Statement of former Georgia Trial Lawyers Association President Robin Frazer Clark on the Georgia Supreme Court's ruling in *FDIC v. Loudermilk et al.* (S18Q1233)

The Supreme Court's opinion in *FDIC v. Loudermilk* reminds me of Mark Twain's quotation: "The rumors of my death have been greatly exaggerated." I believe the rumors of the death of joint and several liability have been greatly exaggerated, ever since its passage in 2005. In every case I have handled involving more than one defendant since 2005, I have argued that joint and several liability is still alive and kicking. Until now, I have not had a trial judge or defense attorney agree with me. *Loudermilk* gives me new hope with my argument. When the Georgia Legislature enacted the apportionment scheme, it did not expressly abolish joint and several liability. So, if we are going to go down the path that strict construction necessarily leads, the only destination one can reach is that joint and several liability survived the apportionment scheme, exactly as Justice Warren explains. For example, in a wrongful death case based on the negligent design of the road, the designer who violated industry standards acts in concert with the State who allowed the design to violate the MUTCD acts in concert with the City who didn't make sure the street lights were working so as to illuminate the construction for a driver, all of which, ***together***, resulted in the death of the motorist. Joint and several liability necessarily creates a right on contribution among joint tortfeasors so it will be interesting to see if more defendants pursue recoupment of money damages they have been ordered to pay via more contributions cases. The *Loudermilk* opinion certainly breathes new life into contribution cases.

I am a little disappointed in the Court's reasoning regarding indivisible injury, because if there ever existed an indivisible injury, it would be the death of someone. In a case where there is no concerted action by the defendants, is one defendant responsible for the decedent's heart? And another defendant responsible for the decedent's lungs? This Court, that has so jealously protected the concept of *stare decisis*, seemingly so quickly tosses away the precedent of *Gilson v. Mitchell,* 131 Ga. App. 321 (1974) without overruling it but referring to it merely as a "paradigm" rather than precedent. The Acquiescence Canon of Construction provides that a Legislature implicitly endorsed existing judicial precedent on an issue or a matter or statutory interpretation. This means that when the Georgia General Assembly enacted apportionment, it implicitly endorsed the binding authority of *Gilson* and its concept of indivisible injury.

I also think there remains a Constitutional problem with apportionment in that under the same analysis in *Nestlehutt v. Atlanta Oculoplastic Surgery,* 286 Ga. 731 (2010), it violates the constitutional right of trial by jury by allowing juries to apportion damages to non-parties from whom plaintiff can never recover. Reducing a jury's verdict by whatever percentage of fault apportioned to a non-party from whom plaintiff can never collect that part of the damages verdict "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."

Just like in *Nestlehutt*, this violates a citizen's right to a jury trial which, as the Supreme Court has noted is "inviolate." I hope the Supreme Court will have the opportunity to review the constitutionality of apportionment under the *Nestlehutt* analysis soon.

Finally, I am a little concerned about the ethical propriety of asking for apportionment of damages among the defendants who are all represented by the same counsel. Neither the Georgia Supreme Court's opinion or the District Court's opinion that originally denied defendant's request for apportionment makes mention of this, although, it seems to me to be an obvious ethical lapse. How would the defendant who was apportioned 99% of the fault feel about his lawyer who requested the apportionment who also represented the defendant who was apportioned only 1%? I suppose now that since the Court found apportionment not to apply, it becomes a "no harm, no foul" situation. But just because "all's well that ends well" doesn't mean it was appropriate to ask for apportionment in the first place.