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Justices Rule 5-2 That Worker's Comp Doesn't Prevent Apportionment

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Still debating the reach of the state's 10-year-old apportionment statute, a divided Georgia Supreme Court on Monday held that workers' compensation law does not prevent defendants in a tort suit from trying to shift blame to the employer of a plaintiff who is injured on the job.

The 5-2 ruling authored by Justice Keith Blackwell extended the reasoning of the court's July ruling in *Zaldivar v. Prickett*, which interpreted the 2005 statute that was part of a tort reform package opposed by plaintiffs lawyers. The statute allows juries to allocate fault and corresponding damages to both parties and nonparties, potentially reducing a defendant's financial obligation without creating any financial obligation on the part of nonparties.

In *Zaldivar*, the court said that the statute generally allows such apportionment of fault to a nonparty regardless of whether that nonparty might have a defense or claim of immunity. On Monday the court majority said defendants could ask juries to apportion blame and damages to a nonparty employer, even if workers' compensation law would make the employer immune from the same claims if brought by an employee.

Winning defense lawyer, Matthew G. Moffett of Atlanta's Gray, Rust, St. Amand, Moffett & Brieske: "The court has affirmed again what our legislature has decreed—if you sue someone, you can no longer make them legally liable for what someone else did."

A plaintiff can still obtain workers' compensation benefits without having to prove his employer's negligence, and the employer will still be immune from tort liability, wrote Blackwell, who also authored the majority opinion in *Zaldivar*.

Justice Robert Benham, joined by Justice Carol Hunstein, dissented. Benham wrote that the court should "reconsider and refine" its holding in *Zaldivar*, a decision from which he also dissented. Benham said in Monday's opinion that allowing juries to apportion fault to plaintiffs' employers, who are supposed to be protected through the workers' compensation system, would hurt employers by, for example, increasing their legal costs. Accordingly, Benham concluded, the law should treat those employers differently from other nonparties.

The case decided Monday was sent to the high court by a federal judge who, in advance of trying the case, sought a definitive ruling on what was then an unsettled question of state law.

U.S. District Judge Timothy Batten of the Northern District of Georgia is presiding over a product liability case. The plaintiffs, Jock Walker and his wife, have sued equipment manufacturer Tensor Machinery over a serious accident Walker suffered while working at an optical fiber plant in Carrollton. The plaintiffs seek to hold Tensor responsible for an alleged equipment malfunction that led to Walker's foot being crushed.

Tensor wants Walker's employer, OFS Fitel, to share blame because, Tensor says, OFS negligently installed, modified or maintained the machine at issue.

Eight days before the Supreme Court was to hear argument in Walker's case, the court issued its opinion in *Zaldivar*. That ruling was a win for a defendant driver who wanted to apportion liability in a wreck case to a plaintiff's employer.

The decision, which had language helpful for both plaintiffs and defendants on apportionment, initially was unanimous, but Benham changed his vote after the plaintiff filed a motion for reconsideration. Although other issues had been the focus of briefing and argument when *Zaldivar* was at the Supreme Court, Benham based his dissent on the notion that a jury shouldn't apportion blame to a plaintiff's employer because the workers' compensation law immunizes the employer from tort suits over the plaintiff's injuries.

Benham expounded upon that on Monday in his dissent in *Walker*. "In my opinion, the majority does not properly consider or analyze the unique aspects of Georgia's workers' compensation scheme and the unintended consequences" of the decision, he said.

Apportionment to nonparty employers "obviously" hurts the employee plaintiff, said Benham, by reducing their tort recovery.

Benham added that apportionment of fault to nonparty employers would hinder their ability to have their workers' compensation payments reimbursed from the employee's recovery of damages in a tort lawsuit against a third-party defendant. An employer is allowed to seek such reimbursement, called subrogation, from any money left over after the plaintiff is made whole by those damages, Benham explained. If apportionment of fault to a nonparty employer reduces the employee's recovery from a third-party defendant, such that he is not fully compensated for his injury, the employer cannot obtain subrogation, Benham said.

The dissenting justices also said that apportioning fault to nonparty employers would undermine the aim of the workers' compensation scheme to exempt employers from the costs of defending tort litigation. Because the employer is involved in a tort case, the parties may seek various discovery from the employer, and the cost to respond will be greater if the employer's fault is at issue in the case, Benham said.

The majority disagreed that the effects of allowing apportionment to employers covered by workers' compensation would be so troubling that an exception to the apportionment law should be made for them. It's not inherently unfair to expect an employer to bear some cost for its wrongdoing, including a limitation on its right of subrogation, wrote Blackwell. He added that employers have long had to respond to discovery in cases in which their employees have been injured on the job.

Blackwell also said that the allocation of fault to an employer covered by workers' compensation was more equitable than keeping them out of the apportionment process. He quoted language from a Mississippi court decision that said "the result of immunizing employers from fault as well as from liability is that third parties pick up the tab for the employer's fault, potentially paying more than their share in order to make up for the excluded employer." He said writings by Georgia legal commentators backed up the majority's conclusion, as well.

The winning defense lawyer, Matthew G. Moffett of Atlanta's Gray, Rust, St. Amand, Moffett & Brieske, said in an email, "The court has affirmed again what our legislature has decreed—if you sue someone, you can no longer make them legally liable for what someone else did."

Dana Norman of the Blaska Law Firm in Atlanta, who represents the plaintiffs, said he would ask the high court to reconsider. "We're certainly not happy with the decision," he said.

The case is *Walker v. Tensor Machinery*, No. S15Q1222.

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