**EVIDENCE ESSENTIALS PODCAST**

**APPORTIONMENT**

* 1. Hello everyone, welcome to another session of the Good Judge-ment podcast. I am Wade Padgett…
	2. *and I am Tain Kell and together, we will be your hosts*
	3. So Tain, remember way back when we started this podcast and we had a series of episodes dealing with evidence essentials?
	4. *Ah yes, I remember it fondly. We started recording at the UGA law school and, as I recall, we had a FOP join us for evidence essentials. What was his name again?*
	5. You remember, it was Mr. Garon Muller. My former staff attorney and former assistant DA. He now works at a law firm in Augusta. Remember? He has a young son and a wife who is an assistant DA…
	6. *Oh – that’s right! He’s the guest that was always trying to plug his law firm whenever he was on the podcast. What ever happened to old Garon?*
	7. Well, during the pandemic we have not seen much of Garon but I recruited him to come out of seclusion and make an return appearance on the Good Judge-ment Podcast.
	8. *That’s great! Garon, tell everyone hello.*
	9. [Hello.]
	10. *Well, that was rather literal.* *In all seriousness, we are glad you are back with us today.*
	11. [Garon- ]
	12. Garon, tell the folks what exciting evidence(ish) topic we will be discussing today.
	13. {Garon} Apportionment
	14. *I am really glad we are discussing this topic because it comes up with some frequency in tort cases and the rules have changed since Wade and I attended law school. Let’s dive right in.*

[Garon – lead off the conversation and we will jump in – shocking, huh?]

{The one thing I want to know is how/why you can blame someone who isn’t at trial and is not a party – the “empty chair” syndrome. I think some notice is required so at least everyone knows you are seeking to blame a third party}

* 1. OCGA 51-12-33- Apportionment of Damages in actions against more than one person according to the percentage of fault of each person
	2. Georgia has a “rule of apportionment by comparative fault”
	3. Look at it as varying levels and degrees of fault as between the various parties relative to each other.
		1. The damages are what they are- No bearing upon
	4. The apportionment problem centers around who is to pay how much of the damages.
	5. Apportionment can come into play:
		1. when a contributorily negligent plaintiff sues a more negligent defendant;
		2. when a plaintiff sues more than one defendant; or
		3. when a plaintiff sues one defendant but other wrongdoer(s) contributed to the injury.
	6. Contributorily Negligent Plaintiff- OCGA 51-12-33(a)
		1. Trier of fact shall determine the fault of the Plaintiff and the Judge shall reduce the damages award in proportion to that fault
		2. Sub(g)- Comparative Negligence- if Plaintiff is more than 50% at fault, cannot recover
	7. Case Against More than One Defendant- OCGA 51-12-33(b)
		1. Trier of fact determines the fault of Plaintiff and each Defendant
		2. After reduction of damages award for Plaintiff’s fault, damages are apportioned among defendants according to their own fault.
		3. “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.**”
	8. Other Wrongdoers Are Not a Party to the Action- OCGA 51-12-33(c)
		1. The trier of fact should consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless if they are a named party, HOWEVER
		2. Defending party must give notice that a nonparty was at fault 120 days prior to date of trial to introduce evidence of such, OR
		3. If Plaintiff entered into settlement agreement with the nonparty, that nonparty’s fault SHALL be considered
	9. Joint and Several Liability
		1. Still around but severely limited by the Apportionment Statute
		2. “Concerted action” or a “civil conspiracy” does survive the apportionment statute and damages (if any) will be awarded jointly and severally. Fed. Deposit Ins. Corp. v. Loudermilk, 305 Ga. 558, 573, 826 S.E.2d 116, 127 (2019).
			1. Great case on the history of J and S and the effect of the Apportionment statute
		3. Where fault is divisible, apportionment (and not J and S) applies
	10. Vicarious Liability and Apportionment
		1. Old Rule
			1. If a defendant employer concedes that it will be vicariously liable under the doctrine of respondeat superior if its employee is found negligent, the employer is entitled to summary judgment on the plaintiff's claims for negligent entrustment, hiring, training, supervision, and retention, unless the plaintiff has also brought a valid claim for punitive damages against the employer for its own independent negligence.
		2. New Rule under *Quynn v. Hulsey*, 850 S.E.2d 725, 732 (Ga. 2020)
			1. Claims that an employer was negligent are divisible from claims that its employee was negligent, and so are capable of being assigned percentages of fault through apportionment.
	11. Recap
		1. Trier of fact should always compare Plaintiff’s negligence to that of Defendants
		2. After a damage award is decided, damages are apportioned to each Defendant according to their respective fault
		3. Jury can consider and attribute fault to non-party if noticed pre-trial or there was a settlement with nonparty
		4. Joint and Several is only applicable in concerted action or civil conspiracy
		5. Respondeat Superior Rule has been abrogated by the Apportionment Statute

[ending script]