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Georgia Justices' Apportionment Ruling Gets Immediate Test

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LAWYERS AT THE GEORGIA Supreme Court on Tuesday tested the breadth of last week's high court decision that provided some guidance on what tort defendants must do to spread the blame for a plaintiff's claims to those that have not been sued.

A 2005 law allows juries to apportion fault and corresponding damages to nonparties. Even though the nonparties don't owe any money to the plaintiff, their presence helps defendants by giving jurors somewhere else to point their fingers for blame, potentially reducing a defendant's financial obligation.

In its July 6 decision in *Zaldivar v. Prickett*, the state high court sided with plaintiffs on a key point, saying only nonparties who have breached a legal duty to the plaintiff can be considered for apportionment purposes. In other words, defendants must make some showing that the nonparty has committed a tort that was a proximate cause of the plaintiff's injuries for the nonparty to be put on the verdict form.

But the high court's decision also contained language that posed challenges to the plaintiffs in the case before the justices on Tuesday. The case poses the somewhat narrower question of whether defendants can seek to apportion fault to nonparties who would be protected from suits by some sort of immunity.

Matthew Moffett

The justices were fairly quiet at Tuesday's argument in this case, although the author of last week's decision, Justice Keith Blackwell, had pointed questions for the plaintiffs' lawyer, Dana Norman of the Blaska Law Firm in Atlanta. Norman told the justices that last week's ruling doesn't decide his case and that a ruling against him would upset the "delicate" balance created by the state's workers' compensation system, requiring employers who were supposed to be protected from litigation to incur litigation costs of defending their reputations. "The apportionment statute was not enacted to completely change tort law," said Norman.

Matthew Moffett of Gray, Rust, St. Amand, Moffett & Brieske in Atlanta, who represents the defendants in the case, said last week's decision mandated a ruling in his favor. "This court's unanimous decision ... in *Zaldivar* in effect will allow the jury in [my case] to do the justice it deems appropriate," said Moffett.

Norman's client, Jock Walker, has sued equipment manufacturer Tensor Machinery over a serious accident he suffered while working at an optical fiber plant in Carrollton. Walker seeks to hold Tensor responsible for an alleged equipment malfunction that led to his foot being crushed. Tensor, which removed the case to federal court, wants Walker's employer, OFS Fitel, on the verdict form, contending that OFS negligently installed, modified or maintained the machine at issue. The plaintiffs objected in a motion in limine.

On March 30, after what would have been the final pre-trial conference in the case, U.S. District Judge Timothy Batten of the Northern District of Georgia sent the issue to the Georgia Supreme Court to decide. He said the uncertainty in the law meant the issue—whether jurors may apportion blame to an employer that would be immune from a suit by an injured employee—should first be decided by the state courts.

Eight days before the argument, the Georgia high court issued its ruling in *Zaldivar*. That matter involved a defendant driver in a car wreck case who wanted the jury to be able to hold the plaintiff's employer responsible for damages, arguing that the employer shouldn't have allowed the plaintiff to drive a company vehicle in light of complaints about his driving. The court ultimately ruled for the defense in a decision that turned on the law of negligent entrustment.

As for the apportionment statute, Blackwell's opinion said things good and bad for plaintiffs. In a remark that seemingly helped Tuesday's defendants, Blackwell said a provision that says a jury is to consider the fault of even those who could not be sued meant that the law "permits consideration, generally speaking, of the 'fault' of a tortfeasor, notwithstanding that he may have a meritorious affirmative defense or claim of immunity against any liability by the plaintiff."

Arguing for the plaintiffs on Tuesday, Norman maintained that the apportionment law wasn't clear. He said the state Supreme Court had held previously that the apportionment statute was a deviation from the common law, so the common law will apply if the language of the statute is unclear. If the language of the statute were clear, said Norman, "we wouldn't be here today."

He said the court's decision in *Zaldivar* was "well reasoned" and "very helpful to the bench and bar and all the parties." But he said the ruling didn't consider the subsection of the apportionment statute that says nothing in it "shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated."

Noting his opinion did quote that provision, Blackwell asked how allowing a nonparty to be found at fault for apportionment purposes, as opposed to a finding of liability carrying an obligation to pay damages, was the same as eliminating or diminishing a defense or immunity.

Immunity means "there is no duty; the duty is gone," Norman replied. Blackwell sounded unsatisfied, questioning whether Norman's position was that workers' compensation immunity means employers have no duties to their employees to comply with workplace safety regulations, for example.

Norman effectively urged the court to err on the side of not upsetting the status quo. "This is a highly political issue," said Norman. "This is an issue for the Legislature to correct, not this court."

Moffett, the defense lawyer, said the plaintiffs essentially were asking his client to "subsidize the workers' compensation system" by paying for a breach of duty by an employer. He said it was unfair to make a defendant pay for another's wrongdoing.

Moffett pointed to the subsection in the apportionment statute that says a jury is to consider the fault of anyone who contributed to the plaintiff's injury, regardless of whether the person or entity could have been named as a party to the suit. "I think that covers everything," Moffett said of the provision. He said immunity addresses only the consequences of a breach of duty, not whether the nonparty committed a tort.

If a defendant doesn't put on a prima facie case that the nonparty has committed a tort, said Moffett, a judge can grant summary judgment or directed verdict as to the nonparty's fault. "That's fair," said Moffett.

He said the court could craft its ruling narrowly, limiting it to a products liability case with a failure to warn issue such as his. But he urged the court to issue a broader opinion.

Moffett sat down having used only about half of his allotted 20 minutes. "I don't think I need any more time," he said.

Justice David Nahmias, who often is an active questioner at oral argument, was absent from Tuesday's session, though Chief Justice Hugh Thompson said Nahmias would participate in the decision, noting the session was being videotaped.

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