

IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

NAIROBI COUCH,)	
)	
Plaintiff/Appellant,)	
)	
v.)	CASE NO. S12Q0625
)	
RED ROOF INNS, INC. and)	
RED ROOF V, LLC,)	
)	
Defendant/Appellees.)	

APPELLEES' BRIEF REGARDING
CERTIFIED QUESTIONS

Counsel for Appellees/Defendants:

BUCKLEY KING, LPA
Burke B. Johnson
Georgia Bar No. 392895

BUCKLEY KING, LPA
219 Boulevard NE
Gainesville, GA 30509
(770) 831-7770

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Come now Red Roof, Inns, Inc. and R Roof V, LLC, (“Appellees”), and file this brief in response to the questions certified by the United States District Court for the Northern District of Georgia, as follows:

I. Introduction

Ignoring the expressed intent of the Georgia Legislature, and the clear and unambiguous language of O.C.G.A. §51-12-33, Appellant seeks to obfuscate the law. With the unequivocal articulated intent “to provide substantive and comprehensive revisions regarding civil practice, evidentiary matters, and liability in tort actions in general . . . to change provisions relating to apportionment of award according to degree of fault,” the Georgia Legislature sought to provide for a more equitable distribution of liability for damages to who the jury determines was at fault for causing the damages.

Dissatisfied with the 2005 amendments to the statute, Appellant seeks judicial review of O.C.G.A. §51-12-33 to exclude its application to premises liability causes of action arising from third party criminal attacks. In essence, Appellant is requesting – contrary to Georgia law – that property owners become the insurers for invitees who suffer injury and damages when subject to criminal attack.

II. Statement Of The Case

Pending before this Court are two certified questions from the United States District Court for the Northern District of Georgia:

- a. In a premises liability case in which a 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 from 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?

Appellees respectfully request that this Court answer the initial question in the affirmative and the second question in the negative.

III. Argument and Citations of Authority

A. Overview

In statutory construction, where the legislative intent is clear, and the statutory language is unambiguous, the statute must be applied as written. In 2005, the Legislature revised the apportionment statute and in clear and unequivocal language instructed trial courts that juries shall apportion damages among those liable, according to a percentage of fault. Without any carved-out exception to the contrary, O.C.G.A. § 51-12-33 applies in premises liability causes of action arising from criminal attacks and the Act is constitutional.

B. The History of Apportionment in Georgia.

Apportionment has existed in Georgia since at least 1863, when the predecessor version of O.C.G.A. § 51-12-31 was enacted. As interpreted by this court and the Court of Appeals, however, this statute was limited to property damage cases. *See, McCalla v. Shaw*, 72 Ga. 458 (1884); *USF&G Fidelity &*

Guaranty Co. v. Paul Assoc., Inc., 230 Ga. App. 243 (1998).

In 1987 the General Assembly provided for apportionment in personal injury cases with the enactment of the prior version of O.C.G.A. § 51-12-33. That statute allowed apportionment in cases where the plaintiff himself was found to be to some degree responsible for his own injuries. Juries apportioned damages under this statute during the eighteen years between 1987 and the passage of Senate Bill 3 in 2005. Consequently, the 2005 revisions to Section 33 are not radical, but an incremental modification consistent with the Georgia Legislature's modification of the common law concept of joint and several liability over the last 150 years.

C. O.C.G.A. § 53-12-33 Applies In Premises Liability Security Cases

The Legislative Act that authorizes apportionment in this case was introduced as Senate Bill 3 during the 2005 session of the Georgia General Assembly. The preamble to the Act provides, in pertinent part, as follows:

An Act to amend Titles 9, 24, 33, 43, and 51 of the Official Code of Georgia Annotated, relating respectively to civil practice; evidence; insurance; professions and businesses; and torts, so as to provide for substantive and comprehensive revision of provisions regarding civil practice, evidentiary matters, and liability in tort actions in general. . . to change provisions relating to apportionment of award according to degree of fault. (emphasis added).

Section 2 of the Act goes on to provide that “[t]he 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.”

The role of the courts in construing legislation has been aptly stated as follows:

Our role in construing legislation 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 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 (2011).

The Court of Appeals has analyzed the subject statute in several cases.

In *Royalston v. Middlebrooks*, 303 Ga. App. 887 (2010), the court affirmed a jury verdict based upon apportionment of damages between two defendants in a car wreck case. In so doing, the court noted:

“[i]n the instant case, the jury found that Davis, the driver who rear-ended Middlebrooks, was 42 percent at fault and that Royalston was 58 percent at fault. ‘[I]n arriving at how to express these different degrees of culpability in mathematical terms, the jury was not bound by any specific formula; instead, the matter was to be ‘determined according to the enlightened conscience of the fair and impartial jury.’”

Royalston, 303 Ga. App. at 893.

In *Murray v. Patel*, 304 Ga. App. 253 (2010), the court reversed a trial court order dismissing a third-party complaint. There, the court noted “the plain language of O.C.G.A. § 51–12–33(b) requires that the factfinder apportion liability.”

Murray, 304 Ga. App. at 255.

In *Cavalier Convenience, Inc. v. Sarvis*, 305 Ga. App. 141 (2011), the court reversed the trial judge who refused to apportion damages, holding that apportionment applies in cases where the plaintiff himself is not negligent.

In accordance with the legislature's unambiguous language in OCGA § 51–12–33(b), we hold that where damages are to be awarded in an action brought against more than one person for injury to person or property—whether or not such damages must be reduced pursuant to

O.C.G.A. § 51–12–33(a)—the trier of fact ‘shall ... apportion its award of damages among the persons who are liable according to the percentage of fault of each person.’ (emphasis added).

Cavalier Convenience, Inc., 305 Ga. App. at 145.

In *Barnett v. Farmer*, 308 Ga. App. 358 (2011), the defendant appealed from the trial court’s decision refusing to charge the jury on apportionment. In reversing the trial judge, the court agreed with the defendant that “O.C.G.A. § 51–12–33. . . as modified by the Tort Reform Act of 2005, requires apportionment of damages in certain tort actions.” *Barnett*, 308 Ga. App. at 360 (emphasis added). The court concluded “the jury in this case should have been instructed to apportion the award of damages. . . according to its determination of the percentage of fault. . . .” *Id.* at 361.

In *Pacheco v. Regal Cinemas, Inc.*, 311 Ga. App. 224 (2011), the court affirmed the trial court’s decision to charge the jury on apportionment in a premises security case. The plaintiffs appealed, arguing, among other things, that it was not possible to apportion fault between a premises owner and a criminal perpetrator. The Court of Appeals rejected this argument, stating “[p]retermitted whether the issue was consequently waived, we find that the Pachecos’ argument nevertheless falls short of demonstrating any trial court error.” *Pacheco*, 311 Ga. App. at 229.

In sum, the Georgia Court of Appeals has applied O.C.G.A. § 51-12-33 consistently in the cases that have appeared before that court. In his arguments challenging the application and constitutionality of the Act, Appellant would have this court ignore those cases, as well as the manner in which apportionment has been applied in Georgia for the last twenty five years.¹

D. Appellants Arguments Fail To Bar Application Of O.C.G.A. § 51-12-33 In Premises Liability Security Cases

1. Requiring Apportionment Would Not Nullify A Property Owner's Duty

Appellant argues that apportionment would nullify the non-delegable duty of a property owner to keep its premises safe are not applicable in the context of this case, but the cases he cites are inapplicable. Those cases discuss the issue of “non-delegable duty” in the context of whether a property owner is liable when it has assigned security duties to an independent security contractor.

The duty that an owner or occupier of land owes to its invitees is codified at O.C.G.A. § 51-3-1. It is well settled that the duty is to exercise ordinary care to keep its premises safe; however, this duty does not extend to the point that a property owner becomes an insurer of its invitee's safety. *Luong v. Tran*, 280 Ga. App. 15 (2006). There is a significant difference between a duty to exercise ordinary care to keep premises safe and a duty to prevent injury.

¹ Given the existing Georgia cases on this statute in particular and apportionment in general, the foreign authorities that Appellant cites are irrelevant.

Here, Appellees are not seeking to delegate their duty to exercise ordinary care to keep their premises safe. Appellees simply seek to have damages apportioned among those who are at fault. Apportionment would not vitiate Appellees' duties, because as expressly stated in O.C.G.A. § 51-12-33 Appellees will remain liable for Appellant's damages in the percentage the jury finds that Appellees' alleged fault contributed to Appellant's injuries. Under O.C.G.A. § 51-12-33, it is within the province of the jury to determine that percentage of fault. As has been shown in at least two jury verdicts where apportionment was applied, depending on the evidence in any given case, the jury may apportion a minimal or a substantial percentage of fault to the landowner defendant.²

2. Apportionment Does Not Allow Property Owners to Avoid the Consequences of Their Actions.

In *Ontario Sewing Machine Co., Ltd. v. Smith*, 275 Ga. 683, 572 S.E.2d 533(2002) *Ontario Sewing*, the defendant argued that it was entitled to summary judgment because the intervening act of the plaintiff's employer constituted the proximate cause of the plaintiff's injury. Quoting Judge Andrews' special concurrence in the Court of Appeals decision, this court held that "it is for the jury to decide whether the proximate cause of Smith's injury was solely acts of [Ontario], or solely acts of Wilen, or a combination of those acts."

² Copies of articles regarding these verdicts are attached hereto as Exhibits "A" and "B."

Application of O.C.G.A. § 51-12-33 would not bar Appellant from any recovery or allow Appellees to avoid the consequences of their actions. Rather, the statute simply provides the jury the opportunity to apportion damages among those at fault. If the jury determines that Appellees breached their duties here, then under O.C.G.A. § 51-12-33, the jury should apportion damages to Appellees to the degree that Appellees' alleged breach caused Appellant's injuries. Again noting the outcome in at least one case that has been tried utilizing apportionment, the jury there certainly did not allow the defendant property owner to avoid the consequences of its actions.³

3. The Negligence of a Property Owner in a Premises Security Case Is Not Derivative of the Criminal Assailant's Conduct

Appellant incorrectly relies upon *PN Express Inc. v. Zegel*, 304 Ga. App. 674 (2010) for the proposition that a property owner's liability is derivative of the conduct of the criminal assailant. *PN Express* is a road wreck case involving a motor carrier. The plaintiffs sought to hold PN Express vicariously liable for the driver's negligence. PN Express appealed the trial court's decision not to charge the jury on apportionment pursuant to O.C.G.A. § 51-12-33. In affirming the trial court, the Court of Appeals concluded that "comparative fault statutes do not apply where the defendant's liability is derivative Since the corporation's liability for the accident was purely vicarious in nature for the acts of [the driver] himself,

³ See article attached as Exhibit "B."

rather than joint and several, it is obvious . . . that the comparative fault statute [does] not apply.” In reaching its decision in *PN Express*, the Court of Appeals relied upon the rule that where a party’s liability is solely vicarious, “that party and the actively-negligent tortfeasor are regarded as a single tortfeasor.” *Id.*

Clearly, under the theory of *respondeat superior*, a master may be held liable for the torts of his servant that are committed during the course and scope of his employment. Under this theory, the master is liable regardless of, and indeed in the absence of, any independent act of negligence on the part of the master. The master’s liability flows from, or is derivative of, the liability of the servant.

The doctrine of agency is central to the theory of vicarious or “derivative” liability. “For the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation or privity to the negligent person as to create the relation of principal and agent.” O.C.G.A. § 51-2-1; *see also Strickland v. ITT Rayonier, Inc.*, 162 Ga. App. 317, 317 (1982) (“[I]mputed negligence must rest on an agency relationship.”) (quoting *McKinney v. Burke*, 108 Ga. App. 501, 504 (1963)).

Contrary to Appellant’s argument, there is no authority in Georgia to suggest that in the context of a premises security case such as this, the property owner’s liability is derivative of the acts of the criminal assailant. Indeed, the very nature of these claims is that the property owner committed independent acts of

negligence. Moreover, there is no agency relationship between a landowner and a criminal assailant upon which to base derivative liability.

Also contrary to Appellant's position, apportionment among tortfeasors who acted negligently and tortfeasors who acted intentionally is authorized by the statute. In drafting Section 33, the Georgia Legislature used the term "fault." The Georgia legislature did not distinguish between negligence and intentional acts, although it clearly could have done so, as have other jurisdictions, *See e.g.*, Fla. Stat. § 768.81.

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

According to the Random House Webster's Unabridged Dictionary, "fault" means as follows: **Fault:** 1) a defect or imperfection; flaw; failing; 2)

responsibility for failure or a wrongful act; 3) an error or mistake; 4) a misdeed or transgression...⁴ Random House Webster's Unabridged Dictionary (2d Ed. 1998).

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

Application of the rule that statutes should be construed to avoid rendering words as mere surplusage also suggests that "fault" is broader than negligence. O.C.G.A. § 51-12-33 refers to "[n]egligence or fault" (emphasis added), and the use of the conjunction "or" suggests that the terms are different or else they would not be listed in the alternative.

In *Cavalier Convenience*, the Court of Appeals, in interpreting the apportionment statute as applying irrespective of the plaintiff's degree of fault, held that the trial court's contrary interpretation had improperly "overlook[ed] the use and placement of the 'if any' clause" in O.C.G.A. § 51-12-33(b). *Cavalier Convenience*, 305 Ga. App. at 144. The Court explained that "courts are 'not authorized to disregard any of the words used therein unless the failure to do so would lead to an absurdity manifestly not intended by the legislature.'" *Id.*

⁴ There are additional definitions that relate to geological, sports, and electrical faults, which, of course, are inapposite here.

Interpreting “fault” as synonymous with “negligence” thus violates this rule of statutory construction by ignoring the use and placement of the word “or” in the statute.

Smith v. Wade, 461 U.S. 30 (1983), which Appellant cites regarding the distinction between negligent and intentional acts is inapposite. In *Smith*, the issue was what degree of culpability of a defendant in a 1983 action would permit an award of punitive damages. The Supreme Court’s discussion had nothing to do with apportionment.

Appellant’s statement that “it is impossible for a neutral fact-finder in a premises liability attack case to rationally weigh the intentional conduct of a criminal with the negligent conduct of the landowner” is frankly belittling to jurors. Every day, jurors in this State are entrusted with life and death issues. Certainly they can weigh the evidence in cases such as this. Moreover, Appellant’s statement is simply not borne out by the results of the two trial court verdicts previously mentioned.

For these same reasons, Judge Tanksley’s statement in *Martin v. Six Flags* that “the fact finder would apportion all damages against the criminal actor” is simply incorrect.

4. Mandatory Apportionment Would Not Provide a Disincentive for a Property Owner to Comply With Its Duties

Appellant initially cites this court's decision in *Polston v. Boomershine Pontiac-GMC Truck, Inc.*, 262 Ga. 616 (1992) in support of a public policy argument against apportionment. The quote in Appellant's case is dicta. Moreover, *Polston* is not analogous to the present situation. In *Polston*, the issue presented was whether the plaintiff or the defendant has burden of proof with regard to apportionment.

As shown by the result of the Newton County case⁵, jurors may conclude that the property owner shares a larger percentage of fault for a crime victim's damages than does the criminal assailant and thus apportion the vast majority of those damages to property owner. Facing this specter of liability, property owners are not going to shirk their legal duties. Lawsuits will still be filed. Property owners will still face significant defense costs. Property owners may still be held liable for significant damages.

Additionally, the types of property owners that are typically the target of such lawsuits *e.g.*, hotels and apartment complexes, have a business incentive to take care of customers. In this age of information, comments and reviews of properties routinely appear on internet websites. News quickly spreads about problems at such properties, and people would avoid properties that have a reputation of failing to protect their tenants and guests.

⁵ Exhibit "B"

Simply stated, O.C.G.A. § 51-12-33 does not provide a disincentive to property owners to comply with their duty to exercise ordinary care to keep their premises safe. Rather, it reinforces that property owners are liable for the share of damages caused by a breach of duty.

5. Plaintiff's Damages Can Be Apportioned Among Those At Fault According to Their Percentage of Fault.

Georgia allowed apportionment for years under the prior versions of O.C.G.A. §§ 51-12-33 and 31. In *Union Camp Corp. v. Helmy*, 258 Ga. 263 (1988), this court acknowledged that “the jury's findings with respect to each joint tortfeasor's respective negligence are easily ascertainable.” *Union Camp Corp.*, 258 Ga. at 265. This court further acknowledged in *Union Camp* that jurors have been authorized to apportion damages in Georgia since as far back as 1863 under O.C.G.A. § 51-12-31.

Apportionment of damages in a personal injury case is not a new concept under the 2005 amendments to Section 33 here at issue. Now, as before the effective date of that statute, personal injury damages are capable of being apportioned among those at fault, according to their respective degrees of fault. This is well illustrated by the jury's verdict as described in *Royalston, supra*.

The Georgia cases that Appellant cites in support of his argument that his damages cannot be apportioned either are not analogous to the present case or

apply the law as it existed prior to the 1987 enactment of the prior version of O.C.G.A. § 51-12-33.

Appellant's argument that his damages cannot be apportioned fails.

6. Whether A Defendant Property Owner Can Establish Evidence To Support A Rational Basis For Apportionment Is A Burden Of Proof At Trial And Should Not Automatically Preclude Application Of The Statute.

Appellees acknowledge this court's decision in *Polston, supra*, regarding the burden of proof for apportionment. Whether a defendant can carry that burden at trial is a completely different matter, however, from whether O.C.G.A. § 51-12-33 should be applied to provide a defendant with that opportunity.

As in any case, the trial judge should only charge the jury on issues as to which evidence has been presented. If the trial judge determines that a defendant has not established evidence to support an apportionment charge, the court should not give the charge.

Indeed, this was the scenario in *McReynolds v. Krebs*, 307 Ga. App. 330 (2010). In *McReynolds*, McReynolds argued that the trial court should have apportioned damages between her and General Motors. However, McReynolds admitted at the beginning of trial that she had no evidence to present regarding GM's liability, and she rested following the plaintiff's case without presenting any evidence whatsoever. The Court of Appeals thus affirmed the trial court's decision not to charge on apportionment because McReynolds "presented no evidence on

which apportionment of liability could be based.”

Notably, both *Polston* and *McReynolds* were “enhanced injury” cases. In both cases, parties were seeking to place some portion of liability on a vehicle manufacturer to show that the injured person’s damages were caused, in part, by the design of the vehicle. Such cases require considerable expert evidence, and it is not always clear whether the injury was due to an initial impact or was “enhanced” by a product design. Such burden of proof issues are not as complex in cases such as the one presently before the court. Here, there is no doubt that the criminals to whom some apportionment is sought caused the plaintiff’s injuries.

7. The Abolishment Of Joint And Several Liability

Appellant argues that the passage of Senate Bill 3 did not abolish joint and several liability in Georgia. Actually, as already discussed above, joint and several liability had been abolished to some extent years earlier.

As far back as 1863, with the passage of the predecessor statute to O.C.G.A. § 51-12-33, joint and several liability was practically eliminated in property damage cases in Georgia. As this court recognized in *McCalla v. Shaw*, 72 Ga. 458 (1884), “[w]e think that this section refers to trespasses committed on property, and not to such a tort as is set forth in the declaration of defendant in error.” *See also, USF&G Fidelity & Guaranty Co. v. Paul Assoc., Inc.*, 230 Ga. App. 243 (1998)(concluding that “the jury was authorized to return separate

verdicts against joint tortfeasors, but not under O.C.G.A. § 51-12-33, because this was a damage to a property interest, as opposed to a personal injury to an individual.”).

Appellant relies on this court’s decision in *Simpson v. Perry*, 9 Ga. 508 (1854) for the historical underpinnings of joint liability. Notably, however, that decision predates the passage of the predecessor to O.C.G.A. § 51-12-31, first enacted in 1863. Later, with the passage of O.C.G.A. § 51-12-33, joint and several liability was abolished in many personal injury cases where the plaintiff was found to be to some degree responsible for his own injury.

The 2005 amendments are not a radical departure from prior law, but simply an expansion of the concept of apportionment

E. O.C.G.A. § 51-12-33 Is Constitutional

“A statute is presumed to be constitutional unless it is established that it ‘manifestly infringes upon a constitutional right or violates the rights of the people.’” *Georgia Dept. of Human Resources v. Sweat*, 276 Ga. 627 (2003). Under this presumption of constitutionality, courts must construe statutes “as valid when possible.” *Judicial Council of Georgia v. Brown & Gallo*, 288 Ga. 294, 297 (2010).

1. O.C.G.A. § 51-12-33 Is Not Vague and Does Not Require Courts and Jurors to Guess at its Meaning

In examining a vagueness challenge to the constitutionality of a statute, the court must consider the statute in its entire context. *Lindsey v. State*, 277 Ga. 772, 772 (2004). While a statute must not be so “vague and indefinite in its meaning, that persons of ordinary intelligence must guess at its meaning and differ as to its application, *Bell v. Austin*, 278 Ga. 844, 847-848(2005), the General Assembly is also not required to draft statutes with “mathematical precision.” *State v. Old South Amusements*, 275 Ga. 274, 276 (2002). This court has cautioned that “[t]he prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision,” because “[m]any statutes will have some inherent vagueness for in most English words and phrases, there lurk uncertainties.” *Lindsey*, 277 Ga. at 773. Statutory language is held to satisfy due process requirements so long as it has a “commonly understood meaning.” *Id.* Application of these established principles demonstrates that O.C.G.A. § 51-12-33 is not unconstitutionally vague.

The fact that a statute can be susceptible to differing interpretations and thus may require judicial interpretation from the higher courts does not render it unconstitutionally vague. Moreover, the threshold applicability of the statute is a legal question for the court, and thus has no relevance to the jury’s ability to apply the statute. If a court determines that O.C.G.A. § 51-12-33 applies, the jury has a clear mandate under O.C.G.A. § 15-12-33(c): “to consider the fault of all persons

or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.”

There is no conflict between Section 31 and 33. As far back as 1884, this court held that Section 31 applies only in cases involving damage to property, not to cases involving personal injury. *McCalla v. Shaw*, 72 Ga. 458 (1884). “We think that this section refers to trespasses committed on property, and not to such a tort as is set forth in the declaration of defendant in error.” *McCalla*, 72 Ga. at 458. *See also, USF&G Fidelity & Guaranty Co. v. Paul Assoc., Inc.*, 230 Ga. App. 243 (1998)(concluding that “the jury was authorized to return separate verdicts against joint tortfeasors, but not under O.C.G.A. § 51-12-33, because this was a damage to a property interest, as opposed to a personal injury to an individual.”)

This distinction between applying Section 31 only to property damage cases and Section 33 to personal torts has been recognized by Georgia’s appellate courts now for over a century. The General Assembly is deemed to be aware of the decisions of the courts of this State. *Nelson v. Roberts*, 217 Ga. 613 (1962). It thus should be presumed that the intent of the Legislature in its work related to Sections 31 and 33 was to maintain the distinction that this court pronounced over 100 years ago. Given this distinction, Appellant’s comment that “O.C.G.A. § 51-12-31 now allows for *discretionary* apportionment in personal injury cases” (Appellant’s Brief, p. 22) is completely unsubstantiated. Nothing in the

amendments at issue suggests that the Legislature intended to set aside a century of precedent applying Section 31 only to property damage. Indeed, as recently as January 31, the Court of Appeals approved apportionment of damages under Section 31 in a property case. *Chapman v. Clark*, 2012 WL 266028 (Case No. A11A2175, January 31, 2012).

2. O.C.G.A. § 51-12-33 Provides Sufficient Standards for Apportionment to Be Applied

The tenor of this argument, as well as much of the rest of Appellant's brief, suggests that jurors cannot figure out these issues. This frankly belittles the abilities that jurors have exhibited over the centuries. It bears repeating that jurors have been tasked with apportioning damages in Georgia since at least 1863. Additionally, in at least two premises security cases that have been tried under this statute, the juries in those cases weighed the evidence and entered verdicts accordingly.

Appellant's claim that O.C.G.A. § 51-12-33 is constitutionally infirm because it provides "no other guidance to the jury with regard to how or by what standards they are to determine the 'percentage of fault' of each person" lacks merit. As already discussed, prior to the 2005 version of O.C.G.A. § 51-12-33, the apportionment statute in effect since 1987 specifically provided for juries to apportion damage awards "according to the degree of fault of each person." *See* Ga. L. 1987, p. 915, § 8. While the prior statute authorized apportionment only

among named parties (i.e., “persons who are liable”) and only when the plaintiff was “to some degree responsible for the injury or damages claimed” (*Id.*), Georgia’s apportionment statute nevertheless authorized the jury to apportion “fault,” without providing the jury specific guidelines for assessing “fault.” If the legislature’s failure to define “fault” makes the current version of O.C.G.A. § 51-12-33 unconstitutionally vague, then the same would be true for the previous version of the apportionment statute that was applied in numerous cases in the eighteen years prior to the 2005 statutory revision.

In *Royalston v. Middlebrooks, supra*, the jury applied the current version of O.C.G.A. § 51-12-33 in a multi-vehicle accident to determine that one driver was 42% at fault for a car accident and the other was 58% at fault. In rejecting a challenge to the jury’s apportionment as unreasonable and contrary to the evidence, the Court of Appeals held that in “arriving at how to express these different degrees of culpability in mathematical terms, the jury was not bound by any specific formula.” *Royalston*, 303 Ga. App. at 893. (internal citations omitted). Instead, the “matter was to be ‘determined according to the enlightened conscience of the fair and impartial jury.’” *Id.*

The current version of O.C.G.A. § 51-12-33, like its predecessor, defers to the jury’s “enlightened conscience” in assessing percentages of fault. The statute is not unconstitutionally vague simply because the legislature chose not to

hamstringing jury discretion by mandating consideration of specific guidelines for determining “fault.”

3. Apportionment Does Not Deprive Appellant of a Substantial Property Right Without Due Process

Appellant notes that before the enactment of the apportionment statute, he potentially could have collected all of his damages from a single defendant. Indeed, prior to apportionment, it was common for a defendant who had only nominal fault but a “deep pocket” to pay damages attributable to the actions of a defendant who was more culpable but who had fewer resources. The legislature corrected this inequity with the passage of Senate Bill 3.

There is no basis to support the argument that an injured party is constitutionally entitled to recover 100% of his damages. In the context of an individual who is injured on the job, his recovery against his employer is limited by statute and many times does not fully compensate the injured worker for the full extent of his loss; nor is the worker’s spouse entitled to pursue a loss of consortium claim against the employer. This limitation is constitutional. *See e.g., Williams v. Byrd*, 242 Ga. 80 (1978); *Henderson v. Hercules, Inc.*, 253 Ga. 685 (1985); *Smith v. Gortman*, 261 Ga. 206 (1991). In the context of punitive damages, this court has upheld constitutional challenges that limit a plaintiff’s ability to recover 100% of the punitive damages a jury awards. *See e.g., Bagley v. Shortt*, 261 Ga. 762

(1991)(punitive damage cap is constitutional); *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539 (1993)(statute requiring payment of 75% of punitive damages in product case to State is constitutional).

Appellant's contention that O.C.G.A. § 51-12-33 deprives him of a "substantial property right without due process" is plainly incorrect. The apportionment statute does not eviscerate Appellant's cause of action. Moreover, while the apportionment statute has no effect on the existence of Appellant's cause of action, it should be noted that a statute is not unconstitutional simply because it prospectively eliminates a cause of action. This court has stated that "[t]he power of the legislature to create, modify, or abolish rights to sue has been clearly and repeatedly recognized by the U.S. Supreme Court and by this Court." *Love v. Whirlpool Corp.*, 264 Ga. 701, 705 (1994). *See also Santana v. Georgia Power*, 269 Ga. 127, 129 (1998)("States are free to create immunities and to eliminate causes of actions, and that legislative determination provides all the process that is due."). The statute has no effect on Appellant's ability to bring a negligence action based on the Appellees' alleged failure to provide adequate security.

Apportionment also does not prevent the Appellant from recovering significant amounts of damages from the named Appellees. If Appellant's allegations of negligence are credited by the jury, the jury could determine that the named Appellees should bear most or all of the percentage of fault for the harm

caused. The possibility that the jury may, however, assess some percentage of fault to the unknown criminal actors does not eliminate Appellant's cause of action or his right to a recovery. Instead, it merely eliminates his ability to require the named Appellees to pay for 100% of his damages irrespective of the jury's determinations as to their proportionate fault.

Appellant's assertion that O.C.G.A. § 51-12-33 is unconstitutional because it forces a jury to "do the impossible by requiring that they make a division of indivisible injuries" ignores the fact that juries have successfully apportioned damages based on fault in other cases where the actions of different tortfeasors combined to produce one injury. *See e.g., Royalston, supra* (affirming jury's determination under O.C.G.A. § 51-12-33 that jury properly apportioned damages in three-car accident where jury found one driver to be 42% at fault and the other driver to be 58% at fault).

Appellant's position that O.C.G.A. § 51-12-33 does not apply in cases involving "indivisible injuries" is incorrect: to the contrary, apportionment under O.C.G.A. § 51-12-33 occurs only when the actions of different tortfeasors (i.e., joint tortfeasors) combine to produce a single harm. The only reason the tortfeasors are jointly liable in the first place is that their different tortious acts combined to produce a single harm to the plaintiff. Thus, in every case involving a "single, indivisible" harm proximately caused by the combination of different

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

In arguing that damages for personal injury may not be apportioned because such injuries are “manifestly not severable into parts,” Appellant cites *ITT Terryphone Corp. v. Tri-State Steel Drum*, 178 Ga. App. 694 (1986). As discussed above, however, one year later, the legislature amended O.C.G.A. § 51-12-33 to allow apportionment among defendants in cases where the plaintiff bore some degree of fault. This court subsequently confirmed that damages may be apportioned in personal injury cases pursuant to the 1987 version of O.C.G.A. § 51-12-33. *See Union Camp v. Helmy*, 258 Ga. 263, 268 (1988)(noting that pursuant to 1987 statutory amendment “the rule of joint and several liability amount joint tort-feasors can be disregarded, with several separate judgments rendered in cases coming within the scope of these provisions.”).

The 2005 amendments simply do not deprive Appellant of a substantial property right.

4. Apportionment Does Not Deprive Appellant of His Right to a Jury Trial

Appellant relies upon this court's decision in *Atlanta Oculoplastic Surgery, P.C., v. Nestlehutt*, 286 Ga. 731 (2010) for the proposition that requiring apportionment of damages deprives a plaintiff of his right to a trial by jury. Appellant's reliance upon *Nestlehutt* is misplaced.

In *Nestlehutt*, this court held that the cap on non-economic damages in medical malpractice cases violated the right to a jury trial. However, there is a clear difference between capping a plaintiff's recovery at a maximum amount, thereby taking that calculation out of the jury's hands entirely, and requiring the jury to apportion damages among those parties it finds are liable, according to their respective percentages of fault.

Indeed, as this court stated in *Nestlehutt*, "the determination of damages rests 'peculiarly within the province of the jury.'" *Nestlehutt*, 286 Ga. at 734.

Under Section 33, the jury remains fully empowered to award a plaintiff all of the damages the jury deems the plaintiff entitled to; it is in no way a "cap." This determination still rests "peculiarly within the province of the jury." Section 33 does not take away anything from the province of the jury.

a. Appellant Remains Entitled to a Jury Trial Regarding Any Violation By Appellee of Any Duties

Appellant's argument here regarding delegation of duty is much the same as he argues at pages 5 through 6 of his brief. His argument here fails for the same reasons discussed at pages 7 through 8 of Appellees' brief, above.

As stated above, Appellees do not seek to delegate their duty to exercise ordinary care to keep their premises safe. Appellees simply seek to have damages apportioned among those who are at fault. Apportionment would not deprive Appellant of his right to have a jury decide whether Appellees violated any duties. That decision remains fully within the province of the jury. Under O.C.G.A. § 51-12-33, Appellees will remain liable for damages in the percentage that their alleged fault contributed to Appellant's injuries, as that percentage is determined by the jury.

b. Appellees Do Not Seek a Double Reduction of Appellant's Damages

Frankly, Appellant's argument in this section of his brief raises an issue that Appellees have never suggested.

The procedure established by Section 33 is best illustrated in an example. At the conclusion of a personal injury trial, the jury is charged on apportionment. If the jury determines during deliberations that the plaintiff's damages are \$100,000.00, that defendant A was 40% at fault, that defendant B was 40% at fault, and that a non-party was 20% at fault, the jury could then enter its verdict on a special verdict form as follows:

“We, the jury, find plaintiff’s damages to be in the amount of \$100,000.00.”

“We, the jury, find the following percentages of fault: 40% to defendant A, 40% to defendant B and 20% to the non-party.”

The court would then enter judgment in favor of plaintiff against defendant A in the amount of \$40,000.00 and against defendant B in the amount of \$40,000.00.

Thus, contrary to Appellant’s strained construction of the statute, nothing suggests that Appellant would be entitled to, or would even request a “double reduction.”


IV. Conclusion

O.C.G.A. § 53-12-33 unequivocally applies to the facts of this case. The statute requires the jury to consider the fault of the criminal assailants and apportion the plaintiff’s damages between Appellees and the assailants according to their respective percentages of fault. Apportionment of fault in this context does not violate Appellant’s constitutional rights to a jury trial or to due process.

Respectfully submitted this 13th day of February, 2012

219 Boulevard NE
Gainesville, GA 30501
770-831-7770
770-532-6128 (Fax)

BUCKLEY KING, LPA


Burke B. Johnson
Georgia Bar No. 392895
Attorney for Appellees

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Tuesday, September 07, 2010

Lawyers: New day in premises liability

Given apportionment order, jury assigns 95 percent of liability for \$184K in murder damages to men convicted in slaying

By Greg Land, Staff Reporter

Correction appended: See below for a correction to this story.

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Lawyers for opposite sides of a suit against the management company of an apartment complex where a man was murdered agree on one thing: The verdict in their case marks a new day in premises liability.

Last month, a DeKalb County jury awarded \$184,192 to the mother of Wesley Hagan, who was shot in the head during an apparent robbery at the Stanford Oaks Apartments in Tucker in 2005.

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Staff Reporter Greg Land can be reached at gland@alm.com Kathryn Hayes Tucker contributed to this story.

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Murder victim's family wins \$1.3M verdict

Jury: Housing authority largely to blame for letting convicted murderer live in complex
By Greg Land, Staff Reporter

A Newton County jury has awarded more than \$1.3 million to the children of a young woman murdered in a public housing apartment complex after finding that the Covington Housing Authority was largely responsible for allowing a convicted murderer to live there. The jury held her murderer 10 percent liable after the judge ordered that he be listed on the verdict form in accordance with Georgia's apportionment statute.

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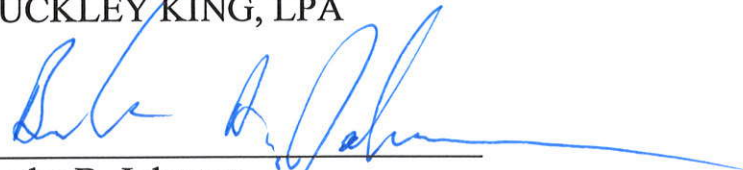
Jeffrey N. Mykkeltvedt, Esq.
David K. Loftin, Esq.
Mykkeltvedt & Loftin, LLC
3001 Lookout Place, NE
Atlanta, GA 30305

Elizabeth Monyak
Office of the Attorney General
40 Capitol Square, SW
Atlanta, GA 30334-1300

Andrew T. Rogers, Esq.
Deitch & Rogers, LLC
5881 Glenridge Drive
Plaza 400, Suite 160
Atlanta, GA 30328

This 13th day of February, 2012.

BUCKLEY KING, LPA



Burke B. Johnson
Georgia State Bar No. 392895
Attorney for Defendants/Appellees

219 Boulevard NE
Gainesville, Georgia 30501
(770) 831-7770
(770) 532-6128 (Fax)
Johnson@buckleyking.com