IN THE COURT OF APPEALS
STATE OF GEORGIA

CASE NO. A16A2069

CAMELOT CLUB CONDOMINIUM ASSOCIATION, INC.,

Appellant

vs.

GEORGINA AFARI-OPOKU, as the Surviving Spouse of EMMANUEL AFARI-OPOKU, Deceased, and **GEORGINA AFARI-OPOKU**, as Personal Representative of the Estate of EMMANUEL AFARI-OPOKU,

Appellee.

GEORGIA DEFENSE LAWYERS ASSOCIATION'S AMICUS CURIAE BRIEF

Prepared by:

Martin A. Levinson
Georgia Bar No. 141791
Camille A. Smith
Georgia Bar No. 183438
HAWKINS PARNELL THACKSTON & YOUNG LLP
303 Peachtree Street, N.E.
Atlanta, Georgia 30308-3243
(404) 614-7400
(404) 614-7500 (fax)
mlevinson@hptylaw.com
csmith@hptylaw.com

Peter Muller, President
Martin A. Levinson (Chair)
Garret W. Meader (Vice Chair)
Amicus Curiae Brief Committee
GEORGIA DEFENSE LAWYERS ASSOCIATION
P.O. Box 191074
Atlanta, GA 31119-1074
(404) 816-9455

IN THE COURT OF APPEALS
STATE OF GEORGIA

CAMELOT CLUB CONDOMINIUM ASSOCIATION, INC., Appellants, **v.** **GEORGINA AFARI-OPOKU**, as the Surviving Spouse of EMMANUEL AFARI-OPOKU, Deceased, and **GEORGINA AFARI-OPOKU**, as Personal Representative of the Estate of EMMANUEL AFARI-OPOKU, Appellees.	**CASE NO. A16A2069**

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

COMES NOW the Georgia Defense Lawyers Association ("GDLA") and files this Brief as *amicus curiae* in the above-styled appeal, showing this honorable Court as follows:

INTRODUCTION & STATEMENT OF INTEREST

The GDLA is an association of more than 850 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the

adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice.

Ensuring consistent, appropriate interpretation and application of Georgia's apportionment statute in tort actions is important to all who are or may become litigants in Georgia courts. In particular, property owners and operators are entitled to rely on trial courts to apply, in every case tried to a jury, the apportionment scheme mandated by the General Assembly and interpreted and reinforced by the Supreme Court of Georgia. Furthermore, all citizens of Georgia have an interest in avoiding the detrimental effects of inconsistent application of Georgia law in general and, more specifically, of trial courts' refusal to apply Georgia's apportionment scheme correctly and consistently.

In case after case, Georgia's appellate courts have reaffirmed that the current version of the apportionment statute says what it means and means what it says. Of course, one of the key changes to the current version of O.C.G.A. § 51-12-33 enacted by the General Assembly in 2005 is the admonition in subsection (b) of the statute that "[d]amages 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."

In this case, the trial court correctly directed the jury to apportion its verdict between all of the persons or entities who might have contributed to Appellee's claimed damages, as required by O.C.G.A. § 51-12-33(c). The jury then did as instructed, apportioning fault among parties and nonparties for Appellee's claimed damages. But after the jury returned its verdict, the trial court inexplicably modified the verdict by entering a judgment that required one defendant to pay a portion of the judgment equal to not only its own percentage of fault, but the percentage of fault apportioned by the jury to a security company that worked on the premises.

In modifying the jury's verdict in this case, the trial court violated the straightforward requirement of O.C.G.A. § 51-12-33(b) that damages apportioned to each party or nonparty shall not be subject to joint liability and shall only apply to the party or nonparty against whom they are apportioned. The trial court erred in declining to follow O.C.G.A. § 51-12-33(b) in this case, and this Court must reverse the faulty judgment and require the trial court to enter a judgment that complies with the clear language of the apportionment statute.

BRIEF FACTUAL BACKGROUND

The case below arose from a murder on the premises of the Camelot Club Condominiums in College Park, Georgia. (R-1900.) Appellant, the owner of the common areas in the condominium complex, had hired Alliance Security and

Protective Services, LLC ("Alliance") to provide unarmed security guards to monitor persons coming and going through the complex's gates. (*Id.*) Alliance placed security guards on the premises and controlled the time, manner, and method of the guards' work. (R-881, 2161-67, 2173-74.)

On October 12, 2010, Emmanuel Afari-Opoku purchased a television from Tariq Smith in the parking lot outside a retail store on Campbellton Road in Atlanta, Georgia. (R-299-304, 332-343, 361-369.) Afterward, Smith got in touch with two other men, Anthony Norris and Tefflon Rhoden, and the three hatched a plan to rob Afari-Opoku because they believed that he had a large amount of money. (R-305-07, 371-74, 398-406, 489-90, 492-97.) They went to a another business's parking lot to watch Afari-Opoku, then followed him to a gas station and watched him pump gas before following him to Camelot Club Condominiums. (R-498-508.) Norris, Smith, and Rhoden then murdered Afari-Opoku in front of Appellee's apartment unit. (R-509-12, 534, 1901.) Police later arrested Norris, Smith, and Rhoden and prosecuted them for Afari-Opoku's murder. (R-300.)

Appellee subsequently sued Appellant and Alliance under various theories, alleging that they were responsible for the murder of Afari-Opoku. The case eventually went to trial, and the trial concluded in a verdict apportioning 50% of the fault to the three criminal perpetrators, 25% to Appellant, and 25% to Alliance.

(R-2180.) Because Alliance lacked insurance, Appellee asked the trial court to issue a judgment against Appellant for not only for the 25% fault apportioned to Appellant, but also the 25% the jury had apportioned to Alliance. (R-2139.) The trial court accepted Appellee's argument and entered a judgment against Appellant alone for an amount equal to 50% of the total verdict. (R-2180.) This appeal followed.

ARGUMENT AND CITATION OF AUTHORITY

In the case below, the trial court erred by entering a final judgment holding Appellant Camelot Club Condominium Association (hereinafter, Appellant or "Camelot") vicariously liable for the percentage of fault assigned to its joint tortfeasor. The plain, unambiguous language of O.C.G.A. § 51-12-33 provides that a party shall only be held liable for its percentage of fault for the alleged injury or damages. Here, the trial court erred in imputing Alliance's independent, common-law liability to Camelot, as there is no statutory basis for vicarious liability where the underlying liability lies in common-law negligence and not a statute.

I. The judgment below must be reversed because the plain language of O.C.G.A. § 51-12-33 requires that each party be held liable only accordingly to its own percentage of fault.

In the 2005 amendment of O.C.G.A. § 51-12-33, the Georgia General Assembly dictated, in no uncertain terms, that in any tort action for injury to

person or property, the jury "**shall . . . apportion its award of damages** among the persons who are liable according to the percentage of fault of each person." O.C.G.A. § 51-12-33(b) (emphasis supplied). The jury is required 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 supplied).

Moreover, in rewriting O.C.G.A. § 51-12-33, the legislature specifically abolished joint and several liability and contribution among joint tortfeasors:

> 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.

O.C.G.A. § 51-12-33(c) (emphasis supplied). As the Supreme Court of Georgia has explained, O.C.G.A. § 51-12-33(c) provides that the "'fault' of…a defendant," as determined by the jury's apportionment of fault, "relative to the 'fault' of all—is the measure and limit of [that defendant's] liability." *Zaldivar v. Prickett*, 297 Ga. 589, 594 (1) (2015).

Apportionment of fault by the jury is not optional; the trial court is required to instruct the jury appropriately on apportionment of fault among all defendants and any applicable nonparties. *McReynolds v. Krebs*, 290 Ga. 850, 852 (2012); see

also *Cavalier Convenience, Inc. v. Sarvis*, 301 Ga. App. 141, 145 (2010). For purposes of apportioning "fault" among parties and nonparties, the word "fault" encompasses both negligence and fault, and the statute requires apportionment of fault according to percentages of responsibility for both negligent and intentional tortfeasors. *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 383 (2012). Similarly, jurors must decide whether to apportion fault to a nonparty that may have caused the plaintiff's injuries or damages regardless of whether the nonparty would be wholly shielded from suit by some legal defense or immunity. *Walker v. Tensor Mach., Ltd.*, 298 Ga. 297 (2015); *Zaldivar v. Prickett*, 297 Ga. 589 (2015).

Our Supreme Court has rejected multiple attempts to evade or circumscribe the requirement of O.C.G.A. § 51-12-33(c) that the fault of all parties and nonparties be considered in juries' fault calculus in tort cases. Plaintiffs had the idea early on to argue that "all persons" as used in the statute did not include nonparties who had committed an intentional tort. Plaintiffs were able to convince several trial courts to accept that nonsensical argument and it took several years for such a case to reach the Supreme Court, but when it did, the Supreme Court roundly rejected that proposition. *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359 (2012). The plaintiffs in *Couch* also contended that O.C.G.A. § 51-12-33 was unconstitutional, but the Supreme Court rejected those arguments in short order as well. *Id.* at 366-67 (2).

In *Zaldivar v. Prickett*, the plaintiff argued that a jury could not apportion fault to the plaintiff's employer under a negligent entrustment theory. The trial court and this court agreed, but the Supreme Court reversed, holding that to the extent that the defendant could show that the plaintiff's employer had breached a duty owed to the plaintiff and that the plaintiff's injury had resulted to some degree from that breach of duty, the jury would be required to include the plaintiff's employer in the apportionment of fault calculation. *Zaldivar*, 297 Ga. at 604 (2). In *Walker*, the plaintiff argued that the allowing jurors to apportion fault to a nonparty with statutory immunity, such as the immunity provided to an employer under the Workers' Compensation Act (WCA), "would upset the careful balance that the General Assembly struck in the [WCA] between the respective interests of employers and employees." 298 Ga. at 300. The Supreme Court rejected that argument as well, holding that a nonparty must be considered when a jury apportions fault regardless of any immunity or legal defense that might have prevented the plaintiff from suing the nonparty. *Id.* at 304.

It is a longstanding principle of Georgia law that the legislature is presumed to enact statutes "with full knowledge of the existing condition of the law and with reference to it." *Hasty v. Castleberry*, 293 Ga. 727, 731 (2) (2013). When it amended O.C.G.A. § 51-12-33, the legislature knew what O.C.G.A. § 51-3-1 said and knew that this court had interpreted that statute as imposing a "nondelegable" duty on

owners or occupiers of land. See, e.g., *Bartlett v. Holder Constr. Co.*, 244 Ga. App. 397, 399 (2000); *Kroger Co. v. Strickland*, 248 Ga. App. 613, 614-15 (2001). Yet when the General Assembly completely rewrote O.C.G.A. § 51-12-33, it did not write O.C.G.A. § 51-12-33(c) to say that 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, except in the case of owners and occupiers of property, who may be held liable for fault apportioned to contractors working on the premises. This is no different from the manner in which the legislature could have provided some limitation in the statute's applicability as to intentional tortfeasors and persons or entities immune from or otherwise not subject to suit. The legislature could have included in O.C.G.A. § 51-12-33(c) an exception to apportionment for contractors hired by property owners, but the legislature did not do so, and the courts must follow the plain language of O.C.G.A. § 51-12-33.

Quite simply, the only reasonable conclusion that can be drawn from all this is that, notwithstanding this Court's prior decisions describing a landowner's duty under O.C.G.A. § 51-3-1 as "nondelegable," the 2005 amendment of O.C.G.A. § 51-12-33 requires the jury to apportion fault amongst the landowner and any at-fault contractors (and others who may bear fault). Plaintiffs and trial courts cannot be

permitted to make an end-run around the clear language of the statute by requiring the jury to apportion fault as directed by the statute but then entering a judgment that violates the statute—trial and appellate courts "are not at liberty to simply rewrite statutes" to accomplish some desired outcome. *Zaldivar*, 297 Ga. at 600, n.7. Just as the Supreme Court held in *Couch*, *Zaldivar*, and *Walker* that the courts may not graft an exception onto the apportionment statute, the trial court was incorrect to do so in this case. The judgment below must be reversed because it violates the clear language of O.C.G.A. § 51-12-33(b).

II. The judgment below must be reversed because there is no statutory or other legal basis for requiring Appellant to pay the portion of the judgment corresponding to the fault apportioned by the jury to Alliance.

Given the backdrop of binding Supreme Court interpretation of the apportionment statute in *Couch*, *Zaldivar*, *Walker*, and other cases, one would think that trial courts now would reject any further arguments designed to avoid the plain meaning and obvious intent of O.C.G.A. § 51-12-33. Yet, in this case, this Court is faced with the argument, essentially, that apportioning fault between all of those with fault is one thing, but apportioning the judgment entered on the jury's verdict is quite another. But what would be the point of requiring jurors to apportion fault between the named defendants and relevant nonparties, as was done in this case, if the trial court could then simply require one defendant to pay the percentage apportioned to another defendant? Likewise, why would the

General Assembly and our own Supreme Court require and endorse such a clearly pointless waste of the jury's time?

Fortunately, little reasoning or research is required to conclude that what the trial court did in this case was error. This Court need only look to the plain language of O.C.G.A. § 51-12-33(c), which provides that "[d]amages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, [and] shall not be a joint liability among the persons liable." This is a simple matter that the trial court simply got wrong, and the judgment below, thus, must be reversed.

But even if O.C.G.A. § 51-12-33(c) permitted entry of a judgment requiring a defendant to pay for the fault apportioned to another defendant or a nonparty, the trial court erred in doing so in this case. At this point, it becomes important to understand the basis and origin of this Court's jurisprudence defining the duty of a landowner to keep the premises safe as "nondelegable."[1] The word "nondelegable" does not appear in O.C.G.A. § 51-3-1; it appears to have been inserted into jurisprudence regarding the interpretation of O.C.G.A. § 51-3-1's predecessor statute in *Millard v. AAA Electrical Contractors & Engineers, Inc.*, 119

[1] The authors of this brief have been unable to find any case in which the Supreme Court of Georgia held that an owner or occupier's duty under O.C.G.A. § 51-3-1 to keep the premises and approaches safe is "nondelegable." Cf. *Peachtree-Cain Co. v. McBee*, 254. Ga. 91 (2) (1985) (holding property owner had nondelegable duty to invitees in context of intentional torts committed by security guards on premises).

Ga. App. 548, 556 (3) (1969). The apparent basis in law for the principle that the duty imposed by O.C.G.A. § 51-3-1 is "nondelegable" lies in O.C.G.A. § 51-2-5(4), which provides that "[a]n employer is liable for the negligence of a contractor…[i]f the wrongful act is the violation of a duty imposed by statute." See *Millard*, 119 Ga. App. at 556 (3), citing former Ga. Code § 105-401.

In this case, the jury did just what the apportionment scheme contemplates and requires by assessing percentages of fault to each party under the theories alleged by the Plaintiff (along with applicable nonparties). The jury determined that each of the named defendants and the three nonparties committed separate torts that are the basis of the corresponding percentages of fault assigned by the jury. The percentage of fault apportioned to Appellant was based on either a breach of Appellant's duty as property owner under O.C.G.A. § 51-3-1 or for maintaining an alleged nuisance on the premises, whereas the percentage of fault assessed to Alliance was based on ordinary negligence. Because the jury is required to apportion fault to all responsible parties, one must assume that the percentage of fault assessed to Alliance was for Alliance's own wrongdoing, separate from any employer-independent contractor relationship with Camelot.

Indeed, Alliance could not have been subjected to liability under O.C.G.A. § 51-3-1 or a nuisance theory, since Alliance did not own or control the premises. See *Perdue v. Atlanta Bldg. Maint. Co.*, 311 Ga. App. 81, 83 (1) (2011) ("The duty

imposed upon an owner or occupier of land by O.C.G.A. § 51-3-1 is inapplicable to an independent contractor."); *Merlino v. City of Atlanta*, 283 Ga. 186, 189 (2) (2008) (holding that a defendant that does not exercise dominion or control over the property where the condition complained of exists cannot be held liable for maintaining a nuisance). In any event, the jury's verdict against Alliance could not have been based on either O.C.G.A. § 51-3-1 or a nuisance theory because Plaintiff alleged no such theories against Alliance. The percentage of fault allocated by the jury to Alliance was for a breach of duty wholly separate from any breach of duty by Appellant. There was no statutory basis for applying vicarious liability, as the trial court purported to do in rendering Appellant liable for Alliance's portion of the verdict, because Alliance was found liable under common law ordinary negligence, and *not* for violation of a statute. O.C.G.A. § 51-2-5(4). See also *Uniroyal v. Hood*, 588 F.2d 454 (5th Cir. 1979) (applying Georgia law).

The trial court erred in ignoring the jury's apportionment of fault and holding Appellant vicariously liable for Alliance's breach of duty. Appellant cannot be held liable for Alliance's portion of the jury's verdict any more than Appellant can be held liable for the part of the verdict apportioned to the three nonparties who took part in murdering Afari-Opoku. Accordingly, the trial court erred in entering a judgment rendering Appellant liable for both its own

percentage of fault and for co-defendant Alliance's percentage of fault, as determined by the jury.

CONCLUSION

By requiring Appellant to pay a greater share of the jury's verdict than the 25% fault apportioned to Appellant by the jury, the trial violated the plain language and clear intent of O.C.G.A. § 51-12-33(c). Also, although the trial court purported to base the judgment on "vicarious liability," the jury's verdict in this case was not and could not have been based on any act by Alliance for which Georgia law would permit Appellant to be held vicariously liable. The trial court committed clear error in this case by entering a judgment that differs substantially and qualitatively from the jury's verdict, and the judgment must be reversed.

Respectfully submitted, this 15th day of November, 2016.

HAWKINS PARNELL THACKSTON & YOUNG LLP

/s/ *Camille A. Smith*
Camille A. Smith
Georgia Bar No. 183438

303 Peachtree Street, N.E.
Suite 4000
Atlanta, GA 30308-3243
(404) 614-7400
(404) 614-7500 (fax)
csmith@hptylaw.com
mlevinson@hptylaw.com

/s/ *Martin A. Levinson*
Martin A. Levinson
Georgia Bar No. 141791
For Amicus Curiae
Georgia Defense Lawyers Association

Certificate of Service

I hereby certify that I have served a true and correct copy of **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** upon all counsel by U.S. mail or electronically via the Court's electronic filing and service system, as follows:

Wayne S. Melnick, Esq.
Sun S. Choy, Esq.
Jacob E. Daly, Esq.
Freeman Mathis & Gary LLP
100 Galleria Pkwy., Suite 1600
Atlanta, Georgia 30339

Jeffrey P. Shiver, Esq.
Alan J. Hamilton, Esq.
Shiver Hamilton, LLC
3340 Peachtree Road NE, Suite 950
Atlanta, Georgia 30326

Andrew T. Rogers, Esq.
Gilbert H. Deitch, Esq.
Deitch & Rogers LLC
5881 Glenridge Drive, Suite 160
Atlanta, Georgia 30328

James Randolph Evans, Esq.
John Stephen Berry, Esq.
David A. Bersinger, Esq.
Kathryn M. Guinn, Esq.
Dentons US LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308

Michael B. Terry, Esq.
Naveen Ramachandrappa, Esq.
Bondurant Mixson & Elmore LLP
3900 One Atlantic Center
1201 W. Peachtree Street, NW
Atlanta, Georgia 30309-3417

This 15th day of November, 2016.

HAWKINS PARNELL THACKSTON & YOUNG LLP

/s/ Martin A. Levinson

Martin A. Levinson
Georgia Bar No. 141791
For Amicus Curiae
Georgia Defense Lawyers Association

303 Peachtree Street, N.E., Suite 4000
Atlanta, GA 30308-3243
(404) 614-7400
(404) 614-7500 (fax)
mlevinson@hptylaw.com