

IN THE SUPREME COURT

STATE OF GEORGIA

CASE NO. S14G1778

IMELDA ZALDIVAR,

Appellant,

v.

DANIEL PRICKETT and MARY PRICKETT,

Appellees.

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

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COMES NOW the Georgia Defense Lawyers Association (“GDLA”) and files this Brief as *amicus curiae* in the above-styled appeal, showing this honorable Court as follows:

I. STATEMENT OF INTEREST

The GDLA is an association of more than 700 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.

Ensuring reasonable, accurate interpretation and application of Georgia's statutory provisions regarding apportionment of fault to nonparties is of key importance to all persons and companies involved in litigation of civil matters in Georgia courts. The GDLA believes that the mandate of the General Assembly to permit defendants to seek apportionment of fault to nonparties, as set forth in O.C.G.A. § 51-12-33(c), must be enforced without additional restrictions or roadblocks from trial or appellate courts. The legitimate purpose of nonparty apportionment is achieved where the decision whether to apportion fault to **anyone** with potential fault for the plaintiff's claimed injuries or damages is left to the jury and not decided or impeded by the courts. As numerous tort cases involve potential apportionment of fault to nonparties, ensuring unreasonable limitations are not placed on litigants' statutory right to seek apportionment to nonparties is of special importance to the GDLA, its members, and their clients. Moreover, all citizens of Georgia and civil litigants involved in cases in this state have an interest in ensuring the fair and reasonable results in civil cases, which requires that the jury be permitted to consider the potential fault of all persons or entities who contributed to the plaintiff's claimed injuries or damages.

This Court has upheld the scheme of nonparty apportionment of fault enacted by the General Assembly. Yet in cases such as this one, plaintiffs have sought to limit defendants' ability to seek apportionment of fault to nonparties. In

this case, the Court of Appeals improperly and unfairly limited Appellant's ability to have the jury decide whether to apportion fault to Appellee's¹ employer. In so doing, the Court of Appeals incorrectly centered its analysis on whether Appellee could have asserted a claim against his employer, rather than following and applying the plain language of O.C.G.A. § 51-12-33(c), which would require the jury to decide whether to apportion any degree of fault to Appellee's employer.

As is true in the great majority of cases in this Court, the outcome of this case has broad implications. The question of whether Appellant may seek to have the jury apportion fault to Appellee's employer is of interest to civil litigants and attorneys throughout Georgia in that it calls upon this Court to interpret O.C.G.A. § 51-12-33 further as to apportionment of fault to non-parties. Furthermore, an affirmance of the opinion of the Court of Appeals in this case would eviscerate nonparty apportionment under O.C.G.A. § 51-12-33(c). Based on the reasoning advocated by Appellee and accepted by the Court of Appeals, plaintiffs will seek to preclude defendants from seeking apportionment of fault to nonparties in any case in which the plaintiff would not be able to sue the nonparty at issue. Such a limitation would not serve the stated purpose of O.C.G.A. § 51-12-33(c) to have

¹ For the sake of simplicity, appellees Daniel Prickett and his wife, Mary Prickett, are referred to herein collectively as "Appellee," inasmuch as Mrs. Prickett's claims are wholly derivative of her husband's claims.

the jury “consider the fault of all persons or entities who contributed to the alleged injury or damages,” and this Court should not read such a requirement into the statutory scheme enacted by the legislature.

II. ARGUMENT AND CITATION OF AUTHORITY

This case arises from a motor vehicle accident on October 19, 2009, involving vehicles driven by Daniel Prickett (“Appellee”) and a vehicle driven by Imelda Zaldivar (“Appellant”). (R-10-11). Appellant claims that the traffic light was green when she entered an intersection and that Appellee failed to yield the right of way to Appellant and turned left in front of her vehicle, while Appellee claims that Appellant “darted out from behind a car that was stopping in front of her, accelerated through a red light, and struck [Appellee].” (R-91, 334-36; Appellee’s Brief at 2.) When the accident occurred, Appellee was driving a vehicle owned by his employer, Overhead Door, with his employer’s permission. (R-302; *Zaldivar*, 328 Ga. App. at 360.) He was employed as a sales representative and was on his way to a sales call appointment. (R-313.)

Appellee had been driving regularly as part of his employment with Overhead Door since June 1999. (R-283, 302.) During that time, Overhead Door had provided Appellee with only a half-day of driver training and only had a safety manager ride with Appellee once to monitor his driving. (R-305-06.)

During the time Appellee was employed by Overhead Door prior to the subject accident, Overhead Door had received at least three separate complaints from other motorists about Appellee's driving. (R-306.) Those complaints included an incident in 2001 where Appellee was reportedly observed driving 85 miles per hour, tailgating another vehicle, and swerving from lane to lane through heavy traffic; an incident during 2006 in which Appellee was reported to be "swerving" up the highway, almost hit another vehicle, and failed to yield to a third vehicle; and an incident in 2007 in which another motorist called Overhead Door and reported that Appellee "ran her off the road." (R-200-02.)

After the call in 2001, Appellee apparently was told by Overhead Door that any further infractions would result in a "driver awareness class," but there was no evidence that Appellee was required at any point prior to the subject accident to attend such a class. (R-200, 313.) Overhead Door took no action at all as to Appellee after the 2006 incident. (R-201.) And after another driver called to report that Appellee "ran her off the road" in 2007, Overhead Door did nothing except possibly telling Appellee to be more cautious and to stop talking on his cell phone while driving. (R-308.) Despite all of these incidents, Overhead Door did not do anything to curtail Appellee's behavior and, instead, Overhead Door apparently continued to grant Appellee unfettered access to drive its company vehicle up through and including the date of the subject accident. (R-313.)

On July 27, 2012, Appellant filed a notice of intent to apportion fault to Overhead Door as a non-party, pursuant to O.C.G.A. § 51-12-33. (R-63-65.) Specifically, Appellant contended that the jury should be permitted to apportion fault to Overhead Door for negligently entrusting its vehicle to Appellee and for negligently supervising and retaining Appellee. (*Id.*) Appellee subsequently filed a motion for partial summary judgment, seeking to preclude the jury from considering the fault of Overhead Door at trial, which was opposed by Appellant. (R-67-68, 179-273.) The trial court granted Appellee's motion for partial summary judgment, and Appellant appealed. (R-1-4, 116.) The Court of Appeals, considering the case *en banc*, affirmed the trial court's decision on July 16, 2014. *Zaldivar v. Prickett*, 328 Ga. App. 359 (2014). Though five judges of the Court of Appeals concurred fully in the decision, Judge Dillard concurred in the judgment only, while Judge Branch wrote a lengthy and well-reasoned dissent. *Id.* at 363-67.

On October 6, 2014, this Court granted Appellant's petition for *certiorari*. In particular, this Court expressed interest in considering the following issue:

Does O.C.G.A. Section 51-12-33(c) permit the defendant in a tort action involving an automobile collision to name the party who allegedly negligently entrusted the vehicle plaintiff was driving at the time of the collision to the plaintiff, as a non-party whose fault, if any,

should be apportioned to reduce the total damages for which the defendant is liable?

Zaldivar v. Prickett, 2014 Ga. LEXIS 827 (Oct. 6, 2014).

The GDLA respectfully contends that the Court of Appeals' opinion unfairly and unreasonably limits the availability of nonparty apportionment to defendants in civil actions. O.C.G.A. § 51-12-33(c) does not limit apportionment to nonparties who could have been sued by the plaintiff; to the contrary, the plain language of the statute says exactly the opposite. Accordingly, Appellant should be permitted to submit the issue of Overhead Door's alleged fault for nonparty apportionment to the jury, and the Court of Appeals' opinion should be reversed.

A. The trial court and the Court of Appeals erred in excluding nonparty Overhead Door from the verdict form, as there was evidence from which a jury could have determined that Overhead Door “contributed to the alleged injury or damages” claimed by Appellee.

1. The Court of Appeals erred in deciding whether a defendant could seek apportionment of fault to a nonparty based on whether the plaintiff in this case could assert a claim against the nonparty.

The Court of Appeals held that summary judgment was properly granted to Appellee because “the actions of the plaintiff's employer did not ‘contribute’ to the plaintiff's alleged injury or damages,” and, thus, “O.C.G.A. § 51-12-33(c) is not

applicable” to this case. *Zaldivar*, 328 Ga. App. at 359. To reach that conclusion, the Court of Appeals found, as a matter of law, that “[i]n the context of negligent entrustment as alleged in this case...th[e] causal connection has been broken because [Overhead Door’s] act of entrusting the truck to [Appellee] did not contribute to his injuries.” *Id.* at 362. In so doing, the Court of Appeals relied on case law holding that an injured driver cannot sue someone else for negligently entrusting him with a vehicle. *Id.*; See also, e.g., *Ridgeway v. Whisman*, 210 Ga. App. 169, 170 (1993). Essentially, the Court of Appeals in this case interpreted the word “contributed” in O.C.G.A. § 51-12-33(c) to mean “proximately caused and could have formed the basis for potential tort liability to the plaintiff.”

In a well-reasoned dissent, Judge Branch explained that the Court of Appeals’ decision relied on a strained interpretation of O.C.G.A. § 51-12-33(c) and would eliminate, at least in cases such as this one, the stated purpose of the statute of considering the fault of *all* persons or entities who contributed to cause the plaintiff’s claimed injuries or damages. Specifically, as Judge Branch stated:

If Imelda Zaldivar had sued Prickett for her own injuries that resulted from the accident, she would be authorized under Georgia law to name Overhead Door as a defendant and recover damages from Overhead Door if she could prove her claim that Overhead Door knowingly entrusted a truck to a reckless driver, i.e., Prickett, and that

Overhead Door's negligence combined with Prickett's negligence resulting from his recklessness. And if Zaldivar had filed suit but only named Prickett as a defendant, Prickett could name Overhead Door — his own employer — as a nonparty under the Georgia apportionment statute, and try to reduce his own liability for Zaldivar's damages by attempting to assign a percentage of fault for Zaldivar's injuries to Overhead Door by claiming that his own employer negligently entrusted him with the truck. Yet even though Prickett's injuries resulted from the same accident, the majority holds that because Prickett is the plaintiff, Zaldivar is prohibited from making the same assertion that Overhead Door was at least partially responsible for the accident that caused Prickett's injuries. To reach this result, the majority reads out of the Georgia apportionment statute, the "ordinary and everyday meaning" of "fault" used in that statute, which the Supreme Court has explained, is how the term should be construed.

Zaldivar, 328 Ga. App. at 363 (Branch, J., dissenting) (internal citation omitted).

Although it may not be possible to explain the problems with the Court of Appeals' holding any better than Judge Branch did in her dissent, the undersigned will attempt to contribute to this Court's consideration of the issues in this case.

The cause of action of negligent entrustment “is predicated not on the doctrine of respondeat superior but on a negligent act of the owner in lending his automobile to another to drive, with actual knowledge that the driver is incompetent or habitually reckless, and this negligence must concur, as a part of the proximate cause, with the negligent conduct of the driver on account of his incompetency and recklessness.” *Cherry v. Kelly Servs., Inc.*, 171 Ga. App. 235, 235 (1) (1984); *Saunders v. Vickers*, 116 Ga. App. 733, 735 (5) (1967). Thus, in the context of a negligent entrustment claim, the entrustor’s alleged negligence is concurrent with, but wholly separate from, any negligence of the driver to whom the vehicle is entrusted. *Id.* This is, of course, distinct from a claim against a driver’s employer that is founded on *respondeat superior*, which is wholly derivative and, essentially, the same claim against both employer and employee. See, e.g., *Am. Material Servs., Inc. v. Giddens*, 296 Ga. App. 643, 647 (2) (2009); *Zarach v. Atlanta Claims Ass’n*, 231 Ga. App. 685, 690 (5) (1998).

Deciding whether a defendant can seek apportionment of fault to a nonparty based on whether the plaintiff would have been able to do so completely misses the point of O.C.G.A. § 51-12-33(c). As Judge Branch put it, “any determination of whether Overhead Door can be assessed a percentage of fault has nothing to do with assigning liability to Overhead Door for [Appellee’s] injuries.” 328 Ga. App. at 364. Certainly, it would be perverse to permit a driver with a known history of

negligent and/or dangerous driving to recover against someone else for negligently entrusting him with a vehicle. However, whether the law allows such a driver to recover against the entrusting party is not dispositive of whether the entrusting party bears a percentage of fault for an accident caused by the driver.²

Appellee is not trying to sue Overhead Door in this case, and whether Appellee could have sued Overhead Door in connection with the accident is completely irrelevant to whether negligent entrustment by Overhead Door of its vehicle to Appellee “contributed” to cause the accident at issue in this case within the meaning of O.C.G.A. § 51-12-33(c). No such limitation on a defendant’s ability to apportion fault to a nonparty appears in O.C.G.A. § 51-12-33 or anywhere else. To the contrary, O.C.G.A. § 51-12-33(c) explicitly provides that the jury “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.” *Id.* (emphasis supplied).

This makes sense, since as this Court has held previously, the concept of allocating “fault” to a nonparty is different from legal liability for the plaintiff’s claimed injuries or damages. *See Couch v. Red Roof Inns, Inc.*, 291 Ga. 359 (1) (2012). “[B]oth *Couch* and the plain meaning of OCGA § 51-12-33 support the

² Appellee also would have been barred from suing his employer by the exclusive remedy doctrine of the Workers’ Compensation Act. *See* O.C.G.A. § 34-9-11(a).

conclusion that the statute considers two fundamentally different concepts: percentages of fault, in its general sense, for all who contributed to the plaintiff's injuries; and legal liability for named parties.” *Zaldivar*, 328 Ga. App. at 365 (Branch, J., dissenting). Though the existence of “fault” and the potential for legal liability often overlap, they are not always coextensive and certainly are not the same thing in concept. The legislature clearly stated in enacting the current version of O.C.G.A. § 51-12-33 that whether the plaintiff could have sued a particular nonparty is **irrelevant** to whether the nonparty may be placed on the verdict form for consideration of the apportionment of fault by the jury.

The case of *Barnett v. Farmer*, 308 Ga. App. 358 (2011) (physical precedent only), cited by both sides and by the Court of Appeals in this case, has no direct application to this case but the Court of Appeals’ reasoning in that case is nonetheless instructive. In *Barnett*, Mr. and Mrs. Farmer sued Barnett for injuries suffered in a motor vehicle collision. One defense asserted by Barnett was that Mr. Farmer, who was driving the vehicle in which his wife was riding, was at fault for the accident. The trial court declined, however, to give a jury instruction regarding apportionment of fault in accordance with O.C.G.A. § 51-12-33. The Court of Appeals reversed, holding that the court should have instructed the jury to consider the fault of Mr. Farmer in reaching its award of damages, if any, to Mrs. Farmer. *Barnett*, 308 Ga. App. at 362 (2). In reaching its holding, the Court of Appeals

rejected the argument that apportionment was barred by the interspousal tort immunity doctrine:

[B]ecause there was evidence from which the jury could have concluded that both Barnett and [Mr. Farmer] were negligent...it would be contrary to the clear intent of the legislature to require Barnett to pay for the full amount of [Mrs. Farmer's] damages for the same collision simply because she was a passenger in the car her husband was driving. Similarly, we reject the Farmers' argument that application of the apportionment [statute] to this case violates the interspousal tort immunity doctrine. Our holding in no way requires Shirley to file suit against her husband, but instead, precludes her from recovering from Barnett that portion of her damages, if any, that a trier of fact concludes resulted from the negligence of her husband.

Id. See also O.C.G.A. § 19-3-8.

Although *Barnett* is physical precedent only and concerned apportionment of fault to plaintiffs rather than to nonparties, the Court of Appeals' sound reasoning in that case is equally applicable here. Apportionment of fault is not defeated simply because the plaintiff could not have brought a claim against the person in question; whether as to co-plaintiffs or nonparties, O.C.G.A. § 51-12-33 simply contains no such limitation.

2. **O.C.G.A. § 51-12-33(c) specifically permits apportionment of fault to any nonparty who contributed to the plaintiff’s claimed injury or damages, regardless of whether the plaintiff could have sued that person or entity, and the plain statutory language does not limit that broad pronouncement based on whether the nonparty could not be named for some jurisdictional or similar reason.**

Both in the trial court and on appeal, Appellee has contended that “O.C.G.A. § 51-12-33 requires that named parties and non-parties be potentially responsible or answerable in law for the plaintiff’s damages under substantive law before either may be found at fault.” (Appellee’s Brief at 5 (emphasis supplied).) But that is precisely not what O.C.G.A. § 51-12-33 provides. Rather, O.C.G.A. § 51-12-33(c) requires apportionment of fault to “**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. *Id.* (emphasis supplied). The plain language of the statute contains no requirement whatsoever that the “person or entity” be subject to suit by the plaintiff based on a substantive theory of law. Under the statute, apportionment of “fault” to a nonparty turns on whether the nonparty “contributed” to the “alleged injury or damages,” and not on whether the nonparty could be held liable to the plaintiff for its actions. For that reason, the Court of Appeals’ holding in this case would lead to results that are

arbitrary, unfair, and not in compliance with the plain language of O.C.G.A. § 51-12-33(c) or this Court’s opinion in *Couch*. Accordingly, the Court of Appeals’ decision in this case must be reversed.

The interpretation of O.C.G.A. § 51-12-33(c) by the trial court and the Court of Appeals, with no precedential basis for doing so, summarily interprets the word “contributed” in the statute as meaning “proximately caused,” and then relies on prior case law on negligent entrustment to determine there can be no proximate cause—and thus no contribution under O.C.G.A. § 51-12-33(c)—because Appellee could not have sued Overhead Door under a theory of negligent entrustment. *Zaldivar*, 328 Ga. App. at 360, 362. But the legislature knew what proximate cause was when it enacted the current version of O.C.G.A. § 51-12-33, and had the legislature intended to make proximate cause the deciding factor for nonparty apportionment under the statute, the legislature would have said so. Indeed, there are numerous examples of where the legislature **has** used “proximate cause” as part of a definition or requirement for civil or criminal liability in a statute.³ The

³ See, e.g., O.C.G.A. § 8-2-36(5) (defining “construction defect”); O.C.G.A. § 9-3-52 (limiting potential defenses in context of injury or death resulting from improvements to realty); O.C.G.A. § 10-1-451(e)(1)(A) (defining extent of damages for wrongful seizure of noncounterfeit goods); O.C.G.A. § 11-4-402(b) (defining extent of payor bank’s liability for damages due to wrongful dishonor of

fact that the legislature used the word “contributed” rather than “proximately caused” in O.C.G.A. § 51-12-33(c), thus, must be interpreted to mean that the

payable instrument); O.C.G.A. § 12-4-147 (defining limitations of liability of cave owner or agents for potential injuries); O.C.G.A. § 15-16-24(3) (defining extent of sheriffs’ liability for misconduct of jailers); O.C.G.A. §§ 26-2-433, 26-2-434 (defining extent of liability of food distributors under certain circumstances); O.C.G.A. § 27-2-25.1 (providing for suspension of hunting privileges for negligent hunting); O.C.G.A. § 27-4-4 (providing for recovery of damages for unlawful dumping); O.C.G.A. § 31-9-6.1(d) (defining as compensable medical malpractice certain violations of disclosure and consent requirements for surgical/diagnostic procedures); O.C.G.A. § 34-9-265(e) (defining compensation and penalties to be imposed on employer under Workers’ Compensation Act for death from injury proximately caused by employer’s intentional act); O.C.G.A. § 40-6-270 (defining criminal liability and punishment for hit and run with a motor vehicle); O.C.G.A. § 43-26-12(a)(9)(B) (defining potential liability for negligently training proxy caregiver); O.C.G.A. § 44-7-20 (defining landlord’s potential tort liability for failure to notify prospective tenant of property’s propensity to flood); O.C.G.A. § 51-1-40 (creating and defining extent of dram shop liability); O.C.G.A. § 51-1-51 (defining immunity from liability for liquefied petroleum gas providers).

legislature did not intend for the statute to require a showing of proximate cause as a prerequisite for nonparty apportionment.

In this case, the Court of Appeals improperly read an exception into O.C.G.A. § 51-12-33(c) for negligent entrustment claims. In so doing, the court ignored the unambiguous nature of the phrases “shall consider,” “all persons or entities,” and “regardless of whether the person or entity was, or could have been named as a party,” and interpreted a single word in the same sentence, “contributed,” to create an exclusion based on a proximate cause standard not contained in the statute. The Court of Appeals’ strained reading of “contribute” in interpreting O.C.G.A. § 51-12-33(c) does not comport with the plain language or the stated purpose of the statute. Following this Court’s reasoning in *Couch*, “[i]f the Legislature intended for an exclusion for [negligent entrustment] to apply to the apportionment statute, it would have expressly said as much. It did not, and the [Court of Appeals] is incorrect in its attempt to create an exclusion where there is no reason to believe that it exists.” *Couch*, 291 Ga. at 362 (1).

Were the roles of the parties in this case reversed and the plaintiff sought, based on the same proffered evidence, to submit to a jury the question of whether the defendant’s employer could be held liable for negligent entrustment, both the trial court and the Court of Appeals would have permitted the case to proceed for the jury’s determination. See, e.g., *CGL Facility Mgmt., LLC v. Wiley*, 328 Ga.

App. 727 (2)(b) (2014); *Dougherty Equip. Co. v. Roper*, 327 Ga. App. 434 (2) (2014); *Ed Sherwood Chevrolet, Inc. v. McAuley*, 164 Ga. App. 798 (1) (1982). This Court’s ruling in this case is thus important to ensure continued and equal fairness to plaintiffs and defendants, a primary goal of nonparty apportionment under O.C.G.A. § 51-12-33.

The supposition that a person or entity can only be said to “contribute” to a plaintiff’s damages for the purposes of apportionment if all elements of a negligence claim are met also is belied by this Court’s interpretation of “fault” in another subsection of the same statute. In *Couch*, in the course of explaining the meaning of “fault” as used in O.C.G.A. § 51-12-33, this Court explained that as used in subsection (a) of the statute, the word “[f]ault’ means that the damages are reduced, where appropriate, based on the degree to which plaintiff’s actions **contributed** to the damages.” 291 Ga. at 360 (1) (emphasis supplied). Obviously this Court was not implying that O.C.G.A. § 51-12-33(a) only applies when the defendant can show that the plaintiff owed a duty to herself, as that would make no sense. By the same token, it makes no sense to interpret “contributed” in light of whether the *plaintiff* would be able to bring a claim against the nonparty tortfeasor, thereby rendering meaningless the remainder of O.C.G.A. § 51-12-33(c).

Couch also is instructive in that this Court rejected the argument that prior case law precluding apportionment to intentional tortfeasors could be relied on in interpreting O.C.G.A. § 51-12-33 on that issue. As this Court explained in *Couch*:

The existence of a common law rule against apportionment to intentional tortfeasors does not alter this interpretation. Courts like to preserve the law they and their predecessors have made in deciding cases. But as long as legislation does not violate the Constitution, when the Legislature says something clearly — or even just implies it — statutes trump cases.

291 Ga. at 364 (1).

Just as this Court held in *Couch* that courts are not authorized to rely on common law to create an exception to apportionment in the context of intentional torts, in this case, the courts cannot rely on earlier case law regarding negligent entrustment to limit the application of O.C.G.A. § 51-12-33(c) in that context. “The legislature is presumed to know the condition of the law and to enact statutes with reference to it.” *O’Neal v. State*, 285 Ga. 361, 362, n.3 (2009); *State v. Tiraboschi*, 269 Ga. 812, 814 (1998). Had the legislature wished to include and apply the limitation on negligent entrustment claims seized upon by the Court of Appeals to limit the application of O.C.G.A. § 51-12-33(c), it would have done so,

and the fact that the statute does not expressly state that it is intended to preempt existing common law changes nothing. *Couch*, 291 Ga. at 364 (1).

Moreover, this Court should explicitly reject the notion that nonparty apportionment is not available where the nonparty would not be subject to suit by the plaintiff for some substantive reason. Under that unfounded reasoning, for example, a defendant could not seek apportionment of fault to the plaintiff's employer or co-employee (since the plaintiff's claim would be barred by the Workers' Compensation Act exclusivity provision) or to governmental actors who would be protected from suit by official or qualified immunity. There is simply nothing in O.C.G.A. § 51-12-33(c) stating or even implying that the legislature intended to limit nonparty apportionment to cases where the plaintiff cannot sue the nonparty due to lack of jurisdiction or venue, or some other procedural issue.

The language of O.C.G.A. § 51-12-33(c) is not confusing or ambiguous, and the legislature's decision not to include an exclusion for negligent entrustment claims must be construed to mean it did not intend for such an exception to exist. See, e.g., *Goddard v. City of Albany*, 285 Ga. 882, 884 (1) (2009); *Hammock v. State*, 277 Ga. 612, 615 (2) (2004). When the General Assembly amended the statute in 2005, it **could** have written the statute to include the limitation urged by Appellee and found to apply by the Court of Appeals. The General Assembly **could** have written O.C.G.A § 51-12-33(c) to say that the fault of a non-party

should be considered by a jury “only if the non-party owed a duty to the plaintiff.” Similarly, had the General Assembly intended to limit the application to O.C.G.A. § 51-12-33(c) to non-parties who could be held “liable” to the plaintiff under applicable law, the legislature would have written the statute to say that, rather than requiring the jury to “consider the fault of **all** persons or entities who contributed to the alleged injury or damages.” *Id.* But the General Assembly did not do any of those things, and the courts are bound to apply O.C.G.A. § 51-12-33(c) as it is written, without reading limitations into the statute not clearly stated therein.

This Court’s opinion in *Couch* applies here, as both cases involve attempts to narrow the scope of O.C.G.A. § 51-12-33(c) beyond that provided by the statute’s plain language. In *Couch*, this Court explained that “OCGA § 51-12-33 addresses the two classes of people, the plaintiff(s) and tortfeasor(s), **including non-parties**, who are **responsible** for these damages and instructs the jury what to do in each scenario.” 291 Ga. at 360 (1) (emphasis supplied). With that fundamental backdrop, the Court went on to hold unequivocally that:

The statutory scheme is designed to apportion damages among ‘all persons or entities who contributed to the alleged injury or damages’ — **even persons who are not and could not be made parties to the lawsuit** — a scheme that **makes no sense if persons whose...acts that contributed to the damages are excluded.**”

Id. at 362 (1) (emphasis supplied).⁴ The Court’s rationale in *Couch* applies equally to apportionment of fault to a nonparty on a theory of negligent entrustment as to a claim against a nonparty for intentional criminal conduct.

3. The case law cited by Appellee does not require a different result and, in any event, cannot override the clear intent of the legislature in enacting O.C.G.A. § 51-12-33(c).

Furthermore, Appellee’s reliance on the Court of Appeals’ decision in *Union Carbide Corp. v. Fields*, 315 Ga. App. 554 (2012), is misplaced. Even assuming that *Fields* remains good law,⁵ the Court of Appeals’ reasoning in that case

⁴ In addition, as noted by this Court in *Couch*, the exclusion of certain types of claims from the application of the immediately preceding statutory provision, O.C.G.A. § 51-12-32, shows that the legislature did not intend to create any such exclusions from the application of non-party apportionment under O.C.G.A. § 51-12-33(c). 291 Ga. at 363 (1).

⁵ In reversing the Court of Appeals’ decision in *Fields*, this Court limited its discussion to Division 1(d) of the Court of Appeals’ opinion but did not limit its holding in that fashion; rather, this Court stated simply that the judgment of the Court of Appeals was reversed. *Georgia-Pacific, LLC v. Fields*, 293 Ga. 499 (2013). Upon remittitur, the Court of Appeals held that the remainder of its opinion, including the portion relied upon by Appellee in this case, was “consistent

actually **supports** reversal of its opinion in this case. Appellee has seized upon *dictum* in *Fields* to argue that Appellant must satisfy “the causation standards imposed upon a plaintiff.” *Fields*, 315 Ga. App. at 559(1)(b)(ii). See also Appellee’s Brief at 15-16. Notably, the Court of Appeals in *Fields* said “**a** plaintiff,” not “appellee” or “**this** plaintiff,” as the question in that case was not whether the **plaintiff** could maintain a claim against the nonparties at issue, but rather whether the defendants had presented sufficient evidence to support of nonparty fault. Quite simply, *Fields* had nothing to do with considering the **plaintiff’s** ability to bring suit against a nonparty in deciding whether the **defendants** could seek apportionment of fault to that nonparty.

Appellee’s reliance on *Durben v. American Materials, Inc.*, 232 Ga. App. 750 (1998), and *Bartja v. National Union Fire Insurance Co.*, 218 Ga. App. 815 (1995), is likewise unavailing. Appellee cites *Durben* and *Bartja* for the proposition that where an employer-employee relationship is admitted by the

with the Supreme Court’s opinion” on appeal in that case. *Union Carbide Corp. v. Fields*, 327 Ga. App. 264, 265 (2014). While the undersigned believes it is questionable whether the remainder of the Court of Appeals’ original opinion in *Fields*, particularly some of the *dictum* seized upon by Appellee in this case, is consistent with this Court’s opinion in that case and other cases, that determination does not appear to be necessary to the Court’s decision in this case.

employer, “allowing claims for negligent entrustment...would not entitle the plaintiff to greater recovery, but would merely serve to prejudice the employer.” *Durben*, 232 Ga. App. at 751 (1). That is, of course, true **where the plaintiff has asserted a claim against the negligent driver’s employer**--in that instance, a negligent entrustment claim is redundant to the *respondeat superior* claim unless the conduct is sufficient to permit a punitive damages award against the employer. See *MasTec N. Am., Inc. v. Wilson*, 325 Ga. App. 863, 865 (2014); *Kelley v. Blue Line Carriers, LLC*, 300 Ga. App. 577, 580 (2) (2009).⁶

⁶ At least one U.S. District Court has held that this rule of law was superseded by the amendment of O.C.G.A. § 51-12-33. See *Little v. McClure*, 2014 U.S. Dist. LEXIS 120681, *7-9 (M.D. Ga. Aug. 29, 2014). By that court’s reasoning, “[b]ecause the jury must apportion separate percentages of damages to each party at fault, the employer's liability will no longer necessarily be coextensive with the employee's simply because *respondeat superior* applies. ... [U]nder Georgia's apportionment statute, an employer would be separately responsible for its degree of fault, if any, based on its independent negligence. A defendant is only liable for the percentage of a plaintiff's damages attributable to his apportioned fault, so the employee's negligence (for which the employer would be liable by virtue of respondeat superior) would be apportioned separately from the employer's independent negligence.” *Id.* at *8. If this Court were to find that reasoning

Since no claim for *respondeat superior* has been asserted in this case, however, *Durben*, *Bartja*, and similar cases have no application here. Moreover, in another negligent entrustment case cited by Appellee, *Thomason v. Harper*, 162 Ga. App. 441 (1982), the Court of Appeals held that a limiting jury instruction by was sufficient to ensure that the jury considered evidence of the individual defendant's bad driving history only as to the negligent entrustment claim against his employer and not as to the plaintiff's claims against the driver himself. *Id.* at 443-44 (1). If acceptable in that context, certainly a similar limiting jury charge could be used in this case to ensure no prejudice comes to Appellee.

Appellee also contends, and the trial court held, that O.C.G.A. § 51-12-33(c) does not permit apportionment to Overhead Door in this case because it did not owe a duty to Appellee. Again, this misses the point and attempts to graft limitations onto the clear statutory language of O.C.G.A. § 51-12-33(c). The lack of a duty on the part of a non-party to the plaintiff is just one of many potential reasons that a nonparty "could [not] have been named as a party to the suit," and it does not mean that the nonparty did not "contribute" to the plaintiff's claimed injury or damages. Appellee and the Court of Appeals may believe that O.C.G.A.

persuasive, of course, there would be no question that the negligent entrustment claim in this case was properly asserted against nonparty Overhead Door.

§ 51-12-33(c) was written more broadly than it should have been, but as long as it is constitutional, the statute must be enforced as written.

Appellee's final argument to this Court is one best categorized as a formulaic "slippery slope" argument. (Appellee's Brief at 26-29.) Essentially, Appellee contends that if this Court were to find that O.C.G.A. § 51-12-33(c) says what it means and means what it says with regard to apportionment of fault to non-parties, that would result in a litany of baseless and far-fetched non-party apportionment claims. (*Id.*) Utter chaos would ensue, according to Appellee, and an "alternate universe of tort law" would be created in which trial courts and appellate courts would be bogged down by endless litigation of non-party apportionment claims. (*Id.*)

Since the amended version of O.C.G.A. § 51-12-33 went into effect nearly ten years ago, the sky has not fallen and courts have not been forced to spend all of their time considering nonparty apportionment issues. And Georgia law already provides a mechanism for aggrieved plaintiffs to seek relief where a defendant asserts an egregiously baseless claim for apportionment to a non-party, such as the ludicrous "example" provided by Appellee of apportioning fault to the mayor or governor for an auto accident that occurred during a significant winter storm event. See O.C.G.A. § 9-15-14.

What O.C.G.A. § 51-12-33 has accomplished is the intended and fully reasonable result of putting plaintiffs and defendants on a more even playing field. Though there always will be difficulties and “glitches” in the system, the current version of O.C.G.A. § 51-12-33(c) helps ensure each defendant is held liable only for the amount of the plaintiff’s damages proportionate to that defendant’s liability. That purpose will not be served by whittling away and limiting the circumstances in which nonparty fault will be considered by the finder of fact.

B. Apportionment to nonparties is available under O.C.G.A. § 51-12-33(c) when only a single defendant is named.

This Court also should soundly reject the argument that Appellant cannot seek apportionment of fault to a nonparty because there is only one defendant. In an *amicus curiae* brief filed in the Court of Appeals, it was argued that “[s]ubsections (a) and (b) [of O.C.G.A. § 51-12-33] instruct the trial court **when** it is authorized to apportion damages, while subsections (c) through (f) tell it **how**, procedurally, such apportionment should be accomplished.” (Brief of the Georgia Trial Lawyers Association in Court of Appeals, at 18.) Although it was not raised in this Court, the argument was made in the Court of Appeals in this case, and the GDLA believes it is of paramount importance that the Court address the argument.

This Court specifically rejected that rather creative reading of the statute in *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359 (2012). In *Couch*, this Court explained

that “subsections **(a) through (c) direct the jury to apportion fault** among all persons who contributed to the damages.” *Id.* at 365 (1) (emphasis supplied). O.C.G.A. § 51-12-33(c) is not “procedural” but rather substantively **requires** the jury to apportion fault to “**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.”

Furthermore, this Court rejected a similar argument that nonparty apportionment did not apply in cases where the plaintiff was not to some degree at fault, under the limiting language of O.C.G.A. § 51-12-33(a). *See McReynolds v. Krebs*, 290 Ga. 850, 851-52 (1)(a) (2012). Much as the limiting language in O.C.G.A. § 51-12-33(a) regarding the plaintiff’s own fault does not limit the applicability of nonparty apportionment under O.C.G.A. § 51-12-33(c), neither does the number of defendants in the case referenced in subsection (b) of the statute. Appellee cannot avoid the clear mandate of O.C.G.A. § 51-12-33(c) based on a purported limitation in subsection (b) of the statute pertaining to cases involving only multiple defendants.

Obviously, this issue would only be pertinent in this case in the event that the Court determines that apportionment of fault to Overhead Door is otherwise appropriate in this case. As outlined in detail above, the GDLA believes that the Court should permit apportionment of fault to Overhead Door as a nonparty in this

case. But regardless, the GDLA respectfully submits that the Court should directly address and dispose, once and for all, of this argument. Otherwise, plaintiffs will continue to raise the argument in the courts below until this Court does address it.

III. CONCLUSION

For the foregoing reasons, the GDLA respectfully submits that this Court should hold that the Court of Appeals and the trial court below erred in precluding Appellant from including Overhead Door on the verdict form at trial and seeking apportionment of fault to that entity as a nonparty.

Respectfully submitted this 31st day of December, 2014.

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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 electronically and also 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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