

IN THE COURT OF APPEALS OF GEORGIA

CAVALIER CONVENIENCE, INC.,)	
)	
Defendant/Appellant,)	
)	
v.)	APPEAL NO. A10A0538
)	
CHRISTOPHER SARVIS,)	
)	
Plaintiff/Appellee.)	
)	
KEN'S SUPERMARKET, INC.,)	
)	
Defendant/Appellant,)	
)	
v.)	APPEAL NO. A10A0539
)	
CHRISTOPHER SARVIS,)	
)	
Plaintiff/Appellee.)	

BRIEF OF AMICUS CURIAE
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STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (hereinafter "GDLA"), consisting of approximately 650 attorneys, including sole practitioners and members of law firms of all sizes throughout the State, engage in litigation primarily for defendants in civil lawsuits. The GDLA and its members have an interest in ensuring that important substantive modifications to the law of joint and several liability enacted by the General Assembly in 2005 are construed correctly and given full and consistent effect by trial courts throughout Georgia.

INTRODUCTION

In 2005, the General Assembly, consistent with 39 sister states,¹ made significant modifications to the common law of joint and several liability in this State. These changes are the culmination of a progressive evolution of joint liability law that began when the General Assembly first created an exception to

¹ According to research conducted by the American Tort Reform Association, forty states have modified their common law rule of joint and several liability in some fashion since 1986. See ATRA Tort Reform Record (Dec. 23, 2009), available at http://www.atra.org/files.cgi/8442_record_12-09.pdf, at 4-13.

the joint liability rule in the Georgia Code of 1863. Since then, the Legislature created two more exceptions, one in the Tort Reform Act of 1987 and the other in the Tort Reform Act of 2005.

The stated intent of the Legislature in amending the joint and several liability doctrine in 2005 was “to change provisions relating to apportionment of award according to degree of fault.” The Legislature effected this change by amending O.C.G.A. § 51-12-33(a) and (b) in several key respects. The trial court in this case erred when it construed the 2005 amendments to apply in this case only if there is evidence of a plaintiff’s fault. Such a finding cannot be reconciled with either the ongoing development of joint liability law in Georgia or fundamental rules of statutory construction.

ARGUMENT AND CITATION OF AUTHORITY

I. The Evolution of Joint and Several Liability Law in Georgia

The doctrine of joint liability is believed to have originated almost 400 years ago in the English report of Sir John Heydon’s case. 77 Eng. Rep. 1150, 1151 (K.B. 1613) (trespass of battery action against multiple defendants in which court found that when “jury finds for the plaintiff . . . the jurors cannot assess several damages against the defendants because all is one trespass”); see also W. Page

Keeton, et al., Prosser and Keeton on the Law of Torts, § 46, at 323 n. 3 (5th ed. 1984 & Supp. 1988) (tracing joint liability's roots to Sir John Heydon's case).

When joint and several liability is applicable, the jury is not permitted to apportion damages. Id. at 323.

By the early 1900s, joint and several liability/non-apportionment of damages in multiple tortfeasor cases was the majority rule in almost every jurisdiction in the United States. See Restatement (Third) of Torts: Apportionment of Liability § A18, Reporters Notes, Comment a (noting that only “a few” American courts resisted adopting joint liability). Notably, Georgia was one of those “few” states that resisted adopting joint and several liability as the rule of law and, in fact, has never adopted it in wholesale fashion.

A. Exception to Joint and Several Liability Rule under the Code of 1863

Initially, the Supreme Court of Georgia did appear inclined to apply the rule in all multiple tortfeasor actions. See, e.g., Simpson v. Perry, 9 Ga. 508, 509 (1851) (“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”) (citing 2 Greenleaf’s Ev. § 277) (emphasis in original). Just a little more than a decade later, however, when Georgia first codified the law, its resistance to the joint liability doctrine was evident in the following Code section: “[W]hen several trespassers are sued jointly, the plaintiff may recover against all, the greatest injury done by either. *But the jury may, in their verdict, specify the particular damage to be recovered of each.*” Orig. Code 1863, § 3007 (emphasis added).² In McCalla v. Shaw, 72 Ga. 458 (1884), the Supreme Court clarified that “this section refers to trespasses committed on property, and not to such a tort [malicious arrest and false imprisonment] as is set forth in the declaration of defendant in error.” Id. at 460. As early as 1884, therefore, the common law rule of joint and several liability in multiple tortfeasor cases was rejected in Georgia in

² The modern version of § 3007 is found at O.C.G.A. § 51-12-31: “Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.”

favor of a rule that created an exception in cases involving trespass to property. In such cases, the jury was free to disregard joint and several liability and apportion damages between or among the several defendants. See, e.g., United States Fidelity & Guaranty Co., Inc. v. Paul Associates, Inc., 230 Ga. App. 243, 248, 496 S.E.2d 283, 298 (1998) (noting jury has right to disregard joint and several liability and to return separate verdicts when “damage to a property interest, as opposed to a personal injury, is inflicted”); accord Gazaway v. Nicholson, 190 Ga. 345, 9 S.E.2d 154 (1940); Jones v. Hutchins, 131 Ga. App. 808, 207 S.E.2d 224 (1974); Craven v. Allen, 118 Ga. App. 462, 164 S.E.2d 358 (1968); Hightower v. Landrum, 109 Ga. App. 510, 136 S.E.2d 425 (1964); Daniel v. Robinson, 96 Ga. App. 342, 100 S.E.2d 94 (1957).

B. Exception to Joint and Several Liability Rule under the Tort Reform Act of 1987

The first of two more legislative changes to the doctrine of joint and several liability in Georgia occurred in the late 1980s, during the era of what one commentator termed “the modern tort reform movement.” Nancy C. Marcus, Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability, 60 Ark. L. Rev. 437, 440 (2007) (“The modern ‘tort

reform' movement, which blossomed in the 1980s and encompassed a myriad of modifications to state tort laws, resulted in many states legislating the limitation of joint and several liability in tort actions”) (footnote omitted). During this period, “the doctrine of joint and several liability has been a frequent target of tort reform efforts.” See Id. at 438.

Georgia’s joint and several liability rule is one such “target.” In 1987, the Georgia Legislature, which much earlier had already created a limited exception to joint liability law in property trespass cases, created yet another exception when it enacted the Tort Reform Act of 1987. As codified at O.C.G.A. § 51-12-33(a), a jury was permitted to apportion damages among all parties in cases involving injury to person or property in which the plaintiff was also at fault:

(a) Where an action is brought against more than one person for injury to person or property and the plaintiff is himself 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, may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if

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.

Ga. Law 1987 p. 921, § 8. Read in conjunction with O.C.G.A. § 15-12-31, the two Code sections allowed apportionment in cases involving either trespass to property (O.C.G.A. § 51-12-31) or injury to person or property where the plaintiff is also at fault (O.C.G.A. § 51-12-33). At that time, however, a jury was *not* permitted to apportion damages in cases such as the instant appeal, which involves multiple defendants and no evidence of contributory negligence by the plaintiff.

C. Exception to Joint and Several Liability Rule under the Tort Reform Act of 2005

In 2005, the General Assembly targeted joint liability law once again. Senate Bill 3 of the 2005-2006 regular session, commonly called the “Tort Reform Act of 2005,” see Mason v. The Home Depot U.S.A., Inc., 283 Ga. 271, 272, 658 S.E.2d 603, 605 (2008), made substantive revisions to O.C.G.A. § 51-12-33 so that apportionment is now required in cases such as the one involved in this appeal,

involving multiple alleged tortfeasors and no allegation or evidence of contributory negligence by the plaintiff:

(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) When 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.

Ga. L. 2005 p. 15, § 12.³

A central inquiry in this case, framed by the trial court's holding that subsection (b) of Section 51-12-33 does not apply unless there is an allegation or factual issue as to plaintiff's fault (R. 1125), is to determine the Legislature's intent when it amended Section 51-12-33 in the above manner. The question is whether the Legislature simply clarified the law as it existed prior to the passage of S.B. 3, as some commentators and the plaintiff's bar have argued, see Michael L. Wells,

³ The 2005 amendment also requires a jury to consider the fault of non-parties when determining percentages of fault, see O.C.G.A. § 51-12-33(c)-(f), and codifies longstanding Georgia law prohibiting recovery by a plaintiff whom the jury finds to be 50 percent or more responsible for the injury or damages claims, see O.C.G.A. § 51-12-33(g); Union Camp Corp. v. Helmy, 258 Ga. 263, 267, 367 S.E.2d 796, 800 (1988) ("a tort plaintiff cannot recover if his negligence is greater than or equal to the negligence of the defendant"). These reforms are not pertinent to this appeal.

39 Georgia Law Advocate, Joint Tortfeasor Rules 18 (Spring/Summer 2005); or did it intend to make substantive changes to joint liability law and require apportionment whether or not the plaintiff was also at fault, as the plain language of the revised statute would appear to provide?

“The cardinal rule of statutory construction is to look for the intention of the General Assembly.” In the Interest of D.H., 285 Ga. 51, 54, 673 S.E.2d 191, 194 (2009), citing, inter alia, O.C.G.A. § 1-3-1(a) (“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.”), recon. denied (Feb. 23, 2009). “In ascertaining the true intention of the legislature, nothing is more pertinent than the legislature’s own declaration of the purpose of the act.” In re Interest of D.H. at 54, 673 S.E.2d at 194 (citations omitted).

Consistent with these principles is the following annotated language found in the caption of S.B. 3, stating the Legislature’s purpose behind the joint and several liability amendments in Section 12 of the Tort Reform Act of 2005:

To amend Title[] . . . 51 of the Official Code of Georgia Annotated, relating respectively to . . . torts, so as to provide for substantive and comprehensive revision of provisions regarding . . . liability in tort

actions in general . . . ; *to change provisions relating to apportionment of award according to degree of fault*

Ga. L. 2005 p. 1 (emphasis added). “The title *or caption* of an act . . . while no part therefore, may always be examined by the court when the act is doubtful, for the purpose of finding the legislative intent thereof.” Moore v. Robinson, 206 Ga. 27, 40, 55 S.E.2d 711, 721 (1949) (emphasis added) (citation omitted). The caption to S.B.3, while not wholly unequivocal, does exhibit an intention to *change* the substantive law relating to apportionment of damages, not merely clarify the law as it existed. Any equivocation in the stated purpose of the Act is eliminated, however, by a comparison of the language in the Act’s caption (“to change the provisions relating to apportionment of award according to degree of fault”) with the title of O.C.G.A. § 51-12-33 before it was amended by S.B. 3: “Apportionment of award according to degree of fault; individual liability.” That the very same language appears in both places, in conjunction with language found at the outset of the preamble – an Act intended to “provide for substantive and comprehensive revision of provisions regarding . . . liability in tort actions in general” – provides strong support for the conclusion that the Legislature intended to make substantive change to the apportionment provisions of Section 51-12-33(a).

Such a change is the predictable and reasonable next step in the ongoing evolution begun long ago in the 1863 Code away from indiscriminate application of the joint and several liability doctrine towards a more equitable approach that takes into account the fault of all persons for the injuries or damages experienced by the plaintiff in cases such as the one under scrutiny in this appeal.

II. O.C.G.A. § 51-12-33, as amended by the Tort Reform Act of 2005, requires apportionment of liability in multiple tortfeasor cases even if there is no allegation or evidence of plaintiff’s contributory negligence

Having determined that the Legislature intended to change the substance of O.C.G.A. § 51-12-33 when it enacted S.B. 3, the Court must next construe the amended Code section in a way that gives full effect to this intent. “It is always the duty of a court, in construing a statute, to ascertain and give full effect to the legislative intent.” Mason, 283 Ga. at 277, 658 S.E.2d at 609, citing Moore v. Robinson, *supra*. Another “cardinal rule,” after ascertaining the legislative intent and purpose in enacting a law, is to “give it [the enactment] that construction which will effectuate the legislative intent and purpose.” RadioShack Corp. v. Cascade Crossing II, LLC, 282 Ga. 841, 843, 653 S.E.2d 680, 683 (2007) (internal quotations and citations omitted), recon. denied (Dec. 14, 2007).

Section 12 of S.B.3 changed prior law relating to apportionment according to degree of fault by dividing up the former subsection (a) of Section 51-12-33, moving all references to apportionment into a new subsection (b), and making apportionment mandatory rather than permissive. Following, for easier visualization, is the statute as modified (new language underlined, old language struck through):

(a) Where an action is brought against ~~more than one person~~ one or more persons for injury to person or property and the plaintiff is ~~himself~~ 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, ~~may~~ shall ~~apportion its award of~~ apportion ~~damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if 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~~⁴ 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) ~~Subsection (a) of this Code section shall not affect venue provisions regarding joint actions.~~ 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.

⁴ All of the language struck through in subsection (a) except for the word “himself” was moved into the new subsection (b).

Before 2005, a jury was permitted to apportion damages in multiple tortfeasor cases only if the plaintiff was also at fault:

Where an action is brought against more than one person for injury to person or property and the plaintiff is himself 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, may apportion its award of damages among the persons who are liable

O.C.G.A. § 51-12-33(a) (1987). After the 2005 amendment, a jury is now required to apportion damages in all multiple tortfeasor cases, irrespective of the plaintiff's fault:

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

O.C.G.A. § 51-12-33(b) (2005). That apportionment is now required in this case is indicated by several important changes to the 1987 version of the statute.

First, the legislature removed the phrase “and the plaintiff is himself to some degree responsible for the injury or damages claimed” from former subsection (a) when it moved the remainder of that sentence to subsection (b). “The rules of statutory interpretation demand that [the Court of Appeals] attach significance to the Legislature’s action in removing the limiting language from a statute.” Cox v. Fowler, 279 Ga. 501, 502, 614 S.E.2d 59, 60 (2005) (citation omitted), recon. denied (June 30, 2005). “[W]here a statute is amended by omitting words, it must be presumed that the words were intentionally omitted.” Hodges v. Community Loan & Investment Corp., 234 Ga. 427, 429, 216 S.E.2d 274, 276 (1975) (citation omitted), reh’g denied (May 20, 1975). The omission of this reference to plaintiff’s fault signifies that the Legislature intentionally omitted those words because it intended subsection (b) to apply in multiple tortfeasor cases irrespective of whether plaintiff is also at fault.

Another critical revision is that the Legislature added the phrase “after reduction of damages pursuant to subsection (a) of this Code section, if any” immediately before the apportionment language. The placement of this additional phrase has significance. It expresses the intent that a jury factor its calculation of the percentage of plaintiff’s contributory fault into its damage apportionment calculation but only *if any* such contributory fault is found to exist. *If* the jury does not find *any* fault on the part of the plaintiff, it is still required to apportion damages among the defendants whom it finds liable. “The fundamental rules of statutory construction require [the court] 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.” Blue Moon Cycle, Inc. v. Jenkins, 281 Ga. 863, 864, 642 S.E.2d 637, 638 (2007) (citation and internal quotations omitted), recon. denied (Apr. 10, 2007). The trial court’s construction of subsection (b) – that comparative negligence must be an issue considered by the jury before it can proceed to apportion damages under subsection (b) – would render the second “if any” in revised subsection (b) “mere surplusage.” Thus, it cannot be reconciled with the above fundamental rule of statutory construction.

The final significant amendment to subsection (b) that pertains to this case is the legislature's substitution of the word "shall" in place of "may" in the former subsection (a), thus making apportionment mandatory rather than permissive. "The general rule is that 'shall' is recognized as a command, and is mandatory." Baylis v. Daryani, 294 Ga. App. 729, 730, 669 S.E.2d 674, 676 (2008) (citations omitted), cert. dismissed (March 9, 2009).

Read together, the above substantive modifications to 1987 apportion law "change the provisions relating to apportionment of award according to degree of fault" and allow a jury to apportion damages in this case even without any evidence of contributory fault by the plaintiff.

CONCLUSION

The GDLA respectfully submits that the trial court's order granting plaintiff/appellee's motion in limine, precluding counsel from mentioning or arguing apportionment of damages to the jury, refusing to charge the jury on apportionment, and presenting a general joint liability verdict form for the jury's should not be affirmed. The lower court's construction of O.C.G.A. § 51-12-33, as amended in 2005, is not supported by the plain and simple language the Legislature used to amend the statute. Furthermore, the court's construction fails

to give full effect to the clear intent of the Legislature to make substantive changes to the law to be applied in multiple tortfeasor cases that come within the purview of O.C.G.A. § 51-12-33, as this case does. Finally, the construction doesn't harmonize with the Legislature's longstanding resistance to the joint and several liability doctrine and ongoing evolution away from wholesale application of the joint and several liability in all multiple tortfeasor cases. For the above reasons, the lower court's ruling must be reversed.

Respectfully submitted this 9th day of February, 2010.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all interested parties to this action with a copy of **BRIEF OF AMICUS CURIA, GEORGIA DEFENSE LAWYERS ASSOCIATION** by depositing a copy of same in the United States Mail, in properly addressed envelopes with adequate postage affixed thereon to:

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