IN THE SUPREME COURT FOR THE STATE OF GEORGIA

JOCK L. WALKER, and TENEKA L. WALKER,	**Supreme Court of Georgia Case No. S15Q1222**
Appellants,	
v.	**United States District Court Northern District of Georgia Newnan Division**
TENSOR MACHINERY, LTD., and TENSOR FIBER OPTIC TECHNOLOGIES, LTD.,	**Case No. 3:12-CV-00175-TCB**
Appellees.	

BRIEF *AMICUS CURIAE* OF DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF APPELLEES

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To that end, DRI participates as *amicus curiae* in cases that raise issues of importance to its membership and to the judicial system. This is one of those cases.

DRI's interest in this case arises from its support of comparative or proportional allocation of fault. DRI's members and their clients frequently litigate issues of fault allocation throughout the country and in Georgia. DRI believes that fault-based allocation of damages to nonparties as adopted by the Georgia General Assembly is consistent with a fair and equitable civil justice system. Accordingly, DRI seeks to ensure that fault-based allocation is not undermined by excluding various classes of nonparties, including those with immunity from suit.

Excluding immune nonparties from the allocation of fault is inconsistent with the public policy adopted by the General Assembly because the nonparties' immunity does not mean that they cannot be negligent or at fault. As persons or entities who can contribute to an injury or damages, such nonparties' fault must be taken into account for a defendant's liability to be limited to the damages caused by the defendant's actions. A regime where a third party bears an employer's responsibility for an employee's workplace injury is unfair and inequitable. *See* Restatement (Third) of Torts § B19, cmt. *l* (2000).

ARGUMENT

As DRI was finalizing this brief, the Court issued its decision in *Zaldivar v. Prickett*, ____ Ga. ____, ___ S.E.2d ___ (July 6, 2015). In *Zaldivar*, this Court rejected the Appellants Jock and Teneka Walker's reading of *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 361, 729 S.E.2d 378 (2012) and held that "the apportionment statute 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 to the plaintiff." Slip op. at 17. That holding answers the certified question in this case in the affirmative.

To the extent that any question remains as to the apportionment of fault to employers with immunity under Georgia's workers' compensation statutes, DRI submits this amicus brief. The brief seeks to clarify the difference between true

immunity and nominal immunity. The former refers to those parties that, for public policy reasons, cannot be sued. The latter refers to those parties that either have no duty to a plaintiff or have not engaged in tortious conduct. The apportionment statute requires allocation of fault to parties with true immunity. Both the Georgia workers' compensation statutes and the compromise underlying workers compensation demonstrate what common sense otherwise would; namely, an employer can be at fault for a vocational injury. Thus, despite workers' compensation statutes that limit liability to employers—creating a true immunity—employers can still be apportioned fault under O.C.G.A. § 51-12-33(c).

I. An employer who is immune from suit because of the workers' compensation exclusive remedy is not, by virtue of that immunity, free from fault for an employee's injuries.

The Georgia Assembly adopted the Tort Reform Act of 2005 to ensure that a defendant would only be liable for damages proportionate to that defendant's fault. Excluding employers from the allocation of fault in third-party suits arising because of workplace injuries defeats that purpose.

Immunity is frequently used to address both true immunity, where a party for public policy reasons cannot be sued, and nominal immunity, where a party owes no duty to the plaintiff or has not engaged in tortious conduct. In most cases, the difference between true and nominal immunity is unimportant. But when determining whether fault can be allocated to an immune nonparty, the distinction

is critical. Nonparties who are immune from suit are shielded from liability even though they may be at fault or negligent. Nonparties who have not engaged in tortious activity or have no duty to the plaintiff are not at fault or negligent. Only nominally immune nonparties should be excluded from allocation of fault, and then only because nominally immune nonparties cannot have "contributed to the alleged injury or damages." O.C.G.A. § 51-12-33(c).

The immunity granted by Georgia's workers' compensation statutes is true immunity. The legislative settlement achieved by the workers' compensation statutes was possible because employers frequently bear some responsibility for a workers' occupational injury. Thus, the workers' compensation exclusive-remedy provision grants employers immunity from suit even if the employer is actually at fault for the employee's injuries or damages.

A. True immunity from suit does not mean that a person or entity if free from fault; nominal immunity does.

The Walkers repeatedly assert that the legal effect of immunity is to render nonparties faultless. (Appellants' Br. 7, 12, 14, 18.) The Walkers cite no authority for this position, but there is myriad authority to the contrary. Indeed, as demonstrated by the cases cited in *Zaldivar*, slip op. 19-21, and the Product Liability Advisory Council, Inc.'s thorough *amicus curiae* brief, jurisdictions throughout the country have determined fault must be allocated to immune parties

to ensure that defendants only bear their fair share of damages (PLAC Br. 7-20). Those authorities are consistent with the legal effect of immunity.

Whether fault should be allocated to an immune nonparty depends on the nature and character of the immunity. True immunity "does not mean that a party is not at fault, it simply means that the party cannot be sued." *Pinnacle Bank v. Villa*, 100 P.3d 1287, 1293 (Wyo. 2004); *see Ocasio v. Federal Express Corp.*, 162 N.H. 436, 445-46, 33 A.3d 1139 (2011). As one Georgia law treatise explains, true immunity "is a legal shield between a tortfeasor and liability for damages flowing from the tort. The tortfeasor may have committed a negligent act so that duty, breach of duty, causation and damages may be proven by a preponderance of the evidence; but for public policy reasons, a recovery of damages is barred." Charles R. Adams III, Ga. Law of Torts § 21:1 (2013-2014 ed.). "There is nothing logically or legally inconsistent about allocating fault but shielding immune parties from liability for the fault." *Mack Trucks, Inc. v. Tackett*, 841 So.2d 1107, 1114 (Miss. 2003).

Nominal immunity arises where a class of persons or entities owes no duty or has been determined not to be liable for a specific class of conduct. Because a nominally immune party cannot be deemed negligent, fault cannot logically be allocated to a nominally immune party. For example, in *Richards v. Owens-Illinois, Inc.*, 928 P.2d 1181 (Cal. 1997), the California Supreme Court addressed

whether fault could be allocated to tobacco companies who, at that time, enjoyed statutory immunity. The defendant argued that the court's earlier decision requiring allocation of fault to an employer who had workers' compensation immunity logically required allocation of fault to the immune tobacco companies. The court distinguished between workers' compensation immunity, which "does not imply that a negligent employer lacks "fault" or is not a "tortfeasor," and the immunity provided to tobacco companies. 928 P.2d at 1183. The latter derives from a legislative judgment that tobacco companies "have no 'fault' or responsibility, in the legal sense, for the harm caused by their products." *Id.* The premise of the tobacco companies' immunity is the companies "simply commit[] no tort against knowing and voluntary smokers by making cigarettes available for their use." *Id.* at 1191.

The California Court of Appeals later applied this analysis to determine that fault could be allocated to the United States Navy despite its sovereign immunity. *Collins v. Plant Insulation Co.*, 185 Cal. App. 4th 260, 268, 110 Cal. Rptr. 3d 241 (2010). In *Collins*, the plaintiffs, survivors of a former naval yard worker who died from mesothelioma, sued various asbestos manufacturers. The defendants wanted to allocate damages to the Navy, but the trial court refused because of the Navy's sovereign immunity. On appeal, the appellate court considered whether the Navy's sovereign immunity was based on a determination that the Navy could not be at

fault or if it was a shield to liability based on public policy considerations. The court noted that under the Federal Tort Claims Act, 28 U.S.C. § 2671, the United States did not waive sovereign immunity for lawsuits based upon discretionary functions of the United States. 185 Cal. App. 4th at 269-70. The Federal Tort Claims Act specifically recognizes that the government might abuse its discretion in performing a discretionary function and still maintain sovereign immunity. *Id.* at 270. In other words, the statute acknowledges that the government could exercise its discretion wrongfully, demonstrating that the government could be at fault for a person's injuries. *Id.* Accordingly, the court concluded that sovereign immunity is true immunity, and fault could be allocated to the Navy. *Id.* at 273. *Accord Pinnacle Bank*, 199 P.3d at 1293 (allocating fault to state despite state sovereign immunity); *Humes v. Fritz Cos.*, 105 P.3d 1000, 1007 (Wash. Ct. App. 2005) (fault can be allocated despite tribal sovereign immunity).

Georgia's allocation statute requires fault to be allocated to nonparties who contributed to a plaintiff's alleged injuries or damages. True immunity does not prevent a nonparty from being at fault. The statutory requirement that the nonparty actually has contributed to a plaintiff's alleged injuries or damages prevents allocation of fault to an immune nonparty who owes no duty or is not at fault. Accordingly, allocation of fault to truly immune nonparties who contributed to a plaintiff's injuries or damages is required by the Georgia allocation statute.

B. Georgia's workers' compensation statutes grant true immunity.

The immunity provided by Georgia's workers' compensation statutes, O.C.G.A. § 34-9-11, is true immunity and should not prevent the allocation of fault to immune employers. Workers' compensation systems generally impose a legislative compromise between an injured worker's interest in speedily obtaining compensation and employers' interests in avoiding liability. As the United States Supreme Court has explained, "Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen Const. Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 461 U.S. 624, 636 (1983). If employers were never at fault for occupational injuries, there would be no basis for the legislative compromise imposing workers' compensation liability on employers.

Moreover, like the Federal Tort Claims Act, Georgia's workers' compensation statutes demonstrate legislative recognition that an employer could be at fault for an employer's injuries. O.C.G.A. § 34-9-265 provides that "[i]f it shall be determined that the death of an employee was the direct result of an injury proximately caused by the intentional act of the employer with specific intent to cause such injury" the employer shall pay a penalty. O.C.G.A. § 34-9-265(e).

This provision would be superfluous if the General Assembly believed that an employer could not be at fault for an employee's injuries.

It simply is not the case that employers cannot be at fault for an employee's vocational injury. Such a conclusion is not only nonsensical, but also contrary to the text and policy of the workers' compensation statutes.

The purpose of the fault-allocation statute is clear. The General Assembly intended to limit liability for payment of damages to degree of fault. The legislative compromise struck in the workers' compensation statute is not undermined by allocating fault to employers. "There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss." *Brown v. Keill*, 580 P.2d 867, 874 (Kan. 1978). Such a result unfairly requires third parties to supplement the workers' compensation system despite receiving no benefit from the workers' compensation bargain. *See Mack Trucks*, 841 So.2d at 115.

The interpretation of Georgia's allocation statute the Walkers advocate continues the very sort of inequitable imposition of employers' fault on nonparties that the adoption of several liability is intended to avoid. Under joint-and-several liability, "a defendant in a third party action bear[s] all of an employer's responsibility, . . . a quite unfair result." Restatement (Third) of Torts § A19,

reporter's note to cmt. e (2000). "The adoption of several liability, coupled with the submission of the nonparty employer for assignment of comparative responsibility . . . ends the unfairness to independent tortfeasors." *Id.* at § B19, cmt. *l.*

The inequity of the Walkers' position is shown when considered in light of the facts in *Mack Trucks, Inc. v. Tackett,* 841 So.2d 1107 (Miss. 2003). In *Mack Trucks,* the decedent was killed in an explosion that occurred while two fuel-tanker trucks were being simultaneously offloaded while parked next to each other. 841 So.2d at 1109-10. His survivors obtained workers' compensation benefits, and brought a third-party action against Mack Trucks, one of the truck manufacturers, and Cummins Engine Company, which made the truck's engine. *Id.* at 1110. The jury assessed damages of $1,470,000; apportioned 60% of fault to the decedent, 39% to the decedent's employer; and concluded that Mack Trucks and Cummins bore ¾% and ¼% of the fault, respectively. *Id.* at 1112. The employer was immune from liability under Mississippi's workers' compensation statutes. *Id.* Under the Walkers' theory, all of the employer's fault should be allocated to Mack Trucks and Cummins even though their collective fault was 1%.[1] The Mississippi

[1] Under Georgia law, if a jury finds a plaintiff 50% or more responsible for an injury or damages, the plaintiff is not entitled to damages. O.C.G.A. § 51-12-33(g). But one can hypothesize a similar result where the jury found the decedent less than 50% responsible.

Supreme Court concluded that this result was inequitable. "To immunize employers from fault allocation in third-party tort suits would go against the spirit of the bargain between employers and employees that under underlies workers' compensation." *Id.* at 1115. Instead of the legislative compromise, "the third party would pay the employer's cost of compensation [through contribution], and the employee would have the possibility of recovering in tort for his employer's fault, since that could be allocated to the third party." *Id.*

The Mississippi Supreme Court's criticism of the allocation of fault in *Mack Trucks* applies here. The purposes of workers' compensation and limiting the liability of defendants to their proportionate share of fault are advanced by allocating fault to immune employers. Failure to do so undermines Georgia public policy as adopted by the General Assembly.

II. An employer who is immune from suit because of the workers' compensation exclusive remedy should be treated like a settling nonparty.

The Restatement (Third) of Torts suggests an alternative view of allocating fault to employers in third-party actions like this one—treating employers like settling nonparties. Restatement (Third) of Torts § B19, cmt. *l*. The Georgia allocation statute specifically addresses the procedure for allocating fault to settling nonparties. O.C.G.A. § 51-12-33(d)(1). As the Court noted in *Zaldivar*, "a settlement agreement ordinarily extinguishes conclusively any potential liability

that the settlement was meant to resolve." Slip op. at 16. So too the workers' compensation system acts to conclusively extinguish any potential tort liability that an employee has for a vocational injury. Thus, the Restatement suggests that "the plaintiff-employee's workers' compensation benefits can be conceptualized as a settlement of tort liability between the plaintiff-employee and the employer." Restatement (Third) of Torts § B19, cmt. *l*. And on this basis, the defendant's liability is limited to its proportionate share of fault, just as would be true if there was any other settling nonparty.

CONCLUSION

DRI respectfully submits that the Court should answer the certified question affirmatively.

Dated: July 8, 2015

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CERTIFICATE OF SERVICE

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