IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NAIROBI COUCH,	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
	)	1:10-CV-00045-SCJ
	)	
RED ROOF INNS, INC; AND R. ROOF V LLC,	)	
	)	
	)	
Defendants.	)	

THE GEORGIA ATTORNEY GENERAL'S RESPONSE TO THE COURT'S SEPTEMBER 1, 2011 ORDER REQUESTING HIS POSITION ON THE CONSTITUTIONALITY OF O.C.G.A. § 51-12-33.

The Georgia Attorney General respectfully submits this response to the Court's September 1, 2011 Order requesting his position as to the constitutionality of O.C.G.A. § 51-12-33:

INTRODUCTION AND BACKGROUND TO THIS RESPONSE

This case is a premises liability suit filed by Plaintiff Nairobi Couch ("Plaintiff") against Defendants Red Roof Inns, Inc. and R. Roof V LLC ("Defendants") for injuries incurred when Plaintiff was attacked by a group of unknown assailants while he was staying at the Red Roof Inn in Atlanta, Georgia.

Plaintiff alleges that Defendants were negligent in failing to properly maintain, secure, inspect, patrol, or manage their premises, despite having actual and constructive knowledge of prior criminal activity on their property. (See Doc. 6 at 1-2; Doc. 1-1 at ¶¶ 9-16). On January 12, 2010, Defendants filed a Notice of Defendants' Intention to Argue Fault of Non-Party, pursuant to Georgia's apportionment statute, O.C.G.A. § 51-12-33, in which the Defendants asserted that that the trier of fact should consider the fault of the unknown non-party criminals in assessing percentages of fault contributing to the harm. (Doc. 3 at 1-2). Thus, the Defendants are invoking the Georgia apportionment statute to reduce their proportionate responsibility for any damages potentially awarded to Plaintiff by the percentage of fault which may be assigned by the factfinder as attributable to the actions of the unknown criminals who attacked Plaintiff.

Plaintiff responded to the Notice by filing a "Motion in Limine to Exclude all Evidence, Arguments, Jury Charges, and Any Special Verdict Form Concerning Apportionment," in which Plaintiff argues that the apportionment statute should not apply to a premises liability action involving criminal acts. (Doc. 41 at 3-5). Alternatively, Plaintiff's Motion in Limine contends that if O.C.G.A. § 51-21-33 were interpreted to require apportionment of fault as between the Defendants and the unknown criminals, it is unconstitutional because it violates the Georgia

Constitution, specifically his right to a jury trial, his procedural and substantive due process rights, and his right to equal protection under the law. (Id. at 10-21). Plaintiff subsequently filed a "Supplemental Brief in Support of Constitutional Challenge to O.C.G.A. § 51-12-33," which further elaborates on his constitutional arguments. (Doc. 57).

On September 1, 2011, this Court entered an Order, pursuant to 28 U.S.C. § 2403(b), certifying that the constitutionality of O.C.G.A. § 51-12-33 has been drawn into question and requesting that the Georgia Attorney General submit his position in reference to this issue no later than November 4, 2011. (Doc. 59).

I. THE CONSTITUTIONAL ISSUE SHOULD NOT BE ADDRESSED IF THE DISPUTE CAN BE RESOLVED ON OTHER GROUNDS.

It is well established that courts will decide a case on constitutional grounds only "as a matter of last resort." Grantham v. Grantham, 269 Ga. 413, 414 (1998). The Georgia Supreme Court has stated that a constitutional question "will not be decided unless it is essential to the resolution of the case." Bell v. Austin, 278 Ga. 844, 844 (2005). See also Sherman v. Fulton County Board of Assessors, 288 Ga. 88, 94 (2010) (noting that it "would not be appropriate" to address the constitutionality of the challenged statute given that case could be resolved on other grounds); Howell v. State of Georgia, 283 Ga. 24, 27, n.1 (2008) (declining

to address constitutional arguments because case could be resolved on other grounds).

The federal courts have also long affirmed the principle that constitutional issues should not be adjudicated unless "absolutely necessary to a decision of the case." Ashwander v. TVA, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). See also Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

Thus, a threshold issue for the Court is to determine whether the apportionment statute applies to this case because, if the statute were held to be inapplicable on the facts of the case, Plaintiff's constitutional challenge to O.C.G.A. § 51-12-33 should not be addressed given that the case could then be resolved on other grounds. See e.g., Burchfield v. CSX Transportation, No. 1:07-CV-1263-TWT, 2009 U.S. Dist. LEXIS 42401 at *34 (N.D. Ga. May 15, 2009) (declining to address Plaintiff's arguments on the constitutionality of O.C.G.A. § 51-12-33 given that the Court resolved the dispute on a different basis: evidence of non-party's fault was not allowed because defendant had failed to assert a defense based upon fault of non-party in its discovery responses).

This case presents a question as to whether the apportionment statute applies when the case involves a comparison of negligent conduct with that of intentional tortious conduct.[1] Courts around the country have split on this issue. See e.g., Ellen M. Bublick, The End Game of Tort Reform: Comparative Apportionment and Intentional Torts, 78 Notre Dame L. Rev. 355, 370-377 (2003) (describing split among states and noting that trend towards allowing a comparison

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[1] This issue -- applicability of the apportionment statute in a case involving a comparison of intentional tortious conduct and negligent conduct -- is the only statutory argument raised by Plaintiff that involves an unsettled area of law. Plaintiff's argument that O.C.G.A. § 51-12-33 does not apply to "single and indivisible injuries" (Doc. 6-7) is incorrect because the statute is specifically designed for precisely that very situation: where the actions of different joint tortfeasors contribute to a single injury. See e.g., Royalston v. Middlebrooks, 303 Ga. App. 887, 883 (2010) (jury applied apportionment statute when plaintiff was injured as a result of a 3-car accident). Plaintiff also contends that if the statute applies, it merely authorizes the jury to "consider" non-party fault, without making any actual findings as to what percentage fault for the harm should be attributed to the non-party and without reducing the amount owed by the named defendants. (Doc. 41 at 8-10). Plaintiff's position is contradicted by the plain language of the statute which states that "[i]n assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." O.C.G.A. § 51-12-33(c). Thus, the statute specifically refers to the fact that the trier of fact will "asses[s] percentages of fault." Plaintiff's assertion that any jury consideration of non-party fault should have no effect on the damages owed by the named defendants is expressly contradicted by O.C.G.A. § 51-12-33(f)(1), which specifically directs that assessments of percentages of fault of nonparties "shall be used only in the determination of the percentage of fault of named parties."

of intentional and negligent fault represents an "emerging minority" of cases that "appears likely to increase").[2]

There is no binding legal precedent in Georgia on this question; however, there are two reported appellate decisions, which address the issue of apportionment in cases involving intentional torts. In Pacheco v. Regal Cinema, 2011 Ga. App. LEXIS 685 (July 14, 2011) (physical precedent only), the Court of Appeals considered the applicability of the apportionment statute in a premises liability case involving a criminal attack in a movie theater parking lot. The plaintiff had argued that the apportionment statute should not apply and had cited to Florida and Tennessee cases which had declined to apportion liability between an intentional tortfeasor and a negligent tortfeasor. Pacheco, 2011 Ga. App. LEXIS at * 13-14. The Court of Appeals, however, noted that the Florida statute was different from Georgia's in that the statutory language in Florida specifically

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[2] Professor Bublick notes that, as of 2003, courts in fourteen states had recently permitted comparisons of defendants' negligent and intentional fault and that such holdings are typically based on "deference to state legislatures, renewed concern for 'fair shares' particularly in light of other rules about allocating fault, conviction that intentional and negligent torts are different only in degree, deference to juries and their ability to make comparative apportionment determinations, and interest in following the lead of other state courts and authorities." She also notes that the law in this area is "in flux" and "still evolving." Bublick, 78 Notre Dame L. Rev. at 377-378.

excluded intentional torts from the definition of "fault."[3] Id. at * 14. With regard to the Tennessee authority, which did not turn on statutory language, the Court of Appeals held that the trial court had properly instructed the jury pursuant to the Georgia apportionment statute, "rather than pursuant to Tennessee case law." Id. Thus, in its ruling, the Court held that O.C.G.A. § 51-12-33 applied to premises liability cases involving criminal acts. Given that one of the judges on the panel concurred in the judgment only, this case, however, constitutes physical precedent only and thus lacks precedential value. See Fulton County Board of Tax Assessors v. National Biscuit Company, 296 Ga. App. 884, 886 (2009)

The only other Georgia Court of Appeals discussion on the applicability of apportionment in a premises liability case involving intentional tortious conduct occurs in dictum in a footnote in Cavalier Convenience v. Sarvis, 305 Ga. App. 141, 146-147 n.24 (2010). Cavalier Convenience involved the applicability of O.C.G.A. § 51-12-33 in a case involving apportionment of damages in an

[3] Some of the cases disallowing apportionment of negligent and tortious conduct are distinguishable from this case because their holdings rest upon the fact that the apportionment law in that state is drafted to specifically exclude intentional torts from the definition of "fault." See e.g., Whitehead v Food Max of Mississippi, 163 F.3d 265, 281-282 (5th Cir. 1998) (in premises liability action against Kmart for failure to provide adequate security in a parking lot where plaintiffs were abducted, the Fifth Circuit noted that "statutory definitions of 'fault' may resolve whether apportionment to intentional tortfeasors is appropriate" and that apportionment to criminal assailants was properly disallowed because Mississippi statute excluded intentional torts from its definition of "fault.")

automobile accident between a drunk driver and the two stores that had sold alcohol to the driver. Cavalier Convenience, 305 Ga. App. at 141. The precise issue in that case was whether O.C.G.A. § 51-12-33 applied when the plaintiff bore no fault, and in reversing the trial court, the Court of Appeals held that the statute applied irrespective of the plaintiff's degree of fault. Id. at 142-144. In a footnote, however, the Court of Appeals noted that "several policy arguments" have been presented for not apportioning fault between tortfeasors who are merely negligent tortfeasors (i.e., the stores that sold the alcohol to the driver) and a tortfeasor who is reckless (i.e., the drunk driver). Cavalier Convenience, 305 Ga. App. at 146, n. 24. The Court specifically noted a policy argument advanced in an amicus brief filed by the DeKalb Rape Crisis Center, which had contended that the apportionment statute should not apply to premises liability cases involving criminal conduct. Id. In declining to adopt such policy arguments, the Court noted that "we have no authority to adopt a construction that is contrary to the General Assembly's intent as plainly codified" and noted that its decision was rooted in "'appropriate deference to the legislative process and separation of powers.'" Id. at 146-147. Thus, while the language in the footnote is clearly dictum given that Cavalier Convenience involved a different issue, the Court's

language nonetheless suggests that it would have applied the apportionment statute to a premises liability case involving criminal acts.

In the absence of binding appellate precedent, Georgia trial courts have split on this issue. Two recent trial court decisions have declined to follow Pacheco and have held that O.C.G.A. § 50-12-33 does not apply in premises liability cases involving harm resulting from criminal acts. See Ana Julia Maya Salinas v. Coro Realty Advisors, No. 10EV009982, slip. op. at 3-5 (State Ct. Fulton Ct. Sept. 20, 2011)(attached hereto as Exhibit "A") ; Joshua R. Martin v. Six Flags Over Georgia et al., No. 09-A-55-4 (State Ct. Cobb Ct. Sept. 12, 2011)(attached hereto as Exhibit "B"). On the other hand, in an earlier case, Ann Herrera v. Miles Properties, No. 08A83964-6 (State Ct. Dekalb Ct. July 22, 2010)(attached hereto as Exhibit "C"), which was decided before the Pacheco decision, the Court relied upon the dicta in the footnote in Cavalier Convenience to apply O.C.G.A. § 51-12-33 in a premises liability case. The trial court concluded that apportionment was appropriate because the Court of Appeals' "premises liability hypothetical" in Cavalier Convenience had "implicitly" applied the apportionment statute to premises liability cases.[4] Herrera slip. op at 2. Last week, in both the Salinas and

[4] This same issue is also currently being litigated in Marcella Paul v. TBTV, LLC, No. 10A33790-2 (State Ct. Dekalb Ct.), a premises liability suit where the plaintiff has challenged the defendant's notice of nonparty fault, which seeks to apportion

Martin cases, the Georgia Court of Appeals granted defendants' petitions for interlocutory appellate review of the trial courts' refusal to apply the apportionment statute. See Martin (Court of Appeals Application No. A12I0045 granted on Oct. 25, 2011); Salinas (Court of Appeals Application No. A12I0046 granted on Oct. 26, 2011). Thus, future appellate guidance is expected on the issue of the applicability of O.C.G.A. § 51-12-33 in cases like this one.

Given that the applicability of the statute is a threshold issue that should be resolved prior to adjudicating the constitutional claims, this Court has two options for determining the applicability of the statute in cases involving a comparison of intentional and non-intentional torts. One option is that this Court can exercise its discretion to certify the question to the Supreme Court of Georgia, pursuant to O.C.G.A § 15-2-9(a). See Gulfstream Park Racing Ass'n v. Tampa Bay Downs, 299 F.3d 1276, 1279 (11th Cir. 2005) ("Where there is any doubt as to the application of state law . . . a federal court should certify the question to the state supreme court to avoid making unnecessary Erie guesses and to offer the state court the opportunity to interpret or change existing law [internal citations omitted]").

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fault to the criminal who abducted and assaulted plaintiff. The plaintiff in that case has also challenged the constitutionality of O.C.G.A. § 51-12-33. The trial court has not yet ruled on the pending motions in that case.

Alternatively, this Court may also in its discretion "exercise an option to make an educated guess" as to how the Georgia courts would resolve the issue. Escareno v. Crucible, 139 F.3d 1456, 1461 (11th Cir. 1998). The Eleventh Circuit has noted that "Erie jurisprudence contemplates that federal courts will in some cases be called upon to decide unsettled issues of state law" and that "[o]n many occasions this court has resolved difficult or uncertain questions of state law without recourse to certification." Escareno, 1139 F. 3d at 1469.

If it is ultimately determined that the apportionment statute applies to the facts of this case[5] (either because this Court rules that it applies or because the

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[5] While it does not appear that the Plaintiff is challenging apportionment here based on a plaintiff's alleged lack of fault, the applicability of O.C.G.A. § 51-12-33 where the plaintiff bears no fault is currently before the Georgia Supreme Court in McReynolds v. Krebs, No. S11C0638, 2011 GA. LEXIS (May 16, 2011). The Georgia Supreme Court granted a petition for the writ of certiorari on this issue, and the case has been fully briefed and argued. A ruling on that case could potentially have a bearing on this one if it is ultimately determined that Plaintiff bears no fault for his injuries. To date, the appellate authority is unanimous in holding that O.C.G.A. § 51-12-33 applies even when the plaintiff bears no fault. See McReynolds v. Krebs, 307 Ga. App. 330, 333-334 (2010); Cavalier Convenience, 305 Ga. App. at 144-145; Barnett v. Farmer, 308 Ga. App. 358, 362 (2011)(physical precedent only). McReynolds is not the first time the Georgia Supreme Court has granted a petition for certiorari in order to address the applicability of apportionment in cases where the plaintiff bears no fault: In Cavalier Convenience, the Georgia Supreme Court also granted a petition for certiorari on this same issue; however, after the petition was granted, the petitioner in that case withdrew the petition. See Sarvis v. Cavalier Convenience, Case No. S10C1895, 2011 Ga. LEXIS 34 (Jan. 18, 2011) (granting certiorari) and 2011 Ga LEXIS 198 (February 24, 2011) (withdrawing petition).

Georgia Supreme Court answers the question in the affirmative upon certification), it will then become necessary for this Court to address Plaintiff's constitutional challenges to O.C.G.A. § 51-12-33. As discussed fully below, the statute is constitutional, and each of Plaintiff's constitutional arguments should, therefore, be rejected.

II. O.C.G.A. § 50-21-33 IS CONSTITUTIONAL.

A. There Is a Strong Presumption In Favor of a Statute's Constitutionality.

In February of 2005, the Georgia General Assembly passed Senate Bill 3, which became known as the Tort Reform Act of 2005. One of the legislative changes resulting from this broad legislative package was a revision of O.C.G.A. § 51-12-33, which addressed apportionment of damages among tortfeasors. Whereas the earlier version of O.C.G.A. § 50-12-33 provided for apportionment of damages among "persons who are liable" and only when the plaintiff bore some degree of contributory negligence, the amended version of O.C.G.A. § 50-12-33 states that the factfinder "shall consider" the "fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." O.C.G.A. § 50-21-33(c). The statute provides that "negligence or fault of a non-party shall be considered" if the plaintiff enters into a settlement agreement with the nonparty or

if a defending party givens notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault. O.C.G.A. § 51-12-33(d)(1). The statute further states that where fault is assessed against a nonparty pursuant to this provision, the findings of fault are used "only in the determination of the percentage of fault of named parties" and "shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action." O.C.G.A. § 51-12-33(f)(1)&(2).

Before examining Plaintiff's specific constitutional challenges to this statute, it is useful to set forth the applicable standard of review that applies when a statute is challenged on constitutional grounds. A "statute is presumed to be constitutional unless it is established that it 'manifestly infringes upon a constitutional right or violates the rights of the people . . .'" Georgia Department of Human Resources v. Sweat, 276 GA. 627, 628 (2003)(internal citations omitted). Under this presumption of constitutionality, courts must construe statutes "as valid when possible." Judicial Council of Georgia v. Brown & Gallo, 288 Ga. 294, 297 (2010). As discussed fully below, Plaintiff's arguments do not overcome the strong presumption in favor of constitutionality.

B. O.C.G.A. § 51-12-33 Does Not Violate Plaintiff's Right to a Jury Trial.

Plaintiff's argument that the apportionment statute violates his right to a jury trial (Doc. 41 at 10-13) lacks merit. Nothing in the apportionment statute abridges Plaintiff's right to present his case to a jury and seek recovery for his damages. The fact that the statute modifies the old common law rule of joint and several liability by providing for apportionment of damages based on an individual tortfeasor's proportionate degree of fault has no bearing on the existence of the right to a jury trial itself. The constitutional right to a jury trial does not guarantee a right to recover damages from any one tortfeasor irrespective of such tortfeasor's responsibility for the harm caused. In arguing that the statute violates his right to a jury trial, Plaintiff relies upon the Georgia Supreme Court's decision in Atlanta Oculoplastic Surgery v. Nestlehutt, 286 Ga. 731 (2010) (Doc. 41 at 12-13), which struck down a statutory cap on non-economic damages in medical malpractice cases on grounds that the cap infringed on a party's constitutional right to a jury determination as to the appropriate amount of noneconomic damages. Nestlehutt, 286 Ga. at 731. The Nestlehutt case is inapposite to this case because it is based on the Court's conclusion that the cap on non-economic damages impinged on the jury's "basic function" to make findings of fact regarding damages. Nestlehutt, 286 Ga. at 735. The apportionment statute does not impinge on the jury's function

in this regard; to the contrary, it affirms the jury's traditional role in determining damages by allowing the jury to apportion awards based on the jury's factual findings as to the degree of fault attributable to all persons or entities who contributed to the harm.

Moreover, Georgia courts have long recognized that the legislature has the authority to modify common law rights of action. See DeLoach v. Elliott, 289 Ga. 319, 322 (2011); Teasley v. Mathis, 243 Ga. 561, 564 (1979). Thus, while O.C.G.A. § 51-12-33 modifies the old common law rule of joint and several liability which had allowed a plaintiff to recover 100% of his or her damages from a defendant, even if that defendant were only 1% responsible for the harm, the Georgia legislature has the legislative discretion to adopt a statutory scheme premised on the principle that a tortfeasor's financial responsibility should be based on the tortfeasor's proportion of fault for the harm. Application of the apportionment statute to the facts of this case means that the jury could choose to apportion some degree of fault to the unknown criminals, in which case Plaintiff cannot recover 100% of his awarded damages from the named party defendants; however, this result does not implicate plaintiff's right to a jury trial.

In DeLoach v. Elliott, the Georgia Supreme Court recently considered whether the application of an employee tort immunity provision violated a

plaintiff's right to a jury trial when the plaintiff had no recourse against the municipality itself due to a failure to comply with the ante litem notice provision. In holding that the constitutional right to a jury trial was not abridged, the Court noted that "shifting responsibility to pay damages in certain situations" did not constitute an abridgement of the right to a jury trial:

> Appellant next contends that the construction of the statute applied by the trial court renders the statute unconstitutional because it violates the Georgia Constitution's guaranty of the right to trial by jury by foreclosing any remedy for Appellant for her injuries arising out of the underlying tort. However, the General Assembly in O.C.G.A. § 36-92-3 did not eliminate the ability of Appellant to recover for injuries but simply shifted the responsibility to pay damages in certain situations from the individual employee to the local government entity, which comports with the General Assembly's general authority to modify common law rights of action.

DeLoach v. Elliott, 289 Ga. 322 (emphasis added). If a statute does not violate the right to a jury trial even though its practical effect can effectively extinguish a cause of action, as was the case in DeLoach, then the same must be true *a fortiori* for the statute here, which has no effect whatsoever on Plaintiff's ability to bring his action and/or obtain a damage award. Whereas the common law modification in DeLoach barred Plaintiff from any recovery given that she had no recourse against the municipality (in view of her failure to provide ante litem notice), here

the application of the apportionment statute does not prevent Plaintiff from bringing his negligence action against any and all responsible tortfeasors. While Plaintiff cannot presently sue the criminals given that their identities are currently unknown, the apportionment statute itself does not limit Plaintiff's ability to seek full recovery of his damages from any and all responsible tortfeasors, nor does it limit his ability to prosecute his action against the named party defendants and recover damages based on their degree of responsibility.

C. O.C.G.A. 51-12-33 Does Not Violate the Equal Protection Clause.

Plaintiff's contention that O.C.G.A. § 51-12-33 violates the equal protection clause in the Georgia Constitution[6] (Doc. 41 at 17-22; Doc. 57 at 7-10) also lacks merit. Plaintiff contends that the standard of "strict scrutiny" applies to his equal protection challenge because the statute involves both a "fundamental right" and a "suspect class." Plaintiff alleges that the "fundamental right" impinged by the statute is the "right to a remedy." (Doc. 41 at 18). In addition, Plaintiff contends that the apportionment statute involves a "suspect class," which Plaintiff defines as "minorities and the poor." (Doc. 41 at 19). Plaintiff's position is that applying an apportionment statute in a case involving premises liability will have an impact on

[6] The equal protection clause in the Georgia Constitution is "coextensive" and "substantially equivalent" to the equal protection clause in the United States Constitution, and courts apply them "as one." See e.g., Democratic Party of Georgia v. Perdue, 288 Ga. 720, 728 (2011).

the suspect class consisting of "people with low incomes [who] are forced to live in unsafe housing . . ." (Id.) Alternatively, Plaintiff argues in his Supplemental Brief that even if the less rigorous "rational basis" were applied to his equal protection challenge, the statute would still fail to meet constitutional standards. (Doc. 57 at 7-11). As discussed below, the "rational basis" standard of review applies to this constitutional challenge and, under that deferential standard, Georgia's apportionment statute is clearly constitutional because it is rationally related to a legitimate governmental purpose.

1. Plaintiff's Constitutional Challenge Should Be Evaluated Under The Rational Basis Test Because The Statute Does Not Involve a Fundamental Right or a Suspect Class.

Where, as in this case, a statute does not infringe upon a fundamental right and does not involve a suspect class, the review of an equal protection challenge to legislative classification is performed under the "rational basis test." Georgia Department of Human Resources v. Sweat, 276 Ga. at 630. The rational basis test is "the least rigorous level of constitutional scrutiny." Id. Under the rational basis test, the courts will uphold a statute if, "under any conceivable set of facts, the classifications drawn in the statute bear a rational relationship to a legitimate end of government not prohibited by the Constitution." Id. A party challenging a statute bears the burden of "'convincing the court that the legislative facts on

which the classification is based could not reasonably be conceived to be true by the governmental decisionmaker." Id.

Plaintiff's contention that the statute should be subject to "strict scrutiny" because it involves both a "fundamental right" and a "suspect class" (Doc. 41 at 18) is plainly incorrect. Turning first to the alleged "fundamental right," Plaintiff contends that "[t]he right to a remedy is deeply imbedded in the constitution and laws of this State" and then cites to three provisions in the Georgia Constitution: Article I, § I, ¶ I; Article I, § I, ¶ II; and Article I, § I, ¶ XII. (Id.). However, these constitutional provisions do not provide a "right to a remedy," nor do they contain any language to that effect. Article I, § I, and ¶ 1 is the Due Process Clause, which provides that "[n]o person shall be deprived of life, liberty, or property except by due process of law." Article I, § I, ¶ II is the Equal Protection Clause, which provides that "[p]rotection to person and property is the paramount duty of government and shall be impartial and complete" and that "[n]o person shall be denied the equal protection of the laws." Lastly, Article I, § I, ¶ XII provides that "[n]o person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." Paragraph XII has been held to "provide only a right of choice between self-representation and representation by counsel." See Smith v. Salon Baptiste, 287

Ga. 23, 24 (2010). None of these provisions provides Plaintiff with a constitutionally-based right to a remedy.

Plaintiff also cites to O.C.G.A. § 9-2-3 (Doc. 41 at 18), a statute which was last amended over 70 years ago and which merely codifies the general legal maxim that "[f]or every right, there shall be a remedy." This general statute does not create a fundamental constitutionally-based right, nor does it provide for any specific statutory right or remedy. This statute simply acknowledges that where a right has been created by statute or by a constitutional provision, the law will recognize a remedy by which such right can be enforced. There is no "fundamental right" to recover damages under the common law rule of joint and several liability, and Plaintiff has no fundamental right to recover 100% of any damage award from the tortfeasor of his choosing.

Plaintiff's contention that the statute involves a "suspect class" given its alleged disparate impacts on the poor, many of whom are minorities (Doc. 41 at 19), is also easily rejected. The federal courts and the Georgia courts have repeatedly held that poverty is not a suspect classification for purposes of an equal protection challenge. See Walker v. Cromartie, 287 Ga. 511, 512 (2010) (upholding constitutionality of expert affidavit requirement in professional negligence cases and stating that "[p]overty alone is not a suspect classification for

the purposes of equal protection analysis."). A facially neutral statute is not held to involve a "suspect class" simply by virtue of the fact that its provisions may affect a greater proportion of one race than of another. See also Lewis v. Casey, 518 U.S. 343, 376-377 (1996) (Thomas, J., concurring) (noting that the Court had in previous cases rejected a "disparate impact theory of the Equal Protection Clause" in part because of the recognition that "'a rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white'")(internal citations omitted); Maher v. Roe, 422 U.S. 464, 471 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.").

Given that the apportionment statute applies to all tort litigants and is facially neutral, it does not involve a suspect classification for purposes of the equal protection analysis. Thus, because O.C.G.A. § 51-12-33 does not involve a fundamental right or a suspect class, its constitutionality must be assessed under the rational basis standard.

2. O.C.G.A. § 51-12-33 Satisfies the Rational Basis Test.

As noted above, the rational basis test is "high deferential" and looks only to see if the statute bears a rational relationship to a legitimate governmental end. See Deen v. Stevens, 287 Ga. 597, 604-606 (2010). The Georgia Supreme Court has made clear that a reviewing court should not weigh policy arguments and "decide on [the] course which is most prudent" because "'[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" Deen, 287 Ga. at 606.

Application of the "rational basis" test demonstrates that O.C.GA. § 51-12-33 is constitutional because it is rationally related to a legitimate governmental purpose – i.e., tort reform and a legislative preference for a tort system in which defendants are required to pay damages in accordance with their percentage of allocated fault. The legislative purpose of the Tort Reform Act of 2005 was to "provide substantive and comprehensive revision of provisions regarding civil practice, evidentiary matters, and liability in tort actions in general and actions related to health care in particular." Senate Bill 3, § 1 (Ga. 2005). While tort reform in the area of health care was of particular concern to the General

Assembly, the Tort Reform Act was intended to address matters beyond health care and provide reform to the tort law system generally. Thus, Plaintiff's assertion that "[t]here is no compelling[7] state interest indicated beyond securing the provision of health care" (Doc. 41 at 20) is incorrect. The Georgia Court of Appeals has in fact specifically noted that the legislative intent underlying O.C.G.A. § 50-21-33 was to require tortfeasors generally to pay damages based on their degree of fault. See Barnett v. Farmer, 308 Ga. App. at 361 (physical precedent only) (in automobile accident case, court approved of apportionment among all tortfeasors, one of whom was plaintiff's husband, because "it would be contrary to clear intent of the legislature to require [defendant] to pay for the full amount of [plaintiff's] damages for the same collision simply because she was a passenger in the car her husband was driving."). Courts have long recognized the inequity of holding a defendant 100% liable for the plaintiff's damages if such defendant is not 100% at fault. See e.g., Hudson v. Union Carbide, 620 F. Supp. 558, 564 (N.D. Ga. 1985) (recognizing "the inequities of forcing a tortfeasor to pay all the damages for injuries which were not caused by its/his/her negligence alone" and noting that "these inequities must be resolved by the legislature and not the

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[7] Under the rational basis test, the state interest need not be "compelling," but merely a "legitimate governmental purpose." Deen, 287 Ga. App. at 603. Plaintiff's reference to a "compelling state interest" relates to judicial review under the strict scrutiny standard, which is not applicable here.

courts"). O.C.G.A. § 51-12-33 is thus rationally related to the legitimate legislative objective that tortfeasors be made to pay in accordance with their degree of fault for the harm caused.

Moreover, the equal protection analysis is not even triggered unless similarly situated individuals are treated differently. Ga. Const. Art. 1, § 5, ¶ 2(a); see also Georgia Department of Human Resources v. Sweat, 276 Ga. at 630 ("It is fundamental that no equal protection violation exists unless legislation treats similarly-situated individuals differently."). O.C.G.A. § 51-12-33 does not treat similarly situated individuals differently. Rather, it treats similarly situated individuals similarly. Plaintiff's objection that "civil plaintiffs are treated differently than civil defendants" (Doc. 57 at 8) misses the point that plaintiffs and defendants are not "similarly situated." See Deal v. Seaboard Coast Line R.R. Co., 236 GA. 629 (1979) (upholding constitutionality of voluntary dismissal procedure and noting that "[w]e are unable to agree that when the jury retires to deliberate plaintiffs and defendants are similarly situated for equal protection purposes"). While both plaintiffs and defendants are litigants, they are not similarly situated in terms of procedural rules and rights of recovery. If the rule were otherwise, it would be prohibitive constitutionally to place a burden of proof on one party or the other in any given situation.

Plaintiff is also incorrect when he asserts that the statute violates the equal protection clause in that it treats premises liability victims differently from false imprisonment victims (Doc. 57 at 7). First, contrary to Plaintiff's interpretation, O.C.G.A. § 51-12-33 should apply to a false imprisonment claim with multiple tortfeasors. The false imprisonment statute cited by Plaintiff – O.C.G.A. § 51-7-22[8] -- was last revised in 1933, at which time the common law rule of joint and several liability governed damages in cases involving joint tortfeasors. Thus, the statute makes a general reference to the common law rule of recovery that governed tort cases at that time. Under the principle of *in pari materia*, O.C.G.A. § 51-7-22 and O.C.G.A. § 51-12-33 should be read together and harmonized, in which case a false imprisonment case involving joint tortfeasors now would be subject to the apportionment procedures set forth in O.C.G.A. § 51-12-33. While O.C.G.A. § 51-7-22 states that tortfeasors "shall be responsible for the entire recovery," O.C.G.A. § 51-12-33 specifies in what proportion they bear responsibility. However, even assuming arguendo that the O.C.G.A. § 51-12-33 were held not to apply to false imprisonment claims, that fact alone does not render O.C.G.A. § 51-12-33 unconstitutional. Plaintiffs suing on different claims are not

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[8] O.C.G.A. § 51-7-22 states as follows: "If false imprisonment is the act of several persons, they may be subject to an action jointly or separately. If jointly, all shall be responsible for the entire recovery."

"similarly situated." Moreover, as noted above in Part I, some states have drafted their apportionment statutes so that they apply only to negligent acts and not to intentional ones, and a legislature's decision to limit the reach of a statute to certain types of torts is constitutional provided there is a reasonable basis for the classification. A statute need not apply to every litigant to be constitutional: as long as the statute applies uniformly to similarly situated litigants, there is no equal protection issue.

In at least two cases, Georgia trial courts have rejected equal protection challenges to O.C.G.A. § 51-12-33. In Herrera v. Miles Properties, *supra*, slip op. at 4-5 (State Court of Dekalb County), the Honorable Edward Carriere considered the application of O.C.G.A. § 51-12-33 in a premises liability case involving criminal acts and held that the plaintiff had not satisfied her burden of showing that the apportionment statute created a "disparate classification." Applying the rational basis test, the Court specifically found that the "revisions to O.C.G.A. § 51-12-33 are legitimate in light of the specific purpose of the tort reform initiatives embodied in the legislative bill proposing the changes." Herrera, slip op. at 5.

Similarly, in Taylor v. Dekalb County, Georgia, No. 06A50694-7, slip op. at 13 (State Court of Dekalb County, Jan. 22, 2009)(attached as Exhibit "D"), the Honorable Janis Gordon also held that the statute did not violate equal protection

under the rational basis test, stating that it provided for "the apportionment of damages based on the fault of all responsible parties, whether named as a defendant or identified through timely notice, and thereby achieves the rational goal of ensuring that each person or entity responsible for Plaintiff's injury will be liable for only that portion of the total damages caused by that person's percentage of fault."

The reasoning of these cases compels dismissal of Plaintiff's challenge under the equal protection clause.

D. O.C.G.A. § 51-12-33 Does Not Violate Substantive Due Process.

Plaintiff's contention that O.C.G.A. § 51-12-33 violates his right to substantive due process (Doc. at 15-17; Doc. 57 at 2-5) should also be rejected. As with an equal protection claim, a substantive due process analysis of governmental action is reviewed under the "rational basis" test unless the statute involves a fundamental right or a suspect class. Georgia Department of Human Resources v. Sweat, 276 Ga. at 628. As set forth above, this case does not involve either a fundamental right or a suspect class, and, therefore, the rational basis test applies to determine its constitutionality. Under this test, a statute will be upheld in the face of a due process attack so long as it is reasonably related to the public

health, safety, or general welfare. Id. at 629. The Georgia Supreme Court has stated that a statute does not offend due process unless the means adopted are "'irrelevant to the [state's] reasonable objective, or altogether arbitrary . . .'" Id. (internal citations omitted). As discussed below, Plaintiff cannot show that O.C.G.A. § 51-12-33 is not reasonably related to a legitimate governmental purpose or that the means chosen to effect that purpose are arbitrary or irrelevant.

Plaintiff argues that the legislative purpose behind O.C.G.A. § 51-12-33 relates to the "'predictability and improvement in the provision of quality health care services," "the resolution of health care liability claims," and "assist[ance] in promoting the provision of health care liability insurance by insurance providers," and then asserts that apportionment in premises liability cases does not further these purported governmental interests. (Doc. 57 at 4-5, quoting Senate Bill 3). However, Plaintiff's reference to legislative history omits the language in Senate Bill 3 where the General Assembly made clear that the purpose of the Tort Reform Act of 2005 extended beyond health care issues: "The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act. (Ga. L. 2005, § 1 [emphasis added]). O.C.G.A. § 51-12-33. The apportionment procedures set forth in O.C.G.A. § 51-12-33 are thus reasonably related to a

legitimate governmental purpose -- that of effecting a more equitable system for assessing tort damages by assuring that a tort defendant be required to pay for only that portion of a plaintiff's damages actually attributable to that defendant.

Moreover, while Plaintiff may believe that O.C.G.A. § 51-12-33 is not the best means to accomplish the legislative purpose here, that fact is irrelevant to a constitutional analysis: a statute will be struck down as unconstitutional only if the means chosen are irrelevant or arbitrary. See e.g., State of Georgia v. Old South Amusements, 275 Ga. 274, 278 (2002) (statute is constitutional even if it is not "the best, or even the least intrusive means" to achieve legislative objective and noting that courts should not second-guess "fairly debatable questions as to [the] "reasonableness, wisdom, and propriety" of legislative action because such decisions are to be made by the legislative body).

Plaintiff's contention that O.C.G.A. § 51-12-33 deprives him of a "substantial property right without due process" is plainly incorrect. (Doc. 57 at 2). The apportionment statute does not eviscerate Plaintiff's cause of action.[9] The

[9] Moreover, while the apportionment statute has no effect on the existence of Plaintiff's cause of action, it should be noted that a statute is not unconstitutional simply because it prospectively eliminates a cause of action. The Georgia Supreme Court has stated that "[t]he power of the legislature to create, modify, or abolish rights to sue has been clearly and repeatedly recognized by the U.S. Supreme Court and by this Court." Love v. Whirpool Corp., 264 Ga. 701, 705 (1994). See also Santana v. Georgia Power, 269 Ga. 127, 129 (1998) ("States are

statute has no effect on Plaintiff's ability to bring a negligence action based on the Defendants' alleged failure to provide adequate security. Moreover, contrary to his assertion that "[a] jury will almost always determine that the criminal is one hundred percent or nearly one hundred percent responsible because of the intentional nature of the act" (Doc. 41 at 16-17), apportionment does not prevent the Plaintiff from recovering significant amounts of damages from the named Defendants. If Plaintiff's allegations of negligence are credited by the jury, a jury could theoretically determine that the named Defendants should bear most or all of the percentage of fault for the harm caused. The possibility that the jury may, however, assess some percentage of fault to the unknown criminal actors does not eliminate his cause of action or his right to a recovery. Instead, it merely eliminates his ability to require the named defendants to pay for 100% of his damages irrespective of the jury's determinations as to their proportionate fault.

Plaintiff's assertion that O.C.G.A. § 51-12-33 is unconstitutional because it forces a jury to "do the impossible by requiring that they make a division of

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free to create immunities and to eliminate causes of actions, and that legislative determination provides all the process that is due."). In addition, while Plaintiff refers to his property rights as "vested," the apportionment statute was enacted in 2005, four years prior to the accrual of his cause of action.

indivisible injuries"[10] (Doc. 57 at 2) ignores the fact that juries have successfully apportioned damages based on fault in other cases where the actions of different tortfeasors combined to produce one injury. See e.g., Royalston v. Middlebrooks, 303 Ga. App. 887, 892 (2010) (affirming jury's determination under O.C.G.A. § 51-12-33 that jury properly apportioned damages in 3-car accident where jury found one driver to be 42% at fault and the other driver to be 58% at fault). Moreover, Plaintiff's position that O.C.G.A. § 51-12-33 does not apply in cases involving "indivisible injuries" is incorrect: to the contrary, apportionment under O.C.G.A. § 51-12-33 occurs only when the actions of different tortfeasors (i.e. joint tortfeasors) combine to produce a single harm. The only reason the tortfeasors are jointly liable in the first place is that their different tortious acts combined to produce a single harm to the plaintiff. Thus, in every case involving a "single, indivisible" harm proximately caused by the combination of different

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[10] In arguing that damages for personal injury may not be apportioned because such injuries are "'manifestly not severable into parts'" (Doc. 57 at 2), Plaintiff cites a 1986 case, ITT Terryphone Corp. v. Tri-State Steel Drum, 178 Ga. App. 694 (1986); however, one year later, the legislature amended O.C.G.A. § 51-12-33(a) to allow apportionment among defendants in cases where the plaintiff bore some degree of fault. The Georgia Supreme Court subsequently confirmed that damages may be apportioned in personal injury cases pursuant to the 1987 version of O.C.G.A. § 51-12-33(a). See Union Camp v. Helmy, 258 Ga. 263, 268 (1988) (noting that pursuant to 1987 statutory amendment "the rule of joint and several liability amount joint tort-feasors can be disregarded, with several separate judgments rendered in cases coming within the scope of these provisions.").

tortious acts, O.C.G.A. § 51-12-33(c) requires the trier of fact to "consider the fault of all persons or entities who contributed to the alleged injuries or damages" and apportion liability based on each tortfeasor's percentage of fault for the harm. If the tortfeasor is not a party to the suit, the nonparty tortfeasor's fault is considered if the tortfeasors settled with the plaintiff or if the defendant gives timely notice that a nonparty was wholly or partially at fault. In all such cases, different tortious acts combined to produce a single injury.

Finally, it should be noted that two Georgia trial courts have considered and rejected claims that O.C.G.A. § 51-12-33 violates substantive due process. In Taylor v. Dekalb County, No. 06A050694-7, slip op., discussed above in connection with its ruling on the equal protection issue, the State Court of Dekalb County emphasized that the apportionment statute does not violate substantive due process:

> The Court finds that Plaintiff has failed to show that O.C.G.A. § 50-12-33 is not reasonably related to the public general welfare such that it violates due process. Contrary to Plaintiff's argument that such statute violates due process by denying a fair trial to litigants and nonparties, O.C.G.A. § 51-12-33 does not diminish Plaintiff's meaningful access to courts; it does not eliminate any substantive claim Plaintiff might assert; and it does not reduce the total amount of damages Plaintiff might prove and be awarded as compensation for his injuries.

Taylor, slip op. at 11. Similarly, in Herrera v. Miles Properties, No. 08A83964-6, the trial court rejected a substantive due process challenge to the apportionment statute on grounds that the state has a "legitimate interest in apportioning damages to defendants according to their respective degree of fault." Herrara, slip. op at 4. The court also noted that O.C.G.A. § 50-21-33 "does not limit an injured party's ability to bring an action against a tortfeasor nor does it limit the application of the Civil Practice Act with regard to discovery from non-parties." Id.

O.C.G.A. § 51-12-33 is reasonably related to the legitimate governmental purpose of tort reform, and as such, it does not violate substantive due process.

E. O.C.G.A. § 51-12-33 Does Not Violate Procedural Due Process.

Plaintiff contends that O.C.G.A. § 51-12-33 violates his right to procedural due process because it is "unconstitutionally vague." (Doc. 41 at 13-14; Doc. 57 at 11-14). Specifically, he contends that the statute does not define "fault" and creates confusion as to whether "fault" and "negligence" are to be deemed as equivalent. (Doc. 57 at 13). Plaintiff also objects to the fact that the statute provides the jury with no guidelines or standards for assessing fault. (Doc. 57 at 12). As discussed below, O.C.G.A. § 51-12-33 is not void for vagueness.

In examining a vagueness challenge to the constitutionality of a statute, the court must consider the statute in its entire context. Lindsey v. State, 277 Ga. 772,

772 (2004). While a statute must not be so "vague and indefinite in its meaning that persons of ordinary intelligence must guess at its meaning and differ as to its application (Bell v. Austin, 278 Ga. at 847-848), the General Assembly is also not required to draft statutes with "mathematical precision." State v. Old South Amusements, 275 Ga. at 276. The Georgia Supreme Court has cautioned that "[t]he prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision," because "[m]any statutes will have some inherent vagueness for in most English words and phrases, there lurk uncertainties." Lindsey, 277 Ga. at 773. Statutory language is held to satisfy due process requirements so long as it has a "commonly understood meaning." Id.

Application of these established principles demonstrates that O.C.G.A. § 51-12-33 is not unconstitutionally vague. While Plaintiff contends that it is unclear whether O.C.G.A. § 51-12-33(d)(1) is intended to equate "negligence" and "fault," (Doc. 57 at 13), any arguable ambiguity on that issue is relevant only to the statutory question as to whether the apportionment statute applies to cases involving conduct that is not negligent -- e.g., intentional tortious conduct and/or criminal acts. The fact that a statute can be susceptible to differing interpretations and thus may require judicial interpretation from the higher courts does not render

it unconstitutionally vague. Moreover, the threshold applicability of the statute is a legal question for the court, and thus has no relevance to the jury's ability to apply the statute. If a court determines that O.C.G.A. § 51-12-33 applies to all tort cases, including cases involving intentional torts, the jury has a clear mandate under O.C.G.A. § 51-12-33(c): "to consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." In that event, the jury will assess percentages of fault, irrespective of whether the "fault" involves conduct that is merely negligent or intentional.

Moreover, while there are currently no reported decisions analyzing this portion of the statutory language, application of settled rules of statutory construction suggests that "fault" and "negligence" have different meanings and that "fault" is broader than "negligence." A fundamental rule of statutory construction is that a court is required "'to construe [a] statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage.'" State v. Mussman, 289 Ga. 586, 588 (2011) (internal citations omitted). According to the Random House Webster's Unabridged Dictionary, "fault" means as follows:

> **Fault**: 1) a defect or imperfection; flaw; failing; 2) responsibility for failure or a wrongful act; 3) an error or mistake; 4) a misdeed or transgression . . .[11]

Random House Webster's Unabridged Dictionary (2d Ed. 1998).

Clearly, the listed definitions describe conduct that may not be synonymous with negligence: whereas a "defect," "imperfection," "error" or "mistake" might not even rise to the level of negligence, "a wrongful act" or a "transgression" could include conduct of a higher culpability level, such as intentional tortious conduct or criminal acts.

Moreover, application of the rule that statutes should be construed to avoid rendering words as mere surplusage also suggests that "fault" is broader than negligence. O.C.G.A. § 51-12-33 refers to "[n]egligence or fault" (emphasis added), and the use of the conjunction "or" suggests that the terms are different or else they would not be listed in the alternative. In Cavalier Convenience, the Court of Appeals, in interpreting the apportionment statute as applying irrespective of the plaintiff's degree of fault, held that the trial court's contrary interpretation had improperly "overlook[ed] the use and placement of the 'if any' clause" in O.C.G.A. § 51-12-33(b). Cavalier Convenience, 305 Ga. App. at 144. The Court explained that "courts are 'not authorized to disregard any of the words used

[11] There are additional definitions that relate to geological, sports, and electrical faults, which, of course, are inapposite here.

therein unless the failure to do so would lead to an absurdity manifestly not intended by the legislature.'" Id. Interpreting "fault" as synonymous with "negligence" thus violates this rule of statutory construction by ignoring the use and placement of the word "or" in the statute.

Plaintiff's claim that O.C.G.A. § 51-12-33 is constitutionally infirm because it provides "no other guidance to the jury with regard to how or by what standards they are to determine the 'percentage of fault' of each person" (Doc. 57 at 12) lacks merit. First, prior to the 2005 version of O.C.G.A. § 51-12-33, the apportionment statute in effect since 1987 specifically required juries to apportion damage awards "according to the degree of fault of each person." See Ga. L. 1987, p. 915, § 8. While the prior statute authorized apportionment only among named parties (i.e., "persons who are liable") and only when the plaintiff was "to some degree responsible for the injury or damages claimed" (Id.), Georgia's apportionment statute nevertheless authorized the jury to apportion "fault," without providing the jury specific guidelines for assessing "fault." If the legislature's failure to define "fault" makes the current version of O.C.G.A. § 51-12-33 unconstitutionally vague, then the same would be true for the previous version of the apportionment statute that was applied in numerous cases in the 18 years prior to the 2005 statutory revision.

Moreover, in Royalston v. Middlebrooks, (discussed above in connection with Plaintiff's substantive due process claim), the jury applied the current version of O.C.G.A. § 51-12-33 in a multi-vehicle accident to determine that one driver was 42% at fault for a car accident and the other was 58% at fault. Royalston, 303 Ga. App. at 893. In rejecting a challenge to the jury's apportionment as unreasonable and contrary to the evidence, the Court of Appeals held that in "'arriving at how to express these different degrees of culpability in mathematical terms, the jury was not bound by any specific formula." Id. (internal citations omitted). Instead, the "'matter was to be 'determined according to the enlightened conscience of the fair and impartial jury.'" Id. The current version of O.C.G.A. § 51-12-33, like its predecessor, defers to the jury's "enlightened conscience" in assessing percentages of fault. The statute is not unconstitutionally vague simply because the legislature chose not to hamstring jury discretion by mandating consideration of specific guidelines for determining "fault." See also Herrera v. Miles Properties, *supra,* slip op. at 3 (rejecting constitutional challenge to apportionment statute as "unconstitutionally vague").[12]

[12] In Taylor v. Dekalb County, *supra*, slip op. at 4-5, the plaintiff also contended that O.C.G.A. § 51-12-33 was "vague, overbroad, uncertain and unclear." While the Court's decision did not specifically address the vagueness claim, the court's dismissal of the constitutional challenges impliedly denied the vagueness challenge.

F. O.C.G.A. § 51-12-33 Does Not Violate Plaintiff's Right to a Fair Trial.

Plaintiff contends that O.C.G.A. § 51-12-33 violates his right to a fair trial because the non-party criminals have not been caught and thus "cannot be compelled to produce evidence or testify in this case," thereby "depriv[ing] Plaintiff of his right to cross-examine them." (Doc. 57 at 5). Plaintiff's suggestion that apportionment applies only if the tortfeasor can be compelled to appear in court is contradicted by the plain language of O.C.G.A. § 51-12-33(c), which instructs the trier of fact to consider the fault of "all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." O.C.G.A. § 51-12-33(c)(emphasis added). The words "could have been" clearly refers to parties that are not susceptible to suit – either because they are statutorily immune or, as in this case, unknown. If the statute had meant to allow apportionment only as to those non-parties who could have been sued, there would have been no need to add the language "or could have been": the statute could instead have read that apportionment was allowed "regardless of whether the person or entity was named as a party to the suit." Under the established rule that statutes should be interpreted to give each word meaning and to avoid rendering language as

surplusage (see State v. Mussman, 289 Ga. at 588), O.C.G.A. § 51-12-33 should be interpreted to include non-parties who are either unknown or immune from suit.

In arguing that the absence of the non-party at trial violates his right to a fair trial, Plaintiff relies on Billings v. Aeropres Corp., 522 F. Supp. 1121 (E.D. Ark. 2007), in which an Arkansas federal court disallowed apportionment under an Arkansas apportionment statute that was similar to Georgia's because the non-party was plaintiff's employer and thus statutorily immune under the worker's compensation law. Although the court declined to rule the Arkansas apportionment statute to be unconstitutional and instead resolved the issue on statutory grounds,[13] it held that it would be unfair to the plaintiff to allow the jury to make findings of fault as to an immune party whose appearance could not be compelled because the plaintiff was deprived of the opportunity to develop the evidence regarding the non-party's fault. Billings, 522 F. Supp. at 1130-1131.

The Billings holding is not persuasive for several reasons. First, the criminal non-parties named in the Notice of Non-Party Fault are not statutorily immune

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[13] Plaintiff's assertion that the Court found apportionment on these facts to be unconstitutional (Doc. 57 at 6) is not correct. Although the federal court did state in dictum that it believed it would be unconstitutional to allow apportionment to an immune employer (Billings, 522 F. Supp. 2d at 1127), the Court applied the "canon of constitutional avoidance" and interpreted the statute in a manner which preserved its constitutionality. Id. at 1126. The Court thus interpreted Arkansas' apportionment statute as excluding immune parties.

from liability, but are simply unknown. It is possible that law enforcement will in the future discover their identities in which case Plaintiff can avail himself of non-party discovery procedures under the Civil Practice Act and cross-examine them at trial. However, assuming arguendo that an unknown party were deemed to be analogous to a statutorily immune party, the reasoning adopted in Billings – i.e. that apportioning liability to an immune party compromises the fairness of the trial – has been rejected by many state Supreme Courts, as well as by another Arkansas federal district court. See Bohannon v. Johnson Food Equipment, 2008 U.S. Dist. LEXIS 45273 at * 4-5 (2008) (explicitly disagreeing with the Billings ruling and allowing apportionment of fault to immune employer).[14]

In Debenedetto v. CLD Consulting Engineers, 153 N.H. 793, 795-804 (2006), for example, the New Hampshire Supreme Court held that the New Hampshire apportionment statute authorized apportionment of fault to immune parties and that the statute was constitutional as applied. Debendetto was a car accident case involving multiple alleged tortfeasors, including the New Hampshire Department of Transportation, which had been dismissed on grounds of sovereign

[14] Moreover, the holdings in these Arkansas federal court cases are essentially moot given the Arkansas Supreme Court's subsequent decision holding the apportionment statute at issue in those cases to be unconstitutional on grounds that it violated the Separation of Powers clause by usurping the courts' authority to establish rules of pleading. See Johnson v. Rockwell Automation, 308 S.W.3d 135, 141-142 (2009).

immunity. In affirming the apportionment of fault to the immune government entity, the New Hampshire Supreme Court surveyed the law in other jurisdictions and concluded that apportionment to "unknown or immune" parties was consistent with the statutory purpose:

> Many jurisdictions permit a jury to consider "nonparties" such as unknown or immune tortfeasors when apportioning fault [internal citations omitted]. The underlying rationale for such a rule is that true apportionment cannot be achieved unless that apportionment includes all tortfeasors who are causally negligent by either causing or contributing to the occurrence in question, whether or not they are named parties to the case.

Debenedetto v. CLD Consulting Engineers, 153 N.H. at 800. The Mississippi and Kansas Supreme Courts have also held that apportionment should be applied to immune parties. See Mack Trucks v. Tackett, 841 So. 2d 1107, 1115 (2003) ("To the extent that Accu-Fab [prior Mississippi Supreme Court decision] may be construed as stating that immune parties may not be assessed fault (as opposed to liability) under [Mississippi apportionment statute] therefore, that opinion is overruled."); Brown v. Keill, 224 Kan. 195, 207 (1978) ("[T]he intent and purpose of the legislature . . . was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries

and damages even though one or more of the parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault.")

The case of Pedge v. RM Holdings, 75 P.3d 1126 (Colo. App. 2002), is also instructive in that it addresses apportionment in a case that is factually similar to this one. In Pedge, the plaintiff was assaulted outside his office by an unknown assailant and brought a premises liability action against his commercial landlord. Under Colorado's apportionment statute, which is similar to Georgia's, the defendant filed a notice of non-party fault asserting that the unknown assailant was at fault. In reversing the trial court which had granted the plaintiff's motion to strike the notice, the Court of Appeals stated that "a number of jurisdictions have upheld the designation of unidentified nonparties, and we are persuaded by their reasoning." Pedge, 75 P.3d at 1128. See also Barnett v. Farmer, 308 Ga. App. at 361 (physical precedent only) (authorizing apportionment of fault to plaintiff's husband, despite existence of interspousal tort immunity); Bartlett v. New Mexico Welding Supply, 98 N.M. 152, 159 (1982) (New Mexico appellate court citing *Comparative Negligence Manual* for proposition that "it is accepted practice to include all tortfeasors in the apportionment question," including "nonparties who may be unknown tortfeasors, phantom drivers, and persons alleged to be negligent but not liable in damages to the injured party . . .").

While some of the above-cited cases, such as Pedge, do not involve constitutional challenges, these cases nevertheless demonstrate approval of apportionment to unknown or immune parties, and thereby implicitly demonstrate that such apportionment does not compromise the plaintiff's right to a fair trial.

CONCLUSION

Given that a constitutional adjudication should be invoked as a last resort, the threshold question for this Court is whether O.C.G.A. § 51-12-33 applies to cases like this one that involve comparisons of negligent conduct and intentional tortious conduct. In view of the fact that there is currently no binding Georgia precedent addressing this question, this Court can either certify the question to the Georgia Supreme Court or make its own determination as to how it thinks a Georgia court would resolve the issue. If the statute is held to be inapplicable, there will be no need to address the constitutional challenge. If the statute is held to be applicable, Plaintiff's constitutional challenge should be rejected. Application of O.C.G.A. § 51-12-33 on the facts of this case does not violate substantive or procedural due process, nor does it violate Plaintiff's right to a jury trial, right to a fair trial, or right to equal protection under the law. O.C.G.A. § 51-12-33 is constitutional and should be upheld.

Respectfully submitted,

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CERTIFICATE PURSUANT TO L.R. 7.1D

I hereby certify that this Response conforms to the requirements of L.R. 5.1C.

This Response is written in 14 point Times New Roman font.

/s/Elizabeth A. Monyak 005745
ELIZABETH A. MONYAK

CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing **ATTORNEY GENERAL'S RESPONSE TO THE COURT'S SEPTEMBER 1, 2011 ORDER REQUESTING HIS POSITION ON THE CONSTITUTIONALITY OF O.C.G.A. § 51-12-33** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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I further certify that I have served, by U.S. mail, first class postage prepaid, the following non-cm/ecf participants: NONE

This 4th day of November, 2011.

/s/Elizabeth A. Monyak 005745
ELIZABETH A. MONYAK