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DAILY REPORT
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Case highlights debate over apportionment

RULE COMPLICATES THE DECISION for the jury and helps the defendant, lawyers contend

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LAWYERS ON BOTH SIDES of a recent trial about a car wreck in which multiple parties could have been held responsible said the case showed the practical effects of Georgia's apportionment of fault rule.

Their conclusion: the apportionment rule, which in an unrelated case is being challenged in the Court of Appeals of Georgia, complicates the decision for the jury and helps the defendant.

That assessment alone may not be surprising, given that the rule was adopted by the General Assembly as part of its 2005 tort reform package. But observations by lawyers in this case, tried earlier this month in Cherokee County, show how jurors are handling the laws allowing them to dole out responsibility for an accident among multiple parties—some of whom, as occurred in this case, may not even have been identified.

"We're all arguing about apportionment, but the jury's not apportioning," said one of the winning defense attorneys, Matthew G. Moffett of Gray, Rust, St. Amand, Moffett & Brieske in Atlanta. He represented the employer of the driver accused of causing the wreck.

"It seems to be that if a jury thinks the plaintiff is to some degree responsible, I don't think they are inclined to award anything," said Moffett, who said this defense verdict was the third involving the apportionment rule he has won this year.

Representing the losing plaintiff, David J. Blevins of Blevins & Blevins in Dalton, said, "The more complicated the fault decision tends to be, and the more complicated apportionment tends to be, juries tend to give up and find for the defendant.

"Apportionment of damages makes the jury's job much more difficult. You have to get 12 people to agree," he added. "The jury dynamics become much more complicated. You run into jury fatigue. They understand that if they are not sure, the plaintiff loses."

Moffett and Blevins were on the opposite sides of *McDowell v. Hartzog*, No. 07-SC-1741, tried before Cherokee County State Court Judge W. Alan Jordan. The jury found for the defendants on May 7 after a weeklong trial.

The plaintiff, Cherokee County resident Herschell McDowell, was driving down Walnut Avenue in Dalton when the primary defendant, Gregory

See ***Apportionment****, page* ***4***

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Apportionment, from page **1**

Hartzog, tried to turn left onto Walnut to go the opposite direction.

The cars collided when Hartzog tried to make his turn, and McDowell suffered injuries to the nose, left arm, shoulder and neck, claiming medical expenses of $45,000 and lost wages of nearly $40,000.

McDowell sued Hartzog and Hartzog's employer, Optimus Solutions, for whom he was working at the time of the crash. Moffett represented Optimus, while Hartzog's attorney was Sean L. Hynes of Downey & Cleveland in Marietta. Hynes said apportionment was only one factor in the decision, arguing that he was able to show his client was not negligent

Moffett said he made a pre-trial settlement offer for Optimus, which was rejected. He did not give the amount, but he said the plaintiff was asking for $270,000.

According to the consolidated pretrial order, Hartzog had a stop sign on his street and was legally obligated to yield the right-of-way to McDowell.

But the defense was able to establish some responsibility for the plaintiff and a truck, driven by a "John Doe" driver, blocking McDowell's path..

The defense argued that as Hartzog was moving forward into Walnut Avenue before turning left, the nearest of two lanes coming toward him was clear. Hartzog could not see that McDowell's SUV was approaching around the John Doe's black pickup truck. Then, as Hartzog was turning, McDowell changed lanes from left to right—too fast for the conditions, the defense contended, to avoid hitting the John Doe's pickup.

Four days of testimony for the plaintiff included an expert witness—accident reconstructionist Ronald B. Cox—testifying that the crash was the defendant's fault.

"They took four days. Our case took 15 minutes," said Moffett, the defense lawyer for Hartzog's employer said. His only witness was Hartzog, who the plaintiff's attorney then cross examined for about 45 minutes.

Moffett said his case was helped considerably by witnesses for the plaintiff, namely two law enforcement officers, who testified that they didn't think the crash was Hartzog's fault.

The jury got the case on the morning of Friday, May 7. As prescribed in the apportionment statute, O.C.G.A. § 51-12-33, the verdict form gave the jury the option of allocating fault among the plaintiff, the defendants and the "John Doe" driver.

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> —David J. Blevins, plaintiff's lawyer

The jury deliberated for about an hour before returning with a defense verdict, the attorneys said.

Blevins said he is considering an appeal, though he acknowledged that he is not sure, given that the cost of the trial court record in this case increased from about $8,000 to $34,000 as a result of the new fee rules adopted by the General Assembly this year.

Moffett said this case was his third win this year in which the jury could have chosen to apportion fault but instead found for the defense. The other two were: *Raines v. Maughan* in Fulton County State Court; and *Pacheco v. Regal Cinemas* in DeKalb County State Court.

In all three cases, Moffett said, the verdict form that the jury saw at the end of the trial included a option of assigning a percentage of blame to all parties. To simplify the jury's decision, he asked only that they rule in his client's favor. "I've never asked the jury to apportion in closing. I've asked them to find for the defendant," he said.

Clearly, others have noticed how this works. In *Sarvis v. Bath* before Evans County State Court Judge Ronald W. Hallman, a plaintiff asked the judge to prevent "the issue of apportionment of liability among defendants from being argued or submitted to the jury," according to the judge's order.

The basis of the argument was that the apportionment of fault statute does not apply and, according to the same judge's order, "does not abolish the joint tortfeasor rule in Georgia," which means that defendants can be jointly held liable for each other's actions.

The judge granted the motion in August 2009, saying "the jury will not be charged on apportionment and a general joint liability verdict form will be used."

That decision is led to an appeal by the defense to the Georgia Court of Appeals, which is pending as *Ken's Supermarkets v. Sarvis*, No. A10A0539.

The case involves a car crash where the plaintiff, Christopher Sarvis, was hit by the defendant, Jeremi Dillon Bath, who was then 17 and admittedly intoxicated. Sarvis was injured and sued Bath, adding to the complaint as defendants two stores, Cavalier Convenience Inc. and Ken's Supermarkets Inc., alleged to have sold beer illegally to the underage driver and a passenger. Both stores denied liability. Cavalier said the store sold alcohol to Bath based upon identification presented. Ken's denied having sold alcohol to either Bath or his passenger.