

IN THE COURT OF APPEALS
STATE OF GEORGIA

CORO REALTY ADVISORS, LLC;)
ROSWELL COMMONS GROUP,)
L.P. and RAM PARTNERS, L.L.C.,)
)
Appellants,)
)
v.)
)
ANA JULIA MAYA SALINAS,)
individually; and ROGER)
KIRSCHENBAUM, as administrator)
of the Estate of Ismael Cervantes)
Orta,)
Appellees.)
)

CASE NO. A12A0796

**BRIEF OF AMICUS CURIAE
GEORGIA DEFENSE LAWYERS ASSOCIATION
IN SUPPORT OF APPELLANTS**

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The Georgia Defense Lawyers Association (hereinafter “GDLA”), as amicus curiae, respectfully submits the following brief in support of Appellants.

I. STATEMENT OF INTEREST

GDLA is a voluntary membership organization composed of more than 600 Georgia lawyers who engage in civil litigation, primarily for defendants. GDLA’s mission is to support and work for the improvement of the adversary system of jurisprudence in our courts, to work for the elimination of court congestion and delays in civil litigation, and to promote improvements in the administration of justice and to increase the quantity and quality of the service and contribution which the legal profession renders to the community, State, and nation.

II. INTRODUCTION

GDLA respectfully requests that the Court reverse the trial court's decision and remand with instructions to reinstate Appellants' notices of non-party fault. The plain language of O.C.G.A. § 51-12-33 requires that the jury be allowed to consider the fault of a non-party actor as long as the prerequisite notice of nonparty fault is properly filed. Any ruling by this Court to the contrary would violate a statutory mandate, offend stare decisis, and create an irreconcilable conflict in this Court's jurisprudence based upon the decision in *Cavalier Convenience, Inc. v. Sarvis*, 305 Ga. App. 141, 699 S.E.2d 104 (2010), cert. granted January 18, 2011. Specifically, dram shop liability cases, just like the subject third party criminal actor premises liability case, involve the duty to protect the public from the intentional, criminal acts of a third person. This Court held in *Cavalier Convenience* that the plain language of O.C.G.A. § 51-12-33 requires the jury to apportion fault in a dram shop case among the criminal, an intoxicated driver, and the alleged negligent business that sold alcohol to the driver - despite various policy arguments to the contrary. The very same policy arguments at issue here were actually raised by amici (Georgia Trial Lawyers Association and DeKalb Rape Crisis Center) in the *Cavalier Convenience* case and summarily rejected.

In *Cavalier Convenience*, this Court correctly acknowledged that it had no authority to adopt a construction that is contrary to the General Assembly's codified intent. Further, this Court found that O.C.G.A. § 51-12-33 requires that a jury be given the opportunity to apportion fault among both an initial negligent actor and a subsequent intentional tortious actor. For these reasons, the GDLA asks this Court to (1) once again uphold the General Assembly's public

policy determination that defendants, including property owners, should be liable only in proportion to their degree of fault and (2) give the jury the opportunity to apportion fault among both the initial negligent actor—the premises owner—and the subsequent intentional tortious actor—the non-party shooter—as required by the mandate of O.C.G.A. § 51-12-33.

III. ARGUMENT AND CITATION OF AUTHORITIES

A. THIS COURT HAS PREVIOUSLY CONSIDERED AND REJECTED THE APPELLEE’S ARGUMENT IN *CAVALIER CONVENIENCE, INC. v. SARVIS*

The trial court erroneously struck Appellants’ notices of non-party fault, reasoning that it would be “incongruous to reduce or relieve the landowner of responsibility by the very harm that was to be deterred.” (R-000209-000210). This argument was considered and rejected by this Court as a reason for disregarding the plain language of O.C.G.A. § 51-12-33. *See Cavalier Convenience*, 305 Ga. App. at 146 n. 24, 699 S.E.2d at 108 n. 24. In both dram shop cases and third party criminal actor premises liability cases, liability does not become actionable for the dram shop or the landowner until certain actions of a third party result in harm. Relying on this proposition, amicus participant DeKalb Rape Crisis Center argued in *Cavalier Convenience* that in a rape victim’s civil action against a landlord, because the liability of a property owner is based on its negligent conduct that exposed the victim to an intentional tort, the victim should be allowed to collect full damages from a negligent defendant who knew, or should have known, that an injury would be intentionally inflicted and failed in its duty to take reasonable steps to prevent it. *Id.* at 147, 699 S.E.2d, 104, 108. Notwithstanding, this Court properly held that

O.C.G.A. § 51-12-33 requires apportionment of fault between the dram shop and the intoxicated driver and rejected the very policy arguments made by Appellees in this case.¹

Further, in *Cavalier Convenience*, the Georgia Trial Lawyers Association (“GTLA”) made the following argument in its amicus curiae brief:

[I]t would be improper as a matter of public policy to apportion fault as between the convenience store defendants who, either negligently or in violation of the laws concerning the sale of alcohol to minors, sold alcohol to a minor who foreseeably placed other motorists, . . . at risk for the underage drinker’s reckless conduct. . . . If apportionment were allowed in this case, it is likely that Appellants would be excused for their wrongful acts, as there is little doubt that the intoxicated, underage driver would be found to be entirely responsible for the injury. Thus, the jury would likely apportion 100% of the fault to the driver, relieving Appellants from liability entirely, despite Appellants’ wrongful conduct or violation of law. Such a result would effectively remove any independent duty on the part of the initial tortfeasor.

Cavalier Convenience, 305 Ga. App. at 146 n. 24, 699 S.E.2d at 108 n. 24.

¹ The GDLA acknowledges that in *Cavalier Convenience*, the intoxicated driver was a named defendant, whereas this case concerns apportionment to a non-party. This fact is of no consequence, however, because the important factor is that this Court upheld the application of the plain language of O.C.G.A. § 51-12-33 in a case where, as here, a business owner’s liability is based on the unlawful act of a third party. Further, O.C.G.A. § 51-12-33 (d)(1) clearly states that the “[n]egligence or fault of a nonparty shall be considered...if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.”

This Court rejected the GTLA's policy argument, as well as that of the DeKalb Rape Crisis Center, based upon the plain language of O.C.G.A. § 51-12-33. In so doing, this Court reasoned that it had "no authority to adopt a construction that is contrary to the General Assembly's intent as plainly codified[.]" explaining that "[t]he doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced. Under that doctrine, statutory construction belongs to the courts, legislation to the legislature." *Id.* at 146-47, 699 S.E.2d at 108 (quoting *Mason v. The Home Depot U.S.A.*, 283 Ga. 271, 276, 658 S.E.2d 603, 608 (2008)).

In a dram shop case, the alleged tort does not become actionable until the intoxicated driver causes harm to another. Thus, a dram shop's liability depends upon its negligence that exposes the public to the intentional acts of the intoxicated driver. As with a dram shop case, a premises owner's liability is based upon its alleged negligent conduct that exposes invitees to the intentional conduct of a third party criminal. The action against the subject premises owner likewise does not become actionable until a third party criminal caused harm to another. There is no logical basis for creating inconsistent law under these substantially similar factual settings.

The possibility that the jury might apportion 100% fault against the intoxicated driver, thus absolving a dram shop of liability, was easily recognized but rejected by this Court as a reason for resisting the plain language of O.C.G.A. § 51-12-33. *Id.* The same result is demanded in the premises context here. "[E]ven those who regard 'stare decisis' with something less than enthusiasm recognize that the principle has even *greater weight* where the precedent relates to interpretation of a statute. *Once the court interprets the statute, 'the interpretation has*

become an integral part of the statute.’” *Walker v. Walker*, 122 Ga. App. 545, 545, 178 S.E.2d 46, 46-47 (1970) (emphasis added) (quoting *Gulf, C. & S.F. Ry. Co. v. Moser*, 275 U.S. 133, 136, 48 S. Ct. 49, 50 (1927)). If this Court were to rule in favor of Appellees in this case, the Court would create an irreconcilable conflict with the decision in *Cavalier Convenience*.

B. O.C.G.A. § 51-12-33 REQUIRES THE JURY TO APPORTION FAULT AMONG BOTH INITIAL NEGLIGENT ACTORS AND SUBSEQUENT INTENTIONAL TORTIOUS ACTORS

O.C.G.A. § 51-12-33 requires that a jury be given the opportunity to apportion fault among both an initial negligent actor and a subsequent intentional tortious actor and thus this Court must remand the case to the trial court with instructions to reinstate Appellants’ notices of non-party fault. *Cavalier Convenience* has addressed the situation of apportioning fault between an initial negligent tortfeasor and a subsequent intentional actor. **Under Georgia law, a drunk driver is considered an intentional actor.** See *Langlois v. Wolford*, 246 Ga. App. 209, 211, 539 S.E.2d 565, 568 (2000) (holding, in a case where a drunk driver fled the scene of an accident, that “driving under the influence of alcohol constituted such wanton conduct that it was both intentionally wilful and evinced such entire want of care as to be wanton, because it placed others at great risk of injury or death”); *In re Caroway*, 279 Ga. 381, 613 S.E.2d 610 (2005) (holding that a lawyer who drove under the influence “knowingly violated Rule 8.4(a)(2) by engaging in intentional criminal misconduct”). Despite the intentional nature of drunk driving, however, this Court held that a jury must be allowed to apportion fault among a drunk driver and the negligent actor that sold alcohol to the driver.

In *Cavalier Convenience*, the plaintiff was injured when his car collided with a vehicle driven by an intoxicated 17-year old. 305 Ga. App. 141, 699 S.E.2d 104 (2010). The plaintiff sued both the intoxicated 17-year old and the business establishments that unlawfully sold her intoxicating beverages. This Court held that the plain language of O.C.G.A. § 51-12-33 required that the jury be given an opportunity to apportion fault among both the initial negligent actors - the business establishments that unlawfully sold the 17-year old intoxicating beverages *and* the subsequent intentional tortious actor - the intoxicated 17-year old. *See id.* (finding that the “trier of fact ‘shall...apportion its award of damages among the persons who are liable according to the percentage of fault of each person’” and reversing the trial court’s order which prohibited the jury from apportioning fault between the intoxicated 17-year old and the business establishments).

Similar to *Cavalier Convenience*, this case involves both an initial negligent actor - the premises owner, and a subsequent intentional tortious actor - the criminal non-party shooter. According to this Court’s ruling in *Cavalier Convenience*, the plain language of O.C.G.A. § 51-12-33 requires that the jury be given an opportunity to apportion fault among both the initial negligent actor - the premises owner *and* the subsequent intentional tortious actor - the non-party shooter. Thus, pursuant to the doctrine of stare decisis, the Appellants’ notices of non-party fault must be reinstated.

IV. CONCLUSION

The trial court erroneously applied policy considerations in choosing to ignore the mandate of O.C.G.A. § 51-12-33. These very same policy considerations have been previously

considered and rejected by this Court as a basis for refusing to allow apportionment of liability. *See Cavalier Convenience*, 305 Ga. App. at 146 n. 24, 699 S.E.2d at 108 n. 24. This Court must follow its decision in *Cavalier Convenience* and reiterate that it has no authority to adopt a construction of O.C.G.A. § 51-12-33 that would exempt premises liability cases. Accordingly, this Court should reverse the decision of the trial court and remand with instructions to reinstate Appellants' notices of non-party fault and allow the jury to determine whether to allocate fault to the non-party shooter.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE OF GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS** has this day been served upon all counsel of record via United States mail in an envelope with adequate postage affixed thereon to ensure delivery as follows:

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