

GEORGIA LAW OF TORTS
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CONTRIBUTION ISSUES IN TORT LAW

I. Introduction.

In the typical tort case, an alleged tort victim asserts a claim against an alleged tortfeasor or alleged joint tortfeasors. The focus of the case is then upon the duties owed to the victim, the duties breached by the tortfeasor(s), the injuries caused by such breaches, and the damages resulting from such injuries. In this context, the Georgia law of torts permits the victim to recover damages for her greatest injury from any one, or more, of the tortfeasors. Stated differently, the tort victim can recover 100% of her damages from a tortfeasor who is 1% negligent. The Georgia law of contribution exists to address, between tortfeasors, some of the potential inequity of this system.

The statutory basis for contribution claims, in the context of the Georgia law of torts, is O.C.G.A. § 51-12-32, which provides:

(a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

(b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.

(c) [Indemnity provisions.]

Two circumstances are statutorily excluded from the application of O.C.G.A. § 51-12-32. First, in litigation of claims for property damage, the jury may specify in its verdict the particular damages to be recovered of each defendant, pursuant to O.C.G.A. § 51-12-31. In such event, the judgment must be entered severally. While the language of this statute is not limited to claims for property damage, it has been interpreted to be only applicable to property damage claims. Walker v. Bishop, 169 Ga.App. 236, 312 S.E.2d 349 (1983).

Second, and consistent with Georgia's hybrid version of contributory/comparative negligence, if the plaintiff has brought an action for injury against more than one defendant and the plaintiff is partially responsible for the injury or damages claimed, a jury may apportion liability among the defendants whose negligence exceeded the plaintiff's negligence, pursuant to O.C.G.A. § 51-12-33. If liability is apportioned by the trier of fact under this statute, then there is no joint liability and no contribution between the tortfeasors; even though, those tortfeasors may be joint tortfeasors.

II. Right of Contribution.

In the context of contribution, Georgia courts have treated "trespass" synonymously with "tort" and have routinely interpreted the term "joint trespasser," as used in O.C.G.A. §51-12-32, to mean "joint tortfeasor." Southern Railway v. City of Rome, 179 Ga. 449, 176 S.E. 7 (1934); Note, *Contribution Among Joint Tortfeasors*, 12 Ga.Law Rev. 553, 560 (1978). Therefore, a joint tortfeasor who pays a judgment or settlement can pursue other joint tortfeasors for contribution. O.C.G.A. §51-12-32(a) & (b). Separate actors are joint tortfeasors if their

“separate and distinct acts of negligence concur to proximately produce an injury.” St. Paul Fire & Marine Insurance Company v. MAG Mutual Insurance Company, 209 Ga.App. 184, 433 S.E.2d 112 (1993) citing Travelers Indem. Co. v. Liberty Loan Corp., 140 Ga.App. 458, 231 S.E.2d 399 (1976).

III. Procedure.

A claim for contribution can properly be asserted through a variety of procedural mechanisms. The traditional mechanism was the filing of a separate action for contribution by one tortfeasor against another tortfeasor, both of whom had been the subject of a judgment entered against them jointly, but which one of them had paid. This mechanism is still viable, as a claim for contribution is not a compulsory claim which must be asserted in the underlying action. Tenneco Oil Company v. Templin, 201 Ga.App. 30, 410 S.E.2d 154 (1991)

While the “quintessential element of a claim for contribution” is still the legal compulsion to pay on the part of the one seeking contribution, it is no longer necessary for a judgment to have been entered against the tortfeasors jointly or that any judgment have been entered against either tortfeasor. GAF Corporation v. Tolar Construction Company, 246 Ga. 411, 412, 271 S.E.2d 811, 812 (1980); Marchman & Sons, Inc. v. Nelson, 251 Ga. 475, 306 S.E.2d 290 (1983); Thyssen Elevator Company v. Drayton-Bryan Company, 106 F.Supp. 2d 1342 (2000). The removal of this requirement, which was codified in the 1972 version of O.C.G.A. §51-12-32(a), permits a defendant who has a potential contribution claim to file a third party complaint in the underlying action against a third party contribution defendant, pursuant to O.C.G.A. §9-11-14. Similarly, a co-defendant may file a cross-claim for contribution against another co-defendant, pursuant to O.C.G.A. §9-11-13(g). While these approaches may serve the purpose of judicial

economy, such approaches may not be strategically beneficial to the defendant/contribution claimant who seeks a defense verdict on the underlying claim.

A claim for contribution may also be asserted as a separate action. The separate action can be filed after the contribution claimant settles with the injured party, with no suit having been filed; it can be filed while the underlying suit is pending at any level; or it can be filed after an underlying suit has been concluded by settlement or by satisfaction of a judgment. If a contribution action is pursued as a separate action in the absence of a judgment, then the liability of the tortfeasors and the appropriate amount of the damages will be subjects of litigation in the separate contribution case.

IV. Allocation Among Joint Tortfeasors.

The allocation of the amount to be paid by each tortfeasor is based upon the number of tortfeasors and not upon the relative fault or responsibility of the tortfeasors. The calculation consists of dividing the amount of the judgment or settlement equally among the number of tortfeasors. Gerschick v. Pounds, 267 Ga.App. 554, 586 S.E. 2d at 22 (2003); Thyssen Elevator Company, 106 F.Supp. at 1348,1352. However, for purposes of counting the number of tortfeasors, a distinction is made between primary and derivative liability. Specifically, if a party “is liable to the injured party solely on the basis of negligence imputed to it by virtue of its relationship with one of the other defendants, the one guilty of the negligent conduct and the one to whom the negligence is imputed are to be treated as one party when determining the pro rata share of the verdict or settlement each defendant must pay.” St. Paul v. MAG Mutual, 209 Ga.App. at 186, 433 S.E.2d at 114. This exception to the general rule has been referred to as the “conjoined tortfeasor” exception. Thyssen Elevator Company, 106 F.Supp. at 1352-1353.

V. Defenses.

A. Failure to Mitigate / No Legal Compulsion.

When a judgment has been entered against the contribution claimant, the contribution defendant may defend against the contribution claim by asserting non-litigated defenses which the contribution claimant could have relied upon to defeat the underlying claim because the “quintessential element” of a contribution claim is the legal compulsion to pay on the part of the contribution claimant. GAF Corporation, 246 Ga. at 412, 271 S.E.2d at 812. These defenses are in the nature of a failure to mitigate defense. The contribution claimant has failed to mitigate his damages, and, therefore, his contribution claim may be reduced or eliminated.

In GAF Corporation, the contribution claimant declined to assert a viable statute of limitation defense to the underlying claim, and the failure to assert that defense was fatal to the subsequent contribution claim. The Court used broad language in stating, “where an action brought by an injured person against an alleged tortfeasor results in the alleged tortfeasor compromising the claim or being cast in judgment, no indemnification or contribution can be recovered by the party cast against a third party if the party cast had a defense available which would have defeated the action but failed to assert it.” Id.

If the contribution claimant has settled the underlying claim in the absence of a suit or a judgment, the GAF Corporation case clearly gives the contribution defendant the opportunity to litigate all defenses which may have been available for the contribution claimant to defeat the underlying claim. These defenses could be based on procedure, based on breach of a duty, based on causation, and/or based on damages. In such circumstances, the contribution claimant must essentially litigate the original plaintiff’s underlying claim against it, as well as its claim against

the contribution defendant.

While these defenses are in the nature of a failure to mitigate, the contribution claimant has no duty to negotiate a reduction in a judgment entered against him. Gerschick, 262 Ga. App. at 558, 586 S.E. 2d at 26. The judgment imposes the legal compulsion to pay against the contribution claimant necessary to sustain the contribution claim.

B. Equitable Defenses.

The Georgia Court of Appeals has recently held that the right of contribution is a legal remedy and that an action for contribution is an action at law. Gerschick, 262 Ga.App. at 558, 586 S.E.2d at 25-26, citing Watkins v. Woodbery, 148 Ga. 249, 96 S.E. 338 (1918). As a result, equitable defenses are not available to defeat a claim for contribution; even though, the claim may be brought under O.C.G.A. §23-2-71, which is an equity statute.

C. Immunity.

The Georgia Tort Claims Act (“GTCA”) has been interpreted as providing a waiver of immunity by the State as to claims for contribution, if the GTCA waives immunity as to the activity which is alleged as the basis for making the State a tortfeasor from whom contribution can be obtained in relation to the underlying claim. Department of Transp. v. Montgomery Tank Lines, Inc., 276 Ga. 105, 575 S.E.2d 487 (2003).

D. Statute of Limitation.

The statute of limitation applicable to an action for contribution is the twenty (20) year period applicable to claims under statutes, O.C.G.A. §9-3-22, rather than any statute of limitation

applicable to the underlying claim. Independent Manufacturing Company, Inc. v. Automotive Products, Inc., 141 Ga.App. 518, 233 S.E.2d 874 (1977); Krasaeath v. Parker, 212 Ga.App. 525, 441 S.E.2d 868 (1994) certiorari denied. The period of limitation does not begin to run until a judgment is entered against the contribution claimant or a compromise and settlement of the underlying claim is made. Tenneco Oil Company v. Templin, 201 Ga.App. at 33, 410 S.E.2d at 157.

E. Statute of Repose.

While there is no statute of repose on a claim for contribution, the Georgia Court of Appeals has held that a statute of repose applicable to the underlying claim does destroy a contribution claim, if the contribution claim is not filed against the contribution defendant within the statute of repose applicable to the underlying claim. Krasaeath, 212 Ga.App. 525, 441 S.E.2d 868; Gwinnett Place Associates v. Pharr Engineering, Inc., 215 Ga.App. 53, 449 S.E.2d 889 (1994). The Court of Appeals has even applied the statute of repose applicable to an underlying claim to cut off a contribution claim which was based on a judgment entered jointly against the contribution claimant and contribution defendant in the underlying action after the expiration of the statute of repose. Pilzer v. The Virginia Insurance Reciprocal, 260 Ga.App. 736, 580 S.E.2d 599 (2003), certiorari granted.