

**IN THE SUPREME COURT  
STATE OF GEORGIA**

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No. S22G0527

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GEORGIA CVS PHARMACY, LLC,

Appellant,

v.

JAMES CARMICHAEL.

Appellee.

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

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## **STATEMENT OF INTEREST**

The Georgia Defense Lawyers Association (GDLA) is an association of more than 1,000 lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, mainly for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, strengthening the adversary system of jurisprudence in our courts, and otherwise promoting improvements in the administration of justice. GDLA members routinely represent businesses and business owners in cases involving allegations of negligent security due to the criminal acts of a third party.

Given the increasing volume of negligent security cases coming before our courts, the GDLA, its members, and their clients have a significant interest in ensuring clear, consistent, and fair standards of law are correctly applied by both our trial and appellate courts. The ruling in this case, as it now stands, essentially adopts a strict liability approach to premises liability for third-party criminal acts – a standard which is not supported by Georgia law and which this Court has repeatedly cautioned Georgia courts not to impose. If allowed to stand, the decision below will transform Georgia proprietors, owners, and occupiers of real property across the State into insurers against the risk of potential crimes, even when those crimes were not—and could not have been—reasonably foreseen.

Accordingly, GDLA submits this brief in support of Appellant Georgia CVS Pharmacy, LLC.

## **INTRODUCTION**

This case affords this Court with the long-awaited opportunity to reel in the ever-expanding scope of liability being placed on Georgia businesses and property owners in negligent security cases involving third-party crime. Armed primarily with highly-charged and emotional but generalized and essentially meaningless statements that the CVS was in a “high-crime area” and evidence of three prior crimes involving two cash register robberies and a purse snatching in the parking lot with no deadly weapon, the Court of Appeals found CVS should have reasonably foreseen that an individual would come to its parking lot to conduct a personal electronics sale, for his own benefit and without notice to CVS, and be robbed and shot during the process. And even worse, the Court of Appeals somehow endorsed the illogical idea that the jury could reasonably and justly find that the armed robber and shooter was zero percent at fault for Plaintiff’s injuries.

Recognizing the importance of these issues, this Court has expressed particular concern surrounding the legal test for determining whether the violent criminal act of a third-party stranger was reasonably foreseeable and whether a rational fact finder may determine that an intentional tortfeasor whose actions directly caused the plaintiff’s injuries bears no fault at all for those injuries.

Though enterprising plaintiffs' lawyers have worked for decades to turn premises owners and occupiers into insurers of the safety of those entering their property, that has never been and cannot be the law. Rather, Georgia law requires plaintiffs to present evidence that the owner or occupier knew or should have known, through the exercise of ordinary care, of an unreasonable risk of harm existing on the premises. And in the context of third-party criminal acts, a plaintiff must do so by showing the owner or occupier actually knew of prior, substantially similar third-party criminal acts in the area where the plaintiff's incident occurred. Any other rule would be untenable and would amount to strict liability.

Similarly, Georgia courts cannot sanction ludicrous results such as the one in the case below, in which a jury finds that the person who **intentionally shot the plaintiff while robbing him** had **no fault** for the plaintiff's claimed injuries. There is simply no good-faith argument or interpretation of the facts or the law which could allow such a verdict to stand. The intentional, malicious, and calculated manner in which the shooter caused the plaintiff's injuries was not even disputed, nor could it have been. To allow the jury to apportion zero fault to the shooter here is nonsensical, eviscerates the scheme of mandatory apportionment of fault between parties and nonparties by jurors under O.C.G.A. § 51-12-33, and represents an illegal verdict which cannot be allowed to stand.

GDLA thus addresses the third and fourth questions posed by the Court to the parties.

## ARGUMENT

### **I. Evidence of a Property Owner or Occupier’s Knowledge of Prior Substantially Similar Crimes on the Premises is Required to Prove a Criminal Act was Reasonably Foreseeable**

A property owner or occupier has a legal duty to exercise ordinary care in keeping its premises safe, but it is not the insurer of an invitee’s safety. *Bolton v. Golden Bus., Inc.*, 348 Ga. App. 761, 762 (2019). And the duty to exercise ordinary care only extends to protecting invitees from unreasonable risks of harm of which the property owner or occupier has superior knowledge. *Id.*; *see also Fair v. CV Underground, LLC*, 340 Ga. App. 790, 792 (2017) (“But even if an intervening criminal act may have been reasonably foreseeable, the true ground of liability is the *superior* knowledge of the proprietor of the existence of a condition that may subject the invitee to an unreasonable risk of harm.”) (citations omitted).

Before a landowner or occupier can be held liable for a third party’s criminal act, a plaintiff has the burden of proving that the criminal act was reasonably foreseeable, and that the owner or occupier failed to exercise ordinary care to protect its invitees from such criminal act. *Days Inns of America, Inc. v. Matt*, 265 Ga. 235, 235 (1995). As this Court has stated, “without foreseeability that a criminal act will occur, no duty on the part of the proprietor to exercise ordinary

care to prevent that act arises.” *Id.* Thus, the prerequisites for liability in a negligent security case are: (1) reasonable foreseeability of a particular risk of crime and (2) superior knowledge of such risk of crime.

**A. Prior Criminal Acts on the Premises Must be “Substantially Similar” to Serve as a Potential Basis for “Constructive Knowledge” of an Unreasonable Risk of Harm to Invitees**

To determine whether a criminal act was reasonably foreseeable, the legal test is that “the incident causing injury to the plaintiff must be substantially similar in type to the previous criminal activities occurring on or near the premises so that a reasonable person would take ordinary precautions to protect his or her customer or tenants against the risk posed by that type of activity.” *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785, 786 (1997). Foreseeable acts are “those which are **probable**, according to ordinary and usual experience, those which, because they happen so frequently, may be expected to happen again.” *Boone v. Udoto*, 323 Ga. App. 482, 484 (2013) (emphasis added; quotation omitted). As our courts have recognized, “[i]t would impose too heavy a responsibility to hold [a property owner or occupier liable] to guard against what is unusual and unlikely to happen, or what is only remotely and slightly probable.” *Id.* Summary judgment cannot be avoided when the crime at issue was unforeseeable. “Without a showing of substantial similarity, the evidence [of prior crimes] is irrelevant as a matter of law

and there is nothing upon which the court's discretion can operate." *Retail Prop. Tr. v. McPhaul*, 359 Ga. App. 345, 348 (2021) (quotation omitted).

To assess "substantial similarity," "the court must inquire into the location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question." *Sturbridge Partners*, 267 Ga. at 786. While the prior criminal activity does not have to be identical to the crime at issue, it must be "sufficient to attract the landlord's attention to the dangerous condition which resulted in the litigated incident." *Vega v. La Movidia, Inc.*, 294 Ga. App. 311, 313 (2008). Of course, the "substantial similarity" test is relative and as such, Georgia courts have varied as to what constitutes a substantially similar crime to establish reasonable foreseeability. But the law is clear as to what "substantially similar" is not.

Substantially similar crime cannot be shown by evidence of generalized crime in a given area, nor can it be shown by prior police reports or crime statistics showing substantially similar crimes occurred, absent evidence of the defendant's actual knowledge of the crime in those reports or statistics. *See, e.g., Lau's Corp., Inc. v. Haskins*, 261 Ga. 491, 493 (1991) (finding no duty exists to warn invitees of a "generalized risk of crime"); *Agnes Scott College, Inc. v. Clark*, 273 Ga. App. 619, 623 (2005) (noting general crime statistics cannot create a question of fact as to the foreseeability of a plaintiff's attack); *SunTrust Banks, Inc. v. Killebrew*, 266

Ga. 109, 109 (1995) (holding that there is “no authority in this State imposing a duty upon a property owner to investigate police files to determine whether criminal activities have occurred on its premises”); *Med. Ctr. Hosp. Auth. v. Cavender*, 331 Ga. App. 469, 477 (2015) (noting a plaintiff cannot use police reports to establish reasonable foreseeability, absent evidence of the defendant’s knowledge of the crimes contained in the reports).

Additionally, substantially similar crimes generally are not those which occurred too far away from the premises at issue, crimes which occurred on one part of the premises when the incident involved crime on another part, or non-violent crimes when the incident at issue involves violent crime. *See, e.g., Gordon v. Starwood Hotels & Resorts Worldwide, Inc.*, 821 F.Supp.2d 1308, 1314 (N.D. Ga. 2011) (acknowledging that the plaintiff had failed to present evidence that prior crime had occurred “in such proximity to the [defendant] so as to put the [defendant] on notice of the possibility of criminal activity occurring [on defendant’s premises].”); *McCoy v. Gay*, 165 Ga. App. 590, 592 (1983) (holding that events occurring inside an inn “would have no relevancy or probative value with regard to appellees’ knowledge of that “dangerous condition” in parking lot.”); *Ritz Carlton Hotel v. Revel*, 216 Ga. App. 300, 303 (1995) (finding evidence of non-violent crimes such as property theft insufficient to establish that Defendant knew or should have known that its guests were at risk of a violent criminal sexual

attack); *Baker v. Simon Prop.*, 273 Ga. App. 406, 407-408 (2005) (holding evidence of prior thefts and damage to unoccupied vehicles, as well as evidence of the theft of vehicles from the parking lot to be insufficient to create a question of fact as to whether a carjacking and shooting was reasonably foreseeable to the defendant).<sup>1</sup>

Our courts have not found, and cannot find, substantial similarity sufficient to establish reasonable foreseeability of crime in cases involving “one-off” or sporadic attacks—such as the robbery and shooting in this case—where the only prior reported crimes on the premises consisted of two cash register robberies and a non-aggravated purse snatching in the parking lot without a deadly weapon. *See Shadow v. Fed. Express Corp.* 359 Ga. App. 772, 778-79 (2021) (holding summary judgment was proper in a case involving a mass shooting at a packaging facility despite evidence of prior crime including incidents of workplace violence and a domestic violence suicide at another facility); *Doe v. Prudential-Bache/A.G. Spanos Realty Partners*, 268 Ga. 604, 604 (1997) (holding a rape and robbery in a

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<sup>1</sup> While this Court noted in *Sturbridge Partners* that nonviolent burglaries could nevertheless, under some circumstances, be deemed to put a property owner on notice that “an unauthorized entry might occur while an apartment was occupied and personal harm to a tenant could result,” 267 Ga. at 787, n.1, that distinction does not apply to the facts of this case. *See also Doe v. Prudential-Bache/A.G. Spanos Realty Partners, L.P.*, 268 Ga. 604 (1997) (distinguishing *Sturbridge Partners* and affirming grant of summary judgment to defendant where plaintiff tenant was raped in common area of apartment complex and only prior property crimes including theft on the premises were known to the defendant).

parking lot was unforeseeable as a matter of law where the only evidence of prior crime was property crimes such as automobile thefts and acts of vandalism).

**B. To Establish Liability, There Must be *Actual Knowledge of Prior Substantially Similar Crime***

While GDLA will not repeat the historical analysis of Georgia’s premises liability case law contained in CVS’s merits brief, the test for imposing liability on a defendant in a traditional slip or trip and fall case is different from the test for imposing liability on a defendant for the criminal acts of a third party. And this Court has addressed that distinction by noting “[w]hen a premises liability cause of action is based on a “trip and fall” or “slip and fall claim[,]” the plaintiff must prove that the defendant had actual or constructive knowledge of the hazard and that the plaintiff lacked knowledge of such hazard despite exercising ordinary care. *American Multi-Cinema, Inc. v. Brown*, 285 Ga. 442, 444 (2009).

Over the years, however, Georgia courts (and plaintiffs) began to apply the constructive knowledge component from traditional trip-and-slip-and-fall premises cases to negligent security cases. This resulted in courts adopting and imposing a true legal fiction in such cases in which the “hazard” or “unreasonable risk of harm” was deemed to be a third-party criminal actor, and “constructive” knowledge of that hazard or risk of harm could be established by showing the property owner or occupier knew of prior, substantially similar acts on the premises. *See McCoy*, 165 Ga. App. at 590; *Burdine v. Linquist*, 177 Ga. App. 545

(1986). Under this analysis, if there was evidence of prior substantially similar crime on the premises, the property owner or occupier would be deemed to have had constructive knowledge that the crime at issue would occur on its premises, which was deemed to amount to an unreasonable risk of harm to invitees. Though Georgia's appellate courts did not always fully discuss the "actual" versus "constructive" knowledge distinction in negligent security cases, it was always there, because negligent security cases are just a species of premises liability cases. *See Sturbridge Partners*, 267 Ga. at 785; *Savannah College of Art & Design v. Roe*, 261 Ga. 764, 765 (1991), *overruled in part by Sturbridge Partners*, 267 Ga. at 786 (analyzing plaintiff's negligent security action under O.C.G.A. § 51-3-1).

Given that O.C.G.A. § 51-3-1 has not been amended since 1933, it is unclear why Georgia's appellate courts suddenly began to consider the acts of third-party criminals as a "hazard" on the premises and deemed constructive knowledge of the risk of harm posed by third-party criminal actors to be sufficient to impose liability on property owners and occupiers. But even if constructive knowledge of the unreasonable risk of harm to invitees is enough to impose liability on a property owner or occupier in a negligent security context, there must be evidence of **actual** knowledge of prior, substantially similar crimes on the premises or other actual knowledge that the crime at issue would occur. As this Court emphasized in *Sturbridge Partners*, a negligent security case involving a rape at an apartment

complex, “[t]he issue is not the foreseeability of the rape itself, **but whether [the defendant] had actual knowledge of the prior burglaries and, because of that knowledge, should have reasonably anticipated the risk of personal harm to a tenant which might occur in the burglary of an occupied apartment.**” 267 Ga. at 787 (emphasis added).

Although a handful of decisions have stated that constructive knowledge of a danger is sufficient, in each of those decisions, the evidence clearly established the defendant’s actual knowledge of prior substantially similar crime. *See Walker v. Aderhold Props.*, 303 Ga. App. 710, 713 (2010) (en banc) (despite stating in dicta that “[a] landlord need not have actual knowledge of criminal conduct before it may be held liable . . . [,]” the Court’s holding was based on the defendant’s actual knowledge of prior substantial similar crime which included evidence of Defendant’s security guards receiving written reports of prior burglaries and evidence of a prior assault on a security guard); *Double View Ventures v. Polite*, 326 Ga. App. 555, 556,560 (2014) (quoting *Aderhold* for the proposition that actual knowledge of crime is unnecessary, but acknowledging undisputed evidence of at least two prior violent crimes reported to the defendant management company and reports of security violations to the management company before Plaintiff was physically attacked in her apartment complex); *TGM Ashley Lakes, Inc. v. Jennings*, 264 Ga. App. 456, 457-459, 462 (2003) (while stating “constructive

knowledge of danger is sufficient” in a case in which Plaintiff was strangled to death by her apartment complex’s maintenance employee, the Court held that the jury could find Plaintiff’s attack was reasonably foreseeable based on Defendant’s actual knowledge of prior substantially similar crime including reports of crime to Defendant’s management, staff meetings where management discussed similar crimes, and Defendant’s knowledge of the maintenance employee’s criminal history). Indeed, each of those cases, when viewed through the lens of how a property owner’s liability must be analyzed under Georgia law, actually stand for the proposition that a proprietor’s constructive knowledge of the risk of harm to invitees from violent crime on the premises may be shown through evidence of **actual** knowledge of substantially similar prior crimes on the premises.

Yet far exceeding the few cases where our courts have said in passing that constructive knowledge is sufficient are the cases which correctly apply the test of actual knowledge of prior substantially similar crime. *See, e.g., Sturbridge*, 267 Ga. at 787 (noting “[t]he issue is not the foreseeability of the [crime] itself, but whether [defendant] had actual knowledge of [prior crime]”); *Hill v. MM Gas & Food Mart, Inc.*, 351 Ga. App. 708, 712 (2019) (finding the plaintiff failed to meet his burden of establishing reasonable foreseeability when the only evidence of prior crime was a previous police report and no evidence that the landowner defendant had actual knowledge of the reported crime); *Bolton*, 348 Ga. App. at

763 (finding a property owner’s lack of knowledge of prior crimes warranted summary judgment and that the general existence of crime in an area alone does not raise a question of fact as to a proprietor’s knowledge); *Luong v. Tran*, 280 Ga. App. 15, 18 (2006) (finding no evidence of substantially similar crime existed when Plaintiff failed to establish that Defendant “*knew* of the prior criminal activity” rather than evidence that prior crime had merely occurred); *Martin v. Six Flags Over Georgia II, L.P.*, 301 Ga. 323, 332 (2017) (holding that the gang related attack on Plaintiff was reasonably foreseeable considering evidence of Defendant’s actual knowledge of prior gang infiltration and gang concerns plaguing the park); *Baker*, 273 Ga. App. at 407 (noting prior police records were inadmissible to establish reasonable foreseeability as Plaintiff failed to show that Defendants were aware of the prior crime reported).

What the plaintiff-appellee argued in the case below—and now argues to this Court—is a change in the applicable standard of proof that his attorneys and other members of the plaintiff’s bar have tried to argue into existence for years. The argument essentially is a calculated attempt to dilute the standard of proof imposed on plaintiffs in negligent security cases by conflating the “actual or constructive knowledge” standard with the way a plaintiff can show the requisite “constructive” knowledge. The result of the scheme urged by the plaintiff-appellee

in this case and accepted by the Court of Appeals amounts to “double counting” the word “constructive.”

If a premises owner has **actual** knowledge of the particular hazard or risk of harm to persons entering its premises, then there is no need for the plaintiff to prove constructive knowledge. The premises owner’s actual knowledge of the hazard or risk of harm is enough, so long as the other elements of a negligence claim (i.e., duty, proximate cause, and damages) are met. But in cases where the premises owner lacks actual knowledge of the hazard in question, the plaintiff may recover by showing the premises owner had “constructive” knowledge of the hazard or risk of harm.

The key here is that the “actual vs. constructive” inquiry is applied to the property owner or occupier’s knowledge **of the relevant risk of harm** to persons entering the premises. That, this Court held long ago, is established by proving that the property owner or occupier knew of prior, substantially similar criminal acts on the premises. That still would not be **actual** knowledge of the risk of harm to the plaintiff, because the **risk to the plaintiff** is not the fact that other crimes occurred on the premises previously, but the specific individual(s) who meant to do the plaintiff harm at the time of the incident in question.

If constructive knowledge of the hazard or risk of harm to the plaintiff can be shown by constructive knowledge of other, prior crimes, that necessarily means

that the property owner or occupier can be held liable for the intentional acts of an unrelated third party without actual knowledge of anything other than the general proposition that people sometimes commit crimes and that some areas tend to have more crime than others. If that is not converting a premises owner or occupier into an insurer of invitees' and licensees' safety, it is hard to fathom what would be. In any event, that is not the law in Georgia.

Despite what our courts may have stated in dictum, the legal test for determining whether a criminal act was reasonably foreseeable always has been—and should continue to be—whether the defendant had actual knowledge of prior substantially similar crime or actual knowledge of a propensity for such crime. This Court should clarify the nature of the evidence required to establish constructive knowledge in cases such as this one to avoid continued inconsistencies and error moving forward.

**II. A Verdict Apportioning Zero Fault to the Criminal Who Undisputedly Robbed and Shot the Plaintiff Defies Logic, is Illegal, and is Unsupportable**

At trial, the jury heard evidence that an unknown assailant jumped into plaintiff James Carmichael's car in the parking lot of CVS, held a gun to Mr. Carmichael's head, threatened to kill him, demanded his money, and ultimately shot and injured him. *Georgia CVS Pharmacy, LLC v. Carmichael*, 362 Ga. App. 59, 60 (2021). After hearing this evidence, the jury had to assign percentages of

fault between Carmichael, CVS, the individual who Carmichael asked to meet him in the CVS parking lot for a personal electronics sale, and the criminal assailant who shot Carmichael. The jury ultimately assigned 95% fault to CVS, 5% fault to Carmichael, and 0% fault to the assailant who robbed Carmichael and pulled the trigger, shot, and injured Carmichael during the course of robbing him. *Id.* at 62. The Court of Appeals held while “the jury’s decision to apportion no fault to the shooter **may well be considered unusual**[,] the verdict was “not inconsistent, ambiguous, or vague so as to be void.” *Id.* at 69, 72 (emphasis added).

At one time, joint tortfeasors were held jointly and severally liable under Georgia law. That changed in 2005 with the enactment of the current version of the apportionment statute, O.C.G.A. § 51-12-33. That statute now provides that “[i]n 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.” O.C.G.A. § 51-12-33(c). While the Court of Appeals correctly acknowledged that the apportionment statute does not require the jury to assign a minimum percentage of fault to any individual or entity, it did not offer any coherent explanation to show the jury surely *considered* each person or entities’ faults when this case was tried. *Carmichael*, 362 Ga. App. at 70. The Court of Appeals’ explanation was that there was evidence that Carmichael attempted to shoot the assailant first, thus it

was “possible that the jury either found that the robber ended up shooting in self-defense and was worthy of no fault or that the jury instead assigned the amount of fault it would have assigned to the shooter to Carmichael instead.” *Id.* at 71.

But that is wholly illogical. If the jury had truly determined that the assailant acted in self-defense, thereby committing no wrongful act, it therefore follows that CVS committed no wrongful act. CVS cannot be found liable without any underlying wrongdoing. Similarly, if the jury had determined that no act of the assailant proximately caused Carmichael’s injuries, there would be no reasonably foreseeable danger to invitees against which for CVS to guard.

The Court of Appeals cites *Lucas v. Charles Schwab & Co.*, 354 Ga. App. 522, 525 (2020), as support for the proposition that a jury verdict is not void when evidence could reasonably be construed to uphold it. But there is no reasonable way to uphold the verdict here. Just as our courts have granted plaintiffs a new trial when a jury improperly awards zero damages in a case of liability, so, too, should our courts grant defendants a new trial when a jury improperly assigns zero fault to a criminal assailant who undisputedly and intentionally caused the plaintiff’s injuries. *See, e.g., Moore v. TCI Cablevision of Ga., Inc.*, 235 Ga. App. 796, 799 (1998) (granting a new trial to plaintiffs where the jury found zero damages despite undisputed evidence that the plaintiffs suffered injuries not attributable to anything but the car accident at issue).

Georgia courts are neither the first nor only courts faced with apportionment challenges involving allocation of fault to intentional tortfeasors in negligent security cases. Courts in other jurisdictions have held that it is irrational, illogical, and unsupportable to assign zero or little fault to an intentional tortfeasor who caused a plaintiff's injuries. As one court in Louisiana has stated, apportionment of fault to the intentional tortfeasor ensures that "[n]o guilty party slithers away aloof and untouched by the horror of the events" and a properly apportioned verdict "proves that the system works." *Muse v. Dunbar*, 716 So.2d 110, 116 (La. Ct. App. 1998).

California has an apportionment statute like Georgia's where jurors are tasked with allocating fault among all potential wrongdoers. Cal. Civ. Code § 1431.2(a). Like Georgia's apportionment statute, nothing within California's apportionment statute *requires* jurors to allocate a certain minimum percentage of fault to each defendant or non-party. *Id.* Yet California courts have refused to uphold verdicts which apportion minuscule fault percentages—even when higher than zero percent as the jury awarded in this case—to criminal assailants. In one case involving the assault and rape of a plaintiff in the garage of her apartment building, the court ordered a new trial after the jury allocated 95% of fault to the plaintiff's landlord and only 4% of fault to the rapist. *Pamela B. v. Hayden*, 31 Cal.

Rptr. 2d 147, 149 (Cal. Ct. App. 1994).<sup>2</sup> Recognizing the importance of common sense, the court exclaimed, “[r]ationally, however, we cannot leave our common sense on the courthouse steps, which is what we would have to do to affirm the allocation made by the jury in this case.” *Id.* at 159. The court added:

[h]ow can the man who grabbed [Plaintiff] from behind, held a knife to her throat, threatened to kill her, forced her to strip, forced her to orally copulate him, raped her again, stuffed her into the trunk of a car and left here there . . . be only four percent at fault for her injuries? **To ask the question compels the answer. He cannot.**

*Id.* at 160 (emphasis added).

Alaska is another state with an apportionment statute like Georgia’s which requires the jury to consider the fault of all persons who may be responsible. Like the California court, when the Alaska Supreme Court encountered an appeal involving a sexual assault case in which the jury apportioned no fault to the sexual predator, the court ordered a new trial, finding the allocation of fault to be irrational and against the weight of the evidence. *State Dep’t of Health and Soc. Services v. Mullins*, 328 P.3d 1038, 1043 (Alaska 2014).

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<sup>2</sup> The California Supreme Court granted review and superseded the court of appeals’ opinion in *Pamela Lee B. v. Hayden*, 880 P.2d 112 (Cal. 1994), and then dismissed review and remanded to the court of appeals, 889 P.2d 539 (Cal. 1995). This case is merely cited by GDLA as one of many examples where courts have addressed apportionment and void verdict issues similar to the ones before this Court, rather than as legal precedent.

But this Court need not go outside of Georgia—or even this Court’s own decisions—to confirm that a verdict which apportions no fault to a criminal assailant who ambushed a plaintiff, tried to rob him, and then shot and injured him, defies all logic and notions of common sense. In *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359 (2012), another negligent security case, this Court held that a criminal assailant who “intentionally abduct[s], rob[s], and assault[s] a hotel guest **is, at the very least, partially at ‘fault’** for the brutal injuries inflicted by the assailant on that guest.” *Id.* at 359 (emphasis added).

As one last attempt to uphold the ludicrous judgment below, the Court of Appeals held that any error was harmless under the Supreme Court of Georgia’s decision in *Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC* and under precedent dating before Georgia’s new apportionment statute was enacted.

*Carmichael*, 362 Ga. App. at 71 (citing *Alston & Bird, LLP v. Hatcher Mgmt. Holdings*, 312 Ga. 350, 356 (2021), and *Schriever v. Maddox*, 259 Ga. App. 558, 561 (2003)).<sup>3</sup> The Court of Appeals incorrectly held that the determination of

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<sup>3</sup> In CVS’s petition for certiorari to the Georgia Supreme Court, CVS sought review on the holding in *Carmichael* that a case is “brought against more than one person” only when more than one defendant remains in the case at the time of trial. (Petition for Writ of Certiorari filed Dec. 29, 2021, pp. 24-26). While this Court did not directly include the “brought against” question in its four enumerated issues posed to the parties, the Court cannot reach issue number four, regarding apportionment of fault, without first addressing when a case is “**brought** against more than one person.” See *Carmichael*, 362 Ga. App. at 72, citing former O.C.G.A. § 51-12-33(b) (emphasis supplied). Although O.C.G.A. § 51-12-33 was

whether an action is “brought against more than one person” is made at the time of trial, rather than when the action is first “brought” or filed and concluded that apportionment was improper because “CVS was the only named defendant in the case by the time the case proceeded to trial.” *Carmichael*, 362 Ga. App. at 72. In reaching that holding, the Court of Appeals incorrectly interpreted and applied the plain language of the apportionment statute.

To determine the meaning of a statute, the Georgia Supreme Court “presume[s] that the General Assembly meant what it said and said what it meant.” *Deal v. Coleman*, 294 Ga. 170, 172 (2013) (internal quotation marks and citation omitted). The text of a statute must be read “in its most natural and reasonable way, as an ordinary speaker of the English language would.” *Zaldivar v. Prickett*, 297 Ga. 589, 591 (2015) (internal quotation marks and citation omitted). Here, the statutory text of subsection (b) of Georgia’s apportionment statute must be afforded its “plain and ordinary meaning.” *Coleman*, 294 Ga. at 172.

The plain text of O.C.G.A. § 51-12-33(b) states that “[w]here an action is **brought against one or more persons** for injury to person or property, the trier of fact . . . **shall** . . . apportion its award of damages among the person or persons who are liable according to the percentage of fault of each person.” Ga. L. 2005, p. 1, §

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amended by the General Assembly in 2022, this issue will remain significant for some time since the amended statute is not retroactive.

1/S.B. 3 (former O.C.G.A. § 51-12-33(b)) (emphasis added). Reasonable minds simply cannot differ as to what it means to “bring” an action. Black’s Law Dictionary defines “bring an action” as “to sue; institute an action.” Black’s Law Dictionary (11th ed. 2019) (“bring an action”). Our appellate courts have similarly recognized that to “bring” an action means to initiate legal proceedings in a lawsuit. *See CL SNF, LLC v. Fountain*, 355 Ga. App. 176, 182-83 (2020), *rev’d on other grounds*, 863 S.E.2d 116 (Ga. 2021).

Reading the plain text of Georgia’s apportionment statute alongside legal and customary definitions of “brought against,” as our rules of statutory construction require, there can be no other conclusion but that the version of O.C.G.A. § 51-12-33(b) applicable to this case requires a jury to apportion fault among at-fault parties and nonparties so long as a legal action was **initially** brought against more than one defendant. It is irrelevant how many defendants remain at the time of trial. Had the General Assembly meant for apportionment under subsection (b) not to only apply in cases such as this one, the General Assembly would have written the statute that way. If Georgia courts are required to read the provisions of O.C.G.A. § 51-12-33(b) strictly and with no room for reasonable interpretation, *see Alston & Bird*, 312 Ga. at 356, that must apply here as well. “Brought against” simply does not mean “pending at the time of trial.” Thus, the courts below erred

in concluding that a verdict apportioning zero fault to the intentional tortfeasor was harmless error.

### **CONCLUSION**

For these reasons, this Court should reverse the judgment of the Court of Appeals and enter judgment for CVS. Furthermore, this Court should clarify Georgia law on the issues outlined herein pertaining to the applicable standard for proving a premises owner or occupier's duty to invitees and the unreasonableness of a jury verdict apportioning no fault whatsoever to an intentional tortfeasor who undisputedly proximately caused the plaintiff's claimed injuries by committing a violent, criminal act against him.

Respectfully submitted this 7<sup>th</sup> day of December, 2022.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of December, 2022, I served the foregoing **BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE** upon the following counsel of record by filing a true and correct copy thereof with the Clerk of Court using the Court's electronic filing system, as permitted by Supreme Court of Georgia Rule 13, as well as by e-mail, addressed as follows:

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