages should have been reduced by her husband's percentage of fault pursuant to the clear intent of the legislature to require a defendant to pay only *his* proportional share of the fault.[14] The court expressly rejected the argument "that application of apportionment to this case violate[d] the interspousal tort immunity doctrine," explaining that its holding "in no way *requires* [the wife] to file suit against her husband, but instead, precludes her from recovering from [the defendant] that portion of her damages, if any, that a trier of fact concludes resulted from the negligence of her husband."[15] This is consistent with similar statutes and schemes in Florida, Arizona, Wisconsin, Minnesota, California, Indiana, Kansas, Louisiana, Idaho, and North Dakota that allow assess-

ment of fault to nonparties who are otherwise immune from liability.[16]

Again, viewed in context, the court's interpretation of subsection (d) makes sense: "several" liability means that ultimate recovery and ability to pay are irrelevant as it relates to what the factfinder is asked to do in apportioning liability. Now, assuming a verdict for the plaintiff, the jury determines the full amount of recovery, that is, how much the injury is worth. From there, the named tortfeasors pay only their comparative share of injury. So, if the named tortfeasor is found to be 10 percent liable for a $1 million injury, that tortfeasor pays for its 10 percent share, even if the other 90 percent is apportioned to someone from whom the plaintiff could never recover.

Apportionment Applies Even When the Theory of Liability is Different Among the Tortfeasors

The Supreme Court of Georgia recently addressed whether the factfinder may apportion fault between tortfeasors against whom there are different standards of liability.[17] In the case of *Couch v. Red Roof Inns, Inc.*, an unknown criminal attacked the plaintiff, who was staying in a hotel. The plaintiff sued the hotel's owner for failing to keep the premises safe.[18] The hotel's owner wanted to put the criminal on the verdict form as a responsible party. The District Court certified two questions to the Supreme Court of Georgia: whether the factfinder could consider the "fault" of the criminal and whether inclusion of the criminal in jury instructions and on the verdict form violated the plaintiff's constitutional rights to a jury trial, due process, or equal protection.[19]

Writing for the five-justice majority, Justice Melton explained that the term "fault" in the apportionment statute encompasses all persons or entities who contributed to the alleged injury and includes negligent and intentional acts. Thus, in the *Couch* case, the Court held that the factfinder should consider the intentional acts and comparative fault of the criminal in the verdict.[20] The Court held the factfinder's consideration of the fault of a nonparty criminal does not violate the right to a jury trial, due process, or equal protection because apportionment provides an efficient and orderly manner of assessing damages among all people responsible for causing harm.[21]

In addition to negligent security cases, another "tort reform" provision raises interesting questions regarding apportionment of fault to a nonparty when the nonparty is a provider of "emergency medical services" under Section 51-1-29.5. Under that statute, proof that a nonparty provider of "emergency medical services" was at fault may require clear and convincing evidence of gross negligence. Accordingly, the plaintiff may choose not to sue the tortfeasor for whom a higher quantum of proof and standard of care is required. Nevertheless, that should not prevent the jury from apportioning damages to those nonparties. What is interesting, and unanswered, is whether a defendant seeking to apportion to a nonparty whose conduct falls under the rubric of Section 51-1-29.5 would be required to prove gross negligence by clear and convincing evidence as well.

There is No Right of Contribution After Liability Has Been Apportioned

Historically, a joint tortfeasor that believed it had overpaid could seek contribution under O.C.G.A. § 51-12-32. Although Section 51-12-32 still exists, it is applicable only when O.C.G.A. § 51-12-33 does *not* apply.[22] Thus, when the factfinder apportions damages, a defendant does not have a right of contribution against co-defendants or nonparties.[23]

The *McReynolds* court addressed contribution as well. In that case, the plaintiff was injured in a car accident and brought suit against the driver and the manufacturer of their car.[24] The manufacturer settled pre-suit and the driver/defendant sought contribution against the manufacturer if she were to be found liable.[25] In dismissing the contribution claim, the trial court ruled that the defendant could not seek contribution, but could ask the jury to apportion the damages to the nonparty manufacturer (even though the defendant was the sole defendant).[26] At trial, the defendant did not present any evidence of the manufacturer's fault. As a result, the jury returned a verdict for $1.2 million solely against the defendant.[27] On appeal, the Supreme Court of Georgia affirmed the lower courts' rulings that when there is apportionment, the defendants have no right of contribution.[28]

This reasoning makes sense in light of the goal of apportionment: making sure that the factfinder determines the total amount of damages and then the proportional share of each wrongdoer. In the context of *McReynolds*, had the defendant presented evidence of the manufacturer's fault, then the factfinder could have assessed the evidence and adjudicated the issue. If the factfinder had determined that the manufacturer was 50-100 percent at fault, then the named defendant would have no argument and, consequently, no need for a contribution action. Although the *McReynolds* defendant believed she overpaid (100 percent liability), the jury apparently had no evidence to convince them otherwise.

Defendants Bear the Burden of Proving the Fault of a Nonparty

The General Assembly did not address the burden of proof applicable to apportioning fault to nonparties. Predictably (and perhaps, correctly), plaintiffs argue that the defendant seeking apportionment bears the burden of proving that the nonparty is at fault. Most people see a request for apportionment as an "affirmative defense," although it is not included in the list of defenses that must be affirmatively pled.

Likewise, it is unclear whether all named tortfeasors have to give notice of apportionment or whether a co-defendant can "bootstrap" off of the notice filed by another co-defendant. In *Union Carbide Corp. v. Fields*, the Court of Appeals of Georgia recently characterized use of the apportionment statute as an "affirmative defense," explaining that "the fault of a nonparty cannot be considered for the purposes of apportioning damages without some competent evidence that the nonparty in fact 'contributed to the alleged injury or damages.'"[29]

In *Union Carbide*, the plaintiff brought product liability claims against a number of manufacturers, suppliers, and sellers of certain asbestos-containing products. Although the defendants noticed a number of nonparties for purposes of apportionment, plaintiff moved for summary judgment on such notices, claiming the defendants failed to present sufficient evidence of fault. The trial court agreed and precluded the defendants from attempting to apportion fault. On appeal, the defendants relied upon the plaintiff's own complaint and sworn affidavit in support of the complaint claiming asbestos exposure to many of the nonparties' products. In affirming the grant of summary judgment, the court rejected plaintiff's allegations as insufficient, noting that defendants failed to offer "any evidence, expert or otherwise, showing that [plaintiff's] alleged exposure to these five nonparties' products in fact contributed to the development of [plaintiff's] mesothelioma."[30]

The *Union Carbide* decision confirms what was suspected by many: defendants carry the burden of providing competent evidence to permit a jury to apportion fault, similar to an affirmative defense. In *Union Carbide*, however, the court held that the burden of proof requires sufficient evidence to survive summary judgment, rather than the lower "any evidence" standard typically used to evaluate jury instruction issues on appeal. This is consistent with appellate court decisions in other states.[31] The *Union Carbide* decision, however, appears to conflict with earlier decisions by the Court of Appeals of Georgia, which used the lower "any evidence" standard.[32]

What Remains Unsettled

The unanswered questions relate primarily to how the litigants, the trial court, and the factfinder should deal with nonparties who are on the verdict form for apportionment. In the text of Section 51-12-33, the General Assembly did not address topics such as the scope of the pleading requirement before a defendant can seek apportionment and whether a defendant can seek third-party relief under theories such as equitable indemnification or equitable subrogation. In the next section, we analyze these issues and look at how other states have approached these problems.

Are There Special Pleading Requirements?

The General Assembly set forth a basic "notice" requirement in the statute, but did not address how a trial court is to address the sufficiency of the notice. For example, in a professional malpractice case, is the defendant required to file an affidavit with its notice? Is the defendant required to hire an expert that will specifically opine as to the standard of care of the nonparty, or can the defendant professional serve in that role? Can the defendant rely on the opinions of the plaintiff's expert?

California has addressed the type of evidence required.[33] In *Wilson v. Ritto*, a defendant/surgeon sought to apportion fault to a nonparty doctor that performed prior surgery on the plaintiff.[34] During the trial, the defendant provided expert testimony criticizing the nonparty doctor for failing to use certain procedures in performing an earlier surgery that should not have been performed in the first place.[35] However, the expert did not testify that the conduct fell below the standard of care. The appellate court held that apportionment amounted to an affirmative defense requiring "substantial evidence" of fault, and that mere criticism of a nonparty was not enough because "fault is measured by the medical standard of care." Accordingly, without specific expert testimony as to the breach of the standard of care, the defendant could not apportion fault to the nonparty.[36] We are not aware of any current cases on appeal in Georgia on this issue.

Does a Third-Party Claim for Equitable Indemnification Still Exist?

The Court of Appeals of Georgia addressed the status of third-party complaints in *Murray, et al v. Patel*.[37] In *Murray*, the plaintiffs were injured when their car, driven by their son, Patel, struck a disabled vehicle in a roadway. Plaintiffs sued the driver and owner of the disabled vehicle, Murray and Hill. Defendants filed a third-party complaint against Patel, alleging that his negligence was the "sole and proximate cause" of plaintiff's injuries and requesting indemnification if defendants were to be held liable.[38] The trial court dismissed the third-party complaint on a motion to dismiss. The Court of Appeals reversed, holding that the third-party complaint should not have been dismissed because the defendant included a claim for indemnification.[39]

Unfortunately, the court never explained the basis for upholding the indemnity claim. Rather, the court only wrote that the claim was properly pled and therefore the trial court should not have dismissed it.[40] As a result, it appears that some sort of third-party relief may still be viable. But beyond the discussion in *Murray*, the Georgia appellate courts have not addressed this issue since the passage of SB3. Accordingly, there is no clear direction on what "implied indemnification" means or how it might work in a trial setting.

Another unanswered question is whether the old line of cases involving indemnification for "active" and "passive" tortfeasors survives. As mentioned before, the Court of

Appeals of Georgia has held that a "passive" employer and an "active" employee are treated as one unit for purposes of calculating the proportional share of liability among multiple tortfeasors. What is less clear is under what circumstances "active" and "passive" liability may still apply outside of the vicarious liability context. For example, one issue is whether a claim for indemnification still exists, because, with apportionment, the jury is supposed to assess each party's individual comparative contribution to the injury. If the scheme works correctly and each defendant pays for its proportional share of damage, then it becomes harder to imagine a scenario in which one party could seek non-contractual indemnification from someone else. Similarly, if the person to be indemnified (indemnitee) is named and the person who is supposed to indemnify them (indemnitor) is not, but is a potential tortfeasor themselves, then it would seem that the indemnitee should insist that the indemnitor be put on the verdict form. Again, these questions remain unanswered at this time.

Are Prior Settlements Admissible into Evidence?

In Section 51-12-33, fault can be apportioned to settling parties. The question arises whether the fact of settlement is admissible to prove fault. Under pre-apportionment caselaw, the answer was generally "no" in the context of setoffs and determining joint and several liability. However, with apportionment, the appellate courts will need to decide whether the factfinder should be told about the existence of settlement because such evidence could help the factfinder apportion fault appropriately and fully. The counterargument is that admitting such evidence might discourage early resolution of claims. Under the revised evidence code, evidence of a settlement or attempts to settle are generally inadmissible to prove liability.[41] However, such evidence may be admissible to prove bias or prejudice by a witness, among other things.[42] Accordingly, there may be circumstances when a settlement may be relevant to assist with the apportionment of damages, although the appellate courts will need to guide litigants about those circumstances.

Ethical Issues

Recently, we have heard about legal malpractice issues arising out of the application of Sections 51-12-33(c) and (d). For plaintiffs' counsel, the concerns surround failing to name or dismissing a party against whom an existing party is then able to point the finger. For defense counsel, most of the concerns surround filing the notice of nonparty fault too late. One problem, of course, is that the statute requires the notice be filed 120 days before trial. Most people do not know, however, when trial is going to start. In addition, defense counsel may have concerns about not filing the notice at all or the effect of failing to file it on time.

For all attorneys, we believe this issue—whom to sue and against whom to point the finger—is something that you should consider discussing with your client very early and documenting the discussion in writing. The new Rules of Professional Conduct require attorneys to obtain "informed consent" about litigation strategy. Although litigators still get the benefit of judgmental immunity, this could become an area that weakens that immunity. The bottom line is that explaining the issue and the rationale behind the recommended strategy may be a prudent way to proceed.

Conclusion

The appellate courts have just begun to provide guidance on the new apportionment of damages scheme. Many questions remain unanswered, such as whether there are special pleading requirements, whether and under what circumstances a claim for indemnification still exists, and whether prior settlements are admissible as relevant to apportionment. Hopefully, future opinions will provide the much needed "predictability and improvement" the General Assembly sought in 2005.

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Endnotes

1. SB 3, Section 1 (2005).
2. It does not appear that the General Assembly abrogated O.C.G.A. § 23-2-71 (contribution as an equitable remedy) in SB 3. However, we are not sure how much force that code section will have going forward because equity follows the law.
3. Couch v. Red Roof Inns, Inc., 2012 WL 2681399, Case No. S12Q0625 (Justice Melton, July 9, 2012).
4. *Id*. at *6.
5. *Id*.
6. PN Express, Inc. v. Zegel¸ 304 Ga. App. 672, 697 S.E.2d 226 (2010).
7. *Id*. at 680, 697 S.E. 2d at 233.
8. *Id*.
9. McReynolds v. Krebs, 290 Ga. 850, 725 S.E.2d 584 (March 23, 2012), *reconsideration denied*, (Apr. 11, 2012).
10. *Id*. at 852, 725 S.E.2d at 587.
11. *Id*. (explaining that subsections (a) and (b) "open with the same broad statement of applicability" and "subsections (c) through (g) address apportionment of fault to nonparties, preserve existing defenses or immunities . . . and prohibit recovery where the plaintiff is 50 percent or more responsible for the injury or damages claimed").
12. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570 (2011).

13. *Id*. at 362, 707 S.E.2d at 574, n.12.
14. Left untouched, the net effect of the unapportioned verdict would have resulted in the defendant paying more than his proportional share of the liability. For example, if the jury returned a total gross award of $100,000 for loss of consortium and apportioned liability 60 percent defendant and 40 percent husband, the wife should have recovered only $60,000 after reduction of the damages because of her husband's culpability. Without apportionment, she would receive the whole $100,000 and the defendant would overpay.
15. Barnett, 308 Ga. App. at 362, 707 S.E.2d at 573-74.
16. *See* Allied- Signal, Inc. v. Fox, 623 So. 2d 1180 (Fla. 1993) (Supreme Court of Florida holding that Florida's comparative fault scheme requires consideration of all potential tortfeasors regardless of whether the potential tortfeasor is immune from liability). *See also* Nance v. Gulf Oil Corp., 817 F.2d 1176 (5th Cir. 1987) (applying Louisiana law); Johnson v. Niagara Machine & Tool Works, 666 F.2d 1223 (8th Cir. 1981) (applying Minnesota law); Roberts v. ACandS, Inc., 873 N.E.2d 1055 (Ind. Ct. App. 2007); Ebach v. Ralston, 510 N.W.2d 604, 607 (N.D. 1994); DaFonte v. Up-Right, Inc., 828 P.2d 140 (Cal. 1992); Dietz v. General Electric Co., 821 P.2d 166 (Ariz. 1991); Pocatello Indus. Park Co. v. Steel W., 621 P.2d 399 (Idaho 1980); Brown v. Keill, 580 P.2d 867 (Kan. 1978); Connar v. West Shore Equipment, Inc., 68 Wis.2d 42 (Wis. 1975).
17. Couch v. Red Roof Inns, Inc., 2012 WL 2681399, Case No. S12Q0625 (Justice Melton, July 9, 2012).
18. *Id*. at fn. 1.
19. *Id*. at *1.
20. *Id*. at *2-3.
21. *Id*.
22. O.C.G.A. § 51-12-32 ("Except as provided in Code Section 51-12-33 . . ."). *See also* McReynolds v. Krebs, 290 Ga. 850, 725 S.E.2d 584 (March 23, 2012), *reconsideration denied*, (Apr. 11, 2012) (explaining that O.C.G.A. 51-12-32's "effect was limited by the 2005 amendments which added the words "[e]xcept as provided in Code Section 51-12-33").
23. McReynolds, 290 Ga. at 852-53, 725 S.E.2d at 587-88.
24. *Id*. at 850, 725 S.E.2d at 586.
25. *Id*.
26. *Id*. at 852, 725 S.E.2d at 587-88.
27. *Id*. at 853, 725 S.E.2d at 588.
28. *Id*. at 852, 725 S.E.2d at 587.
29. Union Carbide Corp. v. Fields, 2012 Ga. App. LEXIS 308, *13 (Mar. 20, 2012).
30. *Id*. at *20.
31. *See, e.g*., Nash v. Wells Fargo Guard Servs., Inc., 678 So. 2d 1262, 1264 (Fla. 1996) ("defendant has the burden of presenting at trial that the nonparty's fault contributed to the [plaintiff's injuries] in order to include the nonparty's name on the jury verdict); McGraw v. Sanders Co. Plumbing & Heating, Inc., 667 P.2d 289, 295-96 (Kan. 1983) (burden of proof by a preponderance of the evidence).
32. *Cf*. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 229, 715 S.E.2d 728, 733, n.13 ("[a] trial court has a duty to charge the jury on the law applicable to issues which are supported by the evidence. If there is even slight evidence on a specific issue, it is not error for the court to charge the jury on the law related to that issue.").
33. Wilson v. Ritto, 129 Cal.Rptr.2d 336 (Cal. App. 2003).
34. *Id*. at 340-41.
35. *Id*.
36. *Id*. at 342. *See also* Burchfield v. CSX Transp., Inc., CIVA.107-CV-1263-TWT, 2009 WL 1405144 (N.D. Ga. May 15, 2009) (not reported) (finding that failure to introduce expert testimony on the standard of care prevented defendant's assertion of fault against nonparty where court found expert testimony was necessary for jury to determine fault).
37. 304 Ga. App. 253, 696 S.E.2d 97 (2010).
38. 304 Ga. App. at 254, 696 S.E.2d at 98.
39. 304 Ga. App. at 255, 696 S.E.2d at 99.
40. *Id*.
41. O.C.G.A. §24-4-408(a).
42. O.C.G.A. §24-4-408(c).