IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

NAIROBI COUCH,	)	
	)	
Plaintiff/Appellant,	)	
v.	)	
	)	CASE NO. S12Q0625
RED ROOF INNS, INC., et al.	)	
	)	
Defendants/Appellees.	)	

PLAINTIFF/APPELLANT'S BRIEF REGARDING CERTIFIED QUESTIONS[1]

I. INTRODUCTION

O.C.G.A. § 51-12-33 was amended in 2005 as part of "tort reform" via Senate Bill 3 ("SB3"), in part, to change permissive apportionment ("may") to purported, mandatory apportionment ("shall"). Defendants contend that, pursuant to O.C.G.A. § 51-12-33, the trial court must instruct the jury to apportion damages between the named Defendants and the unidentified non-party criminal assailants who attacked Plaintiff, and to have an assessment of "fault" of these non-parties included on a special verdict form. As set forth below, apportionment is inapplicable in premises liability criminal attack cases, and any such application would violate Plaintiff's constitutional rights.

[1]Plaintiff was granted an extension of time to January 24, 2012 to file this brief. A copy of that order is attached hereto as Exhibit "A."

II. STATEMENT OF THE CASE

This case arises from the brutal abduction, assault and robbery of Plaintiff that occurred on August 4, 2009 at Defendants' Red Roof Inn hotel located at 1960 N. Druid Hills Road, N.E., Atlanta, Georgia 30329. Defendants owned and managed the subject hotel, and Plaintiff was their registered guest at the time of the attack. Plaintiff filed suit alleging that Defendants negligently failed to keep their premises safe, and failed to provide adequate security to protect Plaintiff in breach of their duties of care. None of Plaintiff's attackers have ever been identified, arrested or prosecuted.

Defendants filed a *Notice of Defendants' Intention to Argue Fault of Non-Party pursuant to O.C.G.A. § 51-12-33*, alleging that their responsibility for damages should be decreased "in whole or in part" due to the fault of the unknown criminals who attacked Plaintiff. Plaintiff filed a *Motion in Limine* challenging the applicability of apportionment, and challenging the constitutionality of O.C.G.A. § 51-12-33 as written or as applied to this case. This case is pending in the United States District Court for the Northern District of Georgia, which has not made any ruling on Plaintiff's motion, and which has certified the following two questions to this Court:

a. **In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, is the jury allowed to consider the "fault" of the criminal assailant and apportion its award of damages among the property owner and the criminal assailant, pursuant to O.C.G.A. § 51-12-33?**

b. **In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, would jury instructions or a special verdict form requiring the jury to apportion its award of damages among the property owner and the criminal assailant, pursuant to O.C.G.A. § 51-12-33, result in a violation of the plaintiff's constitutional rights to a jury trial, due process or equal protection?**

Plaintiff urges this Court to answer the first question in the negative and the second question in the affirmative.

III. ARGUMENT AND CITATION OF AUTHORITY

A. O.C.G.A. § 51-12-33 Is Inapplicable To Premises Liability Criminal Attack Cases.

O.C.G.A. § 51-12-33 does not apply in premises liability criminal attack cases for several reasons. First, applying apportionment in such cases would nullify a defendant property owner's non-delegable duty to keep their premises safe. Second, as the original tortfeasor, a defendant property owner is responsible for all of the consequences flowing from their negligence. Third, a defendant property owner's liability is wholly derivative of the criminals' forseeable, intentional conduct. Fourth, required apportionment would provide a disincentive for a defendant property owner to comply with their duty of care under O.C.G.A. § 51-3-1. Fifth, Plaintiff's injury is single, indivisible and incapable of apportionment. Sixth, a defendant property owner cannot establish evidence to support a rational basis for apportionment in these type of cases. Finally, the amendments to the apportionment statute did not abolish joint liability.[2]

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[2] Defendants may rely on Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224 (2011) or Raines v. Maughan, 2011 Ga. App. LEXIS 945 (2011) as authority that apportionment is allowed in premises liability criminal attack cases. Not only are these cases not binding on this Court, these decisions are not binding on ANY court because they are "physical precedent only" under Court of Appeals Rule 33(a), and therefore do not state the law of Georgia except with reference to those specific cases. There simply is no binding appellate authority in Georgia on the

1. Requiring Apportionment In A Premises Liability Criminal Attack Cases Would Nullify A Defendant Property Owner's Personal, Non-Delegable Duty To Keep Their Premises Safe.

Under Georgia common law (see The Atlanta Cotton-Seed Oil Mills v. Coffey, 80 Ga. 145 (1887)) and O.C.G.A. § 51-3-1 (first codified in 1895), Defendants are required to keep their premises safe for their invitees—including Plaintiff. If the egregious criminal behavior that resulted in Plaintiff's attack was foreseeable to Defendants, they had a legal duty to take reasonable steps to prevent the behavior. FPI Atlanta, Ltd v. Seaton, 240 Ga. App. 880, 886 (1999) ("The duty to guard against injury from dangerous characters arises when 'the [landlord] has reason to anticipate a criminal act'. The duty is "personal and non-delegable.").

Years of common law have established that a landowner's duty under O.C.G.A. § 51-3-1 to keep its premises safe is **non-delegable**. Nothing in the 2005 tort reform bill or in the current version of O.C.G.A. § 51-12-33 changes this longstanding rule of law:

> Under Georgia law, a landowner is liable to invitees for injuries caused by his failure to use ordinary care in keeping the premises safe. *O.C.G.A. § 51-3-1.* **This is a statutory duty and is nondelegable.** As for the contention that the landlord would not in any case be liable for Bradford's intervening criminal act, **a defendant is not insulated from liability by the intervention of an illegal act which proximately causes an injury if the**

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issue of whether apportionment is appropriate – or even possible – in the present case.

defendant had reasonable grounds to apprehend such a criminal act would be committed.

Hickman v. Allen, 217 Ga. App. 701, 702 (1995) (emphasis added).

Here, the Defendants' intended use of apportionment is precisely for the purpose of insulating themselves from liability for Plaintiff's damages. These certified questions presume the jury's finding that Defendants breached the duty to keep their premises safe and are liable for Plaintiff's injuries as a result of the breach. If the jury is instructed pursuant to O.C.G.A. § 51-12-33 that it "shall" apportion damages among the named Defendants and the unknown non-party criminals, the jury's finding of Defendants' breach of a non-delegable duty to keep the premises safe would be partially or totally nullified. Georgia law requires a premises owner to exercise reasonable care to prevent *100% of the foreseeable harm*, not a percentage of it.

2. As The Original Tortfeasors, A Defendant Property Owner Is Responsible For All Of The Consequences Flowing From Their Negligence.

In failing to keep their premises safe, the Defendants started a chain of events that led to the criminal attack upon Plaintiff. This attack would not have occurred but for the Defendants' negligence. As the original wrongdoers, Defendants are liable for all of the harm that resulted from their negligence. As this Court has noted:

> The general rule is that if, subsequently to an original wrongful . . . act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote, still if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the causal connection is not broken, and the original wrong-doer is responsible for **all of the consequences** resulting from the intervening act.

Ontario Sewing Machine Co., et al., 275 Ga. 683, 686 (2002) (quoting Williams v. Grier) (emphasis added).

Defendants invoke apportionment in this case in an obvious attempt to *avoid* the criminal consequences flowing from their negligence. As set forth in Ontario Sewing, however, Defendants are responsible for all of the foreseeable consequences from their negligence, and apportionment in this case is inappropriate.

3. A Defendant Property Owner's Liability Is Wholly Derivative Of The Criminals' Foreseeable, Intentional Conduct.

The Georgia Court of Appeals recently found that apportionment is inapplicable to cases where the Defendant's liability is derivative in nature. In PN Express, Inc. v. Zegel, et al., 304 Ga. App. 674 (2010), the Court held that apportionment was not allowed because the defendant had "derivative liability" for its non-party employee:

> PN Express asserts that the trial court erred in declining to charge the jury under *OCGA § 51-12-33*. *Subsection (c)* of this Code section provides as follows: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." Under *subsection (d) (1)*, "[n]egligence or fault of a nonparty shall be considered . . . if a defending party gives notice . . . that a nonparty was wholly or partially at fault." PN Express gave the notice required under *OCGA § 51-12-33 (d)* of its intent to ask the jury to assign fault "wholly or partially" to Patterson Freight Company and certain other entities. PN Express contends that "[t]he jury could have easily concluded that Patterson Freight Company directed and controlled Surlina or negligently supervised him." Without citing authority, PN Express argues that the trial court's failure to give an apportionment charge under *OCGA § 51-12-33* was reversible error. We disagree.
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> The parties have directed us to no Georgia authority on point on this issue, and our research has uncovered none. We note that the Zegels' action against PN Express is **entirely based on notions of derivative liability**: statutory employment and respondeat superior.
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> .....
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> Other states have determined that **comparative fault statutes do not apply where the defendant's liability is derivative**, and we concur.

PN Express, Inc., 304 Ga. App. at 679 (emphasis added).

Likewise, in a premises liability case arising from a criminal attack, liability is derivative in nature because the premises owner would have no liability for an invitee's injury without there also being a criminal act. While PN Express was a derivative liability case based on the theory of *respondeat superior*, the reasoning in that case is equally compelling in a premises liability case because of a

defendant property owner's statutory duty to keep their premises safe from foreseeable criminal conduct.

One trial court has recently refused to apply apportionment in third party criminal attack cases because of the derivative nature of Defendant's liability. In Salinas v. Coro Realty Advisors, et al., Fulton Co. State Court, Case No. 10EV009982 (currently pending before the Court of Appeals, Case No. A12A0796), the Defendant apartment complex sought to apportion damages with the unknown criminal assailant who shot and killed Plaintiff's decedent. (*Order*, attached hereto as Ex. "B," p. 2). The Salinas Court relied upon PN Express in refusing to apportion damages:

> A premises liability action for third party crime is similar to other claims of vicarious or derivative liability in which the cause of action expressly contemplates responsibility for the damage caused by a third party's actions... [T]hese causes of action share a common policy: the principal or landowner defendant is to be held liable for the harm caused more immediately by a third party actor.
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> ...
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> **It would be incongruous to reduce or relieve the landowner of responsibility by the very harm that was to be deterred. Accordingly, apportioning fault to the assailant as a "contributing" non-party in these circumstances would be an incompatible result under Georgia law.**

Order, pp. 4-6 (emphasis added).

The same court also disallowed apportionment in a motel shooting death case, Todd v. Accor North America, Inc., Fulton Co. State Court, Case No.

09EV006935 (currently pending before the Court of Appeals, Case No. A12I0091) in which the assailants were known, and one of which is a named party-defendant in the case. The court, again, relied heavily on the reasoning in PN Express and reiterated much of its previous ruling from Salinas, stating that "[w]hile the Defense has sought to draw distinctions between *Salinas* and the present facts, no differences compel a different result here." (*Order*, attached hereto as Ex. "C," p. 4).

If a defendant property owner is allowed to compare their negligence with the violent, intentional criminal conduct of the assailants, they would be able to diminish or defeat their liability by shifting responsibility to the intentional actors whose conduct they had a duty to prevent. It is neither unfair nor irrational for a victim to collect full damages from negligent defendants who knew, or should have known, that an injury would be intentionally inflicted on their premises, but failed in their duty to take reasonable steps to prevent the injury. It is, however, unfair *and* irrational to require a jury to compare the intentional criminal acts to the negligent acts of the property owner.

Former Chief Justice Rehnquist has written persuasively of the significant distinction between negligent and intentional conduct. Addressing that issue, Justice Rehnquist noted that:

> This distinction between acts that are intentionally harmful and those that are very negligent, or unreasonable, involves a basic difference of kind, not just a variation of degree. W. Prosser, Law of Torts § 34, p. 185 (4th ed. 1971); Restatement (Second) of Torts § 500, Comment f (1965). The former typically demands inquiry into the actor's subjective motive and purpose, while the latter ordinarily requires only an objective determination of the relative risks and advantages accruing to society from particular behavior. See § 282 . . ."

Smith v. Wade, 461 U.S. 30, 61, 103 S.Ct. 1625, 1644 (1983) (Rehnquist, J., dissenting).

It is impossible for a neutral fact-finder in a premises liability criminal attack case to rationally weigh the intentional conduct a criminal with the negligent conduct of the landowner. One recent trial court has addressed this issue and found that allowing apportionment in premises liability criminal attack cases would "lead to an unreasonable or absurd result." Martin v. Six Flags over Georgia, et al., Cobb Co. State Court, Case No. 09-A-55-4 (currently pending before the Georgia Court of Appeals, Case No. A12I0045). As the Martin trial court observed:

> Allowing apportionment in [premises liability criminal attack cases] would effectively allow the premises owner to shield itself from any potential liability based on an alleged breach of its own duty, if any, because the fact finder would apportion all damages against the criminal actor. If Six Flags did owe a duty in the present case, it would be to protect the Plaintiff from forseeable, intentional conduct. As a jury may find that the Six Flags Defendants owed such a duty to Plaintiff in this case, it would be a patently "absurd result" to allow Six Flags to shield itself from liability for any

> breach of that duty based on the very criminal act that Six Flags owed a duty to prevent.
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> ...
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> It appears to this Court that the intention of the Legislature in the statute at issue was only to address cases alleging negligence, and not in cases where there is an allegation of intentional tort.

(*Order*, attached hereto as Ex. "D," p. 2).

Because of the derivative nature of a defendant property owner's liability in premises liability criminal attack cases, and because of the patently absurd result created by a comparison of negligent and intentional conduct in such cases, such defendants should not be allowed to apportion their damages.[3]

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[3] In addition to the *Restatement Second of Torts* previously relied on by this Court in its consideration of apportionment, Plaintiff urges the Court to consider adopting the reasoning set forth in *Restatement (Third) of the Law of Torts, Apportionment of Liability, §14*:

> **§ 14. *Tortfeasors Liable for Failure to Protect the Plaintiff from the Specific Risk of an Intentional Tort***
>
> A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.
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> Comment:
>
> *a. Scope.* The rule in this Section applies only when a person is negligent *because* of the failure to take reasonable precautions to protect against the specific risk created by an intentional tortfeasor. Negligence (or strict liability) is determined in accordance with governing rules about tortious conduct, but this Section only applies if the risk that makes the tortfeasor negligent or strictly liable is the failure to take precautions against

4. *Mandatory* Apportionment Would Provide A Disincentive For A Defendant Property Owner To Comply With Their Duty Under O.C.G.A. § 51-3-1.

If a jury is now *required* pursuant to O.C.G.A. § 51-12-33 to reduce a defendant property owner's liability for an invitee's injuries, there would be little incentive left for the property owner to keep their premises safe, and O.C.G.A. § 51-3-1 would be rendered meaningless. Restatement (Second) of the Law of Torts § 449, Comment b (1965) (" . . . To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.").

This Court has considered the public policy of avoiding unreasonable risk in the apportionment of damages in automobile crashworthiness cases. In Polston v. Boomershine, 262 Ga. 616 (1992), a car manufacturer attempted to reduce its liability for the plaintiff's damages via apportionment. In answering a certified

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an intentional tort. When a person's unrelated tortious conduct and an intentional tortfeasor's acts concur to cause harm to another, the rules of joint and several liability provided in the applicable Track (A-E) govern. For reasons explained in Comment *b*, this Section is limited to instances in which the person is liable because of the risk of an intentional tort and does not extend to duties to protect against another's negligence. This Section does not determine when a party who fails to protect against the risk of an intentional tort is liable for failing to do so. Rather, the rule in this Section applies only when the governing law provides for such liability.

question from the 11th Circuit, the Court rejected the so-called "Huddell Rule," stating:

> Adoption of the *Huddell* position takes away the incentive of automobile manufacturers to design their products in a responsible fashion. As the Supreme Court of Oklahoma noted, "application of the *Huddell* standard might impair the promotion of 'safer products' design . . . by **weakening the deterrent value** of products actions."

Polston, 262 Ga. at 618. (emphasis added).

Likewise, if apportionment is required in the present case, the deterrent value of premises liability actions would be drastically weakened because a defendant property owner's negligence is effectively excused by the comparative fault of criminals.

5. Plaintiff's Injury Is Single, Indivisible And Incapable Of Apportionment.

Georgia appellate courts have routinely held that certain injuries are indivisible and therefore incapable of apportionment. See, e.g., Georgia DOT v. Heller, 285 Ga 262 (2009) ("Regardless of the number of proximate causes, however, the Plaintiff sustains only one 'loss.' This loss cannot be apportioned among the various proximate causes..."). Confetti Atlanta Ltd., et al. v. Gray, 195 Ga. App. 719, 720 (1990) ("The alleged facts in the case sub judice show that there was no concert of action between appellants and Cooley, but that their separate actions combined to cause one injury which is indivisible and incapable of being

apportioned.") Gay v. Piggly Wiggly Southern, Inc., 183 Ga. App. 175, 178 (1987) ("the true distinction to be made is between injuries which are divisible and those which are indivisible.") "[T]he injury, death, was single and indivisible." Gault v. Nat'l Union Fire Ins. Co., 208 Ga. App. 134, 137 (1993) (See also Posey v. Medical Center-West, 257 Ga. 55 (1987); Kroger Co. v. Mays, 292 Ga. App. 399 (2008)).

There is nothing that came about with the passage of SB3 to change this fact - certain kinds of injuries are still indivisible. In this case, Plaintiff sustained a single and indivisible injury for which Plaintiff claims Defendants are liable. There simply can be no apportionment because of the nature of the injury. As observed in Gay v. Piggly Wiggly Southern, Inc., 183 Ga. App. 175, 181 (1987), "[w]hile it does not take concert of action to make joint tortfeasors, some injuries....are single and cannot be apportioned." See also Aretz v. U.S., 503 F.Supp. 260, 301-02 (1977) ("Under Georgia law..., [t]here may be a recovery against either or both of the responsible parties where their separate and independent acts concur to produce a single injury. This is true although the injury may not have happened had only one of the acts of negligence occurred and although the duty owed by each defendant may not be the same.") "Georgia follows the common law rule against apportionment of damages among joint and

several tortfeasors....It has often been held that a verdict which seeks to apportion damages among joint tortfeasors in violation of this rule is 'illegal.'" Walker v. Bishop, 169 Ga. App. 236, 240 (1984).

6. A Defendant Property Owner Cannot Establish Evidence To Support A Rational Basis For Apportionment.

This Court has established that when a defendant seeks to diminish its responsibility for a plaintiff's damages through apportionment, public policy requires the defendant to bear the burden of proof of causation. "Once the plaintiff's burden has been borne, the burden of proof shifts to the defendant which wishes to limit its liability to demonstrate a rational basis for apportioning the liability for the injuries." Polston v. Boomershine, 262 Ga. 616, 619 (1992) (See, also, Ford Motor Co. v. Gibson, 283 Ga. 398, 405 (2008)). Defendants in this case cannot establish a rational basis for apportionment of Plaintiff's damages. Restatement (Second) of the Law of Torts § 433A, Comment i (1965) (certain kinds of harm are incapable of logical division -- when a defendant creates a situation upon which another may later act to cause harm, if the defendant is liable at all, the defendant is liable for the entire indivisible harm).

In Polston, this Court discussed a defendant's burden and cited the *Restatement Second of Torts*:

> In *Mitchell v. Gilson, 233 Ga. 453 (211 S.E.2d 744) (1975)*, this court affirmed the Court of Appeals' holding that where the acts of two or more tortfeasors join to create a single indivisible injury, i.e., the injury cannot be rationally apportioned between the tortfeasors, the tortfeasors will be treated as joint tortfeasors. *Gilson v. Mitchell, 131 Ga. App. 321 (205 S.E.2d 421) (1974)*. It appears, therefore, that Georgia law had already moved in the direction later taken to its logical conclusion in *Mitchell v. Volkswagenwerk, A.G., supra.* To take the next step and adopt the rule stated in *Mitchell v. Volkswagenwerk, A.G.* is only to continue the course set in *Gilson, supra.*
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> Another factor leading us to adopt the rule stated in *Mitchell v. Volkswagenwerk, A.G.* is its consistency with the *Restatement Second of Torts, § 433A* of which was quoted in *Gilson* to establish the joint liability of tortfeasors who produce indivisible injuries. Even more pertinent to the present case is § 433B (2), which directly addresses the subject of the Eleventh Circuit's question: Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

Polston v. Boomershine Pontiac-GMC Truck, Inc. et al., 262 Ga. at 617.

More recently, the Court of Appeals affirmed a trial court's decision to disallow apportionment under O.C.G.A. § 51-12-33 in another car wreck case. In McReynolds v. Krebs, 307 Ga. App. 330 (2010); certiorari granted, 2011 Ga. LEXIS 400 (2011), the court affirmed the trial court's ruling that the lack of evidence of the degree of fault of the non-party precluded any apportionment of damages and affirmed the trial court's refusal to give any jury instruction on apportionment.

Defendants in the present case are unable to meet their burden of establishing a rational basis for apportionment due to the nature of their duty to Plaintiff, and are therefore not entitled to limit their liability for Plaintiff's damages on the basis of apportionment by way of a jury charge or use of a special verdict form. See Ford Motor Co. v. Reese, 300 Ga. App. 82, 88-89 (2009) (Holding that the trial court did not err in refusing to give an apportionment charge where defendant "did not present any evidence to support a rational apportionment of liability for the injuries and death of [plaintiff]").

7. The Amendments To O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33 Did Not Abolish Joint And Several Liability.

There was no pronouncement by the legislature that it was abolishing joint liability with the passage of SB3 or with the amendments to O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33. No such pronouncement appears in any Georgia statute or in any preamble to any Georgia statute. Defendant will inevitably claim that when the legislature amended O.C.G.A. § 51-12-33 it must have intended to abolish joint liability in all cases and that it did so, *implicitly*, by changing the phrase "may apportion" to the phrase "shall apportion."

From the founding of the State of Georgia, both the courts and the legislature have recognized the necessity of providing for joint liability in civil

cases arising from criminal attacks. In 1854, this Court first enunciated the rule regarding joint liability in which the defendants were sued for assault and battery.

> 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. 2 Greenleaf's Ev. §277.

Simpson v. Perry, 9 Ga. 508 (1854).

As time passed, a debate arose regarding what constituted joint tortfeasors. That question was answered by the Court of Appeals in the case of Gilson v. Mitchell, 131 Ga. App. 32, (1974); affd., 233 Ga. 453 (1975). The Gilson court stated:

> The rule henceforth will be that even though voluntary, intentional concert is lacking, if the separate and independent acts of negligence of several persons combine naturally and directly to produce a **single indivisible injury**, and a **rational basis** does not exist for an apportionment of damages, the actors are joint tortfeasors. In actions for trespasses to property under the authority of [O.C.G.A. § 51-12-31] the jury may apportion damages among the trespassers.

Id. at 330-331. (Emphasis added).

It is in light of the foregoing authority that the changes to O.C.G.A. § 51-12-31 and 33 by SB3 must be analyzed. As discussed in section C.1. of this brief, below, there is no evidence in this case to support the Defendants' contention that joint liability was abolished in this case, much less in *all* cases. The legislature did not expressly *or* implicitly abolish the requirement that Defendants first establish a

rational basis for apportionment. Because the very definition of joint tortfeasors in Georgia requires that "a rational basis does not exist for apportionment," the statute cannot apply to joint tortfeasors in the context of this premises liability case. There can be no such rational basis where a defendant's liability is inextricably dependent upon the occurrence of foreseeable criminal acts on its premises and where Plaintiff suffers a "single, indivisible injury."

B. Interpreting O.C.G.A. § 51-12-33 To *Require* Apportionment Would Deprive Plaintiff Of His Constitutional Rights.

If the General Assembly intended to change settled doctrines of joint and several liability and joint negligence, as well as principles that depend on these doctrines, then it was required to do so carefully and explicitly. Strictly construing O.C.G.A. § 51-12-33 reveals that its purported purpose cannot be accomplished due to vagueness and internal inconsistencies. If a jury is *required* to apportion damages or assess fault of a non-party pursuant to O.C.G.A. § 51-12-33, or if the trial court *requires* the reduction of Plaintiff's recovery of damages consistent with any such apportionment or assessment of fault, Plaintiff submits that any such requirement would be unconstitutional as it would violate Plaintiff's right to due process and right to a fair trial by jury.

1. O.C.G.A. § 51-12-33 Is Unconstitutionally Vague Because Courts And Jurors Must Guess At Its Meaning.

Due process under the Georgia Constitution requires that civil statutes "must provide fair notice to those to whom the statute is directed and its provisions must enable them to determine the legislative intent." Bell v. Austin, 278 Ga. 844, 847 (2005). A civil statute violates this requirement if it is "so vague and indefinite in its meaning that persons of ordinary intelligence must guess at its meaning and differ as to its application." Id., at 848. This court has held that "an act of the General Assembly which is afflicted with such an infirmity is unenforceable and therefore void." *City of Atlanta v. Southern R. Co.*, 213 Ga. 736, 738 (1958).

> A vague law impermissibly delegates basic policy matters to . . . juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (92 S. Ct. 2294, 33 L. Ed. 2d 222) (1972). The vagueness doctrine 'requires legislatures to set reasonably clear guidelines for . . . triers of fact' to apply to statutes. *Smith v. Goguen*, 415 U.S. 566, 572-573 (94 S. Ct. 1242, 39 L. Ed. 2d 605) (1974).

Denton v. Con-Way Express, 261 Ga. 41, 47 (1991) (reversed on other grounds).

There is no doubt that O.C.G.A. § 51-12-33 requires one to guess at its meaning, because seven years after its passage there is still a debate - at a minimum - as to whether O.C.G.A. § 51-12-33 abolished joint and several liability.

In addition, the statute conflicts with O.C.G.A. §§ 51-12-31 and 51-12-32. SB3 amended O.C.G.A. § 51-12-31 *and* O.C.G.A. § 51-12-33. Prior to the

amendments, O.C.G.A. § 51-12-31 provided for apportionment only in cases involving property damage where the plaintiff was not at fault, and any apportionment was at the jury's discretion. O.C.G.A. § 51-12-33 provided for apportionment at the jury's discretion, but only where the plaintiff was also negligent, and it applied to both personal injury and property damage cases. O.C.G.A. § 51-12-31 now also allows for *discretionary* apportionment in personal injury cases, whereas O.C.G.A. § 51-12-33 (a) and (b) now purportedly *require* the jury to apportion damages in *all* cases, regardless of whether the plaintiff is negligent and regardless of whether the defendant can establish a rational basis for doing so.

If the new language ("shall") in O.C.G.A. § 51-12-33 dictates that joint liability was abolished in all cases, then O.C.G.A. § 51-12-31, which states that "[i]n its verdict, the jury *may* specify the particular damages to be recovered of each defendant" would be meaningless (emphasis added). This broad, inferred interpretation of O.C.G.A. § 51-12-33 also conflicts with O.C.G.A. § 51-12-32, which provides for contribution among joint tortfeasors. There is no reasonable way to harmonize all three of these statutes without ignoring certain portions of the statutes and without violating the "basic rule of construction that a statute or constitutional provision should be construed to make all its parts harmonize and to

give a sensible and intelligent effect to each part, as it is not presumed that the legislature intended that any part would be without meaning." Gilbert v. Richardson, 264 Ga. 744, 747 (1994).[4]

Because "men of common intelligence must necessarily guess at its meaning and differ as to its application," O.C.G.A. § 51-12-33 "violates the first essential rule of due process of law." Bullock v. City of Dallas, 248 Ga. 164, 281 S.E.2d 613 (1981). The statute is therefore unconstitutionally vague and apportionment of damages should not be required in this case.

2. O.C.G.A. § 51-12-33 Is Unconstitutionally Vague Because It Provides Insufficient Standards For Apportionment To Be applied.

The reference to "percentages of fault" in O.C.G.A. § 51-12-33 contains insufficient objective standards and guidelines to meet the requirements of due process. 105 Floyd Road, Inc. v. Crisp County, 279 Ga. 345, 350 (2005). O.C.G.A. § 51-12-33 gives virtually no guidelines whatsoever for the jury's

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[4] Another trial court reviewing this statutory scheme found it unconstitutionally vague. **"The Supreme Court of Georgia has instructed that the best indicator of the General Assembly's intent is the statutory test it actually adopted and that as long as the statutory language is clear and does not lead to an unreasonable or absurd result, it is the sole evidence of the ultimate legislative intent. Clearly, O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33 do not meet this criteria."** Medina v. GFI Mgmt. Svcs., Inc., (DeKalb County State Court, Case No. 09A13159-1) (Order attached hereto as Ex. "E.") (emphasis added). Defendant in Medina filed its Notice of Appeal to the Supreme Court of Georgia on January 17, 2012.

application of its apparent mandate to apportion damages, especially in a criminal attack case such as this one.

O.C.G.A. § 51-12-33 (b) states that 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 (c) reads: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit."

The statute provides no other guidance to the jury or the trial court with regard to how or by what standards a "percentage of fault" is to be determined. Does "fault" implicate a moral shortcoming, a percentage of legal responsibility, a percentage of damages caused or something else? When comparing the actions of a negligent landowner who fails to keep its premises safe, and the intentional conduct of a criminal, the moral culpability of the criminal is obviously far greater. The legal responsibility for damages, however, is not based on moral culpability, but upon duty, breach of duty and causation. Where a defendant property owner breaches their duty to keep the foreseeable crime from being committed on its premises, they are entirely responsible for such breach and for all of the resulting

damages. The statute is at irreconcilable odds with a defendant's duty if apportionment is required.

If Plaintiff's injury would not have occurred *but for* the actions of the Defendants, how can the Defendants be said as a matter of law to be anything less than entirely at fault? How can the criminal actors be anything less than entirely at fault for their intentional attack on Plaintiff? Defendants and the criminals bear *full* responsibility for Plaintiff's injuries and damages. Neither should get *credit* for the other's harmful behavior. The statute is unconstitutionally vague and confusing as the assessment of "fault" and apportionment of damages for the invisible injury suffered in this criminal attack can only be determined in an arbitrary manner.

3. O.C.G.A. § 51-12-33 Deprives Plaintiff Of A Substantial Property Right Without Due Process.

"No person shall be deprived of life, liberty, or property except by due process of law." Ga. Const. 1983 Art. 1, § 1, ¶ 1. Georgia's right to remedy rule is codified at O.C.G.A. § 9-2-3, which states that "[f]or every right there shall be a remedy; every court having jurisdiction of the one may, if necessary, frame the other." There is no question that Plaintiff's cause of action is a substantial property right and freedom granted by the Georgia Constitution. See, e.g. Shessel v. Stroup, 253 Ga. 56 (1984) (superseded by statute as stated in Kaminer v. Canas, 282 Ga.

830 (2007)) and Clark v. Singer, 250 Ga. 470 (1983) (holding that the running of the statute of limitations in a wrongful death action before the wrongful death act was discovered depriving plaintiffs of their cause of action was unconstitutional).

There is no dispute that, prior to the passage of SB3, Plaintiff would have been entitled to collect his full award of damages under O.C.G.A. § 51-3-1 from any defendant whose tortious conduct caused his injury. The effect of mandatory apportionment under O.C.G.A. § 51-12-33 in the present case is the removal of Plaintiff's right to remedy for Defendants' failure to keep their premises safe. Ga. Const. Art. I, Sec. I, Para. II states that "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." Rather than protecting Plaintiff's property rights, the purported effect of the SB3 amendments is to deprive Plaintiff of his vested property rights without due process of law.

O.C.G.A. § 51-12-33 deprives Plaintiff of his substantial property right because it forces a jury to do the impossible by *requiring* them to divide Plaintiff's indivisible injuries. "[D]amages for personal injury may not be apportioned, for an injury to the body or feelings is manifestly not severable into parts. Moreover, where joint tortfeasors produce a single, indivisible personal injury not subject to a rational apportionment, apportionment should not be permitted." ITT Terryphone

Corp. v. Tri-State Steel Drum, Inc., 178 Ga. App. 694, 700 (1986). To *require* a jury to do what the courts have acknowledged cannot be done is to deprive Plaintiff of a fair trial and the right to redress wrongs, and eradicates any meaningful access to courts guaranteed by Ga. Const. Art. I, Sec. I, Paragraphs I, II and XII.

4. Apportionment Deprives Plaintiff Of His Right To A Jury Trial.

The Georgia Constitution and common law have long guaranteed an invitee the right to compensation for *all of his injuries* resulting from a landowner's failure to prevent foreseeable harm on its premises. The 2005 changes to O.C.G.A. § 51-12-33 were part of the "tort reform" legislation that included caps on non-economic damages in medical malpractice cases. In 2010, this Court in Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, et al., 286 Ga. 731 (2010), struck down the caps because they infringed on a plaintiffs' common-law right to a jury trial in medical malpractice cases. Likewise, *mandatory* apportionment in this premises liability case would infringe on Plaintiff's common-law right to trial by depriving him of his right to the *full* measure of foreseeable damages resulting from Defendants' negligence.[5]

[5] "As the Court correctly and unanimously concludes in Division 2 of the majority opinion, *OCGA § 51-13-1*'s flat caps on noneconomic compensatory damages, as found by juries in common-law medical malpractice cases, violate this State's

a. Plaintiff is entitled to a fair trial by jury for Defendants' violation of their non-delegable duty to prevent foreseeable crime on their premises.

If the jury in this case is required to consider the fault of the criminals, it would be doing so only *after* finding that Defendants failed in their duty to protect Plaintiff from the criminals, finding that Plaintiff would not have been injured *but for* Defendants' failure, and finding that Plaintiff suffered damages in a particular amount *as a result of Defendants' failure.* If a jury is also required to then make a comparison of fault between Defendant and the criminals they negligently allowed on their premises, Defendants' non-delegable duty to keep the premises safe is effectively eviscerated, and Plaintiff's right to a fair trial by jury for damages resulting from Defendants' breach of the duty evaporates. "The Georgia Constitution states plainly that "[t]he right to trial by jury shall remain inviolate." Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, et al., Id. at 733. As in Nestlehutt, the Court should rule that the application of O.C.G.A. § 51-12-33

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constitutional guarantee that "[t]he right to trial by jury shall remain inviolate." *Ga. Const. of 1983, Art. I, Sec. I, Par. XI (a).* The General Assembly has broad authority to address the many vexing issues related to health care costs and the availability of health care providers, **but the Legislature's discretion is bounded by the fundamental rights enshrined in our Constitution."** Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, et al., 286 Ga. 731, 740 (2010) (Justice Nahmias, special concurrence (emphasis added)).

violates Plaintiffs' right to a fair trial by jury for a property owner's negligent failure to keep its premises safe.

b. Plaintiffs' right to a jury trial is violated if the trial court makes any reduction of damages based on criminals' fault.

Defendants want the trial court to issue a judgment that reduces Plaintiff's damages consistent with the jury's assessment of fault after the jury has concluded its duty and exited the courthouse. Not only is this procedure not specified or authorized by O.C.G.A. § 51-12-33, such a reduction by the court would "clearly nullif[y] the jury's findings of fact regarding damages and thereby undermines the jury's basic function." Nestlehutt, Id. at 735. This procedure also presumes the jury would have not already calculated a reduction of Plaintiff's damages consistent with its assessment of non-party fault, in which case Plaintiff would suffer an *exponential* reduction of damages – first at the hands of the jury, and then by the trial court.[6]

[6] For instance, a jury could determine Plaintiff's damages to total $1 million and the non-party, criminals' "fault" to be 90%. Pursuant to the court's instruction under subsection (b) that "the trier of fact shall" apportion, it would then reduce the damages, and indicate on the jury form that Defendants are liable to Plaintiff for the payment of $100,000 (10% of $1 million). Under Defendants' reading of the statute, the court would then be obligated to reduce the damages of $100,000, again by 90%, leaving the Plaintiff with $10,000.

The Georgia Constitution has long guaranteed an injured invitee the right to recover damages flowing from "all of the consequences" of a negligent landowner's actions. Under O.C.G.A. § 51-12-33, a court's unilateral reduction of damages based on a jury's assessment of "fault" of the criminals from whose acts the landowner's liability is derived is no different than a court's unilateral reduction of damages based on the non-economic caps legislation. If O.C.G.A. § 51-12-33 is read to require the Court to reduce Plaintiffs' damages in the manner presumed by Defendants, "the jury's findings of fact" as to the damages *for which Defendants are found liable* would be nullified. "Consequently, [this Court should be]...compelled to conclude that the [reduction of Plaintiffs' damages due to a non-party criminal's acts]...infringe on a party's constitutional right, as embodied in *Art. I, Sec. I, Par. XI (a)*, to a jury determination as to...damages." Nestlehutt, Id. at 735.

IV. CONCLUSION

Plaintiff respectfully requests this Honorable Court not allow apportionment in the instant case and declare O.C.G.A. § 51-12-33 unconstitutional as written or as applied in this case. Consistent therewith, Plaintiff respectfully requests that Certified Question (a) be answered in the affirmative and Certified Question (b) be answered in the negative.

RESPECTFULLY SUBMITTED, this the 24th day of January, 2012.

MYKKELTVEDT & LOFTIN, LLC

By: /s/ Jeffrey N. Mykkeltvedt /s/ Andrew T. Rogers
w/express permission

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Counsel for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing upon the parties by U.S. Mail with adequate postage thereon, as follows:

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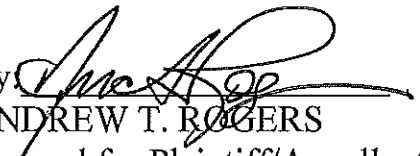
This 24th day of January, 2012.

DEITCH & ROGERS, LLC

By: 
ANDREW T. ROGERS
Counsel for Plaintiff/Appellant

EXHIBIT

"A"

SUPREME COURT OF GEORGIA
Case No. S12Q0625

Atlanta, December 28, 2011

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

NAIROBI COUCH v. RED ROOF INNS, INC., et al.

The request for an extension of time to file the brief of appellant in the above case is granted, you are given an extension until January 24, 2012.

Failure to do so may subject you to the sanctions of Rules 7 and 10 of this Court.

Appellee's brief shall be filed 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed. No extensions requesting oral argument will be granted. Rule 50 (3).

A copy of this order MUST be attached as an exhibit to the document for which appellant received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Thiiss A Bamus, Clerk

EXHIBIT

"B"

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

ANA JULIA MAYA SALINAS, et al., Plaintiff,	)	
	)	CIVIL ACTION FILE
v.	)	
	)	NO. 10 EV 009982
CORO REALTY ADVISORS, et al., Defendants	)	

ORDER

The above styled action came regularly before the Court on Defendant's *Motion For Clarification Of the Court's February 23, 2011 Order*. All parties were represented by counsel. After oral argument and consideration of the entire record, the Court hereby issues the following ruling:

At the hearing of this motion, the parties were asked to brief the following question: whether application of the apportionment statute, codified at O.C.G.A. § 51-12-33,[1] is

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[1] § 51-12-33. *Reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties*

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. 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.

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date

compatible with the non-delegable duty imposed by O.C.G.A. § 51-3-1[2] upon premises owners toward their invitees. To briefly state the allegations of the Complaint, Plaintiff's decedent Ismael Cervantes Orta was visiting family members at the apartment complex owned by the Defendant when he was shot and killed by an unidentified assailant. Plaintiff has brought this premises liability action as a purported invitee of the Defendant and has alleged negligence in the failure to adopt sufficient security measures in light of the preceding criminal activity. The parties have fully briefed this issue post-hearing and have submitted that this as a question of law for the Court.

The defense has cogently responded to this Court's question with the following argument: That the duty owed by the landowner is independent of the duty owed by the assailant. While the duty owed by the landowner is to guard against foreseeable dangers to its invitees, the assailant breached an independent tortious duty to not harm Mr. Orta. Therefore, the Defendant contends that it is not seeking to "delegate" their duty under O.C.G.A. § 51-3-1

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of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

[2] § 51-3-1. Duty of owner or occupier of land to invitee

Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.

to the assailant.[3] The assailant owed separate duties under O.C.G.A. §51-1-13 and 51-1-14 and the apportionment statute merely allows the jury to assign the loss between the independent duties owed by the separate Defendants. After due consideration of this analysis, the question to be decided is answered, and perhaps proposed by this Court, too narrowly. Pretermitting whether the defense correctly analyzes the issue in terms of a non-delegable duty, the question to be decided is whether the particular species of liability in issue here- third party crime premises liability- is compatible with our apportionment statute.

The Court begins with the duty owed by a premises owner: "a landowner can be liable for third-party criminal attacks if the landowner has *reasonable grounds* to apprehend that such a criminal act would be committed but fails to take steps to guard against injury. Walker v. Aderhold Props., 303 Ga. App. 710 (2010). In cases of liability for third party crime, the elements of the action consider that the landowner will be concurrently responsible for causation. FPI Atlanta, L.P. v. Seaton, 240 Ga. App. 880 (1990) (physical precedent) ("Inherent in every case of liability for third-party criminal conduct is the existence of concurrent proximate cause of the landlord's prior negligent act or omission.") *Sutter v. Hutchings*, 254 Ga. 194, 197 (1) (327 S.E.2d 716) (1985); *Bradley Center v. Wessner*, 250 Ga. 199, 200 (296 S.E.2d 693) (1982); *Atlantic Coast Line R. Co. v. Godard*, 211 Ga. 373, 376-377 (1) (86 S.E.2d 311) (1955); *Williams v. Grier*, 196 Ga. 327, 336-338 (2) (26 S.E.2d 698) (1943); *Bozeman v. Blue's Truck Line*, 62 Ga. App. 7, 9-11 (7 S.E.2d 412) (1940). While the criminal actions of third parties are generally considered a supervening intervening cause, breaking the chain of causation, this does not relieve the landowner from liability

[3] For example, an operator of a grocery store may not contractually shift their statutory responsibility to exercise ordinary care in maintaining the premises to a cleaning company. Confetti Atlanta v. Gray, 202 Ga. App. 241 (1991); O.C.G.A. § 51-2-5 (4).

where the criminal conduct was the reasonably foreseeable consequence of the landowner's breach.

Significantly, in PN Express, Inc. v. Zegel, et al., 304 Ga. App. 672 (2010), a recent case that considered the trial Court's refusal to charge on apportionment in a respondeat superior context, the Court affirmed and noted:

> We note that the Zegels' action against PN Express is entirely based on notions of derivative liability: statutory employment and respondeat superior. Generally, where a party's liability is solely vicarious, that party and the actively-negligent tortfeasor are regarded as a single tortfeasor. Thus, where a defendant employer's liability is entirely dependent on principles of vicarious liability, such as respondeat superior, then "[u]nless additional and independent acts of negligence over and above those alleged against the servant or employee are alleged against the employer, a verdict exonerating the employee also exonerates the employer." (internal citations omitted).
>
> Other states have determined that comparative fault statutes do not apply where the defendant's liability is derivative, and we concur. *Since the corporation's liability for the accident was purely vicarious in nature for the acts of [Surlina] himself, rather than joint and several, it is obvious . . . that the comparative fault statute [does] not apply." Thus, the trial court did not err in declining to instruct the jury on OCGA § 51-12-33.* (emphasis supplied)

A premises liability action for third party crime is similar to other claims of vicarious or derivative liability in which the cause of action expressly contemplates responsibility for the damage caused by a third party's actions. The element of duty and breach on these claims may differ in analysis because a respondeat superior defendant is held liable for an agent's breach within the course and scope of his employment while a premises liability or a negligent retention defendant is held liable for their own breach of care in failing to prevent foreseeable harm. However, the causes of action share a common policy: the principal or landowner defendant is to be held liable for the harm caused more immediately by a third party actor. While a landowner is technically responsible for his own breach in failing to adopt sufficient security measures- the breach is not actionable without the element of harm

resulting from another's actions.[4] Thus, the elements of liability expressly incorporate the harm caused by third party criminality. Returning to *PN Express v. Zegel, infra*, the Court affirmed the trial Court and found that apportionment was misapplied in cases of derivative liability. While Defendant argues that the apportionment statute may be rationally applied here since the assailant owed and breach independent duties to the Plaintiff, the servant in *PN Express* also undoubtedly owed and breached independent duties to the Plaintiff. Yet, the Court found that it was "obvious" that the apportionment statute did not apply.

Notwithstanding the fact that the criminal, rather than the landowner, may be the more immediate cause of harm, the landowner's breach is still the proximate cause and it is he who bears responsibility for full consequences of the criminal act if the criminal act was the foreseeable result of the landowner's breach. Moreover, if there is a foreseeable act of crime resulting from the Defendant landowner's initial breach, the actions of a third party who "contributed to the alleged injury" (See O.C.G.A. § 51-12-33(c)) is not a supervening cause that relieves the Defendant landowner of full responsibility.[5] It is the intervening crime that the landowner is required to guard against. It would be incongruous to reduce or relieve the

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[4] As is recognized in Defendant's brief, page 8.

[5] To use a contrasting example supplied by the defense, a defective product case may produce multiple defendants on various claims. These claims may range from manufacturing defects to a failure to warn. Since the jury may award damages in different amounts between the several defendants, the defense draws an analogy to the present facts and contends that allowing apportionment here would be equally unproblematic. However, this example does not address the central issue to be resolved here- whether vicarious liability for the actions of a third party is compatible with apportionment.

The defense also places emphasis on a recently decided case that considered an argument that apportionment was misapplied in a case of third party crime. For two reasons, the Court declines to find the case persuasive. First, the appellant failed to preserve any argument regarding this issue. Secondly, the portion of the opinion that lends some support to the defense is physical precedent only. See Pacheco v. Regal Cinemas, Inc., A11A0503 (July 14, 2011).

landowner of responsibility by the very harm that was to be deterred. Accordingly, apportioning fault to the assailant as a "contributing" non-party in these circumstances would be an incompatible result under Georgia law.

In accordance with the above, Defendant's motion for clarification is decided such that this Court will decline to apply the apportionment statute and will not charge the jury as to its application. See PN Express, Inc. v. Zegel, et al., 304 Ga. App. 672 (2010). As indicated at the hearing, the Court is disposed to grant the non-prevailing party a certificate of immediate review- should one be requested.

SO ORDERED this the 20th day of SEPTEMBER 2011

s/John Mather
The Honorable John R. Mather
Judge State Court of Fulton County

EXHIBIT

"C"

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

JEFFREY HOWARD TODD and TERESA TRAPP, as sole heirs and Administrators of the Estate of Jeffrey Brandon Todd, Deceased, Plaintiffs,	)	
v.	)	CIVIL ACTION FILE NO. 09 EV 006935
ACCOR NORTH AMERICA, INC., MOTEL 6 OPERATING LP, CAROLYN PUGH and LYNDON B. JOHNSON, JR., Defendants	)	

ORDER

The above styled action came regularly before the Court on Plaintiffs' *Motion For Partial summary Judgment That Defendant's Notice Of Fault Of Non-Parties Pursuant TO O.C.G.A. § 51-12-33 Is Not Applicable And O.C.G.A. § 51-12-33 Is Unconstitutional As Written Or As Applied.* All parties were represented by counsel. After consideration of the entire record, the Court hereby issues the following ruling:

In the present motion, Plaintiff brings a myriad of challenges to the operation of Georgia's apportionment statute codified at O.C.G.A. § 51-12-33. These include arguments regarding the application of the statute and challenges on due process and equal protection constitutional grounds. To briefly state the underlying facts, this action arises from a shooting incident at a hotel in which Jimmy Teemer and Lyndon Bernanrd Johnson burst into Jeffrey Todd's room. In the gunfight that followed, both Mr. Todd and Teemer were fatally wounded. Plaintiffs have brought this premises liability action against the hotel; the other assailant Mr. Johnson; and Ms. Pugh, the manager of the hotel. On December 17, 2009, the Defendants filed a "Notice of Fault of Non-Parties Pursuant to O.C.G.A. § 51-12-33." This notice designated Jimmy Teemer; Lyndon Johnson; and Patrick Jackson as individuals to be

considered by the jury, in addition to the named Defendants, when apportioning fault. The subject provision of O.C.G.A. § 51-12-33, provides as follows:

> (c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.
>
> (d) (1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or 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.
>
> (2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

Recently, this Court had occasion to decide a similar challenge to this statute in the context of third party crime. In *Salinas v. Corl Realty Advisors, et al.*, 10EV009982 (Order of September 22, 2011) the Defendant filed a third party notice of fault as to the unknown shooter that killed the plaintiff's decedent.[1] In considering whether apportionment with the assailant is compatible with the Defendant's duty toward invitees in regard to foreseeable third party crime, this Court drew heavily on the rationale of PN Express, Inc. v. Zegel, et al., 304 Ga. App. 672 (2010), and decided that the apportionment statute did not apply in this particular context. The Court's explanation in that Order is repeated here:

> The Court begins with the duty owed by a premises owner: "a landowner can be liable for third-party criminal attacks if the landowner has *reasonable grounds* to apprehend that such a criminal act would be committed but fails to take steps to guard against injury. Walker v. Aderhold Props., 303 Ga. App. 710 (2010). In cases of liability for third party crime, the elements of the action consider that the landowner will be concurrently responsible for causation. FPI Atlanta, L.P. v. Seaton, 240 Ga. App. 880 (1990) (physical precedent) ("Inherent in every case of liability for third-party criminal conduct is the existence of concurrent proximate cause of the landlord's prior negligent act or omission.") *Sutter v. Hutchings*, 254 Ga. 194, 197 (1) (327 S.E.2d

[1] The only analytical difference from the present facts is that the assailants were both known in this action and one is actually a party defendant.

716) (1985); *Bradley Center v. Wessner*, 250 Ga. 199, 200 (296 S.E.2d 693) (1982); *Atlantic Coast Line R. Co. v. Godard*, 211 Ga. 373, 376-377 (1) (86 S.E.2d 311) (1955); *Williams v. Grier*, 196 Ga. 327, 336-338 (2) (26 S.E.2d 698) (1943); *Bozeman v. Blue's Truck Line*, 62 Ga. App. 7, 9-11 (7 S.E.2d 412) (1940). While the criminal actions of third parties are generally considered a supervening intervening cause, breaking the chain of causation, this does not relieve the landowner from liability where the criminal conduct was the reasonably foreseeable consequence of the landowner's breach.

Significantly, in PN Express, Inc. v. Zegel, et al., 304 Ga. App. 672 (2010), a recent case that considered the trial Court's refusal to charge on apportionment in a respondeat superior context, the Court affirmed and noted:

We note that the Zegels' action against PN Express is entirely based on notions of derivative liability: statutory employment and respondeat superior. Generally, where a party's liability is solely vicarious, that party and the actively-negligent tortfeasor are regarded as a single tortfeasor. Thus, where a defendant employer's liability is entirely dependent on principles of vicarious liability, such as respondeat superior, then "[u]nless additional and independent acts of negligence over and above those alleged against the servant or employee are alleged against the employer, a verdict exonerating the employee also exonerates the employer." (internal citations omitted).

Other states have determined that comparative fault statutes do not apply where the defendant's liability is derivative, and we concur. *Since the corporation's liability for the accident was purely vicarious in nature for the acts of [Surlina] himself, rather than joint and several, it is obvious . . . that the comparative fault statute [does] not apply." Thus, the trial court did not err in declining to instruct the jury on OCGA § 51-12-33.* (emphasis supplied)

A premises liability action for third party crime is similar to other claims of vicarious or derivative liability in which the cause of action expressly contemplates responsibility for the damage caused by a third party's actions. The element of duty and breach on these claims may differ in analysis because a respondeat superior defendant is held liable for an agent's breach within the course and scope of his employment while a premises liability or a negligent retention defendant is held liable for their own breach of care in failing to prevent foreseeable harm. However, the causes of action share a common policy: the principal or landowner defendant is to be held liable for the harm caused more immediately by a third party actor. While a landowner is technically responsible for his own breach in failing to adopt sufficient security measures- the breach is not actionable without the element of harm resulting from another's actions. Thus, the elements of liability expressly incorporate the harm caused by third party criminality. Returning to *PN Express v. Zegel, infra*, the Court affirmed the trial Court and found that apportionment was misapplied in cases of derivative liability. While Defendant argues that the apportionment statute may be rationally applied here since the assailant owed and breached independent duties to the Plaintiff, the servant in *PN Express* also undoubtedly owed and breached independent duties to the Plaintiff. Yet, the Court found that it was "obvious" that the apportionment statute did not apply.

> Notwithstanding the fact that the criminal, rather than the landowner, may be the more immediate cause of harm, the landowner's breach is still the proximate cause and it is he who bears responsibility for full consequences of the criminal act if the criminal act was the foreseeable result of the landowner's breach. Moreover, if there is a foreseeable act of crime resulting from the Defendant landowner's initial breach, the actions of a third party who "contributed to the alleged injury" (See O.C.G.A. § 51-12-33(c)) is not a supervening cause that relieves the Defendant landowner of full responsibility. It is the intervening crime that the landowner is required to guard against. It would be incongruous to reduce or relieve the landowner of responsibility by the very harm that was to be deterred. Accordingly, apportioning fault to the assailant as a "contributing" non-party in these circumstances would be an incompatible result under Georgia law.

While the Defense has sought to draw distinctions between *Salinas* and the present facts, no differences compel a different result here. Accordingly, the Plaintiff's *Motion For Partial Summary Judgment* is GRANTED and the jury will not be charged as to any apportionment with third parties. Moreover, it light of the above resolution, it is unnecessary to address the constitutional challenges advanced by the Plaintiff.[2]

SO ORDERED this the 10th day of NOVEMBER 2011

s/John Mather
The Honorable John R. Mather
Judge State Court of Fulton County

[2] "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." Ashwander v. TVA, 297 U.S. 288 (1935)

EXHIBIT

"D"

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

JOSHUA R. MARTIN,

Plaintiffs,

VS.

SIX FLAGS OVER GEORGIA II, L.P., SIX FLAGS OVER GEORGIA, LLC, SFOG II, INC., SFG-II, LLC, MIDTOWN LANIER PARKING, INC., WILLIE GRAY FRANKLIN, JR., BRAD MCGAIL JOHNSON, DEANDRE EVANS, CLAUDE MOREY III, and JOHN DOES NOS. 1-15,

Defendants.

CIVIL ACTION

FILE NO. 09-A-55-4

ORDER

This case is before the Court on the "Plaintiff's Motion for Partial Summary Judgment that O.C.G.A. § 51-12-33 is Not Applicable and is Unconstitutional as Written or as Applied, or in the Alternative Motion in Limine to Exclude All Evidence and All Arguments of Apportionment Pursuant to O.C.G.A. § 51-12-33."[1] Specifically, Plaintiff seeks a ruling from this Court that the 2005 Amendment to O.C.G.A. § 51-12-33 does not mandate that the fact finder apportion any damages based on the percentage of fault of each Defendant in cases where one Defendant has committed a criminal act. Upon consideration of all matter filed of record, the Court enters this order as follows:

In that there is no Georgia appellate case law addressing the exact issue before this Court, the undersigned is constrained by the following language cited in Cavalier

[1] As the issue currently before the Court specifically relates to the exclusion of evidence and argument at trial on the issue of apportionment, the Court hereby enters this Order in response to Plaintiff's Motion in Limine only.

Convenience, Inc. and Ken's Supermarkets, Inc. v. Sarvis, 305 Ga. App. 141, 142 (2010), which states:

> The cardinal rule in construing a legislative act is 'to ascertain the legislative intent and purpose in enacting the law, and then to give it that construction which will effectuate the legislative intent and purpose.' 'In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.' The Supreme Court of Georgia has instructed that the 'best indicator of the General Assembly's intent is the statutory text it actually adopted' and that '[a]s long as the statutory language is clear and does not lead to an unreasonable or absurd result, it is the sole evidence of the ultimate legislative intent.'

Additionally, the Court finds the following language instructive in the present case: "Statutes in derogation of the common law are construed strictly." Heard v. Neighbor Newspapers, 259 Ga. 458, 459 (1989).

While Defendant argues that the issue presently before the Court was conclusively resolved in the Cavalier case, the Court is unable to agree with that position. In that case, the Court of Appeals was specifically addressing the question of whether the fact finder should apportion damages in cases where there is no allegation that Plaintiff was at fault. In the present case, the issue before this Court is whether the legislature intended to eliminate joint and several liability in premises liability cases where one Defendant is alleged to have committed an intentional tort.

This Court believes that a thorough analysis of O.C.G.A. § 51-12-31, and the subsequent code sections, reveals that allowing apportionment in cases such as this would "lead to an unreasonable or absurd result." Allowing apportionment in the present case would effectively allow the premises owner to shield itself from any potential liability based on an alleged breach of its own duty, if any, because the fact finder would apportion all damages against the criminal actor. If Six Flags did owe a duty in the

present case, it would be to protect Plaintiff from foreseeable, intentional conduct. As a jury may find that the Six Flags Defendants owed such a duty to Plaintiff in this case, it would be a patently "absurd result" to allow Six Flags to shield itself from liability for any breach of that duty based on the very criminal act that Six Flags owed a duty to prevent.

Additionally, the Court notes that within the statute at issue, the Legislature specifically references "negligence or fault" in subsection (d)(1). It appears to this Court that the intention of the Legislature in the statute at issue was only to address cases alleging negligence, and not in cases where there is an allegation of intentional tort.[2] Therefore, the presumption is that the common law remains as to joint and several liability in cases such as the one currently before this Court.

Accordingly, the Court hereby grants Plaintiff's Motion in Limine on the issue of apportionment.

So Ordered, this 12 day of Sept, 2011.

Kathryn J. Tanksley, Judge
State Court of Cobb County

[2] A thorough evaluation of the legislative history shows that the intention of the legislature was to address tort reform in the specific context of healthcare. "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act." See Editor's Notes Ga. L. 2005, p. 1, § 1.

CERTIFICATE OF SERVICE

This is to certify that I have this day mailed true and exact copies of the foregoing

ORDER

through the Cobb County Mail System, to the following:

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This 12th day of September, 2011.

Ericka Kemp

Ericka Kemp, Judicial Administrative Assistant to
Judge Kathryn J. Tanksley

EXHIBIT

"E"

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

TERENCE L.D. MEDINA,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION
GFI MANAGEMENT SERVICES, INC.,	)	FILE NO.: 09A13159-1
Defendant.	)	

ORDER

This is a premises liability case where Plaintiff was shot in his leg by a third-party whose identity remains unknown and who has not been apprehended by law enforcement at an apartment complex managed by the Defendant. Plaintiff filed a motion in limine to preclude any apportionment of damages to a non-party pursuant to OCGA 51-12-33.

Plaintiff contends a premises owner or operator who fails to exercise ordinary care to keep the premises safe for invitees cannot be allowed to reduce its liability by seeking to apportion damages to the intentional tortfeasor whose conduct it had a duty to prevent.

Other jurisdictions facing the question of apportionment under these circumstances have reached different conclusions:

Some have refused to allow apportionment. See, .e.g, Veazey v. Elmwood Plantation Assocs., 650 So. 2d 712, 719 (La. 1994), superseded by statute as stated in Thomas v. Sheridan, 977 So. 2d 303 (La. Ct. App. 2008) ("As a general rule, we find that negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent."); Brandon v. County of Richardson, 261 Neb. 636, 655 (2001) ("[I]t would be irrational to allow a party who negligently fails to discharge a duty to protect to reduce its liability because there is an

intervening intentional tort when the intervening intentional tort is exactly what the negligent party had a duty to protect against.").

Others have taken the position that liability of the property owner should be reduced based on the percentage of fault attributed to a third-party tortfeasor. See, e.g, Barth v. Coleman, 118 N.M. 1, 3 (1994) ("Notwithstanding the importance of the premises owner's duty of care, we concluded that 'public policy would support a holding that the bar owner may reduce his liability by the percentage of fault attributable to a third party.'"); Bhinder v. Sun Co., 717 A.2d 202, 212 (Conn. 1998), superseded by statute as stated in Allard v. Liberty Oil Equip. Co., 756 A.2d 237 (Conn. 2000) (holding in case of robbery and murder of gas station employee: "It is consistent with the principles of apportionment to permit the allocation of fault in a negligence action between a negligent and an intentional tortfeasor.").

As aptly summarized by the Tennessee Supreme Court in Turner v. Jordan, 957 S.W.2d 815, 823 (1997), "the concern in cases that compare the negligence of a defendant with the intentional act of a third party is not burdening the negligent tortfeasor with liability in excess of his or her fault; conversely, the primary concern in those cases that do not compare is that the plaintiff not be penalized by allowing the negligent party to use the intentional act it had a duty to prevent to reduce its liability."

Under Georgia law, Code Section 51-12-33(b) requires apportionment of damages among "the persons who are liable according to the percentage of fault of each person"; Code Section 33 (c) requires "In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit"; and, Code Section 33 (d) sets forth the requirements necessary for consideration of the "[n]egligence or fault of a nonparty."

Although the meaning of "fault" is not defined in the statute, it is a word of general use and not a term of art and it should be given its ordinary and everyday meaning. According to Webster's Third New World Dictionary, fault is defined as "failure to have or do what is required" or "something done wrongly." Similarly, fault is defined by Black's Law Dictionary as "negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty, or rectitude." See A.A. Prof'l Bail v. State of Ga., 265 Ga. App. 42, 44 (2004) (interpreting the term fault as used in O.C.G.A. § 17-6-31(e) involving a surety's liability on a bond). Thus, the word "fault" denotes not only negligent conduct but also intentional acts.

As the statute requires apportionment "according to the percentage of fault of each person, " it allows apportionment between persons who are liable due to negligence and those who are liable due to an intentional tort. And because it requires consideration of "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," that comparison can be made even where the criminal actor is a non-party.

In Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 228-30 (2011) (physical precedent only), the Court of Appeals rejected the argument that this Trial Court erred in instructing the jury pursuant to OCGA § 51-12-33. However, that ruling held the trial court was charging a Georgia statute, and the appellant was relying on Tennessee case law authority for the proposition that it is not rationally possible to apportion fault between a premises owner and the criminal perpetrator that the owner was supposed to protect against. The Pacheco ruling did not offer further clarification to the current apportionment quagmire of premises liability litigation involving third party criminal acts.

The Plaintiff in this case raises constitutional challenges and contends the strict scrutiny standard of review applies as the statute impedes a fundamental right "to remedy" and works particular hardship on the poor and minorities. Plaintiff contends by apportioning damages, he is denied the right to have a jury make a full and complete award for his injuries which violates his right to due process and equal protection.

No doubt, the right to a jury trial under the Georgia Constitution includes the right to have the jury determine the amount of damages awarded to the plaintiff. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 733-34 (2010). In Nestlehutt, the Supreme Court declared a cap on the amount of non-economic damages in medical malpractice cases unconstitutional. Id. at 738. The Supreme Court held a jury sits as the trier of fact in determining the amount of damages and putting a cap on the amount of damages awarded undermines the jury's basic function. See id. at 734-36.

Unlike a cap on non-economic damages, OCGA 51-12-33 does not limit the amount of damages a jury can award. Rather, the jury is asked to make an additional finding of fact – the extent to which each defendant or non-party is at fault. The limitation on the extent to which each defendant is responsible for the payment of damages does not nullify the jury's fact finding role nor does it impede a jury's ability to award damages. Therefore, OCGA 51-12-33 does not impede a fundamental or property right.

As to the claim that the statute involves a suspect classification, Plaintiff contends premises liability cases involving third party criminal acts usually occur in poor neighborhoods. Assuming this allegation to be true, our courts have held poverty alone is not a suspect classification. Walker v. Cromartie, 287 Ga. 511, 512 (2010).

Because OCGA 51-12-33 does not involve a fundamental right nor a suspect classification, it is subject to a rational basis rather than a strict scrutiny analysis as to Plaintiff's equal protection and due process claims.

Under the rational basis test, a statute does not violate equal protection as long as it is rationally related to a legitimate government interest; it is not arbitrary; and it has a fair and rational relationship to the government's objective such that all persons similarly situated are treated alike. Rhodes v. State, 283 Ga.361, 363 (2008); Benefit Support, Inc. v. Hall County, 281 Ga. App. 825, 829 (2006).

As to Plaintiff's substantive due process claim, the government action need only be reasonable in relation to the goal they seek to achieve. Unless the means adopted and the resulting classifications are irrelevant to the government's reasonable objective, or are altogether arbitrary, the government action does not offend due process. Benefit Support, 281 Ga. App. at 829.

As to Plaintiff's procedural due process claim based on vagueness, "'[a] statute violates due process if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." Rouse v. Dep't of Natural Res., 271 Ga. 726, 728-29 (1999).

Plaintiff argues there is a due process violation because the statute is vague. Plaintiff contends there is no instruction on apportionment between negligent and intentional acts. As discussed above, the plain language of the statute in the use of the word "fault" can be readily applied to negligent and intentional tortfeasors without a need for further instructions. Therefore, the statute is not vague on that ground.

Plaintiff claims the statute is vague because it requires apportionment of an indivisible injury and apportionment is unconstitutional as applied in this case because there is an indivisible injury for which the premises owner is fully liable and for which a rational apportionment of damages cannot be made. This Court does not find any merit in the argument.

Indivisible injury is tied to the concept of joint and several liability envisioned by Gilson v. Mitchell, 131 Ga. App. 321, 324 (1974), aff'd 233 Ga. 453 (1975), where the duties owed to the plaintiff by the defendants are separate, and may not be identical in character or scope, but the entire liability rests upon the obvious fact that each has contributed to the single result and that no rational division can be made.

In a third party criminal premises liability case, physical injury is caused by the conduct of the intentional actor - the criminal. A negligence claim against the premises owner or operator would not exist without the criminal act. The criminal or the intentional tortfeasor also bears responsibility for the injury caused to the plaintiff. Neither Gilson nor the fact that a premises owner or operator's negligence would not be actionable but for the criminal's conduct makes a comparison of fault constitutionally suspect. Apportionment under these circumstances is reasonable in light of the Legislature's goal of limiting an owner's damages to its share of fault.

Plaintiff's main equal protection claim alleges different treatment between criminal attack victims and other plaintiffs who recover fully where the defendant's liability is derivative.

In PN Express, Inc. v. Zegel, 304 Ga. App. 672, 680 (2010), the Court of Appeals held this Trial Court did not err by refusing to give an apportionment charge. In Zegel, the appellant corporate defendant asserted the truck driver was not its employee. That was the sole defense. The liability of the corporation for the driver was purely vicarious. In such a situation, the party being held vicariously liable and the actively negligent tortfeasor are regarded as a single tortfeasor. Id.

In this case, the intentional third party tortfeasor, the criminal, is not the agent or employee of the land owner. The wrongful conduct is not attributable to the land owner. Vicarious liability simply does not apply whether the concept is called "vicarious" or "derivative."

Limiting the amount of damages a defendant is responsible to pay to its proportionate degree of fault is a legitimate government interest. The wisdom of allowing a negligent actor to seek to reduce the damages he must pay by placing blame on the person whose conduct he had a duty to prevent is a question for the legislature, not this Court.

However, this Court cannot reconcile the co-existence of Sections 31 and 33:

Apportionment involves three statutes: OCGA 51-12-31, 51-12-32, and 51-12-33. Because this case does not involve contribution, an analysis of Section 32 is not necessary.

OCGA 51-12-31 existed before the enactment of SB 3. It is Georgia's statutory enactment of common law's joint and several liability. That statute states a jury *may* allocate damages among several defendants. In that event, judgment must be entered severally. The law was that a jury is not required to apportion damages when it cannot determine or allocate which of two or more acts was the causation of injury. In that instance, a jury is not required to apportion damages. That is the concept of joint and several liability.

Before the amendment generated by SB 3, OCGA 51-12-33 applied where the action was brought against more than one person for injury to person or property where the plaintiff was also to some degree responsible. And like OCGA 51-12-31, it also stated a jury *may* apportion damages among persons who are liable and whose degree of fault was greater than that of the injured party.

Under the former statutory scheme, it was clear when apportionment was invoked, OCGA 51-12-33 applied where the plaintiff was at fault and OCGA 51-12-31 applied if the plaintiff

was not at fault. In either situation, apportionment was discretionary.

After the amendment, OCGA 51-12-31 still provides a jury *may* specify the amount of damages to be recovered against each liable defendant. At the same time, Section 31 was also amended where "several trespassers" was changed to "several persons"; and "the plaintiff may recover damages for the greatest injury done by any of the defendants against all of them" was changed to "the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury." And the amended code section kept the language of "Except as provided in Code Section 51-12-33" which originally referred to discretionary apportionment after set-off for an at fault plaintiff. Other than these two changes, no additional subsections were added to Section 31.

Code Section 33 underwent a much more radical alteration. It is now compromised of seven subsections, (a) - (g). Subsection (a) mirrored the intent of the old Section 33 (a) that allows set-off for Plaintiff's fault. The use of the word "shall" in subsection (a) denotes the jury must set-off for the fault of the plaintiff if the jury so finds. This really is not different than the requirement of the pre-SB3 Section 33.

Section 33 (b) was amended with a complete re-write which requires mandatory apportionment among the defendants when more than one defendant is sued.

The Legislature clearly intended to change a jury's ability to decide a case based on discretionary joint and several liability to mandatory apportionment of fault when more than one defendant is sued. Inexplicably, the Legislature made apportionment under Sections 33 (a) and (b) mandatory with the use of the word "*shall*" but left apportionment discretionary under Section 31 by keeping the word "*may*".

The problem is further complicated when Sections 33 (c) and (d) were added to allow

the designation of at fault non-party or non-parties only in Section 33 but not in Section 31. Suffice it to say, none of the current flood of litigation involving apportionment and designation of non-party would exist if Sections 33(c) and (d) were added to Section 31.

The current language in Sections 31 and 33 presents several problems:

1. There is no benchmark for a trial court to determine if a case against multiple defendants should proceed under Section 31 as a discretionary apportionment case or under Section 33 as a mandatory apportionment case. This Court is unable to find a rational basis to make such a distinction. Moreover, if a case proceeds under Section 31 as a discretionary apportionment case, designation of a non-party otherwise allowed under Section 33(c) is not available as there is no similar provision in Section 31.

2. If mandatory apportionment under Section 33 only applies if a plaintiff is at fault, defendants sued by a plaintiff who is not at fault are only entitled to discretionary apportionment under Section 31 and cannot designate an at fault non-party. There is no rational basis to justify a defendant's ability to invoke mandatory apportionment in a multiple defendant case based on whether the plaintiff is at fault or not.

3. If mandatory apportionment applies whether a plaintiff is at fault or not (see Cavalier Convenience Inc. & Ken's Supermarkets, Inc. v. Sarvis, 305 Ga. App. 141 (2010), and McReynolds v. Krebs, 307 Ga. App. 330 (2010), cert. granted), then Section 31 is meaningless. This is a point raised by the appellant, acknowledged by but not ruled upon by the Sarvis Court.

4. Whether "more than one person" set forth in Section 33(b) is applied literally or interpreted in accordance with Schriever v. Maddox, 259 Ga. App. 558 (2003), to mean more than one person *at the time of trial*, there is no rational basis to apply apportionment based on the number of persons or entities sued.

Before SB 3, there was no mechanism for designation of a non-party. Joint and several liability came into play only when more than one defendant was sued. Now, the re-write has created the question of whether apportionment by the designation of an at fault non-party applies when suit is brought against only one defendant.

Heretofore, this Court relied on Section 33(c) to invoke apportionment regardless of the number of defendants sued as Section 33(c) is silent as to that requirement. This Court is now constrained from making that interpretation since McReynolds specifically held Section 33(c) and (d) are enabling provisions which explain the procedure to be used when applying apportionment to Section 33 (a) and (b).

If the language of "more than one person" used in Section 33(b) is applied literally, apportionment and designation of an at fault non-party are not available to lawsuits against a single defendant.

If "more than one person" is interpreted according to Schriever, a pre SB3 case, to mean more than one person at the time of trial, a defendant's ability to apportion fault among multiple defendants or to designate an at fault non-party or parties is subject to complete manipulation.

This case is a perfect example of the ills created by the re-write of Sections 31 and 33.

According to the Defendant, a witness in this case reported he saw the perpetrator pick something off the ground while the Plaintiff laid there after he was shot. Defendant further alleged the Plaintiff did not provide his correct name to the police and the Plaintiff was particularly concerned his cell phone was missing. Defendant contends that a jury could certainly infer something untoward - perhaps drugs - was involved. Of course, the Plaintiff denies this allegation.

These details illustrate the difficulty a trial court faces in managing a trial (if

apportionment under Section 33 only applies if a plaintiff is at fault.) Should the defendant be allowed to introduce evidence of the fault of the non-party before the jury decides if plaintiff is at fault?

Also, the Plaintiff originally sued the Defendant and several John Doe Defendants. The John Doe Defendants have been dismissed. This illustrates the problem created by the interpretation of "more than one." Do apportionment and designation apply when suit was brought against several persons but there is only one defendant remaining at the time of trial?

While policy decisions regarding whether a defendant's liability should be joint and several or proportionate to his degree of fault are reserved for the Legislature, the present statutory scheme leaves trial courts and litigants unable to determine the legislative intent as evidenced by the flood of litigation. This Court is aware of at least three cases dealing with apportionment pending in our appellate courts: Salinas et al v. Coro Realty Advisors, Fulton State Court, 10EV 009982, Mather J. ; Martin v. Six Flags Over Georgia, LLP, 09-A-55-4, Cobb State Court, Tanksley, J.; and a Northern District Certified Questions Request, 1:10-cv-00045-SCJ.

The Supreme Court of Georgia has instructed that the best indicator of the General Assembly's intent is the statutory text it actually adopted and that as long as the statutory language is clear and does not lead to an unreasonable or absurd result, it is the sole evidence of the ultimate legislative intent. Barnett v. Farmer, 308 Ga. App. 358, 361-62 (2011).

Clearly, OCGA 51-12-31 and OCGA 51-12-33 do not meet this criteria. This Court therefore finds OCGA 51-12-31 and OCGA 51-12-33 unconstitutionally vague and the uncertainty brought about deprives the citizens of this state of due process and equal protection of the law.

Plaintiff's motion in limine is seeking to eliminate a defense. Despite its nomenclature, it should be treated as a motion for partial summary judgment. Plaintiff's Motion In Limine, in the alternative, for partial summary judgment, to strike apportionment is **granted.**

SO ORDERED, this 11TH day of JANUARY, 2012.

ALVIN T. WONG, Judge
State Court of DeKalb County

Copy To:

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David C. Marshall, Esq.