

IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S17A0811

JOHNSON STREET PROPERTIES, LLC,

Petitioner,

v.

CYNTHIA CLURE,

Respondent.

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

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Despite repeated holdings and admonitions from this Court about the applicability of the apportionment statute, Ms. Clure once again questions the statute and invites this Court to abolish it. As with all of the prior challenges, the Court should decline that invitation.

I. INTRODUCTION AND STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (“GDLA”) is an association of more than 900 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice.

The GDLA and its members are interested in ensuring that the principles of the Constitution of Georgia are clearly defined and uniformly applied. Furthermore, the GDLA is interested in ensuring fairness in the tort system by, among other things, supporting the notion that fault is properly allocated among parties and non-parties.

In 2005, the Georgia General Assembly passed a tort reform package, including the abolishment of joint and several liability and also a substantial amendment to O.C.G.A. § 51-12-33 allowing for the assessment of fault of non-parties in any civil action. The Legislature made it clear that in assessing percentages of fault, the trier of fact *shall* consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was named as a party to the lawsuit.¹ Pursuant to O.C.G.A. § 51-12-33, a party can only be held liable for the specific damages that the party caused. The party is not, and cannot be held liable for damages that it did not cause. The purpose and effect of O.C.G.A. § 51-12-33 is to allow a jury to consider everyone who may be at fault.² Apportionment, under O.C.G.A. § 51-12-33, only allows a jury to levy damages against a party for the damages for which it is determined to be at fault. O.C.G.A. § 51-12-33 ensures that one party

¹ O.C.G.A. § 51-12-33(c).

² *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 365 (2012).

is not liable for more than his fair share of damages, and accordingly is necessary for maintaining a fair and just judicial system.

All parties to a lawsuit in Georgia are entitled to apportionment of damages. All persons are entitled to know that they will not bear the brunt of more damages than they are responsible for.

All citizens of Georgia and civil litigants involved in cases in this state have an interest in ensuring fair and reasonable results in civil cases. This necessarily requires that courts and juries apportion damages, even to non-parties, so that litigants are not held liable for damages arising from actions outside the defendant's control and for which he is not responsible. Furthermore, O.C.G.A. § 51-12-33 ensures that non-parties cannot be held liable to pay any damages and findings of fault cannot be used against them in any other case.³

In an attempt to destroy this fair and equitable system, Ms. Clure seeks to cast herself as the champion of the non-parties and claims that the Constitutional rights of *others* are affected by the application of the apportionment statute. While Ms. Clure attempts to dodge the fact that she does not have standing to make these arguments, she nonetheless tries to invoke the rights of the non-parties, the Smiths, arguing that their Constitutional rights have been violated.

³ O.C.G.A. § 51-12-33(f)(1) and (2).

Despite the novel argument, there is no legal support for the claim that O.C.G.A. § 51-12-33 violates the due process or equal protection clauses of either the Georgia or United States Constitutions. Meanwhile, Johnson Street correctly notes that neither Ms. Clure nor the Smiths suffered any deprivation of a protected interest and that the Smiths are treated the same as any other non-party by O.C.G.A. § 51-12-33.

This Court already held that O.C.G.A. § 51-12-33 does not violate a Plaintiff's due process or equal protection rights and is supported by a rational basis.⁴ This Court should uphold the trial court and follow its own precedent extending its prior holding to non-parties.

II. ARGUMENT AND CITATION OF AUTHORITY

This case arises from an incident that occurred on March 30, 2013 at the Johnson Street Apartments in Bremen, Georgia owned by Johnson Street, LLC. Ms. Clure was injured when a tree, which had fallen on the roof of one of the apartments from an adjacent property, was pulled down by another tenant, swung loose, and hit her.

Johnson Street filed a notice of fault of non-parties identifying the adjacent property owners, the Smiths. Ms. Clure moved for partial summary judgment as to Johnson Street's notice of fault of non-parties on two grounds: first, that

⁴ *Couch*, 291 Ga. at 367.

O.C.G.A. § 51-12-33 violates the non-party's constitutional rights to due process and equal protection; and second, that the evidence did not support a finding that the non-party was at fault. The trial court rejected Ms. Clure's first argument and held that O.C.G.A. § 51-12-33 was not unconstitutional as applied to non-parties. However, the trial court granted Ms. Clure's motion finding there was no support that the non-party was at fault. The trial court separately certified both rulings for immediate review. Johnson Street appealed the grant of Ms. Clure's motion and Ms. Clure cross-appealed the constitutionality ruling. Ms. Clure then moved to transfer the appeals to this Court. On September 21, 2016, the Court of Appeals granted Ms. Clure's motion and transferred the case to this Court.

"The purpose of the apportionment statute is to have the jury consider all of the tortfeasors who may be liable to the plaintiff together, so their respective responsibilities for the harm can be determined."⁵ O.C.G.A. § 51-12-33(b) provides in relevant part "that 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 [reflecting a plaintiff's responsibility], if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person."

⁵ *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 365 (2012).

In *Couch v. Red Roof Inns, Inc.*, this Court held that a plaintiff's constitutional rights to a jury trial, due process, or equal protection are not violated by requiring a jury to apportion damages pursuant to O.C.G.A. § 51-12-33.⁶ This Court held that O.C.G.A. § 51-12-33 "neither violates a plaintiff's right to due process because it is unconstitutionally vague or because it destroys a vested property right."⁷ Furthermore this Court held that O.C.G.A. § 51-12-33 is "certainly supported by a *rational basis* of apportioning damages among all tortfeasors responsible for harming a plaintiff in an efficient and orderly manner."⁸ Ms. Clure's arguments are at odds with common sense, fairness, and prior precedent, this Court should affirm the trial court's ruling that O.C.G.A. § 51-12-33 does not violate the Georgia or United States Constitutions.

A. Plaintiff/Cross Appellant Ms. Clure does not have standing to challenge the constitutionality of O.C.G.A. 51-12-33.

Ms. Clure alleges that O.C.G.A. § 51-12-33 is unconstitutional and violates due process rights under the Georgia and United States Constitutions because it does not afford non-parties notice, and therefore, "a nonparty may be formally accused and formally declared at fault for the serious injuries or death of

⁶ *Couch*, 291 Ga. at 367.

⁷ *Id.*

⁸ *Id.* (emphasis added).

another, all without ever being informed.”⁹ Specifically, in this case, Ms. Clure claims that it is the adjacent landowners, the Smiths, whose constitutional rights have been violated. Ms. Clure does not claim that her rights have been violated in any way, as that issue has already been decided. Without claiming any infringement on her rights, Ms. Clure lacks standing to bring this constitutional challenge.

Georgia law has long held “that before a statute can be attacked by anyone on the ground of its unconstitutionality, he must show that its enforcement infringes upon some right of his and that the infringement results from the unconstitutional feature of the statute upon which he bases his attack.”¹⁰ Ms. Clure argues that O.C.G.A. § 51-12-33 violates the Smiths’ rights because they may suffer reputational damage upon the entry of a speculative verdict in the underlying matter finding them at fault. And that if such verdict is entered, the Smiths may further suffer pecuniary damage by having to report it to their insurance.¹¹ Even if it were possible that such damages would occur, any infringement of constitutional rights would be suffered by the Smiths, and not by Ms. Clure. Accordingly, Ms. Clure does not have standing to bring this claim.

⁹ Brief of Plaintiff/Cross-Appellant Cynthia Clure, p. 10.

¹⁰ *Smith v. State*, 248 Ga. 828, 830 (1982); *See also Atlanta Taxicab Co. Owners Ass’n, Inc. v. City of Atlanta*, 281 Ga. 342, 345 (2006).

¹¹ Logically this argument makes no sense. While non-parties may appear on a verdict form, they do not appear on a judgment and are not subject to any loss (or anything else) based on the entry of a judgment on which they do not appear.

Regardless, no such verdict has been entered against the Smiths, or anyone else, and accordingly no such damages have occurred. The infringement of rights alleged by Ms. Clure is purely speculative. This Court previously held in *Kumar v. Hall* that a party lacks standing where its argument rests on hypothetical situations that do not pertain to the party.¹²

In the present case, Ms. Clure does not argue that her interests or rights will be affected by O.C.G.A. § 51-12-33 but rather that the Smiths' right to notice is violated. "In order to challenge a statute or an administrative action taken pursuant to a statute, the plaintiff must normally show that it has interests or rights which are or will be affected by the statute or the action."¹³

Quite simply, in the words of this Court, "[a] party will not be heard to complain of the violation of another person's constitutional rights."¹⁴ This Court should dismiss Ms. Clure's claims for lack of standing.

¹² *Kumar v. Hall*, 262 Ga. 639, 644 (1992) (Guardian of mentally incompetent ward could not base equal protection challenge to statute extending limitations period for medical malpractice actions to actions brought on behalf of persons who are legally incompetent because of mental retardation or mental illness on hypothetical situations that did not pertain to ward).

¹³ *Atlanta Taxicab Co. Owners Ass'n, Inc. v. City of Atlanta*, 281 Ga. 342, 345 (2006).

¹⁴ *Bell v. Austin*, 278 Ga. 844, 846 (2005) (Holding that Appellant lacked standing since he is not among the class of non-medical professionals whose reports from the hearsay rule by O.C.G.A. § 24-3-18).

B. O.C.G.A. § 51-12-33 does not violate due process.

Due process requires that the State must give notice and an opportunity to be heard to a person deprived of a protected interest in life, liberty, or property.¹⁵ There are two types of due process claims: procedural due process and substantive due process. The apportionment statute violates neither.

a. Procedural Due Process

In procedural due process claims, the constitutional violation occurs not at the time of the deprivation of the protected interest, but when the State fails to provide due process.¹⁶ In the present case, the analysis cannot even get that far because there has not been, and in fact cannot be, a deprivation of the Smiths interests under O.C.G.A. § 51-12-33.

As outlined above, Ms. Clure does not claim that she has been deprived of any protected interest but rather that the non-parties, the Smiths, have been deprived of such interest. Ms. Clure claims that O.C.G.A. § 51-12-33 “subjects [the Smiths] to a verdict by a jury of their peers.” However, O.C.G.A. § 51-12-33 specifically provides that “[a]ssessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties” and “[w]here fault is assessed against nonparties pursuant to this Code

¹⁵ *Camden Cty. v. Haddock*, 271 Ga. 664, 665 (1999); *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

¹⁶ *Bd. of Comm'rs of Effingham Cty. v. Farmer*, 228 Ga. App. 819, 820-21 (1997).

section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.”¹⁷ Pursuant to O.C.G.A. § 51-12-33 there can be neither a verdict against a non-party, nor does the assessment of fault constitute admissible evidence in any other action. Simply, the apportionment statute does not do what Ms. Clure argues that it does.

Ms. Clure mischaracterizes O.C.G.A. § 51-12-33 as a determination of liability as to a non-party when it does no such thing. The purpose of O.C.G.A. § 51-12-33 is to serve as a tool to have the jury assess the appropriate percentage of fault as to the parties and non-parties such that their respective responsibilities for the harm can be determined. There can be no verdict against the Smiths, no liability determined, and no deprivation of rights suffered. Therefore, the Smiths procedural due process rights cannot possibly be violated.

b. Substantive Due Process

Substantive due process differs from procedural due process in two important ways: First, substantive due process protects fundamental rights, and second, a violation of a substantive due process right occurs at the time of the deprivation because no process can justify the deprivation.¹⁸

Ms. Clure’s argument that O.C.G.A. § 51-12-33 is unconstitutional rests heavily on a 1996 Montana Supreme Court case, *Plumb v. Fourth Judicial District*

¹⁷ O.C.G.A. § 51-12-33(f)(1) and (2).

¹⁸ *McKinney v. Pate*, 20 F.3d 1550, 1556-1557 (11th Cir. 1994).

Court, 927 P.2d 1011 (1996). In *Plumb*, the Montana Supreme Court applied the rational basis test to Montana’s apportionment statute and held the State had a legitimate interest in apportioning liability for damages based on a party’s degree of fault but that the apportionment of fault to non-parties was not rationally related to that interest.¹⁹

The rational basis test is utilized when “a statute does not infringe upon a fundamental right and the complaining party is not a member of a suspect class.”²⁰ The rational basis test is the least rigorous level of constitutional scrutiny, requiring only that a statute’s purpose be reasonably related to the public health, safety, or general welfare.²¹

Ms. Clure claims that the Georgia Legislature’s only interest in passing O.C.G.A. § 51-12-33 was related to health care services and medical malpractice cases. However, the Georgia legislature stated that its purpose was to “promote predictability and improvement” of health care liability claims and that such reasoning extends to “other civil actions.”²² The Georgia Legislature clearly did not intend to limit the reform to medical malpractice claims as Ms. Clure suggests. Furthermore, this Court held that the purpose of O.C.G.A. § 51-12-33 is

¹⁹ *Plumb v. Fourth Judicial District Court*, 927 P.2d 1011, 1019 (1996).

²⁰ *Georgia Dep't of Human Res. v. Sweat*, 276 Ga. 627, 628–29 (2003).

²¹ *Sweat*, 276 Ga. at 629; *Old S. Duck Tours v. Mayor & Aldermen of City of Savannah*, 272 Ga. 869, 872 (2000).

²² 2005 Georgia Laws Act 1 (S.B. 3)

to have the “jury consider all of the tortfeasors who may be liable to the plaintiff together, so their respective responsibilities for the harm can be determined.”²³

Accordingly, the question becomes whether apportionment of fault to non-parties pursuant to O.C.G.A. § 51-12-33 is rationally related to that interest. As noted above, this Court has already answered that question and held that O.C.G.A. § 51-12-33 is “certainly supported by a *rational basis* of apportioning damages among all tortfeasors responsible for harming a plaintiff in an efficient and orderly manner.”²⁴

Ms. Clure also cites to *Billings v. Aeropres Corp.*, 522 F.Supp.2d 1121 (E.D. Ark. 2007) which found that “apportioning fault to an immune employer will compromise the truth-determining function of a trial.”²⁵ However, such a finding is not analogous to the present case in that it does not involve an immune employer. Additionally, the reasoning followed in *Billings* has not even been followed in the same district. In *Bohannon v. Johnson Food Equip., Inc.*, the court held that because a non-party is not subject to liability under Arkansas’s apportionment statute, a non-party is not required to be served with process

²³ *Couch*, 291 Ga. at 365.

²⁴ *Id.*, 291 Ga. at 367.

²⁵ *Billings v. Aeropres Corp.*, 522 F.Supp.2d 1121, 1131 (E.D. Ark. 2007)

directly contradicting its ruling *Billings*.²⁶ O.C.G.A. § 51-12-33 is identical to the Arkansas statute, in that it also does not subject a non-party to liability.

Attempting to bring her argument into the realm of Georgia case law, Ms. Clure cites to *Barham v. City of Atlanta*, 292 Ga. 375 (2013), claiming that the case holds that nonparties have a right to be free from judgments conferring reputational harm upon them. However, that case contains no such holding.²⁷

In *Barham*, a group of firefighters brought a class action lawsuit against the City of Atlanta for failure to prevent cheating on a promotional exam. Plaintiffs prevailed, and the Court ordered a permanent injunction that mandated all individuals who scored a 90 or higher would have their promotions revoked.²⁸ The group of firefighters who scored a 90 or higher, non-parties, appealed the entry of the permanent injunction.²⁹ This Court held that the firefighters' due process rights were violated because the revocation of their promotions "treated appellants as if they were parties to the lawsuit" and "directed punitive action against appellants."³⁰

The fundamental difference between the non-parties in *Barham* and the present case, or any case where fault is apportioned to a non-party pursuant to

²⁶ See *Bohannon v. Johnson Food Equip., Inc.*, 5:07CV00123 JMM, 2008 WL 2685719, at *2 (E.D. Ark. June 16, 2008).

²⁷ See generally *Barham v. City of Atlanta*, 292 Ga. 375 (2013).

²⁸ *Barham v. City of Atlanta*, 292 Ga. at 375.

²⁹ *Id.*

³⁰ *Id.* at 377.

O.C.G.A. § 51-12-33, is that in *Barham* a judgment with actual effects was rendered against the non-party.³¹ Under O.C.G.A. § 51-12-33, a non-party cannot be held liable or be held responsible for any verdict rendered. In other words, *Barham* held that a Court cannot order relief that actually affects the rights of non-parties. That is not the effect of the apportionment statute. Unlike O.C.G.A. § 51-12-33, that specifically provides that liability cannot be attributed to non-parties, the permanent injunction in *Barham* punished the firefighters who scored over 90 and held that they must have cheated by revoking their promotions and it punished them without due process.

Similarly, *Ford Motor Co. v. Young*, 322 Ga.App. 348 (2013), also cited by Ms. Clure, did not hold that attorneys have a right to notice and an opportunity to be heard where a judicial hearing could impact their reputation.³² Rather, the Court of Appeals found that the attorneys had a due process right to notice and opportunity to be heard because their *pro hac vice* status was revoked.³³ Given the nature of cross-jurisdictional *pro hac vice* practice in the products liability arena and the effect that a revocation of *pro hac* status in one state could have on an attorney's ability to gain *pro hac* status in other states, an actual quantifiable deprivation of a protected interest occurred. Ms. Clure ignores the fact that a

³¹ *Id.* at 376.

³² See generally *Ford Motor Co. v. Young*, 322 Ga. App. 348 (2013).

³³ *Id.* at 354.

penalty was imposed on the attorneys, the revocation of their *pro hac vice* statute, in order to tailor the Court's holding to her argument. The Smiths have not, and cannot be held liable under O.C.G.A. § 51-12-33 and therefore cannot be deprived of any protected interest.

C. O.C.G.A. § 51-12-33 does not violate equal protection

Ms. Clure next argues that O.C.G.A. § 51-12-33 violates the equal protection guarantees of the Georgia and United States Constitution. The equal protection clause of the Georgia Constitution is consistent with the federal equal protection clause and Georgia courts apply them as one.³⁴

Ms. Clure notes in her brief that under the equal protection clauses of the federal and state constitutions, the government is required to treat similarly-situated individuals in a similar manner, and that is certainly correct.³⁵ However, Ms. Clure does not make any argument regarding how the Smiths are treated differently than any other non-party by O.C.G.A. § 51-12-33. Where similarly-situated individuals are treated alike, a statute cannot violate equal protection and is not discriminatory.³⁶

³⁴ *Ackerman v. Columbus, GA*, 269 F. Supp. 2d 1354, 1361 (M.D. Ga. 2003), *aff'd sub nom. Ackerman v. Columbus, GA*, 97 Fed. Appx. 907 (11th Cir. 2004).

³⁵ *Morgan Cty. Bd. of Comm'rs v. Mealor*, 280 Ga. 241, 243 (2006); *Nichols v. Gross*, 282 Ga. 811, 812 (2007).

³⁶ *Dansby v. Dansby*, 222 Ga. 118, 122 (1966) (Holding that inasmuch as Uniform Reciprocal Enforcement of Support Act treats all fathers living in state with

Ms. Clure does not allege that the Smiths are treated differently than other similarly-situated individuals, because they are not; they are treated exactly the same as any other non-party pursuant to O.C.G.A. § 51-12-33. Accordingly, Ms. Clure's argument that O.C.G.A. § 51-12-33 violates the equal protection clause of the state and federal constitutions should be summarily rejected.

III. CONCLUSION

This is yet the latest attempt by plaintiffs to have this Court undue the work of the Legislature. The Court has consistently and correctly refused to abolish this legitimate and constitutional statute. The same result is required here. Georgia litigants are entitled to fairness and equity. The apportionment statute provides both. It should be allowed to stand and the people of Georgia should be allowed to continue to benefit from its fairness.

The trial court followed in the steps of this Court's prior holdings and correctly held that O.C.G.A. § 51-12-33 constitutional. This Court should affirm the trial court's decision, and in so doing, maintain Georgia's fair and just judicial system by ensuring that one party is not liable for more than his fair share of damages.

dependent children living in another state alike, it does not deny equal protection of law).

Respectfully submitted this 6th day of March, 2017.

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*On Behalf of the Georgia
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** in the above-listed case on all parties by depositing a copy of same in the United States Mail with sufficient postage thereon to ensure delivery, addressed as follows:

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This 6th day of March, 2017.

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