IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

NO.: S22C0527

GEORGIA CVS PHARMACY, LLC,
PETITIONER-DEFENDANT,

v.

JAMES CARMICHAEL,
RESPONDENT-PLAINTIFF.

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's membership includes many companies that operate in Georgia. The decision below is deeply problematic for such businesses, particularly because of the Court of Appeals' expansive view of foreseeability in a premises liability case and its atextual application of Georgia's apportionment statute, OCGA § 51-12-33. The latter ruling essentially allows the reinstatement of joint and several liability against deep-pocketed defendants, in direct contravention of the Legislature's 2005 decision to abolish such liability for most tort cases. Absent this Court's intervention, the Court of Appeals' opinion permits plaintiffs to file suit against multiple entities and then to dismiss all but one remaining defendant on the eve of trial—thereby precluding the remaining defendant from reducing its liability to account for the fault of nonparties who also contributed to the plaintiff's injury. That result cannot be squared with either the text of the statute or the policies underlying the statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a number of issues of great public importance. After an unknown criminal assailant shot Mr. Carmichael in a CVS parking lot, Mr. Carmichael sued Georgia CVS Pharmacy, LLC ("CVS") for premises liability. The jury awarded Mr. Carmichael over $42 million in damages against CVS and concluded that the unknown criminal bore *no fault at all* for Mr. Carmichael's injuries, despite having robbed and shot Mr. Carmichael. The trial court entered judgment against CVS, which the Court of Appeals affirmed in the decision below. As relevant here, the Court of Appeals issued three rulings: (1) the attack on Mr. Carmichael was foreseeable, thus triggering premises liability for CVS; (2) the jury's decision that the unknown shooter bore no fault at all was consistent with the evidence; and (3) CVS could not have reduced its damages to account for the shooter's fault in any event, even if the jury had apportioned fault to him.

Each of these rulings warrants this Court's review. As CVS's petition points out, there is much confusion concerning the proper test for determining whether a third-party criminal attack is sufficiently foreseeable such that it can result in liability for the owner of the premises. This Court should thus recede from the confusing test announced in *Sturbridge Partners v. Walker*, 267 Ga. 785 (1997), which, when applied as the Court of Appeals did in this case, is inconsistent with the formulation developed in *Goldstein, Garber & Salama, LLC v. J.B.*, 300 Ga. 840 (2017), that a landowner is responsible "'only for a consequence which is probable, according to ordinary and usual

experience.'" *Id.* at 842 (citation omitted). Absent review by this Court, decisions like the one in this case will make a proprietor an insurer of safety, contrary to Georgia law.

The Court should also review the Court of Appeals' affirmance of the jury's conclusion that the criminal assailant bore no fault at all. A jury cannot reasonably find a criminal assailant blameless where, as here, the record is undisputed that the assailant initiated the confrontation and ultimately shot the plaintiff.

Given that other amici will address these first two issues, the Chamber focuses its amicus brief on the third issue presented in this case: the Court of Appeals' conclusion that reduction of damages to account for nonparty fault is not available unless the case *proceeds to trial* against more than one defendant. This analysis is contrary to what the Legislature said in subsection (b) of Georgia's apportionment statute, OCGA § 51-12-33. The plain text of that statute makes clear that apportionment of damages is available whenever an action is "*brought*"—not tried—against multiple defendants. The Court of Appeals' atextual rule is patently unfair to defendants in Georgia, as it essentially allows counsel for a plaintiff, at his or her option, to reinstate joint and several liability—even though the Legislature severely limited this concept when it amended OCGA § 51-12-33 in 2005. The Court of Appeals' rule will frequently leave defendants holding the bag for the entire damages verdict, even in a case where such a defendant caused only a fraction of the plaintiff's injury. The new rule will also spur more litigation and add costs for Georgia's court system and for private litigants, while making it more difficult to resolve cases before trial. This Court should thus grant

review and apply subsection (b) as the Legislature wrote it—that is, apply it whenever a case is originally filed (*i.e.*, "brought") against multiple parties.

ARGUMENT AND CITATION OF AUTHORITIES

The Court of Appeals' ruling on the availability of nonparty fault apportionment of damages is (A) irreconcilable with the plain text of OCGA § 51-12-33 and (B) presents "great concern . . . to the public," Ga. Sup. Ct. R. 40, particularly for businesses facing litigation in Georgia. This Court's review is urgently needed.

A. 1. Focusing on the plain text of Georgia's apportionment statute (OCGA § 51-12-33), this Court recently held in *Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC* that reduction of damages based on nonparty fault is available only if a case falls within the ambit of subsection (b) of the statute. *See* 862 S.E.2d 295, 298-301 (Ga. 2021). Subsection (b) provides as follows:

> Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. 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.

OCGA § 51-12-33(b). By its own terms, subsection (b) applies when "an action is *brought* against more than one person for injury to person or property." *Id.* (emphasis added). In this case, however, the Court of Appeals held that subsection (b) applies only if the case "proceed[s] to trial" against more than one person. *Georgia CVS*

Pharmacy v. Carmichael, 2021 WL 5049438, at *9 (Ga. Ct. App. Nov. 1, 2021). Under the decision below, the applicability of subsection (b) (and thus nonparty fault reduction of damages) depends on the status of the action at the time of trial—as opposed to its status at the time it "is brought." This is error.

As this Court emphasized in *Hatcher*, statutory interpretation requires a court to "follow the path of the text[.]" 862 S.E.2d at 296. That is, "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012).

Here, the inquiry must focus on the phrase "[w]here an action is *brought*." OCGA § 51-12-33(b) (emphasis added). "Brought" is the past tense and past participle of "bring," which means "to cause to exist or occur." *Brought*, MERRIAM-WEBSTER, available at https://www.merriam-webster.com/dictionary/brought; *Bring*, MERRIAM-WEBSTER, available at https://www.merriam-webster.com/dictionary/bring. And in the context of a lawsuit, to "bring an action" is "[t]o sue" or to "institute legal proceedings." *Bring an Action*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Bring*, MERRIAM-WEBSTER, *supra* (defining "bring" in the context of "bring legal action" as "institute"). To determine whether a case was "brought" against more than one person, the analysis must therefore focus on the status of the case at the time it was initiated through the filing of the original complaint. *See* OCGA § 9-11-3(a) ("A civil action is commenced by filing a complaint with the court."). Following the path of the legislative

text in this context leads to the conclusion that the applicability of subsection (b) depends on the status at the time the case is filed—not at the time it goes to trial.

2. The Court of Appeals' conclusion to the contrary lacks any basis in the text of subsection (b). Indeed, the court's opinion does not examine the relevant statutory text at all. *See Carmichael*, 2021 WL 5049438 at *9. Adhering to the actual text of the statute provides "greater certainty in the law, and hence greater predictability and greater respect for the rule of law." SCALIA & GARNER, *supra*, XXIX. The Court of Appeals' ruling is irreconcilable with this Court's directive to "start with the statutory text itself," *Hatcher*, 862 S.E.2d at 298, and to afford subsection (b) "its plain and ordinary meaning," *id.* at 298 (citations omitted). Nothing in the text of subsection (b) supports the notion that its application depends on the status of the case at the time of trial. Had the Legislature wanted to make the application of nonparty fault reduction dependent on the status at the time of trial, "it could have and should have said so." *Hatcher*, 862 S.E.2d at 301. But it instead used the word "brought" to indicate that the analysis must focus on the state of affairs at the time the action is commenced. *See Jordan v. Bosworth*, 123 Ga. 879, 880 (1905) ("There is no substantial difference between bringing a suit, and commencing a suit.").

B. There is also good reason why the Legislature decided that the analysis must depend on the status of the action at the time it is initiated and, by the same token, why the Court of Appeals' contrary rule is "of great concern . . . to the public," Ga. Sup. Ct.

R. 40, such that this Court should grant review. Left undisturbed, the Court of Appeals' atextual analysis would create dire and unfair consequences for defendants in Georgia.

1. The Legislature amended OCGA § 51-12-33 in 2005 to abolish joint and several liability in most tort cases and to instead provide for apportionment of any award of damages "according to degree of fault." 2005 Ga. S.B. 3. "[T]he statute reiterates this point by saying that damages 'shall not be a joint liability among the persons liable.'" *McReynolds v. Krebs*, 290 Ga. 850, 852 (2012) (citation omitted). With that in mind, "the purpose [of the statute] is to subject the defendant only to the portion of fault that he is actually responsible for, so as not to make him bear liability in excess of his responsibility for the harm. Simply put, fairness is the aim of Georgia's apportionment statute." Michael Koty Newman, *The Elephant in the Room: Apportionment to Nonparties in Georgia*, 50 GA. L. REV. 669, 671 (2016).

Yet the Court of Appeals' new rule essentially nullifies the Legislature's decision to restrict joint and several liability. It allows counsel for a plaintiff to dictate whether a tort defendant has the ability to apportion damages to a nonparty whose fault also contributed to the plaintiff's injury. A plaintiff can now sue multiple defendants—for example, in an effort to prevent a foreign corporation from removing the case under federal diversity jurisdiction—and then dismiss all but one defendant on the eve of trial, thereby precluding the one remaining defendant from allocating any damages to nonparties who also harmed the plaintiff. The result of this maneuver is that the one remaining defendant is left holding the bag—it has to pay for 100 percent of the

plaintiff's injury even in a case where it caused only one percent of the injury. That is exactly the kind of unfairness the Legislature sought to prevent.

After all, "traditional joint and several liability rules encourage plaintiffs to seek out a 'deep-pocket' defendant, even if that defendant contributed only modestly to causing the damages." Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 VAND. L. REV. 257, 271 (2013). "Tort law . . . should not encourage a suit only against well-heeled defendants. This is precisely what happens, however, when apportionment is unavailable and joint and several liability is imposed." Gerald W. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 U. DAYTON L. REV. 267, 374 (1996).

But under the Court of Appeals' new rule, the Legislature's decision can easily be circumvented by re-imposing joint and several liability on selected defendants. In fact, a plaintiff can first collect settlements from various other entities and then preclude the one remaining defendant (likely the one with the most resources) from allocating any damages to the settled former defendants, even in cases where the settled defendants were the major culprits for the plaintiff's injury. This runs afoul of what the Legislature intended in 2005, in particular as to fault apportionment for settled defendants. The Legislature specifically provided that "[n]egligence or fault of a nonparty *shall be considered* if the plaintiff entered into a settlement agreement with the nonparty"—even without the remaining defendant having to provide notice of its intent to blame the settled nonparty at trial. OCGA § 51-12-33(d)(1) (emphasis added).

The Court of Appeals' new rule, however, means that the remaining defendant cannot reduce its damages based on the fault of a settled nonparty if the plaintiff decides to make the case a single-defendant action on the eve of trial.

2. The Court of Appeals' new rule will also increase litigation in this state and likely make the resolution of disputes more difficult. Under OCGA 51-12-33(b), "[d]amages apportioned by the trier of fact . . . shall not be subject to any right of contribution." By foreclosing apportionment when only one defendant proceeds to trial, the Court of Appeals' rule returns Georgia to a system where a remaining defendant's best option is to seek contribution from a nonparty after the trial. But there are several problems with that approach. For one, such claims "are often fruitless when the other [nonparty] tortfeasors lack resources." Shepherd, *supra*, at 271. In other words, the remaining defendant will in many cases still be left holding the bag. Robert C. Riter, Jr. & David A. Pfeifle, *An Invitation for Lawyers' Participation in Civil Justice Reform*, 42 S.D. L. REV. 243, 252 (1997) ("Traditional joint and several liability has been criticized because the right of contribution among joint-tortfeasors does not protect solvent defendants from bearing the risk of insolvent co-defendants or joint-tortfeasors.").

For another, "apportionment is more judicially efficient because it avoids a second phase of litigation respecting contribution." Boston, *supra*, at 367. Forcing the remaining defendant to seek contribution means that there will be additional judicial

labor and cost to private litigants. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212 (1994) (requiring a defendant to later sue a settling defendant for contribution "burdens the courts with additional litigation").

Worse still, the Court of Appeals' new rule makes it difficult to obtain early resolution of cases. Properly applied, Georgia's apportionment statute encourages resolution because a defendant can assess a settlement offer knowing that accepting it will limit its risk and bring finality. That is, the settled defendant knows that it will *not* be subject to a contribution claim later on if the case goes to trial and that any subsequent nonparty apportionment of damages to the settled defendant will not increase the settled defendant's actual liability. The case is over for a defendant the moment the ink dries on the settlement agreement.

But under the Court of Appeals' scheme, a defendant in a multi-defendant case cannot seriously evaluate the value of a pretrial settlement offer because it cannot know whether it will be subject to a contribution claim later on if the case goes to trial. That is, the plaintiff may offer and collect what appears to be a fair and reasonable pretrial settlement from one defendant—but then preclude the jury from apportioning damages to the settled defendant and any other nonparties, which in turn forces (and enables) the remaining defendant to sue the settled defendant for contribution. The result is that the settled defendant no longer gains certainty, let alone finality, by entering into a pretrial settlement. It has no idea whether it will be subject to a contribution claim down the road, much less whether the original settlement amount will end up being a

fair deal after the conclusion of the contribution suit, which is particularly troubling in light of the recent trend of massive tort verdicts in Georgia. *See, e.g.*, *Batchelder v. Malibu Boats, LLC*, No. 2016CV0114 (Ga. Super. Ct. Rabun Cnty. Aug. 28, 2021) (awarding $200 million to plaintiffs in case against boat manufacturer); *Madere v. Schnitzer Southeast, LLC*, No. SC17CV106 (Ga. St. Ct. Muscogee Cnty. Aug. 23, 2019) (awarding $280 million to plaintiffs in case against trucking company); *Cheston-Thornton v. HACC Pointe South Inc.*, No. 2014CV01498D (Ga. Super. Ct. Clayton Cnty. May 22, 2018) (awarding $1 billion to plaintiff in case against apartment complex where plaintiff was assaulted). This goes against what the Legislature intended with the 2005 amendment of OCGA § 51-12-33 and also against Georgia's longstanding policy that "settlement agreements are highly favored." *Sanders v. Graves*, 297 Ga. App. 779, 779 (2009).

* * *

The Court of Appeals failed to consider the plain language of the apportionment statute and thus created a new, counter-textual rule that is unfair for tort defendants in Georgia and is contrary to what the Legislature intended and enacted. This Court should review this case and apply the statute consistent with its text.

CONCLUSION

This Court should grant a writ of certiorari.

Respectfully submitted this 10th day of January, 2022.

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CERTIFICATE OF SERVICE

It is hereby certified that on this 10th day of January 2022, the foregoing **AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA** has been served upon:

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