

IN THE SUPREME COURT OF GEORGIA

NAIROBI COUCH,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. S12Q0625
	)	
RED ROOF INNS, INC. and	)	
R ROOF V, LLC,	)	
	)	
Appellees,	)	

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**AMICUS CURIAE BRIEF OF THE  
GEORGIA DEFENSE LAWYERS ASSOCIATION**

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## I.

### **STATEMENT OF INTEREST**

The Georgia Defense Lawyers Association is an association of more than 600 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.

Before 2005, plaintiffs in premises liability cases based on third-party criminal conduct could recover their full damages from the owner<sup>1</sup> of the premises because there was no formal mechanism in the law for juries to apportion fault to non-parties, such as the criminals whose crimes actually injured the plaintiffs. Such plaintiffs rarely named the criminals as defendants, presumably because they assumed that the criminals had no assets with which to satisfy a money judgment against them. Thus, property owners typically were the only defendants sued in these cases, and plaintiffs hoped to reap the benefit of the doctrine of joint and several liability by not asserting claims against the criminals. That benefit, of course, was the prohibition on apportionment of fault. Under a traditional

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<sup>1</sup> The GDLA recognizes that O.C.G.A. § 51-3-1 applies to owners and occupiers of property, but it will use “owner(s)” throughout this brief to refer to both.

application of the doctrine of joint and several liability, the plaintiff would be able to recover the full amount of his alleged damages from any joint tortfeasor. The effect of this was that property owners would be liable not only for their own alleged negligence in securing the premises, if any, but also for intentional torts (i.e., crimes) committed by others even though there was no agency or employment relationship between the owners and the criminals.

In 2005, the General Assembly recognized the gross inequity in this system and amended O.C.G.A. § 51-12-33 to allow for proportionate liability instead of joint liability. Apportionment of fault (and, consequently, of damages) reflects the General Assembly's public policy determination that a defendant should pay only for the consequences of its own tortious act or omission and not for the tortious act or omission of others. *Barnett v. Farmer*, 308 Ga. App. 358, 362, 707 S.E.2d 570, 574 (2011) (physical precedent). Not surprisingly, plaintiffs in these cases disagree with the General Assembly, but the fact nevertheless remains that joint liability has now been abolished in most cases. To change the General Assembly's public policy determination concerning apportionment of fault to non-parties, plaintiffs and their supporters must look to the General Assembly, not the courts.

Because the impact of apportionment of fault to non-parties on these cases can be enormous, the GDLA is justifiably concerned with challenges to the applicability and constitutionality of the 2005 amendment to O.C.G.A. § 51-12-33.

Indeed, every premises liability case based on third-party criminal conduct will, by definition, involve a client of a member or potential member of the GDLA and a criminal to whom some fault should be apportioned. The GDLA does not seek quasi-immunity for property owners, and it is not arguing that appellees did not owe appellant a duty under O.C.G.A. § 51-3-1. Instead, the GDLA seeks only to uphold the public policy determination made by the General Assembly that property owners should be liable only in proportion to their degree of fault.

## II.

### **ARGUMENT AND CITATION OF AUTHORITY**

Appellant asserts a variety of arguments challenging the applicability and constitutionality of O.C.G.A. § 51-12-33. Because the face of O.C.G.A. § 51-12-33 contains no exceptions for premises liability cases based on third-party criminal conduct, apportionment of fault to non-parties applies in this case the same as it applies in other cases, and so the Court should answer the first certified question in the affirmative. And, because O.C.G.A. § 51-12-33 does not violate appellant's constitutional rights, it represents a valid exercise of the General Assembly's authority, and so the Court should answer the second certified question in the negative. Before addressing appellant's statutory and constitutional arguments, the GDLA will first frame the issue for the Court by discussing the history of joint and several liability and apportionment of fault in Georgia.

## A. A BRIEF HISTORY OF JOINT AND SEVERAL LIABILITY AND APPORTIONMENT OF FAULT IN GEORGIA

Although the precise origin of the doctrine of joint and several liability is open to debate, there is no doubt that it dates back to the early English common law. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 46, at 322-23 (5th ed. 1984) [hereinafter PROSSER & KEETON] (attributing the doctrine to several seventeenth-century English cases); 3 FOWLER V. HARPER ET AL., HARPER, JAMES & GRAY ON TORTS § 10.1, at 1 (3d ed. 2007) [hereinafter HARPER, JAMES & GRAY] (attributing the doctrine to an English case decided in 1432). Under this doctrine, two or more tortfeasors who caused a single, indivisible injury were jointly and severally liable, meaning that the plaintiff could recover his entire damages from any one tortfeasor, even if that tortfeasor was responsible for only 1% of the damages. PROSSER & KEETON §§ 46-47, at 322-30.<sup>2</sup> This doctrine was recognized in Georgia at least as early as 1851 when this Court held, “The rule is, in an action for a *joint tort* against several defendants, that the Jury are to assess damages against all the defendants *jointly*, according to the amount which in their judgment, the most culpable of the defendants ought to pay.” *Simpson v. Perry*, 9

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<sup>2</sup> A good example of this is seen in *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987). That case involved a woman who was injured while driving a racecar at Walt Disney World when her fiancé rammed her vehicle from behind. The jury found fault as follows: plaintiff – 14 %; her fiancé – 85%; and Disney – 1%. Nevertheless, judgment was entered against Disney for 86% of the plaintiff’s damages. (Subsequent to the accrual of the cause of action in *Wood*, the Florida legislature enacted a statute providing for apportionment of damages.)

Ga. 508, 509 (1851). Apportionment of fault among joint tortfeasors was not permitted. PROSSER & KEETON § 46, at 323.

At common law, the potential harshness of joint and several liability was balanced on the opposite extreme by the doctrine of contributory negligence. Under this doctrine, a negligent plaintiff was completely barred from recovering, even if he was responsible for only 1% of his own damages. *Id.* § 65, at 451-62. The perceived unfairness of this doctrine was somewhat cured by the advent of the doctrine of comparative negligence, whereby a plaintiff's recovery is reduced by the amount of fault attributable to him. *Id.* § 67, at 468-79.<sup>3</sup> Logically, it would seem that comparative negligence and joint and several liability are incompatible since comparative negligence is based on proportionate fault between the plaintiff(s) and the defendant(s), but most states that adopted some form of comparative negligence also retained joint and several liability. *Id.* § 67, at 475. That meant a defendant who was less at fault than the plaintiff could be liable for all of the damages awarded against the defendants collectively. *See, e.g., Union Camp Corp. v. Helmy*, 258 Ga. 263, 367 S.E.2d 796 (1988) (holding that “a plaintiff whose comparative fault exceeds that of one defendant but does not

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<sup>3</sup> Georgia was among the first states to adopt a form of comparative negligence. For an account of Georgia's pioneering efforts, see VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 1.04[b][1], at 13 and 1.05[a][2], at 18-19 (4th ed. 2002).

exceed that of another defendant is entitled to a judgment against both defendants”).

The unfairness of requiring a tortfeasor to pay more than its proportionate share of the plaintiff’s damages caused many state legislatures to enact tort reform measures during the 1980s and 1990s. 1 COMPARATIVE NEGLIGENCE MANUAL § 1:24 (3d ed. 2009); Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627, 688 (1996). Although Georgia was a part of this movement, the General Assembly had already taken its first step in the arena of tort reform more than a hundred years earlier. In 1863, the General Assembly enacted the predecessor to O.C.G.A. § 51-12-31, which permitted apportionment of damages against joint trespassers who were named as defendants. That statute, however, was limited to property torts and was held not to apply to personal injury torts. *McCalla v. Shaw*, 72 Ga. 458, 460 (1884). In 1987, the General Assembly enacted O.C.G.A. § 51-12-33, which permitted apportionment of damages against joint tortfeasors in both property damage and personal injury cases, but only if the plaintiff was “to some degree responsible for the injury or damages claimed.” Apportionment of damages to non-parties still was not permitted under the 1987 version of the statute. *Schriever v. Maddox*, 259 Ga. App. 558, 561, 578 S.E.2d 210, 213-14 (2003).

The next step in the evolution of joint and several liability in Georgia came in 2005 when the General Assembly enacted a tort reform bill whose purpose was, among other things, “to change provisions relating to apportionment of award according to degree of fault.” S.B. 3 preamble (Ga. 2005). The General Assembly accomplished this purpose by amending O.C.G.A. § 51-12-33 in two principal ways. First, apportionment of damages between the plaintiff(s) and the defendant(s) is now mandatory and does not depend on the plaintiff(s) being at fault. Second, fault now must be apportioned among all joint tortfeasors, regardless of whether they are named as defendants (assuming that certain requirements are satisfied). These changes to O.C.G.A. § 51-12-33 effectively abolished joint and several liability in all cases to which the statute applies.<sup>4</sup>

Georgia does not stand alone among the states in how it treats joint and several liability and apportionment of damages. Since the 1980s, “[t]he clear trend has been a move away from full joint and several liability, and the majority of jurisdictions have now abolished or limited joint and several liability by statute.” 1 COMPARATIVE NEGLIGENCE MANUAL § 1:24. There are variations among the states as to how or the extent to which they implement proportionate liability, and so comparing the 2005 amendment to O.C.G.A. § 51-12-33 with statutes in other

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<sup>4</sup> Contrary to appellant’s characterization, this is not a novel conclusion. In fact, this Court has held that in any case to which O.C.G.A. § 51-12-31 or O.C.G.A. § 51-12-33 applies, “the rule of joint and several liability among joint tort-feasors can be disregarded.” *Helmy*, 258 Ga. at 268, 367 S.E.2d at 800.

states is useful only to a certain extent since the statutes in other states reflect different public policy determinations made by those states' legislatures. Nevertheless, it is helpful for the Court to be aware of the weight of authority that generally favors proportionate liability.<sup>5</sup>

Although proportionate liability has become more prevalent since the 1980s, the concept is much older than that. As previously noted, it has existed in Georgia for about 150 years with respect to property torts, and it has existed elsewhere in the world for more than two thousand years. Francis S. Philbrick, *Loss Apportionment in Negligence Cases*, 99 U. PA. L. REV. 766, 799 (1951). In more modern times, it was codified in Prussia in 1794 and in Austria in 1811, and it

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<sup>5</sup> By the GDLA's count, at least 39 states besides Georgia have abolished or limited joint and several liability to some degree and enacted some form of proportionate liability. See ALASKA STAT. § 09.17.080; ARIZ. REV. STAT. § 12-2506; ARK. CODE ANN. § 16-55-201; CAL. CIV. CODE § 1431.2; COLO. REV. STAT. § 13-21-111.5; CONN. GEN. STAT. § 52-572h; FLA. STAT. § 768.81; HAW. REV. STAT. § 663-10.9; IDAHO CODE §§ 6-802 to -3; 735 ILL. COMP. STAT. 5/2-1117; IND. CODE §§ 34-51-2-8, -11; IOWA CODE §§ 668.1 to .7; KAN. STAT. ANN. § 60-258a; KY. REV. STAT. ANN. § 411.182; LA. CIV. CODE ANN. art. 2324; ME. REV. STAT. ANN. tit. 14, § 156; MICH. COMP. LAWS §§ 600.6304, .6312; MINN. STAT. §§ 604.01 to .02; MISS. CODE ANN. § 85-5-7; MO. REV. STAT. § 537.067; MONT. CODE ANN. § 27-1-703; NEB. REV. STAT. § 25-21,185.10; NEV. REV. STAT. 41.141; N.H. REV. STAT. ANN. § 507:7-e; N.J. STAT. ANN. § 2A:15-5.3; N.M. STAT. ANN. § 41-3A-1; N.Y. C.P.L.R. LAW §§ 1601-1602; N.D. CENT. CODE § 32-03.2-02; OHIO REV. CODE ANN. §§ 2307.22, .23, .25; OKLA. STAT. tit. 23, § 15; OR. REV. STAT. §§ 31.600, .605, .610, .800, .805; 42 PA. CONS. STAT. § 7102; S.C. CODE ANN. § 15-38-15; TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001 to .017; UTAH CODE ANN. §§ 78B-5-817 to -823; VT. STAT. ANN. tit. 12, § 1036; WASH. REV. CODE § 4.22.070; W. VA. CODE § 55-7-24; WIS. STAT. § 895.045; WYO. STAT. ANN. § 1-1-109.

swept across much of the rest of Europe, Canada, and Asia throughout the nineteenth and twentieth centuries. *Id.*; Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 238-45 (1950); PROSSER & KEETON § 67, at 470. On the federal level in the United States, the Supreme Court has adopted proportionate liability in admiralty cases because of “the patent harshness of an equal division of damages in the face of disparate blame.” *United States v. Reliable Transfer Co.*, 421 U.S. 397, 406 (1975). In addition, Congress has adopted proportionate liability for private securities litigation. 15 U.S.C. § 78u-4(f). The House Conference Report accompanying the Private Securities Litigation Reform Act of 1995 justified the adoption of proportionate liability because of the unfairness of joint and several liability:

One of the most manifestly unfair aspects of the current system of securities litigation is its imposition of liability on one party for injury actually caused by another. Under current law, a single defendant who has been found to be 1% liable may be forced to pay 100% of the damages in the case.

H.R. CONF. REP. NO. 104-369, at 37 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 736.

With this historical context in mind, the GDLA turns to appellant’s arguments challenging the validity of O.C.G.A. § 51-12-33. Due to space constraints, the GDLA is not addressing every argument asserted by appellant. This decision should not be interpreted as acquiescence in those arguments.

**B. THE NON-DELEGABLE NATURE OF THE DUTY OWED BY PROPERTY OWNERS UNDER O.C.G.A. § 51-3-1 IS CONSISTENT WITH APPORTIONMENT OF FAULT TO NON-PARTIES UNDER O.C.G.A. § 51-12-33**

Appellant argues that apportionment of fault to non-parties is improper in premises liability cases based on third-party criminal conduct because doing so would “nullify” the non-delegable duty owed by property owners under O.C.G.A. § 51-3-1. (Appellant’s Br. at 5-6.) According to appellant, property owners are liable for all injuries and damages that were caused by their initial negligence, even if other tortious conduct also caused the invitee’s alleged injuries and damages. This argument is a red herring because it fails to recognize the different duties involved in such cases and the public policy embodied in the 2005 amendment to O.C.G.A. § 51-12-33.

The fatal flaw in appellant’s argument is that he fails to recognize that cases like this involve different duties. On the one hand, appellees may have owed a duty to appellant under O.C.G.A. § 51-3-1, depending on the circumstances. On the other hand, the unknown assailant unquestionably owed appellant a duty not to abduct, assault, and rob him. *See, e.g.*, O.C.G.A. §§ 51-1-13, 51-1-14. The GDLA does not contend that appellees did not owe appellant a duty under O.C.G.A. § 51-3-1 merely because it was the unknown assailant who abducted, assaulted, and robbed him. Further, the GDLA does not contend that the unknown assailant owed appellant a duty under O.C.G.A. § 51-3-1 or that he assumed such a duty from

appellees. Instead, the unknown assailant's duty not to abduct, assault, and rob appellant existed independent of any duty appellees may have owed.

This is why this case does not involve an attempt by appellees to delegate any duty they may have owed under O.C.G.A. § 51-3-1. The non-delegable nature of the duty created by O.C.G.A. § 51-3-1 means that a property owner cannot transfer the duty it owes to its invitees under *that* statute to someone else. Such a delegation issue arises when a property owner hires an independent contractor – such as a security company – in order to comply with its duty under O.C.G.A. § 51-3-1. Because *that* duty is non-delegable, the property owner cannot avoid liability under *that* statute for a third-party criminal act merely because it hired a security company to patrol the property and perform other security-related services. *See, e.g., Griffin v. AAA Auto Club South, Inc.*, 221 Ga. App. 1, 2, 470 S.E.2d 474, 476 (1996). Here, however, the non-delegation rule does not even apply because appellees are not claiming that they hired an independent contractor and thereby transferred their duty under O.C.G.A. § 51-3-1. Instead, appellees are claiming that the unknown assailant owed an independent duty to appellant and breached that duty by abducting, assaulting, and robbing him, irrespective of whatever duty appellees may have owed to appellant. In sum, nothing is being delegated by holding the unknown assailant responsible for his own breach of his own duty.

Appellant's argument implies that the only permissible defendant in a premises liability case based on third-party criminal conduct is the owner of the premises. Precedent and common sense show that this is not true. The cases in this area show that a claim against an entity other than the property owner is permissible under certain circumstances. *See, e.g., Anderson v. Atlanta Committee for the Olympic Games, Inc.*, 273 Ga. 113, 537 S.E.2d 345 (2000). There is no reason why the perpetrator of the crime cannot be a proper defendant. In cases like *Anderson*, the claims against the security companies were not based on an alleged delegation of the property owners' duty under O.C.G.A. § 51-3-1. Rather, the claims were based on an entirely separate source: the contracts between the security companies and the property owners. Here, the duty owed by the unknown assailant likewise does not arise under O.C.G.A. § 51-3-1. The unknown assailant, not being an owner of the property, could not have owed a duty under this statute and, consequently, could not have breached a duty under this statute. However, the unknown assailant undeniably owed a duty not to abduct, assault, and rob appellant, and he undeniably breached this duty.

It is unreasonable and illogical for appellant to contend that the unknown assailant did not owe him a duty and that the unknown assailant bears no fault for abducting, assaulting, and robbing him. If appellant contends this, and it appears that he does, there are two consequences that necessarily follow. First, he must

believe that a person has civil immunity for abducting, assaulting, and robbing someone as long as the crime is committed on someone else's property. Second, he must believe that a criminal cannot be named as a defendant in a premises liability lawsuit. Both of these propositions are absurd. *See, e.g., Spear v. Calhoun*, 261 Ga. App. 835, 836, 584 S.E.2d 71, 72 (2003) (noting that the plaintiff sued the unknown person who shot the plaintiff's decedent as a John Doe defendant). Appellant could have named the unknown assailant as a John Doe defendant, but he elected not to do so. Moreover, if appellant knew the unknown assailant's identity and had evidence showing that the unknown assailant had assets to pay a judgment, is there any doubt that he would have sued him also?

Appellant relies on *Hickman v. Allen*, 217 Ga. App. 701, 458 S.E.2d 883 (1995), which was decided before the General Assembly amended O.C.G.A. § 51-12-33 in 2005, but that case is unavailing for the very reason that it was decided before 2005. The GDLA does not dispute the general principle that a property owner may be liable for injuries caused by criminal conduct on its property, if the plaintiff provides appropriate and sufficient evidence, but appellant goes too far when he argues that the property owner is solely responsible for the criminal conduct. (Appellant's Br. at 6-7.) Regardless of whether this was the law before 2005, it is not the law now. Appellant would have the Court believe that the 2005 amendment to O.C.G.A. § 51-12-33, which allows apportionment of fault to non-

parties, is invalid because it contradicts cases that were decided *before* it was enacted. Appellant has it backwards; the prior cases must yield to the subsequent statute. *DeLoach v. Elliott*, 289 Ga. 319, 322, 710 S.E.2d 763, 765 (2011) (noting that the General Assembly has “general authority to modify common law rights of action”). Today, in 2012, the law is that each tortfeasor – regardless of whether he, she, or it is on the verdict form as a party or as a non-party – may be liable only for the damages that resulted from his, her, or its own tortious conduct and not from the tortious conduct of another.

Appellant also argues that apportionment of fault to non-parties is improper because reducing the fault of the property owner essentially excuses its breach of the duty it owes under O.C.G.A. § 51-3-1. This argument reflects a fundamental misunderstanding of O.C.G.A. § 51-12-33. Allowing the jury to apportion fault to the non-party criminal does not excuse any conduct by the property owner. If the jury chooses to apportion fault to the criminal, its decision would represent nothing more than its view that the criminal was responsible to some degree for the plaintiff’s alleged injuries and damages. The jury could find the property owner to be 100% at fault and the criminal to be 0% at fault, or it could find the property owner to be 0% at fault and the criminal to be 100% at fault. Or, the jury could find the property owner and the criminal to be at fault in any other combination of percentages totaling 100% (unless the jury finds that the plaintiff also bears some

fault). Appellant's argument is that the only valid verdict would be one in which the jury finds the property owner to be 100% at fault. Otherwise, the property owner would be "excused" from liability. To the contrary, a verdict apportioned between the property owner and the criminal would mean only that the jury found both to be at fault for the plaintiff's alleged injuries and damages.

Appellant suggests that this would be an absurd result and that there is no rational basis for allowing it. However, appellant has not offered any reason why it was absurd or irrational for the General Assembly to determine that the public policy of Georgia is that a defendant can be liable only for the consequences of its own conduct. The fact that another tortfeasor, whom the plaintiff elected not to sue, may be judgment proof does not make this policy absurd or irrational. Further, although appellant focuses only on premises liability cases, apportionment functions the same in all cases to which O.C.G.A. § 51-12-33 applies. Thus, appellant must be arguing that apportionment is absurd in *all* cases, and that apportionment is *never* proper, because apportioning fault to a non-party tortfeasor necessarily decreases the fault apportioned to the party tortfeasor and thereby "excuses" its tortious act or omission.

This logical extension of appellant's argument illustrates the absurdity of it. Under appellant's theory, cases involving multiple defendants would not be permissible because apportionment among them would "excuse" some percentage

of their liability. In a case with four defendants, for example, assume that the jury finds each defendant to be 25% at fault. Under appellant's theory, this would mean that the jury "excused" 75% of the fault for each defendant. This is why appellant's argument about apportionment "excusing" liability does not make sense. A plaintiff can recover only 100% of his damages (not taking into account the possibility that he may be limited to a lesser percentage if the jury finds that he was also at fault), and so whenever there are multiple defendants, someone's liability will be "excused" to a certain degree. But this is not really "excusing" anyone's liability. Under appellant's theory, the only way to avoid such an "excusal" of liability would be to allow a plaintiff to recover 100% of his damages from each defendant. In the example case involving four defendants, appellant's theory would result in the plaintiff recovering quadruple damages. This is contrary to Georgia law. *Georgia Northeastern R.R., Inc. v. Lusk*, 277 Ga. 245, 246, 587 S.E.2d 643, 644 (2003) ("Georgia, as part of its common law and public policy, has always prohibited a plaintiff from a double recovery of damages; the plaintiff is entitled to only one recovery and satisfaction of damages, because such recovery and satisfaction is deemed to make the plaintiff whole."). The point that appellant continues to miss is that a plaintiff in whose favor the jury finds is entitled only to a full judgment, irrespective of who the judgment is entered against and in what

amount. Under the 2005 amendment to O.C.G.A. § 51-12-33, a plaintiff is not entitled to a maximum recovery from the tortfeasor of his choosing.

O.C.G.A. § 51-12-33 does not affect whether or under what circumstances a property owner owes a duty to invitees on its premises. The jury could determine that appellees owed appellant a duty under O.C.G.A. § 51-3-1 but that appellees' fault in causing appellant's alleged injuries and damages was less than the unknown assailant's fault. There is nothing inconsistent about such a result. If there were, then it would be equally improper to apportion fault among multiple property owners, but appellant is not complaining about that. Indeed, this is the situation in this case, but appellant does not seem to care about "excusing" any of appellees' individual liability because they are related companies and presumably have the ability to pay a judgment entered against them collectively. Appellant cares about "excusing" appellees' collective liability only because the unknown assailant likely does not have assets to satisfy a judgment entered against him.

**C. A PROPERTY OWNER IS NOT VICARIOUSLY LIABLE FOR THE INTENTIONAL TORTS OF A CRIMINAL**

Appellant argues that apportionment of fault to the unknown assailant would be improper because appellee's liability is derivative of the unknown assailant's conduct. (Appellant's Br. at 7-12.) Although it is true that any alleged negligence by appellees in maintaining the premises did not become actionable until the

unknown assailant abducted, assaulted, and robbed appellant, this does not mean that appellees' alleged liability is derivative or vicarious.

Appellant relies on *PN Express, Inc. v. Zegel*, 304 Ga. App. 672, 697 S.E.2d 226 (2010), in which the Court of Appeals “determined that comparative fault statutes do not apply where the defendant’s liability is derivative.” *Id.* at 680, 697 S.E.2d at 233. Because the claim against PN Express “[wa]s entirely based on notions of derivative liability: statutory employment and respondeat superior,” the Court of Appeals affirmed the trial court’s refusal to instruct the jury on apportionment. *Id.* The Court of Appeals explained that fault cannot be apportioned between an employee and an employer because the vicariously liable employer and the actively negligent employee “are regarded as a single tortfeasor.” *Id.* However, the Court of Appeals also indicated that apportionment between an employee and an employer would be appropriate when the employer’s alleged liability is not “entirely dependent on principles of vicarious liability,” such as when it has committed “additional and independent acts of negligence.” *Id.* (internal quotation marks omitted).

Appellant’s reliance on *PN Express* is flawed for two reasons. First, there is no relationship between appellees and the unknown assailant that would give rise to derivative or vicarious liability by appellees for the unknown assailant’s actions. “For the negligence of one person to be properly imputable to another, the one to

whom it is imputed must stand in such a relation or privity to the negligent person as to create the relation of principal and agent.” O.C.G.A. § 51-2-1; *see also Strickland v. ITT Rayonier, Inc.*, 162 Ga. App. 317, 317, 291 S.E.2d 396, 397 (1982); CHARLES R. ADAMS III, GEORGIA LAW OF TORTS § 6-1, at 255-56 (2010-2011 ed.). Here, there is no allegation or evidence that appellees and the unknown assailant had any prior legal relationship, much less some kind of agency relationship that would give rise to vicarious liability by appellees for the unknown assailant’s torts. Nor is there any allegation or evidence that appellees had a legal right to regulate or otherwise control the unknown assailant’s conduct. Without this, appellees cannot be vicariously liable for the unknown assailant’s torts.

Second, even if appellees and the unknown assailant had the requisite relationship upon which to base a claim of vicarious liability, apportionment still would be proper because appellees’ alleged liability is not predicated solely on the unknown assailant’s conduct. Appellant does not allege that appellees are liable only on a theory of vicarious liability for the unknown assailant’s torts. Instead, appellant alleges that appellees are directly liable for their own negligence in breaching their duty under O.C.G.A. § 51-3-1. Thus, even under appellant’s own theory of liability, appellees and the unknown assailant owed independent duties and committed independent tortious acts. As such, they bear independent fault, if any, for appellant’s alleged injuries and damages.

Appellant's creativity in looking for a way to avoid apportionment cannot change the fundamental fact that this is not a case of derivative or vicarious liability. *PN Express* is inapposite and does not support appellant's argument for not apportioning fault to the unknown assailant and for excluding the unknown assailant from the verdict form. Appellant essentially acknowledges this by recognizing that *PN Express* involved an employer-employee relationship, but he argues that the Court should nevertheless apply *PN Express* to the facts of this case because its reasoning is "compelling." Of course, it should go without saying that *PN Express* has no applicability here because it was not a premises liability case based on third-party criminal conduct. And, most importantly, the Court of Appeals did not hold in *PN Express* that a premises owner can be vicariously liable for the criminal conduct of a person with whom it has no legal relationship. Accordingly, the Court should reject appellant's attempt to avoid apportionment by incorrectly applying the doctrine of vicarious liability.

**D. APPORTIONMENT IS AUTHORIZED EVEN WHEN THE NON-PARTY HAS COMMITTED AN INTENTIONAL TORT**

Relying on the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 14 (2000), appellant argues that a property owner is liable for all injuries and damages caused by its alleged failure to protect invitees from the specific risk of an intentional tort and that it is unfair and irrational to compare the negligence of a property owner with the intentional conduct of a criminal.

(Appellant’s Br. at 10-12.) While this may be the law in other states, it is not the law in Georgia. The Georgia General Assembly and appellate courts establish the law of Georgia; the American Law Institute has no such power, and the Restatements it adopts are not binding authority.

The GDLA acknowledges that some states prohibit apportionment between a negligent property owner and a criminal who commits an intentional tort. For example, Florida’s statute prohibits apportionment in “any action based upon an intentional tort.” FLA. STAT. ANN. § 768.81(4). Because O.C.G.A. § 51-12-33 does not contain the same exclusionary language found in Florida’s statute, comparisons to Florida law are not useful. *Pacheco v. Regal Cinemas, Inc.*, 311 Ga. App. 224, 229, 715 S.E.2d 728, 733-34 (2011) (physical precedent) (rejecting the plaintiffs’ reliance on Florida law because of the difference between O.C.G.A. § 51-12-33 and Florida’s statute). There being no language in O.C.G.A. § 51-12-33 that precludes apportionment of fault between a negligent property owner and a criminal who commits an intentional tort, the Court should not read such a limitation into the statute. Moreover, although O.C.G.A. § 51-12-33 does not define “fault,” the plain meaning of the term encompasses intentional conduct. BLACK’S LAW DICTIONARY 641 (8th ed. 2004) (defining “fault” as “[t]he intentional or negligent failure to maintain some standard of conduct when that failure results in harm to another person”).

Appellant repeatedly states his conclusion that it is unfair, irrational, and absurd to compare negligent and intentional conduct, but he never bothers to explain why this is so. He suggests that negligent property owners should not be permitted to reduce their liability based on an intentional tort that they had a duty to prevent, but he still fails to explain why this would be unfair, irrational, and absurd. To the contrary, in light of the General Assembly's public policy determination that a person should be liable only for his own torts and not the torts of someone else, it would be unfair, irrational, and absurd not to apportion fault between negligent and intentional tortfeasors, especially since there is no exclusion in O.C.G.A. § 51-12-33 for intentional conduct. Many state supreme courts, interpreting statutes that do not expressly exclude intentional conduct, have reached this conclusion because apportioning fault between negligent and intentional tortfeasors is consistent with proportionate liability.

Arizona is most notable among these states because its statute is virtually identical to O.C.G.A. § 51-12-33 in terms of apportionment to non-parties. *Compare* ARIZ. REV. STAT. § 12-2506(B), *with* O.C.G.A. § 51-12-33(c), (d), (f). When confronted with the issue of whether a jury could compare negligent and intentional conduct, the Arizona Supreme Court agreed with the New Jersey Supreme Court's determination that "different types of tortious conduct, ranging from negligent to intentional, are merely points along a fault continuum and should

be thought of not as ‘different-in-kind,’ but rather ‘different-in-degree.’” *Hutcherson v. City of Phoenix*, 961 P.2d 449, 452 (Ariz. 1998) (citing *Blazovic v. Andrich*, 590 A.2d 222, 231 (N.J. 1991)). Because the court found “no compelling authority . . . for the proposition that intentional conduct must be given more weight than negligent conduct in the apportionment of fault,” it concluded that “a jury may apportion fault among defendants and nonparties, without distinguishing between intentional and negligent conduct or requiring that a minimum percentage of responsibility be assigned to the former.” *Id.* at 452-53. Unlike appellant in this case, the Arizona Supreme Court “ha[s] no doubt that jurors are capable of evaluating degrees of fault” and “will be able to understand the duties involved in situations similar to this case, and will be able to equitably apportion fault according to those duties and the facts presented in the particular case.” *Id.* at 453. Many other state supreme courts agree. *See, e.g., Chianese v. Meier*, 774 N.E.2d 722, 724-26 (N.Y. 2002); *Rodenburg v. Fargo-Moorhead Young Men’s Christian Ass’n*, 632 N.W.2d 407, 416-18 (N.D. 2001); *Barth v. Coleman*, 878 P.2d 319, 320-22 (N.M. 1994).

Appellant obviously disagrees with the General Assembly’s policy of proportionate liability, but he cannot change this policy via this lawsuit. The wisdom of this policy must be addressed to the General Assembly, not the courts. As this Court recently explained in a different context,

It may be good policy to have a law that directly protects consumers against corporations (or others) that employ notaries as well as the notaries themselves, but that is not the law that our Legislature has enacted. It is not the place of this Court to rewrite statutes to promote policies that are not expressed in that legislation – much less read into a statute a policy that contradicts the text of the law and is derived without citation to any other source.

*Anthony v. Am. Gen. Fin. Servs., Inc.*, 287 Ga. 448, 450, 697 S.E.2d 166, 169 (2010). Appellant is asking the Court to read into O.C.G.A. § 51-12-33 an exception for cases involving intentional torts committed by criminals. The plain language of the statute does not allow for such an exception, and the Court is not empowered to rewrite the statute in this manner. Because the statute refers to “fault” and not just “negligence,” apportionment is proper regardless of whether the tortious conduct of the non-party is negligent or intentional.

**E. APPELLANT’S ALLEGED INJURIES AND DAMAGES ARE CAPABLE OF BEING APPORTIONED**

Appellant argues that because his injury is indivisible, there is no rational basis for apportioning fault between appellees and the unknown assailant. (Appellant’s Br. at 14-16.) The Court of Appeals recently rejected this argument, and there is no need to reconsider it here.

In *Royalston v. Middlebrooks*, 303 Ga. App. 887, 696 S.E.2d 66 (2010), the plaintiff was injured when the vehicle she was driving was rear-ended by one defendant’s vehicle and immediately thereafter struck by the other defendant’s vehicle. The successive collisions caused indivisible injuries to the plaintiff. The

jury found the first defendant to be 42% at fault and the second defendant to be 58% at fault. On appeal, the second defendant and his employer argued that the trial court should have granted their motion for a new trial because the jury's apportionment of fault was unreasonable. The Court of Appeals rejected this argument: "In arriving at how to express these different degrees of culpability in mathematical terms, the jury was not bound by any specific formula; instead, the matter was to be determined according to the enlightened conscience of the fair and impartial jury." *Id.* at 893, 696 S.E.2d at 72 (punctuation and internal quotation marks omitted).

If appellant's argument were correct, the jury would be prohibited from apportioning fault in a case involving multiple property owners (as in this case). Under appellant's theory, the jury would not be permitted to apportion fault among these defendants, even though such apportionment is mandated by O.C.G.A. § 51-12-33(b). *Cavalier Convenience, Inc. v. Sarvis*, 305 Ga. App. 141, 145, 699 S.E.2d 104, 107 (2010). Appellant's theory would also prohibit the jury from apportioning fault to a negligent plaintiff. However, such apportionment is mandated by O.C.G.A. § 51-12-33(a), and there is no question that O.C.G.A. § 51-12-33 did not abolish the doctrine of comparative negligence. Under appellant's theory, the only person who could bear any fault is the person the plaintiff decided to sue, but that is not how our system works.

Appellant relies almost exclusively on cases decided before the General Assembly amended O.C.G.A. § 51-12-33 in 2005 to argue that apportionment of fault to non-parties is improper in cases involving single, indivisible injuries.<sup>6</sup> These cases, however, discuss single, indivisible injuries in the context of determining whether independent wrongdoers are joint tortfeasors or successive tortfeasors. *See, e.g., Gay v. Piggly Wiggly Southern, Inc.*, 183 Ga. App. 175, 177-78, 358 S.E.2d 468, 471 (1987). If the tortfeasors' conduct caused separate and distinct injuries – i.e., injuries that can be “apportioned” between them – then they are successive tortfeasors and are liable only for the injuries caused by their own conduct. On the other hand, if the tortfeasors' conduct caused single, indivisible injuries – i.e., injuries that cannot be “apportioned” between them – then they are joint tortfeasors and are liable for all of the injuries. This, of course, changed in 2005 when the General Assembly amended O.C.G.A. § 51-12-33. While an injury may be single and indivisible in the sense that it cannot be separated into subparts, that kind of “apportionment” of the injury is not the same kind of apportionment that O.C.G.A. § 51-12-33 deals with. Apportionment under this statute deals with the parties' and non-parties' relative fault for the alleged injuries and damages.

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<sup>6</sup> The only post-2005 cases cited by appellant, *Ga. Dep't of Transp. v. Heller*, 285 Ga. 262, 674 S.E.2d 914 (2009), and *Kroger Co. v. Mays*, 292 Ga. App. 399, 664 S.E.2d 812 (2008), involved causes of action that accrued before 2005. Thus, the 2005 version of O.C.G.A. § 51-12-33 did not apply in those cases.

Under appellant's theory, apportionment of fault is improper in a case involving single, indivisible injuries because fault for the injuries cannot be allocated to each defendant or non-party. If this were correct, O.C.G.A. § 51-12-33 would be unnecessary and superfluous. Joint liability does not apply to successive tortfeasors, and so there is no reason to provide for apportionment of fault among successive tortfeasors. Because successive tortfeasors are liable only for their own tortious conduct, and not the tortious conduct of other tortfeasors, there is nothing to apportion among them. By definition, successive tortfeasors have committed separate torts with separate injuries and damages. Thus, O.C.G.A. § 51-12-33 would be meaningless if it did not apply to joint tortfeasors. Its applicability to joint tortfeasors is confirmed by the fact that it precludes the right of contribution among tortfeasors whose fault has been apportioned. Because the right of contribution exists only among joint tortfeasors, there would have been no reason for the General Assembly to include this provision in the statute if it applied only to successive tortfeasors.

Juries have always been asked to determine the parties' and non-parties' relative fault for the alleged injuries and damages, and appellant's argument that there must be some kind of formula or mathematical basis for this determination is contrary to historical practice. It is also contrary to *Royalston*. Ironically, the plaintiffs' bar routinely champions the jury system and vigorously attacks

legislative and judicial efforts to restrict the jury's discretion in awarding damages based on the enlightened conscience of fair and impartial jurors, but now appellant does not trust the jury to do the same with respect to the fault of non-parties.

**F. APPORTIONMENT OF FAULT TO NON-PARTIES DOES NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS**

Finally, appellant argues that apportionment of fault to the unknown assailant, and a corresponding reduction in appellees' fault, if any, would violate his rights under the Georgia Constitution to due process and to a jury trial. (Appellant's Br. at 20-30.) To evaluate the constitutionality of the 2005 amendment to O.C.G.A. § 51-12-33, the Court must bear in mind the presumption of constitutionality that all statutes enjoy under Georgia law. *Judicial Council of Ga. v. Brown & Gallo, LLC*, 288 Ga. 294, 297, 702 S.E.2d 894, 897 (2010). Thus, the standard for invalidating a statute on constitutional grounds is as follows: "Only when it is established that the legislative enactment manifestly infringes upon a constitutional provision or violates the rights of the people will the statute be declared unconstitutional." *Glass Sys., Inc. v. Ga. Power Co.*, 288 Ga. 85, 86, 703 S.E.2d 605, 608 (2010) (internal quotation marks omitted).

**1. Apportionment of Fault to Non-Parties Does Not Deprive Appellant of His Right to Due Process**

**a. O.C.G.A. § 51-12-33 is not unconstitutionally vague.**

Appellant's first due process challenge to O.C.G.A. § 51-12-33 is that it is unconstitutionally vague because it requires jurors to guess at its meaning. (Appellant's Br. at 21-23.) To the contrary, O.C.G.A. § 51-12-33 is clear and certain, and so it satisfies the requirements of due process.

“To withstand an attack of vagueness or indefiniteness [under the Due Process Clause], a civil statute must provide fair notice to those to whom the statute is directed and its provisions must enable them to determine the legislative intent.” *Jekyll Island-State Park Auth. v. Jekyll Island Citizens Ass'n*, 266 Ga. 152, 153, 464 S.E.2d 808, 810 (1996). A statute is unconstitutionally vague only if people of common intelligence must guess at its meaning and differ as to its application. *Id.* Appellant argues that O.C.G.A. § 51-12-33 requires jurors to guess at whether it abolished joint liability, especially in light of the fact that the General Assembly did not repeal O.C.G.A. §§ 51-12-31 and 51-12-32 in 2005.

The fallacy in appellant's argument is that he fails to recognize the introductory phrase in O.C.G.A. §§ 51-12-31 and 51-12-32. Both statutes begin with the phrase “Except as provided in Code Section 51-12-33,” and so by definition there is no conflict between these two statutes and O.C.G.A. § 51-12-33. *Sarvis*, 305 Ga. App. at 145, 699 S.E.2d at 107 (“The legislature has plainly

restricted application of OCGA § 51-12-31; that statute applies “[e]xcept as provided in Code Section 51-12-33.”). Despite this language, appellant contends that the 2005 amendment to O.C.G.A. § 51-12-33 renders O.C.G.A. §§ 51-12-31 and 51-12-32 meaningless because the three statutes cannot be harmonized. The Court of Appeals considered and implicitly rejected this argument in *Sarvis*. 305 Ga. App. at 145-46, 699 S.E.2d at 107-08. As the Court of Appeals noted, it had previously decided in *Murray v. Patel*, 304 Ga. App. 253, 696 S.E.2d 97 (2010), that the right of contribution still exists after 2005. *Sarvis*, 305 Ga. App. at 146 n.21, 699 S.E.2d at 108 n.21. Further, the defendants in *Sarvis* noted that O.C.G.A. § 51-12-32 would still apply in cases where a tortfeasor settles an entire claim and then pursues a claim for contribution against another tortfeasor. *Id.*

Appellant also argues that O.C.G.A. § 51-12-33 is unconstitutionally vague because it provides insufficient guidelines for jurors to use in apportioning fault to non-parties. (Appellant’s Br. at 23-25.) Appellant does not seem to take issue with “the enlightened conscience of fair and impartial jurors” as the standard for measuring damages in this type of case, but he believes that the jurors’ enlightened conscience cannot be trusted when it comes to assessing percentages of fault. Although appellant apparently cannot figure out how jurors could possibly apportion fault, the Court of Appeals has no such concern. In *Royalston*, the jury apportioned 58% of the fault to one defendant and 42% to the other, and they

argued on appeal that the jury's apportionment was unreasonable. The Court of Appeals rejected this argument, explaining as follows: "In arriving at how to express these different degrees of culpability in mathematical terms, the jury was not bound by any specific formula; instead, the matter was to be determined according to the enlightened conscience of the fair and impartial jury." 303 Ga. App. at 893, 696 S.E.2d at 72 (punctuation and internal quotation marks omitted). Apportioning fault between a defendant and a non-party is no different from apportioning fault between two defendants or between a plaintiff and a defendant.

Numerous respected commentators confirm the GDLA's faith in juries to apportion fault. According to Professors Harper, James, and Gray,

Theoretically, it would be no harder for juries to make a rough but fair apportionment of faults than to perform many feats that are daily required of them. On the practical side, it may be pointed out that in many Anglo-American jurisdictions, juries have for years been apportioning damages according to fault, without any indication that they are less able to perform this task than any other. . . . But even these complexities (which arise in a surprisingly small proportion of the cases) are not insuperable and can be met by appropriate instructions and proper interrogatories.

4 HARPER, JAMES & GRAY § 22.2, at 345-46 (footnotes omitted). By way of example, Professors Harper, James, and Gray note that apportioning fault is no more difficult for a jury to do than determining proximate cause, "particularly since the concept of 'proximate cause' is frequently explained to the jury in terms difficult for laypeople (as well as lawyers) to comprehend." *Id.* at 345 n.40.

Professor Philbrick, analogizing to admiralty cases, concluded that “[t]he evidence seems to be very strong that the rule [of proportionate liability] is feasible and its operation highly satisfactory. . . . No difficulties have, seemingly, occurred in applying the rule to [sailors], and there is strong evidence that the allocation of fault between two vessels in a collision is a simpler problem.” Philbrick, *supra*, at 798. The case for proportionate liability is stronger when one considers the irrationality and inequity of equal liability:

To divide loss by halves is to admit that justice demands some division. Either the principle of division is just, and then it should be complete, that is proportional;—subject to the test of feasibility, which in practice it successfully meets—or it is unjust, and there should be no division, by halves any more than by quarters.

*Id.* at 799 (internal quotation marks omitted); *see also* PROSSER & KEETON § 52, at 345 (noting that “it is better to attempt some rough division than to hold one defendant [liable] for the wound inflicted by the other”).

**b. O.C.G.A. § 51-12-33 does not deprive appellant of a substantial property right without due process.**

Appellant’s second due process challenge to O.C.G.A. § 51-12-33 is that it deprives him of a substantial property right without due process. (Appellant’s Br. at 25-27.) Specifically, appellant contends that he has a property right protected by the Due Process Clause to recover 100% of his alleged damages from appellees and that O.C.G.A. § 51-12-33 infringes on this right by requiring the jury to apportion some or all of appellees’ fault to the unknown assailant. This argument

fails for two reasons. First, because the General Assembly is authorized to alter, or even to abolish, common-law remedies and causes of action, it was authorized to abolish joint and several liability and to provide for apportionment of fault to non-parties, as it did when it amended O.C.G.A. § 51-12-33 in 2005. Second, appellant has not been deprived of a vested property right because his cause of action accrued after the General Assembly amended O.C.G.A. § 51-12-33 in 2005. *Love v. Whirlpool Corp.*, 264 Ga. 701, 705, 449 S.E.2d 602, 606 (1994) (“The enactment of a statute delineating, or indeed even abolishing a cause of action, before it has accrued, deprives the plaintiff of no vested right.”).

Appellant defines the property right at issue as his right to pursue his claims against appellees only and to recover 100% of his alleged damages from appellees only, and he considers this to be a fundamental right to a remedy. He contends that this right is constitutionally based and not simply derived from a statute. However, there is no such right in the Georgia Constitution. Instead, the right to a remedy is found in a statute, O.C.G.A. § 9-2-3, that the General Assembly first enacted in 1863. Because the right to a remedy has had a statutory source for almost 150 years, the General Assembly has the authority to define, modify, or even eliminate this right through additional legislation. Thus, even if the statutory right to a remedy encompasses a right to recover 100% of the damages from a tortfeasor who is not 100% at fault, the General Assembly would be authorized to define the

extent of this right differently. The General Assembly exercised this authority when it amended O.C.G.A. § 51-12-33 in 2005.<sup>7</sup>

The GDLA acknowledges the right of individuals “to be heard in matters affecting one’s life, liberty, or property” as an element of due process, but this right “is not absolutely unrestricted.” *Couch v. Parker*, 280 Ga. 580, 582, 630 S.E.2d 364, 366 (2006). According to this Court, “[t]he power of the legislature to create, modify, or abolish rights to sue has been clearly and repeatedly recognized both by the U.S. Supreme Court and by this Court.” *Love*, 264 Ga. at 705, 449 S.E.2d at 606. Even the abolition of a cause of action does not deny due process because “[s]tates are free to create immunities and eliminate causes of action, and that legislative determination provides all of the process that is due.” *Santana v. Ga. Power Co.*, 269 Ga. 127, 129, 498 S.E.2d 521, 523 (1998). Due process only “recognizes a citizen’s unfettered right to defend his or her life, liberty, or property in accordance with limitations constitutionally established by the General Assembly.” *Couch*, 280 Ga. at 582, 630 S.E.2d at 366. *Couch*, *Love*, and *Santana*

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<sup>7</sup> This Court has recognized that the General Assembly is constitutionally authorized to redefine the scope of joint and several liability. In *Gazaway v. Nicholson*, 190 Ga. 345, 9 S.E.2d 154 (1940), the Court considered a prior version of O.C.G.A. § 51-12-31 and reaffirmed previous decisions in which it held that the statute applied to actions for property damage, not for personal injury. The Court held that in actions for personal injury where multiple defendants were shown to be liable, the rule that “the jury shall assess damages against all of them jointly in one amount is a common-law origin, and remains of force where it has not been changed by statute.” *Id.* at 348, 9 S.E.2d at 156.

each held that the General Assembly had acted properly in restricting the right to sue, and they provide ample authority for holding that the General Assembly was authorized to provide for apportionment of fault to non-parties, as it did when it amended O.C.G.A. § 51-12-33 in 2005.

The 2005 amendment to O.C.G.A. § 51-12-33 does not go so far as to abolish the right to recover for personal injuries. Nor does it limit the amount of any recovery. It does not restrict appellant's right to assert a claim against anyone, does not abolish any substantive claim that appellant might have, and does not reduce by any amount the total damages that appellant may be awarded by a jury. Appellant still is able to sue for personal injuries and to obtain a judgment against every person and entity whose tortious conduct caused his alleged injuries and damages. His right to a judgment awarding full damages for his alleged injuries remains unchanged. The statute requires fault to be apportioned among those parties and non-parties whose conduct contributed to the alleged injuries and damages, and the defendants are required to pay only their respective shares of the total award. Thus, while appellant is entitled to a judgment awarding full damages, to collect all of his damages he must pursue a claim against every person who contributed to his alleged injuries. In other words, appellant still may obtain an

award of 100% of his alleged damages, but he may not recover 100% of the award from the tortfeasor of his choosing, regardless of that tortfeasor's degree of fault.<sup>8</sup>

The Court should reject appellant's due process challenge and decline his invitation to reconsider the policy interests that the General Assembly already considered when it amended O.C.G.A. § 51-12-33 in 2005. Aside from the fact that it would be improper for the Court to substitute its own policy judgment for the General Assembly's, the simple fact is that there is no constitutional right in Georgia to a fully collectable judgment.

## **2. Apportionment of Fault to Non-Parties Does Not Deprive Appellant of His Right to a Jury Trial**

The Georgia Constitution provides that “[t]he right to trial by jury shall remain inviolate.” GA. CONST. art. I, § I, ¶ XI(a). Appellant contends that apportionment of fault to the unknown assailant, and a corresponding reduction in appellees' fault, if any, would violate this right because his award of damages would be less than what it would be without apportionment. (Appellant's Br. at 27-30.) Appellant misapprehends the scope of his right to a jury trial, and this right is not infringed by apportionment of fault to the unknown assailant and a corresponding reduction in appellees' fault.

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<sup>8</sup> Courts in other states have reached similar conclusions in response to constitutional challenges to legislation abolishing joint and several liability. *See, e.g., Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861, 868-70 (Ariz. 1995).

The GDLA does not contest appellant’s right to a jury trial on a premises liability claim. Instead, the issue is whether the method for determining fault and damages outlined in O.C.G.A. § 51-12-33 infringes on this right. “Because the amount of damages sustained by a plaintiff is ordinarily an issue of fact,” “[t]he right to a jury trial includes the right to have a jury determine the amount of . . . damages, if any, awarded to the [plaintiff].” *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 734, 691 S.E.2d 218, 222 (2010) (quoting *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998)) (alterations in original). In *Nestlehutt*, this Court held that the cap on non-economic damages in medical malpractice actions violates this right because it “nullifies the jury’s findings of fact regarding damages and thereby undermines the jury’s basic function.” *Id.* at 735, 691 S.E.2d at 223.

Appellant argues that the damages cap at issue in *Nestlehutt* is equivalent to apportionment of fault to non-parties under O.C.G.A. § 51-12-33. This is an unpersuasive analogy because a damages cap imposes a limit on damages that a plaintiff can recover, and O.C.G.A. § 51-12-33 does not impose any such limit. Appellant’s potential damages in this case are unlimited, except to the extent that they are unreasonable based on the evidence or are so excessive that they violate appellees’ constitutional rights. The question posed by O.C.G.A. § 51-12-33 is whether the damages, if any, will be assessed against appellees, the unknown

assailant, or some combination thereof. O.C.G.A. § 51-12-33 does not require the jury to take any particular action; it is free to assess fault and damages however it wishes. This is no different than what the jury would do in a case involving multiple defendants or in a case involving a plaintiff's own negligence. Most tellingly, this is exactly what the jury would do in a case in which the plaintiff elected to assert a claim against the criminal. There is no doubt that appellant could have asserted a claim against the unknown assailant in this case, and so apportioning fault against the unknown assailant – either as a party or as a non-party – is the same from the standpoint of the right to a jury trial. Any award of damages against a co-defendant, or a reduction of damages based on a plaintiff's own negligence, has the effect of reducing the damages awarded against the other defendant, but neither of these scenarios violates the right to a jury trial.

Apportionment of fault – whether among defendants or non-parties – still allows a plaintiff to be awarded the full measure of damages, just not against each defendant. Viewed in this light, it becomes clear that appellant's argument really is that he has a constitutional right to recover his maximum possible damages from the wealthiest tortfeasor. Of course, there is no such right. *DeBenedetto v. CLD Consulting Eng'rs, Inc.*, 903 A.2d 969, 981-82 (N.H. 2006). Appellant's complaint is that he believes any judgment against the unknown assailant will not be collectable, but the right to a jury trial is not concerned with the financial

solvency of the person against whom the jury awards damages. Instead, this right focuses on whether the law in question interferes with the jury's ability to determine the amount of damages. The damages cap at issue in *Nestlehutt* did so because it had the effect of altering the jury's award of damages, but O.C.G.A. § 51-12-33 does not do so. Application of the jury's apportionment of fault actually upholds the jury's intent with respect to who is at fault and in what amount.

This conclusion is confirmed by this Court's decision in *DeLoach v. Elliott*, 289 Ga. 319, 710 S.E.2d 763 (2011). That case involved a challenge to the constitutionality of O.C.G.A. § 36-92-3, which provides immunity to local government officials who commit a tort involving the use of a motor vehicle and in exchange allows the local government entity to be sued, based on the right to a jury trial. The plaintiff argued that this immunity violated her right to a jury trial because it precluded her from having any remedy for the injuries she sustained in an automobile accident (she could not sue the local government entity because she failed to provide timely ante litem notice). In rejecting this argument, this Court held that "the General Assembly in OCGA § 36-92-3 did not eliminate the ability of [the plaintiff] to recover for her 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." *Id.* at 322, 710 S.E.2d at 765.

O.C.G.A. § 51-12-33 is much more analogous to the law at issue in *DeLoach* than to the law at issue in *Nestlehutt*. Accordingly, the 2005 amendment to O.C.G.A. § 51-12-33 does not violate the right to a jury trial.

### III.

#### CONCLUSION

For the foregoing reasons, the GDLA asks the Court to confirm the applicability of O.C.G.A. § 51-12-33 to premises liability cases based on third-party criminal conduct, as intended by the General Assembly, and to uphold the constitutionality of the statute. Accordingly, the Court should answer the first certified question in the affirmative and the second certified question in the negative.

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**CERTIFICATE OF SERVICE**

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