**EVIDENCE ESSENTIALS PODCAST**

**APPORTIONMENT**

* 1. Hello everyone, welcome to another session of the Good Judge-ment podcast. I am Wade Padgett…
  2. *and I am Tain Kell and together, we will be your hosts*
  3. So Tain, remember way back when we started this podcast and we had a series of episodes dealing with evidence essentials?
  4. *Ah yes, I remember it fondly. We started recording at the UGA law school and, as I recall, we had a FOP join us for evidence essentials. What was his name again?*
  5. You remember, it was Mr. Garon Muller. My former staff attorney and former assistant DA. He now works at a law firm in Augusta. Remember? He has a young son and a wife who is an assistant DA…
  6. *Oh – that’s right! He’s the guest that was always trying to plug his law firm whenever he was on the podcast. What ever happened to old Garon?*
  7. Well, during the pandemic we have not seen much of Garon but I recruited him to come out of seclusion and make a return appearance on the Good Judge-ment Podcast.
  8. *That’s great! Garon, tell everyone hello.*
  9. [Hello.]
  10. *Well, that was rather literal.* *In all seriousness, we are glad you are back with us today.*
  11. [Garon- ]
  12. Garon, tell the folks what exciting evidence(ish) topic we will be discussing today.
  13. {Garon} Apportionment Update
  14. *I am really glad we are discussing this topic because it comes up with some frequency in tort cases and the rules have changed since Wade and I attended law school. Let’s dive right in.*

[Garon – lead off the conversation and we will jump in – shocking, huh?]

{The one thing I want to know is how/why you can blame someone who isn’t at trial and is not a party – the “empty chair” syndrome. I think some notice is required so at least everyone knows you are seeking to blame a third party}

1. Apportionment Recap- OCGA 51-12-33
   1. Subsection (a)
      1. Governs what should be done when Plaintiff shares responsibility for the injury or damages
      2. Sub (g)- Plaintiff who is more than 50% at fault cannot recover
   2. Subsection (b)
      1. Provides for situations where someone other than the Plaintiff shares responsibility with a named defendant for the injury or damage. I.e. nonparty
      2. Trier of fact determines the fault of Plaintiff and each Defendant
      3. “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.**”
   3. Subsection (C)
      1. When assessing percentages of fault, the trier of fact should consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless if they are a named party, HOWEVER
      2. Defendant must give notice that a nonparty was at fault 120 days prior to date of trial to introduce evidence of such, OR
      3. If Plaintiff entered into settlement agreement with the nonparty, that nonparty’s fault SHALL be considered
   4. In August 2021, the Supreme Court interpreted the apportionment statute in Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC, S20G1419, 2021 WL 3501075 (Ga. Aug. 10, 2021):
      1. 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.
      2. 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.
      3. Reasoning: Sub B states “Where an action is brought against more than one person” while Sub (a) states “Where an action is brought against one or more persons.”
   5. What does it all mean?
      1. Two considerations for fact finder:
         1. Percentage of fault
            1. Sub(a)- Plaintiff’s damages are reduced by Plaintiff’s percentage of fault
            2. Sub(c)- Fact finder should consider the fault of all persons or entities, whether a party or not to assign percentages of fault
            3. Sub (d)- If a Defendant wants to fact finder to consider the actions of a non-party when assigning percentages of fault, that Defendant must file a notice- unless that nonparty settled with Plaintiff
         2. Damages
            1. Sub (a)- reduced by Plaintiff’s fault
            2. Sub (b)- ONLY where there are multiple Defendants, damages are assigned to each Defendant according to their respective percentage of fault.
            3. When there is One Plaintiff and One Defendant, the damages are not reduced by the percentage of fault of a non-party.
   6. Recap
      1. Trier of fact should assign Plaintiff’s negligence
      2. Trier of fact can consider and attribute fault to non-party if noticed pre-trial or there was a settlement with nonparty
      3. Damages should be decided regardless of fault
      4. Where there are multiple defendants, damages are apportioned to each Defendant according to their respective fault
      5. Where there is only one Defendant, the damages are assigned to the Defendant and are not reduced by non-party fault percentages.

[ending script]