Georgia Defense Lawyers Association

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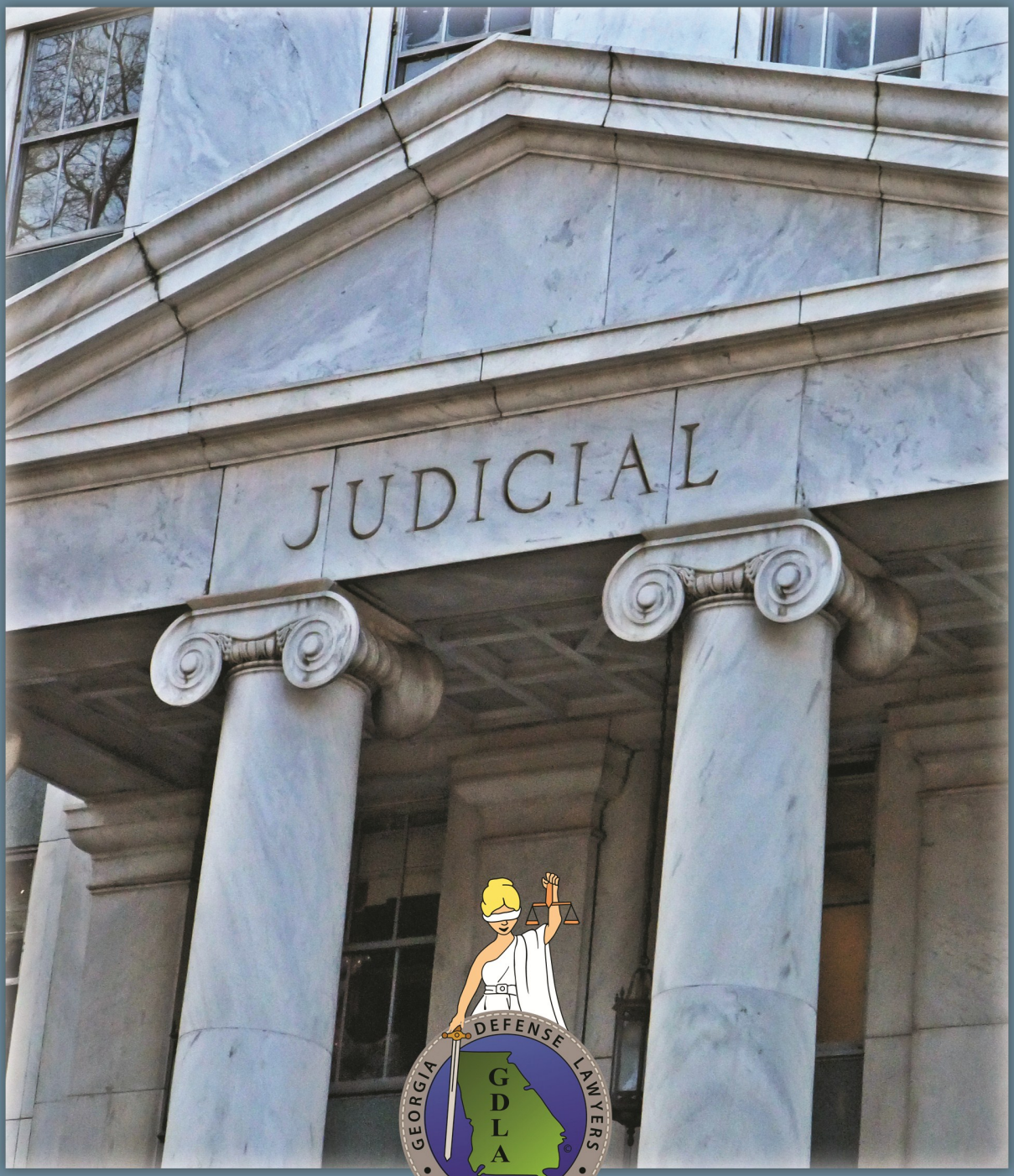

Advancing the Civil Defense Bar©

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Articles

Mel Haas is the Office Head for the Macon office of Constangy, Brooks & Smith, LLP. He focuses his practice on labor and employment law, representing management exclusively, in such areas as labor relations counseling, contract negotiations, union campaigns and avoidance, NLRB litigation, wage and hour and employment advice, and mergers and acquisitions.

PRESIDENT'S MESSAGE

On behalf of the membership, I want to thank all of the authors for the articles contributed to this year's *Law Journal.* The articles continue to represent excellent analysis of timely topics of interest to the membership and the trial bar in general, as well as to the judges.

The fact that members are willing to give of their time and expertise each year to create a quality publication like the *Law Journal* is an obvious example of the value of membership and participation.

I also want to thank Kirby Mason for editing the *Law Journal.* It is not an easy task to recruit authors, ensure timely submittals, coordinate publication and edit the product but Kirby, as anticipated, has done an outstanding job, and I think you will be pleased with the final product.

I want to also recognize Jennifer Davis, our Executive Director, for her work in connection with this *Law Journal* and the many other matters she handles in such an excellent fashion on behalf of the Association.

The result of the effort of all of those involved no doubt will be a more informed and enjoyable practice in the future and the furtherance of professionalism for all of our benefit.

For the defense,

W. Melvin Haas, III
GDLA President
Constangy, Brooks & Smith, LLP

Kirby Mason is a partner in the firm of HunterMaclean. An experienced defense litigator, she represents individuals and businesses in disputes involving employment issues, medical malpractice claims, premises liability, real estate, and contract claims.

EDITOR'S ACKNOWLEDGEMENT

The *GDLA Law Journal* would not exist without the commitment and effort of the Contributors: Ed Stabell, III and Britton White – Brennan, Harris & Rominger, LLP; Dart Meadows – Balch & Bingham, LLP; Alexander ("Alec") Galloway, II and Tammi L. Brown – Moore, Ingram, Johnson & Steele, LLP; Dennis Keene – Hunter-Maclean; Clay Robertson – McLain & Merritt; W. Melvin Haas, III, William M. Clifton, III, W. Jonathan Martin, II, Alyssa Peters Morris – Brooks & Smith, LLP; Eric J. Frisch and Douglas W. Smith – Carlock Copeland; Todd C. Alley – Hawkins, Parnell, Thackston & Young, LLP; and Stephanie Collings Patel. I thank each of them for generously volunteering their time and talent to research and draft the following articles.

I apologize to them and to you for the liberties I took in editing the articles. I learned that our common practice often deviates from the Blue Book formalities and I elected, on occasion, to depart from the prescribed method where I thought it would prevent distraction and aid comprehension. The errors you find, therefore, are mine.

My gratitude extends to Kim Jameson, my assistant of 17 years. She was responsible for putting the *Law Journal* into the proper format, and was required to use new computer software without any formal training or guidance. I am fortunate that she accepted the challenge.

My thanks to Allan Galis, a valuable addition to Hunter Maclean. His keen eye and attention to detail improved the final product.

I hope that each of you has had the pleasure of meeting Jennifer Davis, our wonderful Executive Director. She is a delight to work with, and is to be applauded for making all of the finishing touches needed for publication and distribution.

As always, the Board of Directors continues to seek ways to make the Georgia Defense Lawyers Association meaningful to the membership. I hope that this year's *Law Journal* includes articles that are both informative and useful in your practice.

For the defense,

Kirby Mason

Kirby G. Mason
Editor, *GDLA Law Journal*
HunterMaclean

CURRENT STATUS OF APPORTIONMENT IN GEORGIA:

AS MANY QUESTIONS AS ANSWERS

By Ed Stabell, III and Britton White

Edward R. Stabell, III is a partner with Brennan, Harris & Rominger LLP in Savannah, GA. For the past twenty years, he has represented clients throughout the State of Georgia in the areas of insurance defense, transportation, construction, professional malpractice, coverage, bad faith, and complex commercial and bankruptcy litigation. He is a graduate of the Walter F. Georgia School of Law, Mercer University, where he was a Member of the Mercer Law Review.

He is the current Chairman of the Automobile Law Committee and past Chairman of the Transportation Law Committee of the GDLA. He is also a Member of the Defense Research Institute and was invited to be a Member of the Claims and Litigation Management Alliance (CLMA) and the Professional Liability Defense Federation. He has given lectures and seminars on insurance coverage, bad faith and defense law to members of Savannah Bar Association, the CLMA, and other insurance industry groups.

Britton G. White is an associate at Brennan, Harris & Rominger, LLP in Savannah. He is a graduate of the University of Georgia School of Law. Mr. White practices primarily in the areas of insurance defense and civil litigation.

I. INTRODUCTION

The passage of Senate Bill 3 in 2005 ushered in significant changes to the tort system in Georgia.[1] Notably, the amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 created a new scheme of apportionment of fault and abolished joint and several liability among co-defendants.[2] They also established a new concept of apportioning fault to nonparties.[3] Prior to the 2005 amendments, O.C.G.A § 51-12-31 read as follows:

> Except as provided in Code Section 51-12-33, where an action is brought jointly against several trespassers, the plaintiff may recover damage for the greatest injury done by any of the defendants against all of them. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.[4]

In addition, the relevant portions of the pre-2005 version of O.C.G.A. § 51-12-33 read as follows:

> Where an action is brought against more than one person for injury to person or property and the plaintiff is himself to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if apportioned by the trier of fact as provided in this Code section, shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

After the 2005 amendments, those

statutes now read as follows:

Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) 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, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designated the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of

this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

O.C.G.A. § 51-12-32, which remained unchanged by the 2005 amendments, continues to read as follows:

(a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

(b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.

(c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.[8]

As predicted by scholars, these changes raised significant questions as to the intent of the Legislature and the practical effect of the statutes, as amended.[9] Beginning in 2010, the Georgia Court of Appeals answered some of these questions in deciding several notable cases, and the Georgia Supreme Court very recently has weighed in on some issues and likely will do so again in the near future.[10] However, despite the questions that have been answered thus far, additional questions persist that will need to be addressed as well. This article examines recent decisions of Georgia's appellate and trial courts construing O.C.G.A. § 51-12-33. It also identifies several issues that remain unresolved and which have sparked intense debate among scholars and practitioners.

II. QUESTIONS ANSWERED

A. *McReynolds v. Krebs*: Apportionment Among Co-Defendants Irrespective of the Plaintiff's Fault Under O.C.G.A. § 51-12-33(b)

Until very recently, the only appellate cases addressing the issue of whether O.C.G.A. § 51-12-33(b) applies in a situation where the plaintiff is not at fault were the 2010 Georgia Court of Appeals decisions in *Cavalier Convenience v. Sarvis*[11] and *McReynolds v. Krebs*.[12] Although the petition for certiorari to the Georgia Supreme Court in *Cavalier Convenience* was withdrawn by the parties, a similar petition was granted in *McReynolds*, and a decision was issued on March 23, 2012, affirming the Court of Appeals' ruling on apportionment.[14] This question has now been answered definitively: Apportionment of fault among co-defendants is required, *regardless of the whether the plaintiff is at fault*.[15]

1. Background: *Cavalier Convenience v. Sarvis*

On July 9, 2010, after much debate among scholars and practitioners regarding the status

of joint and several liability among co-defendants in the wake of the 2005 amendments, the Court of Appeals finally addressed the issue of whether O.C.G.A. § 51-12-33(b) applies in a situation where the plaintiff is not at fault. Christopher Sarvis filed suit against 17-year-old Jeremi Bath, alleging that Mr. Bath caused the subject motor vehicle collision and that he was intoxicated at the time.[16] The complaint also named two businesses that allegedly sold alcoholic beverages to the underage Mr. Bath.[17] Prior to trial, Mr. Sarvis argued that because there was no evidence of his own fault in causing the accident, the defendants should be prohibited from utilizing O.C.G.A. § 51-12-33(b) to apportion fault among themselves, but rather should be held jointly and severally liable.[18]

The trial court agreed with Mr. Sarvis and prohibited the defendants from arguing apportionment of damages, but it also granted the defendants' request for an interlocutory appeal.[19] In an opinion lauded by the defense bar, the Court of Appeals rejected the trial court's interpretation of O.C.G.A. § 51-12-33(b) and held that when multiple defendants are involved, apportionment of damages among them is mandatory, regardless of the plaintiff's fault.[20] Essentially, the trial court had ignored the crucial second use of the phrase "if any" in O.C.G.A. § 51-12-33(b), which refers to the assessment of the plaintiff's fault by a percentage pursuant to O.C.G.A. § 51-12-33(a) prior to apportioning damages among the defendants.[21] In other words, by inserting the phrase "if any" in referring to whether the plaintiff's damages would be reduced to account for his own fault, the Georgia General Assembly specifically contemplated the very circumstance presented by *Cavalier Convenience* (i.e., multiple defendants sued by a non-negligent plaintiff). The Court reasoned that if the General Assembly had intended for apportionment to be limited to situations where the plaintiff was to some degree responsible, it would not have used the latter "if any" clause in O.C.G.A. § 51-12-33(b).[22]

2. *McReynolds v. Krebs*: The Georgia Supreme Court Has Spoken

When *McReynolds v. Krebs* reached the Georgia Court of Appeals several months after *Cavalier Convenience*, it appeared to be a logical extension of the O.C.G.A. § 51-12-33(b) debate. In *McReynolds*, Lisa Krebs was injured in a motor vehicle collision when a vehicle driven by Carmen McReynolds collided with a vehicle in which Ms. Krebs was a passenger.[23] Ms. Krebs sued both Ms. McReynolds and General Motors Company ("GM"), the manufacturer of the vehicle in which she was riding.[24] Ms. McReynolds filed a cross-claim against GM for set-off and contribution.[25] After GM's pre-trial settlement with the plaintiff, Ms. McReynolds continued to assert that she had a viable cross-claim against GM for set-off or contribution in the amount of the settlement.[26] Over McReynolds' objection, the trial court granted GM's motion to dismiss and held that the 2005 amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 abolished joint and several liability and eliminated any right of set-off or contribution for nonsettling parties.[27] The case proceeded to trial, and after Ms. McReynolds admitted that she had no evidence of GM's potential fault, she was prohibited by the Court from arguing that the jury should apportion fault to GM.[28] The jury found Ms. McReynolds liable for the plaintiff's damages, and the court entered judgment against her for the full amount of the damages.[29]

Interestingly, Ms. McReynolds' first argument to the Court of Appeals was that O.C.G.A. § 51-12-33 was not applicable to cases in which the *Cavalier Convenience* plaintiff was not at fault, similar to what the plaintiff had argued unsuccessfully on appeal.[30] The Court of

Appeals quickly rejected this argument by citing its recent decision to the contrary.[31] On certiorari to the Georgia Supreme Court, McReynolds' attorneys clearly argued that the Court of Appeals' analysis on this issue in *Cavalier Convenience* should be revisited.[32]

However, in its March 23, 2012 decision, Justice David E. Nahmias, writing for a nearly unanimous Georgia Supreme Court,[33] affirmed the Court of Appeals' holding that apportionment under O.C.G.A. § 51-12-33(b) is required regardless of the plaintiff's fault.[34] The Court reasoned, "the statute nowhere states that the remaining subsections are dependent on satisfying subsection (a)'s limitation to cases involving plaintiff fault."[35] It also added, "subsection (b) expressly states that it applies 'after a reduction of damages pursuant to subsection (a) of this Code section, if any.'"[36] Accordingly, the Georgia Supreme Court held that O.C.G.A. § 51-12-33(b) "is plainly meant to apply even if there is no plaintiff fault."[37]

B. More Answers from *McReynolds*: No Contribution or Set-off for Nonsettling Defendant; Nonparty Apportionment Does Not Depend on the Plaintiff's Fault

Another principal issue presented by *McReynolds* on appeal was the right of a nonsettling defendant to obtain a set-off or contribution to account for any settling defendant. In *McReynolds*, the Georgia Court of Appeals had looked to the plain language of the statute, focusing on the last sentence of O.C.G.A. § 51-12-33(b), which provides, "[d]amages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, *and shall not be subject to any right of contribution.*"[38] According to the Court of Appeals, its interpretation of O.C.G.A. § 51-12-33(b) led to the inescapable conclusion that GM was entitled to be dismissed from the suit after it had settled, and the remaining defendant, Ms. McReynolds, had no claim of contribution or set-off. The Court reasoned that the statute requires each liable party to pay its own percentage share of fault, and significantly, Ms. McReynolds presented no evidence regarding GM's alleged fault.[40]

In her brief to the Georgia Supreme Court, McReynolds' attorneys argued that she should have been entitled to either a set-off or apportionment, but could not be denied both.[41] The argument went as follows:

> If the Court of Appeals is wrong in its interpretation of § 51-12-33 [that joint and several liability has been abolished regardless of the plaintiff's fault], then McReynolds was entitled to contribution and/or set-off. If the Court of Appeals is correct, then McReynolds was entitled to apportionment. McReynolds, however, was denied all three, and the net effect of these rulings was to permit that which is prohibited under any interpretation: a double recovery by the plaintiff.[42]

Essentially, McReynolds' attorneys argued to the Georgia Supreme Court that their client was first denied contribution or set-off by virtue of the *Cavalier Convenience* holding, but at the same time not allowed to reap the rewards of the 2005 amendments through apportionment, all the while with the plaintiff gaining a windfall in the form of a double recovery.[43]

The Supreme Court reiterated the Court of Appeals' reliance on the plain language of the anti-contribution provision of O.C.G.A. § 51-12-33(b), noting that it "flatly states that apportioned damages "shall not be subject to any right of contribution'" and "'shall not be a joint liability among the persons liable.'"[44] The Court also rejected McReynolds' argu-

ment that she could obtain contribution through O.C.G.A. § 51-12-32, noting that it "obviously cannot trump the rules set forth in § 51-12-33 because it begins with the phrase, '[e]xcept as provided in Code Section 51-12-33.'"[45] Moreover, the Court held that because the applicability of a set-off is predicated on the settling party being liable, at least in part, to the plaintiff, McReynolds was not entitled to a set-off, given that she admitted she had no evidence of GM's potential liability.[46]

The rulings in *McReynolds* and *Cavalier Convenience* obviously hold that joint and several liability and the right of contribution have been abolished among multiple defendants. However, do these holdings affect cases involving apportionment of fault to nonparties, given that much of the analysis was limited to subsection (b) of O.C.G.A. § 51-12-33? Some language in the Supreme Court opinion in *McReynolds* appears to suggest that its holding indeed reaches this issue as well.

Although *Cavalier Convenience* initially answered the question of whether apportionment is required *among co-defendants* regardless of the plaintiff's fault, that case did not involve any attempt to apportion fault *to nonparties* pursuant to O.C.G.A. § 51-12-33(c) and (d). *McReynolds* presented a slightly different situation in that one of the original defendants reached a settlement with the plaintiff and requested that it be dismissed as a party. Certainly a reasonable implication of the courts' holdings is that apportionment, in a general sense,[47] is the applicable rule in all cases in the wake of the 2005 amendments. However, a careful reading of both opinions reveals no such sweeping rule. In fact, the opening sentence of the Court of Appeals' opinion in *Cavalier Convenience* clearly frames the narrow issue presented as "whether . . . a trier of fact is required to apportion its award of damages *among multiple liable defendants* when the plaintiff bears no fault."[48] Similarly, the Georgia Supreme Court in *McReynolds* opened its opinion with the question presented on certiorari: "Did the Court of Appeals correctly construe O.C.G.A. § 51-12-33 to require a trier of fact to apportion an award of damages *among multiple defendants* when the plaintiff is not at fault?"[49]

In *Raines v. Maughan*,[50] the appellant argued to the Court of Appeals that *Cavalier Convenience* does not apply where a defendant attempts to apportion fault to a nonparty,[51] because if the plaintiff bears no responsibility, the defendants may not utilize O.C.G.A. § 51-12-33(c) or (d) to apportion fault to a nonparty.[52] Notably, O.C.G.A. § 51-12-33(c) and (d) are silent as to whether the plaintiff is required to be at fault. Thus, proponents of this argument contend that the holding of *Cavalier Convenience* is limited to O.C.G.A. § 51-12-33(b), while the remaining portions of the statute retain the requirement that the plaintiff be to some degree responsible.

Unfortunately, the Court of Appeals in *Raines* did not reach this specific issue in its ruling. In *Raines*, it was undisputed that the plaintiff was not negligent, given that he was the victim of an attack by a third party at an apartment complex.[53] However, because the jury returned a defense verdict at trial, the Court found that there was no occasion to apportion damages at all.[54] The Court reasoned that any error in charging the jury on apportionment had no effect on the outcome of the trial and necessarily would have been harmless, citing its recent decision in *Pacheco v. Regal Cinemas*[55] as authority.[56] The Court concluded, "we need not consider, therefore, whether instructing the jury on apportionment in this case actually was error."[57]

In *Barnett v. Farmer*, this question may have been resolved by the Court of Appeals, albeit in the context of a set of somewhat peculiar facts. The plaintiffs, Willie and Shirley

Farmer, were both injured in a motor vehicle collision with the defendant, Madison Barnett.[59] Shirley Farmer, Willie Farmer's wife, was riding as a passenger in their vehicle at the time.[60] Both Mr. and Mrs. Farmer asserted claims for personal injury against Ms. Barnett, as well as loss of consortium on each other's claims.[61] There was evidence that Ms. Barnett and Mr. Farmer were negligent in causing the collision, and the trial court gave a jury instruction on comparative negligence on Mr. Farmer's claims.[62] However, with regard to Mrs. Farmer's claims, the trial court refused to instruct the jury that it should consider the negligence of Mr. Farmer.[63] The jury returned verdicts for the plaintiffs, but awarded Mr. Farmer less than the full amount of his damages, presumably because it found that he was comparatively negligent and reduced his award by his proportion of fault.[64] Ms. Barnett appealed the denial of her jury instruction on apportionment on Mrs. Farmer's claims.[65]

In reversing the trial court's decision on this issue, the Court of Appeals reasoned that it would be contrary to the "clear intent of the legislature" to require Ms. Barnett to pay the full amount of Mrs. Farmer's damages simply because she was a passenger in a vehicle driven by her (presumably) negligent husband.[66] In other words, given that the jury already found Mr. Farmer partially at fault, it would be inequitable to require Ms. Barnett to pay *all* of Mrs. Farmer's damages, without regard to the fault of another person (i.e., Mr. Farmer) who caused or contributed to the collision. In essence, Mr. Farmer's negligence had the same effect of that of a nonparty on Mrs. Farmer's claim, and his negligence should have been considered by the jury, regardless of the fact that Mrs. Farmer may not have been negligent.[67] Although this interpretation of the Court's holding may be slightly strained given the unique facts of the case and the assumptions made by the Court of Appeals regarding the verdict,[68] it has been cited subsequently by the Court of Appeals as standing for this very rule.[69]

Additionally, the significance of the Georgia Supreme Court's recent holding in *McReynolds* cannot go unnoticed and likely answers this question as well, given that GM became a nonparty after it settled with the plaintiff. Again, although the Court framed the issue as being one of apportionment among multiple defendants, it briefly addressed arguments regarding O.C.G.A. § 51-12-33(c) and (d) as well, given that alternative arguments were made that GM's fault as a nonparty should have been considered. In its rejection of McReynolds' argument that "§ 51-12-33 imports subsection (a)'s limiting language [regarding plaintiff fault] into the six following subsections," the Court noted that "the statute nowhere states that the remaining subsections are dependent on satisfying subsection (a)'s limitation to cases involving plaintiff fault."[70] Additionally, the fact that the Court addressed McReynolds' alternative argument for apportionment of fault to GM as a nonparty under subsections (c) and (d) suggests that the appellate Courts of this state will now reject any argument that a plaintiff's lack of fault has some bearing on nonparty apportionment.[71] Therefore, the language used by the Supreme Court in *McReynolds* should be cited by defense attorneys as standing for the rule that apportionment to nonparties is allowed regardless of the plaintiff's fault.

C. *Union Carbide Corporation v. Fields*: Proving Nonparty Fault is an Affirmative Defense; Inferences Alone are Insufficient

The question of the standard of proof on claims of nonparty fault was arguably up for debate in the wake of the Court of Appeals' decision in *McReynolds*. However, in *Union Carbide Corporation v. Fields*,[72] the Court offered additional guidance as to the amount

of proof required on a defense of nonparty negligence. In *Fields*, the plaintiffs sued multiple manufacturers, suppliers, and sellers of asbestos-containing products for damages allegedly resulting from the plaintiffs' mesothelioma.[73] The defendants filed notices of nonparty fault pursuant to O.C.G.A. § 51-12-33(d), seeking to apportion fault to some 51 other entities that were allegedly responsible for exposing the plaintiffs to asbestos-containing products.[74] The plaintiffs moved for partial summary judgment as to many of these claims, asserting that the defendants should be precluded from apportioning fault to nonparties because they failed to present evidence creating a jury question on the issue.[75]

The Court of Appeals affirmed the trial court's grant of partial summary judgment, holding that the defendants' allegations of nonparty fault rested entirely on inferences.[76] The Court reasoned that "[w]hen a party is relying on inferences to prove a point, not only must those inferences tend in some proximate degree to establish the conclusion sought, but must also render less probable all inconsistent conclusions."[77] The Court also rejected the defendants' argument that O.C.G.A. § 51-12-33(d) provides for "automatic" consideration of fault for settling entities, noting that when read with subsection (c), a defending party still must show that a settled entity "contributed to the alleged injury or damages" before fault can be assessed by the jury.[78] The Court also held that nonparty fault is an affirmative defense for which the defendant bears the burden of proof, and a plaintiff has the initial burden of piercing the defense at the summary judgment stage.[79]

D. *Murray v. Patel*: The Filing of a Third-Party Complaint for Contribution or Indemnity Triggers Apportionment

In *Murray v. Patel*, the plaintiffs were injured in a motor vehicle collision while they were passengers in a vehicle driven by their son.[81] They sued the driver of the other vehicle, Brittany Murray, and the vehicle owner, Anthony Hill, who then filed a third-party complaint for indemnification against the plaintiffs' son for his alleged negligence in causing the accident.[82] The third-party defendant filed a motion to dismiss, asserting that because joint and several liability had been abolished by the 2005 amendments, there was no longer a right of contribution under Georgia law.[83] The trial court granted the motion, apparently without making any findings of fact or conclusions of law, and the defendants/third-party plaintiffs filed an interlocutory appeal.[84]

The Court of Appeals recited the entire text of O.C.G.A. § 51-12-33(b) and framed the third-party defendant's argument as follows: "because joint and several liability has been abolished, Murray and Hill cannot assert their third-party complaint."[85] The Court succinctly responded by pointing out that there was no legal authority for such a proposition.[86] The Court also noted that the purposes of the statutes[87] are not incompatible, but rather the filing of the third-party complaint required apportionment between the defendants and third-party defendant, and neither has a right of contribution against the other.[88] In other words, when a defendant files a third-party complaint for contribution or indemnification, O.C.G.A. § 51-12-33(b) is immediately triggered, thus requiring apportionment among those parties just as if they were all named as defendants in the original complaint. Furthermore, by virtue of the plain language of O.C.G.A. § 51-12-33(b), as construed by the Georgia Supreme Court in *McReynolds v. Krebs*, there is no right of contribution among those parties.

As discussed more in Part III.B., *infra*, the Court's terse analysis in *Murray* has left open an interesting debate on the current status of the right of contribution.

E. *PN Express, Inc. v. Zegel*: No Apportionment of Fault to a Nonparty Where the Only Basis for Apportionment is an Agency Relationship

In 2010, the Court of Appeals also addressed apportionment to nonparties in the context of agency relationships in *PN Express, Inc. v. Zegel*. In that case, the plaintiffs were injured when a tractor trailer owned by Mile Surlina and leased by PN Express, Inc. collided with their vehicle.[90] Although most of the Court's opinion was devoted to the trial court's jury instructions regarding statutory employment and respondeat superior, it concluded by addressing whether it was proper for the trial court to deny the defendant the opportunity to apportion fault to a nonparty with whom the defendant had an agency relationship.[91]

At trial, the defendant argued that the jury should consider the fault of another company, Patterson Freight Company and "certain other entities."[92] The trial court rejected this argument and the Court of Appeals affirmed, reasoning that the nonparty to which the defendant was attempting to assign fault would have been responsible only on notions of derivative liability (i.e., respondeat superior and/or statutory employment).[93] In other words, a defendant may not apportion fault to a nonparty with whom it has an agency relationship *and that relationship is the only basis for assigning fault to the nonparty*.

At first blush, this appears to be a logical holding, with which few would disagree. However, as discussed in Part III.A.3., the Court's holding may have affected some existing arguments that have been made regarding whether apportionment to nonparties is proper when there is only one defendant. The holding also has added weight to some arguments regarding derivative liability in the context of third-party attack cases.

F. *Clark v. Rush*: Pattern Jury Charge § 60.141 is Invalid

On November 1, 2011, the Georgia Court of Appeals decided *Clark v. Rush*,[94] which held that the pattern jury charge on comparative negligence[95] is no longer an accurate statement of the law in light of the amendments to O.C.G.A. § 51-12-33(a). The facts of *Clark* arose out of a two-vehicle crash involving Zanta'vious Rush and Courtny Clark. Ms. Clark's defense was that the plaintiff was partly at fault for causing the collision because he was speeding at the time.[96] Over the defendant's objection, the trial court gave the following pattern charge on comparative negligence:

> If you find that the defendant was negligent so as to be liable to the plaintiff and that the plaintiff [also] was negligent, thereby contributing to the plaintiff's injury and damage, but that the plaintiff's negligence was less than the defendant's negligence, then the negligence of the plaintiff would not prevent the plaintiff's recovery of damages, but would require that you reduce the amount of damages otherwise awarded to [the] plaintiff in proportion to the negligence . . . of the plaintiff compared with that of the defendant.[97]

The Court began by noting that this charge was based upon prior case law that predated the 2005 amendments to O.C.G.A. § 51-12-33.[98] Under the new apportionment scheme, the Court held that if the jury concludes that the plaintiff was negligent and that his negligence was less than that of the defendant, the jury "must identify the percentage of fault attributable to the plaintiff and specifically report that percentage to the judge, who then must reduce the award of damages by the same percentage."[99] Under the Court's interpretation of O.C.G.A. § 51-12-33(a), it is implicit that a special verdict form be used so

that the parties' respective percentages of fault be specified by the jury.[100]

Turning to pattern charge § 60.141, the Court pointed out that it was inconsistent with O.C.G.A. § 51-12-33(a) in two important respects. First, § 60.141 does not require the jury to quantify the fault of the plaintiff but rather that it determine the "proportion" of the plaintiff's negligence. According to the Court, such a "mere rough proportionality of fault" is not consistent with the concept of specific percentages of fault embodied in O.C.G.A. § 51-12-33(a).[101] Second, the pattern charge ambiguously leaves open the possibility that the jury may not have found comparative negligence at all, or that it made an error in reducing the plaintiff's damages in proportion to the degree of his negligence.[102]

According to the Court, the plain language of the statute makes clear that the judge, rather than the jury, is required to reduce the plaintiff's damages, and that this procedure occurs only after the jury has specifically reported the parties' respective percentages of fault on a special jury verdict form.[103] The Court concluded by holding that both pattern charge § 60.141 and the prior case law on which it was based have been superseded by O.C.G.A. § 51-12-33(a), as amended.[104]

III. QUESTIONS REMAINING

A. Is Apportionment Applicable in Single-Defendant Scenarios?

Some plaintiffs have made the argument that apportionment of fault to nonparties is not allowed where there is only a single defendant, which has led to mixed results from trial courts.[105] Again, this argument is based on a reading of O.C.G.A. § 51-12-33 that examines the interplay between subsections (a) and (b) thereof and their relationship with the remaining portions of the statute. The argument is as follows: O.C.G.A. § 51-12-33(a) simply describes the process for reducing a plaintiff's damages award by his or her own negligence, while subsection (b) is the true "apportionment" provision in the statute that abolishes joint and several liability; the remaining subsections of the statute, which are silent as to the number of defendants that are required, should be read as falling under subsection (b). Therefore, because subsection (b) limits its application to actions "against more than one person," apportionment of fault to nonparties pursuant to subsections (c) and (d) is not allowed in single-defendant cases.[106]

The logical response to this argument is that subsections (c) and (d) of O.C.G.A. § 51-12-33 appear in the statute as separate subsections, not as sub-subsections of subsection (b). If the General Assembly intended for subsection (b) to apply to the remaining portions of the statute, presumably it would have drafted the statute to reflect this structure.[107] The use of the phrase "[i]n assessing percentages of fault" in subsection (c) does not require an interpretation that the Legislature was intending to refer only to subsection (b). After all, the jury assesses percentages of fault under *both* subsections (a) and (b), so this phrase logically could refer to either subsection.[108]

The recent Georgia Supreme Court opinion in *McReynolds* should also be used by defense attorneys to argue that subsections (c) and (d) of O.C.G.A. § 51-12-33 are standalone provisions of the statute, and just as the Court declined to import the limiting language of subsection (a) into the remaining subsections, the multiple defendant limitation of subsection (b) similarly should not be imported into the nonparty fault subsections.

1. Single Defendant Sued by Plaintiff

The simplest example is a case where the plaintiff sues only one defendant. Such a sce-

nario certainly could not qualify as an action "brought against more than one person" within the meaning of O.C.G.A. § 51-12-33(b). The typical argument described above is then made that because O.C.G.A. § 51-12-33(c) and (d) are limited by subsection (b), the single defendant is precluded from apportioning fault to a nonparty.[109] However, some trial courts have allowed apportionment under these circumstances.[110] Again, it would be reasonable to expect trial judges to become more receptive to single defendants' arguments for nonparty apportionment, given the reasoning used by the Georgia Supreme Court in *McReynolds* that O.C.G.A. § 51-12-33(c) and (d) are not limited by the preceding subsections of the statute.[111]

2. Single, Nonsettling Defendant

A slightly different situation than that presented by *McReynolds v. Krebs* occurs when multiple parties are originally sued, but the remaining nonsettling defendant attempts to apportion fault not only to the settling parties,[112] but *also to other nonparties*. This issue was not addressed in *McReynolds*, and an analogous argument to that made in *Raines v. Maughan* could be made in such a scenario: the single remaining defendant is not allowed to apportion fault to nonparties.

However, this argument is less persuasive than where a single defendant is originally sued by the plaintiff. One need look no further than the language of O.C.G.A. § 51-12-33(b) itself to see the flaw in this argument. Subsection (b) applies to all actions "brought against more than one person . . ."[113] If the plaintiff originally sued multiple defendants and settled with all but one of them, subsection (b) would still be implicated because it was "brought" against more than one person, thus allowing a defendant to utilize subsections (c) and (d), even under the plaintiff's structural interpretation of the statute.[114]

3. Multiple Defendants and Respondeat Superior

Where a second defendant is named only for purposes of respondeat superior liability, a plaintiff who wishes to foreclose a single defendant's attempt to apportion fault to nonarties can argue that the multiple-defendant requirement is lacking because the two defendants are not truly separate parties or joint tortfeasors. There is some established authority that supports the rule that a claim based upon respondeat superior technically is not one against joint tortfeasors because the claim against the principal is purely derivative of the claim against the agent.[115] Thus, where there are no named defendants other than the principal and agent, and the claim against the principal rests entirely on respondeat superior, it can be expected that a court would find that only a single defendant has been sued for purposes of O.C.G.A. § 51-12-33(b), and the plaintiff's arguments discussed above likely will ensue.[116]

The recent holding in *PN Express, Inc. v. Zegel*, discussed in Part II.E., *supra*, obviously stands for the rule that there can be no apportionment between a principal and an agent, even where one of them is a nonparty.[117] This case supports the traditional rule that two defendants are treated as a single party rather than joint tortfeasors, which likely will result in more arguments by plaintiffs that apportionment to nonparties is not allowed in such cases, despite the fact that the action was "brought against more than one person."[118]

Another interesting effect of the *PN Express* holding can be seen in premises liability cases involving an intentional third-party attacker, discussed more in Part III.C., *infra*. Some plaintiffs are now arguing that because a premises owner's liability is essentially derivative of the third-party attacker, apportionment between the two should not be allowed under

the reasoning of *PN Express*.[119] In other words, there would be no attack and injury, but for the owner's negligent failure to discharge its duty to prevent that very attack.[120]

However, is an owner's liability truly "derivative" of the attacker? In respondeat superior cases such as *PN Express*, the principal's liability is triggered by virtue of the relationship with its agent, and a plaintiff may recover under a separate cause of action against the principal for negligent hiring and retention, assuming there is sufficient evidence for this separate claim. By analogy, a premises owner is not automatically liable by virtue of the attacker's conduct, but may be liable under a separate cause of action for a failure to protect its guest. In other words, there can be an attack and injury to a guest even if the owner or occupier is not negligent.

B. Contribution and Implied Indemnity: What is Left After *McReynolds v. Krebs* and *Murray v. Patel*?

Has the right of contribution been eliminated by the 2005 amendments? At first blush, the *McReynolds* opinion would suggest so. Many scholars and practitioners have agreed with this proposition or have suggestions predating *Cavalier Convenience* that if joint and several liability were truly abolished in all situations, regardless of the plaintiff's fault, then the right of contribution would also be eliminated.[121]

However, *Murray v. Patel* may have specifically rejected the argument that the right of contribution no longer exists in Georgia, implying that it may have been retained in a limited form. However, did the third-party defendant in Murray lose because the Court expressly found that the right to contribution still exists, or did it hold simply that the third-party defendant could not be liable for contribution *by virtue of it being added pursuant to the provisions of O.C.G.A. § 9-11-14?* The Court's terse analysis in *Murray* has led to a debate on the ramifications of that holding.[122] *McReynolds* clearly stands for the proposition that when apportionment is utilized, there is no contribution among the defendants, regardless of whether a defendant has settled prior to trial. At the very least, *Murray* says that when a third-party complaint for contribution or indemnity is filed, both the defendants and third-party defendants are treated as co-defendants for purposes of apportionment, and there is no contribution between them (i.e., their respective liability "shall be the liability of each person against whom they are awarded . . .").[123]

However, this leaves open the possibility that the right of contribution or implied indemnity in a separate, subsequent action lives on so long as the nonparty is not made a party to the original suit. Such a position has considerable support and would logically harmonize O.C.G.A. §§ 51-12-33(b) and 51-12-32, without reducing the latter to mere surplusage.[124] In other words, nothing in the text of O.C.G.A. § 51-12-33(b) says anything that would preclude a single defendant from defending his case through trial or settlement, and then choosing to institute a subsequent contribution action against a third party at a later date. So long as that third party was not made a party to the initial litigation, there is no need to consider the anti-contribution language of O.C.G.A. § 51-12-33(b) because that third party would not qualify as one of the "persons who are liable" within the meaning of that Code section. Similarly, if a nonparty is assigned a percentage of fault pursuant to O.C.G.A. § 51-12-33(c) and (d), the named defendants would be precluded from seeking contribution or implied indemnity from the nonparty. However, even if the nonparty is considered by the jury and given a percentage of fault, it is still not a person who is "liable" within the meaning of O.C.G.A. § 51-12-33(b). Nevertheless, the logical conclusion is that once a jury has ap-

portioned fault to a nonparty, the defendants are thereafter precluded from litigating the issue of that nonparty's responsibility.

This suggests that the rights of contribution and implied indemnity have survived in a limited form, and a defendant generally has three choices when he believes an unnamed person is wholly or partly responsible: (1) file a third-party complaint and bring the person into the action; (2) serve a O.C.G.A. § 51-12-33(d)(2) notice of nonparty fault; or (3) defend the case and institute a separate action for contribution or implied indemnity at a later date against the other person(s) believed to be responsible. Only in scenario (1) is the right of contribution eliminated by O.C.G.A. § 51-12-33(b) under *Murray*.[125] Logically, it would appear that there can be no contribution or indemnity in scenario (2) either. In scenario (3), it can be argued that contribution or implied indemnity still exists, a theory that does not appear to have been affected by the recent Georgia Supreme Court decision in *McReynolds*.

C. Negligent Security: O.C.G.A. § 51-12-33 Under Attack in Third-Party Criminal Attack Cases

Perhaps the most vigorous debate regarding O.C.G.A. § 51-12-33 occurs in the context of premises liability cases where an injured person asserts that the defendant was negligent in failing to protect him from a third-party criminal attacker. In fact, several trial courts have already held that O.C.G.A. § 51-12-33 is inapplicable to negligent security cases or have declared portions of it unconstitutional,[126] which is contrary to the recent nonbinding decision of the Court of Appeals in *Pacheco v. Regal Cinemas, Inc.*[127] These trial courts reason that by allowing a premises owner to apportion fault to a nonparty criminal assailant, the owner effectively escapes or significantly diminishes his liability by shifting responsibility to the very actors whose conduct it had a duty to prevent, essentially nullifying its nondelegable duty to keep its premises safe.[128] The Restatement (Third) of the Law of Torts supports this position:

> A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.[129]

Such reasoning raises concern that the language of the statute is broad enough to include intentional conduct. O.C.G.A. § 51-12-33(c) and (d) both speak in terms of "fault"[130] and "negligence," while subsection (a) uses the broader term "responsible."[131] Although the definition of "fault" from Black's Law Dictionary contains a theme of negligence, rather than intentional conduct, at least one trial judge has disagreed and held that "fault," as defined by Black's, is broad enough to include intentional acts.[132] Regardless of ambiguity, if the General Assembly intended subsections (c) and (d) to encompass *all* conduct, including intentional acts, why would it choose to use the terms "fault" and "negligence" instead of the broader term "responsible" that was used in a previous subsection of the same statute? It could hardly be argued that the term "responsible" is not broad enough to include intentional conduct.

Furthermore, even assuming that the General Assembly intended for intentional conduct to be considered pursuant to O.C.G.A. §§ 51-12-33(c) and (d), as a practical matter, will a jury actually be able to make such a comparison and arrive at a result that appropriately separates each person's respective fault? This is precisely what the appellate argued before the Georgia Supreme Court in *Couch v. Red Roof Inns, Inc.* by the appellant on certified ques-

tions from the United States District Court for the Northern District of Georgia.[133] In *Couch*, the appellant argued that it was unfair, irrational and impossible for a jury to weigh the two types of conduct in negligent security cases.[134] In response, Justice Nahmias suggested that such a comparison is not impossible, despite theories to the contrary by legal "commentators."[135] He also hinted that he may look to other jurisdictions for guidance on the issue, pointing out that several other states have addressed this very issue or have carved out an exception by statute.[136] Counsel for the appellee noted in response that juries decide difficult questions on a regular basis,[137] and that courts and litigants should have faith in the "enlightened conscience" of the jury to do its job. As of the time of publication of this article, no ruling has been issued by the Georgia Supreme Court resolving this issue.

D. "Proving" a Nonparty's Negligence: What Proof is Required?

As discussed in Part II.A., *supra*, the trial court in *McReynolds v. Krebs* prohibited the nonsettling defendant from arguing apportionment or even mentioning the settling defendant to the jury.[138] This was because at the beginning of the trial, the nonsettling defendant, Ms. McReynolds, admitted that she had no evidence of the settling defendant's potential fault for the accident.[139] The Court of Appeals and Supreme Court affirmed this ruling, noting the particular importance of the fact that no evidence of GM's potential liability existed.[140] Notably, McReynolds' attorneys had been given extra time in discovery to pursue her allegations against GM, which they chose not to do.[141] Simply stated, McReynolds "presented *no evidence* on which apportionment of liability could be based."[142] This statement raises questions regarding the amount of evidence needed to argue the fault of a nonparty.

The statute is conspicuously silent as to the amount of evidence required to apportion and whether there is a threshold evidentiary inquiry is required by the court before the jury decides apportionment. The trial court in *McReynolds* essentially found that there was such a threshold evidentiary requirement and that because Ms. McReynolds failed to meet this burden, she was not allowed to argue apportionment or obtain such a jury instruction.[143] The Court of Appeals' statement that McReynolds presented "no evidence on which apportionment of liability could be based" echoed this conclusion, implying that there is a threshold evidentiary standard that a party must meet before arguing the negligence of a nonparty.[144] This unavoidably leads to the next question: how high is that standard?

A party must ultimately make his or her case of nonparty negligence in the same way he would prove any negligent claim (i.e., proof of a duty, breach, cause and harm by a preponderance of the evidence). The apportioning party will argue his case to the jury, and the jury will decide whether the preponderance standard has been met (just as it would do for the primary claim by the plaintiff). The existence of a threshold evidentiary test for the court, as implied by the *McReynolds* decision, raises questions regarding the procedure for apportionment.[145] Most often, the issue arises in the context of a pre-trial motion in limine by the plaintiff to preclude any reference to nonparty fault or a motion to strike the defendant's O.C.G.A. § 51-12-33(d) notice. Should a trial court deny such a motion if there is *any* evidence of nonparty fault? Does the apportioning party have to meet the preponderance standard at this initial stage, effectively being required to prove by a preponderance of the evidence to both the judge and jury?

The language of the statute demonstrates that the legislature intended for the mandatory consideration of nonparty negligence.

O.C.G.A. § 51-12-33(c) provides in part that "the trier of fact *shall* consider the fault of all persons or entities . . ., regardless of whether the person or entity was, or could have been, named as a party to the suit."[146] Similarly, subsection (d) provides that "[n]egligence or fault of a nonparty *shall* be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial . . ."[147] This language strips the trial court of its discretion to allow apportionment based on a party's meeting some unknown evidentiary burden of proof.[148] However, a counter-argument could be made that if the evidence of nonparty negligence is zero (as it was in *McReynolds*), then there is no fault to be considered or apportioned, and O.C.G.A. § 51-12-33 is not implicated.[149] This is essentially what the Court held in *McReynolds*, suggesting that a party seeking apportionment of fault to a nonparty must make a prima facie case beyond mere conclusory allegations.[150] In addition, given that the general standard of proof on affirmative defenses involving negligence is a preponderance of the evidence and the fact that *Union Carbide Corporation v. Fields* holds that an attempt to apportion fault to a nonparty is an affirmative defense, it is likely that the ultimate burden on the defendant to prove nonparty negligence is by a preponderance of the evidence.[151] As discussed in Part II.C., *supra, Fields* also makes clear that a defendant may not rely on inferences alone to carry this burden; such inferential allegations of nonparty negligence are subjected to summary adjudication in favor of the plaintiff.[152]

E. Constitutional Issues

A host of arguments are being made that O.C.G.A. §51-12-33 is unconstitutional, most notably that it is vague when read in conjunction with O.C.G.A. §§ 51-12-31 and 51-12-32.[153] Judge Alvin T. Wong recently held both O.C.G.A. §§ 51-12-31 and 51-12-33 unconstitutionally vague in his January 11, 2012 order in *Medina v. GFI Management Services, Inc.*[154] The Court noted that prior to the 2005 amendments, O.C.G.A. § 51-12-33 applied where the plaintiff was at fault and O.C.G.A. § 51-12-31 applied where the plaintiff was not at fault, and in either situation, apportionment was discretionary (i.e., by use of the word "may").[155] However, with the 2005 amendments, apportionment under section 51-12-33 is now mandatory (i.e., by use of the word "shall"), but the Legislature left apportionment discretionary under section 51-12-31 by retaining the word "may."[156] The court reasoned that if apportionment is mandatory regardless of whether the plaintiff is at fault, as held in *Cavalier Convenience v. Sarvis*, then section 51-12-31 is rendered meaningless.[157]

However, it cannot be ignored that section 51-12-31 clearly defers to section 51-12-33 by use of the phrase "[e]xcept as otherwise provided in Code Section 51-12-33."[158] The Court of Appeals placed significance importance on this language in deciding *Cavalier Convenience* as it side-stepped the plaintiff's argument that its holding would render § 51-12-31 meaningless.[159] Similarly, the Georgia Supreme Court noted in *McReynolds* that O.C.G.A. § 51-12-32 "obviously cannot trump the rules set forth in § 51-12-33" due to the opening phrase "[e]xcept as provided in Code Section 51-12-33."[160] Nevertheless, given that the constitutionality of the 2005 amendments was not raised in *McReynolds* on certiorari to the Georgia Supreme Court, opponents of these holdings will continue to rely upon Georgia's fundamental rules of statutory construction[161] to argue that the opening sentences of sections 51-12-31 and 51-12-32 essentially now read: "except for [always], the following rules will apply."[162]

IV. CONCLUSION

The 2005 amendments have dramatically altered the landscape of tort litigation in Georgia. The significance of these changes only began to be realized in 2010 with the Court of Appeals' decisions in *Cavalier Convenience v. Sarvis* and *McReynolds v. Krebs*. Given that the Supreme Court of Georgia agreed with the Court of Appeals' analysis in *McReynolds* and *Cavalier Convenience*, it appears that joint and several liability has been totally eliminated in Georgia. However, there is a colorable argument that the rights of contribution and implied indemnity still exist in a separate action against a person or entity who was not previously made a party to the original suit. Many questions remain open regarding who may take advantage of apportionment of fault to nonparties or whether it applies at all in certain types of cases. Additionally, there are possible constitutional problems with the 2005 amendments that cannot be ignored in light of recent trial court decisions from around the state. Judges, attorneys, litigants, insurance companies and many others are anxiously awaiting the appellate decisions that offer additional guidance on these issues. Possibly, the appellate courts will once again defer to the Legislature as in *Cavalier Convenience*. In all likelihood, this will prompt yet another rewrite by the General Assembly of the statutes at issue. Until then, there appear to be as many questions raised by the 2005 amendments as there are answers.

ENDNOTES:

[1] Hereinafter referred to as "the 2005 amend ments."

[2] For purposes of this article, it is assumed that the reader has a general understanding of these amendments. This article is in tended neither as a survey of the history of joint and several liability and contribution in Georgia, nor of the amendments them selves or the legislative history of these statutes. For a detailed analysis of the background of the 2005 amendments and the law as it existed prior thereto, which is beyond the scope of this article, see David C. Marshall, Christian J. Lang & Marcus W. Wisehart, *Apportionment of Fault to a Non-Party: Pointing Fingers to Victory,* 2011 Ga. Def. Lawyers Ass'n L.J. 33, 34-39; Kirby G. Mason, *Are Joint Liability and the Right to Contribution Dead?*, 2008 Ga. Def. Lawyers Ass'n L.J. 61, 61-63; Emily Ruth Boness, Note, *The Effect (or Noneffect) of the 2005 Amendments to O.C.G.A. Sections 51-12-31 and 51-12-33 on Joint Liability in Georgia*, 44 Ga. L. Rev. 215, 216-233 (2009).

[3] *See* O.C.G.A. § 51-12-33(c) and (d).

[4] O.C.G.A. § 51-12-31 (1987), *amended by* S.B. 3 (2005).

[5] O.C.G.A. § 51-12-33 (1987), *amended by* S.B. 3 (2005).

[6] O.C.G.A. § 51-12-31 (2011).

[7] O.C.G.A. § 51-12-33 (2011).

[8] O.C.G.A. § 51-12-32 (2011).

[9] Michael L. Wells, *Joint Liability Rules*, 39 Ga. Law Advocate 18, Spring/Summer 2005.

[10] Exhibit "A"

[11] 305 Ga. App. 141, 699 S.E.2d 104 (2010).

[12] 307 Ga. App. 330, 705 S.E.2d 214 (2010).

[13] 2011 Ga. LEXIS 198.

[14] *See* McReynolds v. Krebs, S11G0638

(Mar. 23, 2012).

[15] *See id.*

[16] 305 Ga. App. at 141.

[17] *Id.*

[18] *Id.* at 142.

[19] *Id*.

[20] *Id*. at 145.

[21] *Id*. at 144.

[22] *Id*. at 144-145.

[23] 307 Ga. App. at 330-331.

[24] *Id*. at 331.

[25] *Id*.

[26] *Id*. The terms of GM's settlement included a confidentiality agreement. Thus, Ms. McReynolds had no knowledge of the amount of the settlement.

[27] *Id*. at 332.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 333, *citing Cavalier Convenience*, 305 Ga. App. 141.

[32] Brief of Appellant at 20, McReynolds v. Krebs, 2011 Ga. LEXIS 400 (2011) (S11G0638).

[33] All of the justices concurred on this partic ular issue, except Justice Hunstein, who concurred only in the judgment.

[34] *See* McReynolds v. Krebs, S11G0638 (Mar. 23, 2012).

[35] *Id*. at 5.

[36] *Id., quoting* O.C.G.A. § 51-12-33(b) (emphasis added in opinion).

[37] S11G0638 at 5.

[38] 307 Ga. App. at 334, *quoting* O.C.G.A. § 51-12-33(b) (emphasis added).

[39] 307 Ga. App. at 334.

[40] *Id*.

[41] Brief of Appellant at 20, McReynolds v. Krebs, 2011 Ga. LEXIS 400 (2011) (S11G0638).

[42] *Id.*

[43] In layperson's parlance, Ms. McReynolds was left between the proverbial "rock and a hard place."

[44] S11G0638 at 6, *quoting* O.C.G.A. § 51-12-33(b).

[45] S11G0638 at 6, *quoting* O.C.G.A. § 51-12-32(a).

[46] S11G0638 at 6, *citing Broda v. Dziwura*, 286 Ga. 507, 509, 689 S.E.2d 319 (2010).

[47] That is, whether under any subsection of O.C.G.A. § 51-12-33.

[48] 305 Ga. App. at 141 (emphasis added).

[49] S11G0638 at 2 (emphasis added).

[50] 312 Ga. App. 303, 718 S.E.2d 135 (2011)

(physical precedent only).

[51] Amended Brief of Appellants at 16-17, R aines v. Maughan, 312 Ga. App. 303 (2011) (A11A0793).

[52] *Id*.

[53] *Id*. at 17.

[54] 312 Ga. App. at 308.

[55] 311 Ga. App. 224, 228, 715 S.E.2d 728 (2011) (physical precedent only for division (2)(b)).

[56] 312 Ga. App. at 308.

[57] *Id*.

[58] 308 Ga. App. 358, 362, 707 S.E.2d 570 (2011).

[59] *Id*. at 358.

[60] *Id*. at 362.

[61] *Id*. at 358.

[62] *Id*. at 360, n.8.

[63] *Id*. at 360. Additionally, it did not appear that any instruction on comparative negligence was given on Mrs. Farmer's claims, given that she was riding as a passenger in the vehicle, and in all likely-hood, was not negligent.

[64] *Id.* at 362, n.14. Apparently, a special verdict form was not used at trial, and it appears that the Court of Appeals assumed that the jury found Mr. Farmer partially at fault by not awarding him the full amount of damages sought on his claim. This is precisely what gave the Court of Appeals such concern in *Clark v. Rush*, 312 Ga. App. 333, 718 S.E.2d 555 (2011), discussed in Part II.F., *infra*, because there is no way to discern the exact percentage of negligence, if any, was assessed against the plaintiff or whether the jury had al ready reduced its award based on that negligence. *See Clark,* 312 Ga. App. at 337.

[65] 308 Ga. App. at 358.

[66] *Id*. at 362.

[67] The Court also rejected the Farmers' argument that apportionment in this case would violate the interspousal tort immunity doctrine, reasoning that Mrs. Farmer was in no way required to file suit against her husband. Rather, she was precluded from recovering from Ms. Barnett that portion of her damages, if any, that the jury concluded resulted from the negligence of her husband.

See note 63, *supra.*

[68] *See* Union Carbide Corp. v. Fields, 2012 Ga. App. LEXIS 308 (Mar. 20, 2012), discussed in Part II.C., *infra* (noting that *Barnett* held that the negligence of a non party was properly considered where there was evidence of negligence on the part of both the defendant and the nonparty, despite the fact that the nonparty was immune from suit or could not be named as a party). At the time of this article's publication, the *Fields* opinion was uncorrected and subject to revision by the court.

[70] S11G0638 at 4 (emphasis added).

[71] *Id*. at 7.

[72] 2012 Ga. App. LEXIS 308 (Mar. 20, 2012).

[73] *Id*.

[74] *Id*. at 4-6.

[75] *Id*. at 6.

[76] *Id*. at 15-16.

[77] *Id*. at 16, *quoting* Adamson v. Gen. Elec. Co., 303 Ga. App. 741, 744, 694 S.E.2d 363 (2010).

[78] *Fields* at 10-11, *quoting* O.C.G.A. § 51-12-33(c).

[79] *Fields* at 7.

[80] 304 Ga. App. 253, 696 S.E.2d 97 (2010).

[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*. at 255.

[86] *Id*.

[87] Referring to O.C.G.A. §§ 9-11-14 and 51-12-33(b).

[88] 304 Ga. App. at 255.

[89] 304 Ga. App. 672, 697 S.E.2d 226 (2010).

[90] *Id*. at 673.

[91] *Id*. at 673-680.

[92] *Id*. at 680.

[93] *Id*. *See also* Travelers Indem. Co. v. Liberty Loan Corp., 140 Ga. App. 458, 461, 231 S.E.2d 399 (1976) (recognizing the rule that where liability against an employer rests only on the doctrine of respondeat superior, the employer is not a joint tortfeasor in the ordinary sense of the term, and law of joint and several liability does not apply).

[94] 312 Ga. App. 333, 718 S.E.2d 555 (2011).

[95] Council of Superior Court Judges of Georgia, *Suggested Pattern Jury Instructions*, Vol. I: Civil Cases (4th ed.) § 60.141 (2006).

[96] 312 Ga. App. at 333.

[97] *Id*. at 334-335, *quoting Suggested Pattern Jury Instructions,* §60.141.

[98] *See* Underwood v. Atlanta & West Point R.R. Co., 105 Ga. App. 340, 358-362, 124 S.E.2d 758 (1962).

[99] 312 Ga. App. at 336.

[100] *Id*.

[101] *Id*. at 336-337.

[102] *Id*. at 337.

[103] *Id.*

[104] *Id*.

[105] *Compare* Order granting Plaintiff's Motion to Strike, Reasoner v. Schwartz, State Court of DeKalb County, Civil Action No. 08A92811-3 (July 30, 2009), attached hereto as Exhibit "B" (not allowing jury to

consider fault of nonparty where only a single defendant was sued), *with* Order denying Plaintiff's Motion to Strike, Taylor v. DeKalb County, Georgia, State Court of DeKalb County, Civil Action No. 06A50694-7 (Jan. 22, 2009), attached hereto as Exhibit "C" (allowing the jury to consider apportionment to non-party even where only a single defendant was sued). *See also* Susan J. Levy, Sometimes, *It Makes Sense To Waive Apportionment, Georgia Insurance Defense Lawyer Blog,* Jan. 4, 2010, http://www.georgiainsurancedefenselawer.com/2010/01/somtimes_it_makes_sense_to_wa.html#more (recognizing the significance of this intra-county split on nonparty apportionment). This apparent split within the State Court of DeKalb County represents a fundamental problem with the structure of the statute and the ambiguity it presents.

106 This is precisely the interpretation used by Judge Wayne Purdom in *Reasoner v. Schwartz*, note 105, *supra*. Additionally, Judge Alvin T. Wong of the State Court of DeKalb County noted in a recent order declaring O.C.G.A. §§ 51-12-31 and 51-12-33 unconstitutional that the Court of Appeals in *McReynolds v. Krebs* "specifically held" that O.C.G.A. § 51-12-33(c) and (d) are "enabling provisions" that foreclose the concept of apportionment where a single defendant is involved. *See* Medina v. GFI Management Svcs., Inc., DeKalb County State Court, Civil Action No. 09A13159-1 (Jan. 11, 2012), attached hereto as Exhibit "D." This conclusion is presumably based upon the following sentence from the Court of Appeals' opinion in *McReynolds*: "[t]he remainder of the Code section [subsections (c) through (g)] explains the procedure to be followed for apportionment." 307 Ga. App. at 333. In its use of this sentence in *McReynolds*, did the court of appeals actually announce that subsections (c) and (d) were to be limited by the multiple defendant provision in subsection (b)? Such a conclusion seems contrary to the Georgia Supreme Court's recent analysis in *McReynolds* on certiorari, where it seemed to hold that subsections (c) and (d) are standalone provisions that are not limited by the preceding subsections.

107 For example, the statute could have been structured with subsections (a) and (b) as they appear currently, with a (b)(1) instead of (c), and (b)(2)(A) and (B) instead of (d)(1) and (2). Alternatively, the Legislature could have inserted additional language in subsection (c) to read instead: "In assessing percentages of fault *pursuant to subsection (b) of this Code section*, . . ." (emphasis added). Defense attorneys can reasonably argue that the Legislature's failure to use this language, which it presumably knows how to do, results in a logical interpretation that subsections (c) and (d) are not limited by subsection (b).

108 *See also* Order, Herrera v. Miles Properties, Inc., State Court of DeKalb County, Civil Action No. 08A83964-6 (Aug. 16, 2010), attached hereto as Exhibit "E" (allowing apportionment to nonparty and noting that the legislature neither stated nor indicated that subsection (c) applies only after application of subsections (a) and (b)).

109 Amended Brief of Appellants at 18, Raines v. Maughan, 312 Ga. App. 303

(2011) (A11A0793).

110 *See* Taylor v. DeKalb County, Georgia, State Court of DeKalb County, Civil Action No. 06A50694-7.

111 *See* McReynolds v. Krebs, S11G0638 at 4-5 (Mar. 23, 2012). However, it should be noted that the Supreme Court's opinion contains an apparent error in referring to what it describes as the same opening "broad statement of applicability" of subsections (a) and (b): "Where an action is brought against *more than one* person for injury to person or property . . ." (emphasis added). Clearly, subsection (a) opens with "[w]here an action is brought against *one or more* persons . . ." (emphasis added). Therefore, given that the two subsections indeed do differ as to the number of defendants required, it remains unclear whether apportionment to nonparties is allowed where only a single defendant is sued.

112 As the defendant attempted to do in *McReynolds*, assuming some actual evidence of the settling parties' negligence exists, as was not the case in *McReynolds*.

113 O.C.G.A. § 51-12-33(b) (emphasis added).

114 *See* Order, Herrera v. Miles Properties, Inc., State Court of DeKalb County, Civil Action No. 08A83964-6 (Aug. 16, 2010) (finding apportionment to nonparty appropriate, even after dismissal of all but one defendant, because the action was originally *brought* against more than one defendant).

115 *See* Travelers Indem. Co. v. Liberty Loan Corp., 140 Ga. App. 458, 461, 231 S.E.2d 399 (1976); Giles v. Smith, 80 Ga. App. 540, 543, 56 S.E.2d 860 (1949).

116 Interestingly, in *Bennett v. Wal-Mart Transportation, LLC, et al.*, State Court of Bulloch County, Case No. 2B06CV406, this factual situation presented itself, but the plaintiff apparently chose not to argue the single-defendant issue, even though the only two named defendants were in a respondeat superior relationship. Instead, the plaintiff challenged the 2005 amendments on constitutional grounds. On July 5, 2007, Judge Gary L. Mikell denied the plaintiff's motion and allowed the defendants to argue that a nonparty was at fault for causing the accident forming the basis of the suit. A copy of Judge Mikell's Order is attached hereto as Exhibit "F."

117 304 Ga. App. at 680.

118 O.C.G.A. § 51-12-33(b). It is not clear why the trial court or court of appeals declined to allow the defendant in *PN Express* to apportion fault to the "certain other entities" in addition to Patterson Freight Company, the company with whom PN Express, Inc. had an agency relationship. Additionally, the single-defendant argument was not raised on appeal or otherwise discussed by the court in the opinion, despite the fact that PN Express, Inc. apparently was the only defendant sued by the plaintiffs.

119 *See* Order denying apportionment at 4-6, Salinas v. Coro Realty Advisors, State Court of Fulton County, Civil Action No. 10EV009982 (Sept. 20, 2011), attached hereto as Exhibit "G";

Order granting Plaintiff's Motion for Partial Summary Judgment, Todd v. Accor North America, Inc., State Court of Fulton County, Civil Action No. 09EV006935 (Nov. 10, 2011), attached hereto as Exhibit "H"; Plaintiff/Appellant's Brief Regarding Certified Questions at 7-9, Couch v. Red Roof Inns, Inc., Supreme Court of Georgia, Case No. S12Q0625.

120 See Plaintiff/Appellant's Brief Regarding Certified Questions at 8, Couch, note 119, supra.

121 *See* Michael L. Wells, *Joint Liability Rules*, 39 Ga. Law Advocate 18, Spring/Summer 2005 (pre-*Cavalier Convenience*, positing that O.C.G.A. § 51-12-33 merely clarifies the law as it existed prior to the enactment of S.B. 3, namely, that joint and several liability is abolished only when the plaintiff is at fault because if joint liability has indeed been abolished, even where the plaintiff is not at fault, O.C.G.A. § 51-12-32 would be a nulli ty); Emily Ruth Boness, Note, *The Effect (or Noneffect) of the 2005 Amendments to O.C.G.A. Sections 51-12-31 and 51-12-33 on Joint Liability in Georgia,* 44 Ga. L. Rev. 215, 235-236, 244 (2009); Adam Hoipkemier, *Georgia's Apportionment Scheme: Reevaluating Accepted Litigation Tactics*, Feb. 15, 2012, http://www.carltonfields.com/georgia apportionmentscheme/.

122 Reply Brief of Cross Appellants at 12-13, K&V Meter Automation, LLC and Khafra Operations, LLC v. City of Atlanta, 2011 Ga. App. Ct. Briefs 10769 (2011) (A11A0769); Brief of Cross Appellee at 26, K&V Meter Automation, LLC and Khafra Operations, LLC v. City of Atlanta, 2011 Ga. App. Ct. Briefs 10769 (2011) (A11A0769).

123 O.C.G.A. § 51-12-33(b).

124 *See Cavalier Convenience*, 305 Ga. App. at 146, n.21 (*citing Murray v. Patel*, and noting that the appellants in the instant case each argued that the right of a tortfeasor to contribution would continue to be applicable in instances where one party resolves the plaintiff's entire claim by way of settlement and then pursues an action for contribution against others claimed to be responsible). See also Daniel J. Huff, *The Joint Tortfeasor Maze,* 24 Medical Malpractice Inst. 1, 21 (2008).

125 304 Ga. App. at 255 (requiring apportionment between the defendant and third-party defendant).

126 *See* Order granting Plaintiff's motion in limine, Martin v. Six Flags Over Georgia II, L.P., et al, Cobb County State Court, Civil Action No. 09-A-55-4 (Sept. 12, 2011), attached hereto as Exhibit "I" (finding apportionment in applicable in premises cases where there is an allegation of an intentional tort); Order denying apportionment, Salinas v. Coro Realty Advisors, et al., Fulton County State Court, Civil Action No. 10EV009982 (Sept. 20, 2011) (holding that to allow a land owner to apportion fault to a third-party criminal assailant would be an "incompatible result" under Georgia law); Order granting Plaintiff's motion in limine, Medina v. GFI Management Svcs., Inc., DeKalb County State Court, Civil Action No. 09A13159-1 (Jan. 11, 2012) (holding O.C.G.A. §§ 51-12-31 and 51-12-33 unconstitution-

ally vague and violative of due process and equal protection, although noting that nothing in O.C.G.A. § 51-12-33 precludes its application to negligent security cases). In his Order denying apportionment in *Medina*, Judge Alvin T. Wong described the current state of apportionment in premises liability liti gation involving third party criminal actors as a "quagmire." Additionally, in *Couch v. Red Roof Inns, Inc.,* Certified Questions from Northern District of Georgia, 1:10-CV-00045-SCJ, the Georgia Supreme Court heard oral arguments on March 6, 2012 on these very issues.

[127] 311 Ga. App. 224, 715 S.E.2d 728 (2011) (physical precedent only for Division (2)(b)).

[128] *See* Plaintiff/Appellant's Brief Regard ing Certified Questions at 10, Couch v. Red Roof Inns, Inc., Supreme Court of Georgia, Case No. S12Q0625. Interestingly, these very same arguments were made in *Cavalier Convenience* by the Georgia Trial Lawyers Association and the DeKalb Rape Crises Center in their amicus curiae briefs to the Georgia Court of Appeals, effectively predicting the coming of the current "quagmire" in negligent security cases described by Judge Wong in *Medina*. Nevertheless, the court rejected these "policy argu ments" in *Cavalier Convenience*, deferring to the Legislature and the doctrine of separation of powers. 305 Ga. App. at 146-147.

[129] Restatement (Third) of the Law of Torts, Apportionment of Liability, §14.

[130] Black's Law Dictionary defines "fault" as "*[n]egligence*; an error or defect of judgment or of conduct; any *deviation from prudence*, duty, or rectitude; any shortcoming, or *neglect of care* or per formance resulting from inattention, incapacity, or perversity; a wrong tendency, course or act; bad faith or mismanagement; *neglect of duty*." Black's Law Dictionary 608 (6th ed. 1990) (emphasis added).

[131] O.C.G.A. § 51-12-33(a).

[132] *See* Order granting Plaintiff's motion in limine at 3, Medina v. GFI Manage-ment Services, Inc., DeKalb County State Court, Civil Action No. 09A13159-1 (Jan. 11, 2012). Cf. Order granting Plaintiff's motion in limine at 3, Martin v. Six Flags Over Georgia II, L.P., et al., Cobb County State Court, Civil Action No. 09-A-55-4 (Sept. 12, 2011) (finding that the terms "negligence" and "fault" in O.C.G.A. § 51-12-33(d) clearly evidences the Legislature's intent that the subsection be limited to cases involving negligence, rather than intentional torts).

[133] Oral arguments held on March 6, 2012, Supreme Court of Georgia, Case No. S12Q0625.

[134] Plaintiff/Appellant's Brief Regarding Certified Questions at 10-11, Couch v. Red Roof Inns, Inc., Supreme Court of Georgia, Case No. S12Q0625. Counsel for the Plaintiff/Appellant pointed out examples of multiple cases with similar facts in which juries returned verdicts that reflected disparate percentages of apportionment to the nonparty attackers. For instance, some cases have reflected heavy apportionment for the nonparty, while in others only nominal fault was found

by the nonparty attacker. Counsel reasoned that such disparities show a lack of rational basis for apportionment in these instances.

135 Oral arguments held on March 6, 2012, Supreme Court of Georgia, Case No. S12Q0625.

136 *Id.* *See also* Barth v. Coleman, 878 P.2d 319 (N.M. 1994) (allowing apportionment between defendants and third party attacker); Weidenfeller v. Star & Garter, 2 Cal. Rptr.2d 14 (Cal. App. 4 Dist. 1991) (holding that apportionment between defendant and third-party attacker was proper under Cal. Civ. Proc. Code ' 1431.2, rejecting plaintiff's public policy arguments); Natseway v. City of Tempe, 909 P.2d 441 (Ariz. App. 1995). *But see* Turner v. Jordan, 957 S.W.2d 815, 823 (Tenn. 1997) (declining to allow apportionment between negligent defendant and intentional actor where the intentional conduct is the foreseeable risk created by the negligent tortfeasor); Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12, 22 (Fla. App. 1 Dist. 1996) (reasoning that if a negligent tortfeasor were to be allowed to blame an intentional wrongdoer, it would create a disincentive for the negligent tortfeasor to prevent the intentional harm from occurring); Kansas State Bank & Trust Co. v. Specialized Transp. Services, Inc., 819 P.2d 587 (Kan. 1991) (holding that negligent defendants should not be allowed to reduce their liability by intentional acts they had a duty to prevent); Brandon v. County of Richardson, 624 N.W.2d 604 (Ned. 2001) (finding it irrational to allow a negligent party to reduce its liability due to an intentional tort when the intentional tort is exactly what the negligent party had a duty to protect against); Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991) (allowing apportionment between negligent property owner and intentional attacker but only because the attack was not foreseeable, thus there was no duty on the part of the owner to prevent the attack).

137 One example given by the appellee's counsel during oral argument was the calculation of the value of a human life in wrongful death cases, the amount of which can often vary from one case to another. However, this difficulty does not warrant a conclusion that such a calculation is unfair, irrational or im possible, as suggested by the appellant's counsel.

138 307 Ga. App. at 332.

139 *Id.*

140 *Id.* at 335; S11G0638 at 7.

141 307 Ga. App. at 335; S11G0638 at 7.

142 307 Ga. App. at 335 (emphasis added)

143 307 Ga. App. at 332.

144 *Id.* at 335.

145 An interesting point was raised by the plaintiff in *McReynolds* in her brief to the Georgia Supreme Court: "[w]ithout evidence of GM's fault or liability, McReynolds' argument that she should have been allowed to 'mention' GM is meritless. Although every plaintiff's lawyer in Georgia wishes it were so, the mere use of unproven allegations . . . cannot form the basis of fault or liability . . ." Appellee's Response to

Brief of Appellant at 4, McReynolds v. Krebs, 2011 Ga. LEXIS 400 (2011) (S11G0638).

146 O.C.G.A. § 51-12-33(c) (emphasis added).

147 O.C.G.A. § 51-12-33(d)(1) (emphasis added).

148 *But see Fields*, 2012 Ga. App. LEXIS 308 (holding that despite the mandatory language found in O.C.G.A. § 51-12-33(d) as to consideration of fault of settling parties, there must be some competent evidence that the nonparty "contributed to the alleged injury or damages" before its fault can be assessed by the jury), *quoting* O.C.G.A. § 51-12-33(c). As such, it is unlikely that defendants will be able to argue successfully that juries must *automatically* consider the fault of non parties pursuant to O.C.G.A. § 51-12-33(d).

149 Perhaps another way of justifying the harsh outcome for Ms. McReynolds is that she was essentially arguing for a set-off, even in her "alternative" argument for apportionment. Ulti mately, she sought to reduce her liability for the plaintiff's damages by the amount of GM's settlement payment or its "fault," but by arguing the latter in the alternative (i.e., that she should be allowed to apportion), she may have appeared to be seeking the identical relief as in her argument for set-off. Perhaps the court believed this was a clever attempt to obtain a set-off, disguised as apportionment.

150 *See also* Deloach v. Deloach, 258 Ga. App. 187, 573 S.E.2d 444 (2002) (noting that where there is any evidence, however slight, upon a particular issue, it is not error for the court to charge the law in relation to that issue).

151 2012 Ga. App. LEXIS 308 (Mar. 20, 2012). Prior to *Fields*, it would appear that some confusion existed on whether an allegation of nonparty fault is an affirmative defense or merely an alternative theory of causation. *See* Order granting Plaintiff's motion for clarification, Johnson v. Gibson, State Court of Fulton County, Civil Action No. 10EV009486 (Feb. 17, 2011), attached hereto as Exhibit "J." In light of the *Fields* analysis, it seems reasonably clear that proving nonparty fault is in fact an affirmative defense.

152 *See id.* (holding that defendants' claims of nonparty negligence were precluded as a matter of law because they failed to render less probable all inconsistent conclusions).

153 Plaintiff/Appellant's Brief Regarding Certified Questions at 20-30, Couch v. Red Roof Inns, Inc., et al., Supreme Court of Georgia (S12Q0625).

154 Order granting Plaintiff's motion in limine, DeKalb County State Court, Civil Action No. 09A13159-1 (Jan. 11, 2012).

155 *Id.* at 7-8.

156 *Id.* at 8.

157 *Id.* at 9.

158 O.C.G.A. § 51-12-31. Additionally, O.C.G.A. § 51-12-32 contains an identical opening phrase.

[159] 305 Ga. App. at 145-146.

[160] S11G0638 at 6.

[161] *See* Slakman v. Continental Cas. Co., 277 Ga. 189, 191, 587 S.E.2d 24 (2003) (noting the rule that courts avoid a construction that makes some language mere surplusage).

[162] *See* Michael L. Wells, *Joint Liability Rules*, 39 Ga. Law Advocate 18, Spring/Summer 2005.

APPORTIONMENT LESSONS

A. Apportionment Among Co-Defendants Irrespective of the Plaintiff's Fault Under O.C.G.A. § 51-12-33(b). *McReynolds v. Krebs,* S11G0638 (March 23, 2012)

B. No Contribution or Set-off for Nonsettling Defendant; Nonparty Apportionment Does Not Depend on the Plaintiff's Fault. *McReynolds v. Krebs,* S11G0638 (March 23, 2012)

C. Proving Nonparty Fault is an Affirmative Defense; Inferences Alone are Insufficient. *Union Carbide Corporation v. Fields,* A11A2025 (March 20, 2012)

D. The Filing of a Third-Party Complaint for Contribution or Indemnity Triggers Appor tionment. *Murray v. Patel,* 304 Ga. App. 253 (2010)

E. No Apportionment of Fault to a Nonparty Where the Only Basis for Apportionment is an Agency Relationship. *PN Express, Inc. v. Zegel*, 304 Ga. App. 672 (2012)

F. Pattern Jury Charge for comparative negligence is Invalid. *Clark v. Rush,* 312 Ga. App. 333 (2011)

EXHIBIT "A"

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

RICHARD MERLE REASONER, as surviving spouse of ELIZABETH DIANNE REASONER, deceased,		
Plaintiff,		CIVIL ACTION FILE
v.		No. 08A92811-3
ANN C. STIEN SCHWARTZ, as the Administrator of the Estate of TODD KIRK STIEN, deceased,		
Defendant.		

ORDER

Introduction

This wrongful death action is specially set for trial on August 18, 2009. On May 6, 2009, Defendant GuideOne/Stien[1] filed a Notice and Designation of a Negligent or At Fault Nonparty pursuant to O.C.G.A. §51-12-33, along with a First Amended Answer and Defenses to Plaintiff's First Amended Complaint. Plaintiff moves to strike this defense and designation.

O.C.G.A. §51-12-33 (d) provides that a defending party shall give notice not later than 120 days before trial "that a non-party was wholly or partially at fault." The number of days between May 6, 2009, and August 18, 2009, is 104. However, in footnote 3 on page 8 of the Motion to Strike, Plaintiff states that "[i]n order to meet the Court's trial schedule, Plaintiff agreed to waive the 120 day notice requirement." Assuming this concession forecloses the simple

[1] GuideOne Elite Insurance Company is the uninsured/underinsured motorist carrier for Ms. Reasoner's employer, which provided the vehicle that was involved in the subject accident. It was served with a copy of the complaint under O.C.G.A. § 33-7-11 and filed a special appearance/answer in this case.

EXHIBIT "B"

resolution of this matter, the Court will address the statutory interpretation issues asserted by the parties.

Factual and Procedural Background

This case stems from an April 1, 2007 vehicular collision that resulted in two fatalities and caused other serious injuries on Interstate 985 in Gwinnett County. Plaintiff alleges that Todd Kirk Stien was negligently, recklessly and wantonly operating a 2004 Jeep Liberty in the southbound lanes of I-985 and as a result struck the rear of another vehicle, a 1996 Chrysler Town & Country van. Plaintiff contends this caused the Liberty and the van to travel through the median of I-985 and into the northbound lanes, where the Liberty struck the 2006 Jeep Grand Cherokee Laredo. Elizabeth Dianne Reasoner, a front seat passenger in the Laredo, was killed, as was Stien.

The Consolidated Pretrial Order, filed on April 24, 2009, stated upon information and belief that Stien's actions were the result of his being attacked by his dog, which caused him to contact the van with his vehicle and caused them to cross the median. As such, the defense contended Stien was confronted with a sudden emergency.

On May 6, 2009, "Defendant GuideOne Elite/Stien" filed a First Amended Proposed Pretrial Order, along with the aforementioned Notice and Designation of a Negligent or At Fault Nonparty and the First Amended Answer and Defenses to Plaintiff's First Amended Complaint. After these amendments, Defendant's outline of the case asserts that the proximate cause of the Plaintiff's injuries was the negligent design of the highway by the Georgia Department of Transportation in failing to erect a barrier in the median that would have prevented the Liberty

and the van from crossing into oncoming traffic in the northbound lanes.

Plaintiff's motion to strike, filed June 5, 2009, asserts that under the plain language of O.C.G.A. §51-12-33 fault cannot be apportioned to a nonparty in this case because the Plaintiff was not negligent and because multiple tortfeasors were not named in this action. Indeed, Plaintiff urges that ***both*** contributory negligence by plaintiff and multiple defendants remain requirements under the new statutes as under the earlier version. Alternatively, Plaintiff asserts that application of the statute in the manner suggested by Defendant in this case would be unconstitutional and would conflict with the Georgia Tort Claims Act and impede the state's sovereign immunity.

Defendant's response asserts that O.CG.A. §51-12-33 applies in the absence of any fault on the part of the Plaintiff and in an action where the plaintiff has sued only one defendant - in other words, the new version of the statute requires apportionment of several liability in all cases in single defendant cases. Defendant asserts that to read the statute otherwise would lead to absurd results. Furthermore, Defendant argues that the statutory language is sufficiently definite to withstand Plaintiff's vagueness and due process challenges and that this statute neither impedes the state's sovereign immunity nor conflicts with the Georgia Tort Claims Act.

Legal Analysis

The statutory language at issue in this case was enacted as a part of the Georgia Tort Reform Act of 2005. The *old* version of O.C.G.A. §51-12-33 (a), prior to its 2005 amendment, provided:

Where an action is brought against more than one person for injury to person or

> property and the plaintiff is himself to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if apportioned by the trier of fact as provided in this Code section, shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

Subsections (b) and (c) of the former code section addressed venue and effective date issues.

In *Schriever v. Maddox*, 259 Ga. App. 558, 561, 578 S.E.2d 210, 213-14 (2003), the Georgia Court of Appeals rejected the assertion of defendants that there should have been an instruction under the former O.C.G.A. §51-12-33 (a) on apportionment of damages with a co-defendant who had been dismissed from the case. In *Schriever*, the court found that the law did not apply apportionment to non-parties, even former parties to the action; thus, "an instruction on apportionment with him would have been inappropriate." 259 Ga. App. at 561, 578 S.E.2d at 214.

In 2005, the General Assembly amended O.C.G.A. §51-12-33, creating a new subsection (c) to allow defendants to shift blame to a nonparty for its percentage of the harm suffered by the plaintiff. It is this provision that Defendant seeks to invoke in this case to fault highway design, instead of the defendant driver. But the amendment of subsection (c) was not the only alteration the General Assembly made in O.C.G.A. §51-12-33, and thus it must be viewed in conjunction with other changes made in the statute.[2]

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[2] The current O.C.G.A. §51-12-33 provides in pertinent part:

> (a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the

Analysis of the language of O.C.G.A. § 51-12-33

The former subsection (a) of O.C.G.A. §51-12-33 provided that it applied "[w]here an action is brought against more than one person for injury to person or property *and* the plaintiff is himself to some degree responsible for the injury or damages claimed." (Emphasis supplied.) As a result of the conjunctive wording, the old law required both the presence of more than one defendant in the case at the time of trial, as the Court of Appeals held in *Schriever*, and that the plaintiff also be culpable to some degree for the injuries suffered.

When the General Assembly rewrote subsection (a) in 2005, the revised subsection dealt only with the reduction of damages due to comparative negligence. The new language makes clear what has always been the case - that comparative negligence principles apply even when there is only one defendant: "[w]here an action is brought against *one or more persons* for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed." (Emphasis supplied.)

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judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) 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, or could have been, named as a party to the suit.

But the General Assembly did not stop there in its redrafting of the statute in 2005. It also created a new subsection (b) to separately deal with the apportionment of damages. The new subsection (b) states in its introductory clause that it applies "[w]here an action is brought against *more than one person* for injury to person or property." (Emphasis supplied.) Thus, the plain language of this subsection makes it apply only where there are multiple defendants. It is also noteworthy that the introductory clause in the new subsection (b) is the same wording as the former subsection (a), which also applied to an action "brought against more than one person for injury to person or property." Although the General Assembly altered the language of subsection (a) in the 2005 redraft to apply to cases with a single defendant, it consciously chose to *retain* the requirement of multiple defendants when it expanded the applicability of apportionment.

In the new subsection (b), apportionment of damages is now undertaken "after a reduction of damages pursuant to subsection (a) of this Code section, ***if any***." By emplacing apportionment in a separate paragraph from comparative negligence and incorporating the above cited language, the language of this code section, ***read in isolation***, appears to show an intent to apportion damages irrespective of whether the plaintiff was at fault.[3]

Next, after re-crafting in subsection (b) the circumstances in which fault can be apportioned, the General Assembly included an introductory clause in its re-write of subsection (c). That clause states: "In assessing percentages of fault. . . ," and then goes on to allow for the inclusion of a nonparty among those against whom blame can be assessed. For purposes of apportionment, the introductory clause referring to the assessment of fault percentages appears to

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[3] This opinion will discuss below the effect of reading this section in pari materia with other parts of the Act and unamended portions of Georgia law.

refer back to the prior subsection in which the General Assembly has set out the circumstances in which fault can be apportioned: where there is ["more than one" defendant as set out in subsection (b). Had the General Assembly wanted subsection (c) to apply to any type of case in which a nonparty could be faulted, it would not have used the introductory clause. And, indeed, subsection (c) contains no language authorizing apportionment or reduction of damages by either the judge or jury. Because this is not a case "[i]here an action is brought against *more than one person* for injury to person or property," the provision in subsection (c) for shifting blame to a nonparty does not apply.[4]

Defendant's sole argument against the plain language of the introductory clause of subsection (b) is that it is an absurd result, because if, for instance, a plaintiff who is injured by three tortfeasors sues two of them, the fault of the absent tortfeasor is considered, but not if the plaintiff only sues one of them. Such a result is not absurd; instead it retains, in limited form, a privilege plaintiffs have had from time immemorial - to pursue their rights against an individual guilty party without tracking down every remotely responsible party.[5] Defendant's broad reading

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[4] GuideOne Elite Insurance Company has not alleged that it is a "party" to this action. A special appearance and participation in litigation by an uninsured motorist carrier would not create multiple parties for purposes of the statute in any event. Although prior pleadings were ambiguous, the Pretrial Order states that it "shall be defending this case exclusively in the name of Todd Kirk Stien." Even where an uninsured motorist carrier defends in its own name, it would not be an action "*brought* against more than one person for injury to person," and GuideOne is not a tortfeasor.

[5] Assuming arguendo that O.C.G.A. § 51-12-33 applies to all cases of multiple tortfeasors, irrespective of fault of the plaintiff, giving effect to the introductory phrase of O.C.G.A. § 51-12-33(b), limiting apportionment and reduction of damages to cases involving multiple parties, operates in a fair fashion to allow the plaintiff a remedy for the wrong done him. It mitigates conflict with the longstanding principle that every right should have a remedy, while addressing the evil of trolling for deep pockets among those peripherally and very remotely responsible. A plaintiff is not likely to sue a remotely involved defendant by himself - it would be

of the statute, however, would violate an important principle of statutory construction.

Statutes in derogation of the common law "must be strictly construed and never extended beyond their plain and explicit terms." *Stanfield v. Glynn County*, 280 Ga. 785, 787, 631 S.E.2d 374 (2006); *accord, Killearn Partners, Inc. v. Southeast Props.*, 279 Ga. 144, 146, 611 S.E.2d 26 (2005) (statutory language must be read literally), *Boyds v. Daryant*, 294 Ga. App. 729, 731-32, 669 S.E.2d 674, 677 (2008); *Stoker v. Severn*, 292 Ga. App. 870, 874 (n. 10), 665 S.E.2d 913 (2008) ("cannot be extended to cases not enumerated in the statutes, and the courts have no power to enlarge the remedy").

> The legislature is presumed to act with knowledge of this rule of construction, and with that body only lies the right and privilege to grant rights not given under the common law and to extend and broaden any rights so granted. Such is not the function of the courts.

Delta Airlines, Inc. v. Townsend, 279 Ga. 511, 512, 614 S.E.2d 745 (2005). Here, the legislature, while extending defendants' rights to apportion the responsibility for damages, chose to retain the existing limitation to suits "brought against more than one person." Accordingly, an interpretation that preserves the common law right of a plaintiff to severally sue a single responsible party for all of his or her damages is to be favored.

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very hard to establish proximate cause considering the predominant fault of those whose are not present (and even a shadow of contributory fault would be compared to that small amount of fault of the named defendant). But the wronged plaintiff would still have the right to a complete recovery by selecting a substantially liable defendant, and that defendant in turn would have the right to contribution against the other responsible parties, a remedy that has been deemed sufficient for more than a century. Or the plaintiff could elect, instead, to proceed against multiple responsible parties and have each defendant pay only the share that accords with its own degree of fault. Arguably, such an interpretation would mitigate much of the perceived problems of searching for a deep pocket while mitigating some of the ill effects on the injured plaintiff of the solution.

Interpretation in pari materia with other provisions

In the same section of the same Act with the revisions of O.C.G.A. § 51-12-33, the General Assembly also revised O.C.G.A. § 51-12-31. The changes are shown below (new language in *italics*, old language struck through):

> Except as provided in Code Section 51-12-33, where an action is brought jointly against several ~~trespassers~~ *persons*, the plaintiff may recover damages for ~~the greatest injury done by any of the defendants against all of them~~ *an injury caused by any of the defendants against only the defendant or defendants liable for the injury*. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

The first item which leaps out is that this Code Section is only to apply when O.C.G.A. § 51-12-33 does not. And Section 15 of the Act makes the new provisions of both Section 31 and Section 33 "apply only with respect to causes of action arising on or after the effective date of this Act, and any prior causes of action shall continue to be governed by prior law." Accordingly, the Defendant's independent interpretation of O.C.G.A. § 51-12-33 would make the revised language, and indeed the entirety, of O.C.G.A. § 51-12-31 meaningless.[6] There would be literally no cases "where an action is brought jointly against several persons" which would be outside the scope of O.C.G.A. § 51-12-33 under Defendant's interpretation. "The two statutes are 'in pari materia' since they relate to the same subject matter, and it is an elementary rule of statutory construction that statutes in pari materia be construed together." *Synder v. State*, 283 Ga. 211, 214, 657 S.E.2d 834, 837 (2008). "It is a basic rule of construction that a statute or constitutional provision should be construed to make all its parts harmonize and to give a

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[6] In this case, there is a single injury, death, and the new language of O.C.G.A. § 51-12-31 would not suggest a severance of damages if the Georgia DOT was a party. Rather, the Plaintiff could recover damages against "the defendant or defendants liable for the" death.

sensible and intelligent effect to each part[, as it is not presumed that the legislature intended that any part would be without meaning.' *Houston v. Lowes of Savannah*, 235 Ga. 201, 203 (219 S.E.2d 115) (1975)." *Gilbert v. Richardson*, 264 Ga. 744, 747-748(3), 452 S.E.2d 476 (1994).[7]

Conclusion

It does less violence to the rules of statutory construction to lay no weight on the reorganization of former subsection (a) into two subsections in the 2005 revision than to render meaningless an entire Code Section. The revision of O.C.G.A. § 51-12-31 lends no support to an intent to eliminate joint liability in all cases. Therefore Plaintiff's reading of O.C.G.A. § 51-12-33, limited to cases involving contributory negligence by the Plaintiff in accordance with its previous meaning, is superior to an interpretation which extends the reach of O.C.G.A. § 51-12-33 to all cases involving multiple tortfeasors, excluding *any* cases from the reach of Section 31. Such an interpretation is also consistent with the decision to leave O.C.G.A. § 51-12-32 unamended - that "[e]xcept as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly."[8] And, most importantly, such a limiting construction is also in accordance with the principle that statutes in derogation of the common

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[7] The precise meaning of "damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury" is not relevant to this decision. Suffice it to say that, construed in the light of the limited construction of changes from the common law, it would not suggest an intent to abolish joint and several liability. And given that this language is only intended to apply in cases where Section 33 does not, the language concerning apportionment in Section 33 cannot used to read such an intent in Section 31.

[8] This Code section gives a remedy for a defendant sued singly and required to pay all of the damages; under Defendant's interpretation, the Code section would only be applicable when a Defendant slept on its rights in failing to proceed under O.C.G.A. § 51-12-33(d).

law "must be strictly construed and never extended beyond their plain and explicit terms." *Stanfield v. Glynn County*, 280 Ga. 785, 787, 631 S.E.2d 374 (2006).

Finally, it cannot be the case that reduction of damages is available where there is an empty chair to point to, but no possibility of obtaining relief from that absent party, but is not available when the other person allegedly at fault is a party present and defending itself and subject to being assessed with responsibility for the damages. Such a result would not only be absurd, but also a violation of equal protection.

Accordingly, the Court finds that Defendant cannot seek to apportion blame with a nonparty because there is, and at all times has been, only one Defendant in this case and there is no assertion of contributory negligence on the part of the Plaintiff. Therefore, Plaintiff's Motion to Strike Defendant's Fifth Defense and Notice and Designation of a Negligent or At Fault Party, filed on June 5, 2009, is GRANTED.

SO ORDERED, this 30 day of July, 2009.

Wayne M Purdom

WAYNE PURDOM, JUDGE
STATE COURT OF DEKALB COUNTY

Copy to:
All parties (kw)

FILED IN THIS OFFICE
THIS 31st DAY OF July 2009
Clerk State Court, DeKalb County

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

MAXWELL TAYLOR,	:	
	:	
Plaintiff,	:	CIVIL ACTION FILE
	:	NO. 06A50694-7
v.	:	
	:	
DEKALB COUNTY, GEORGIA,	:	
	:	
Defendant.	:	

ORDER

Defendant in the above-styled case filed a Notice of Fault of Non-Party pursuant to O.C.G.A. § 51-12-33. On July 22, 2008, Plaintiff filed a Motion to Strike Defendant's Notice of Fault of Non-Party, claiming that O.C.G.A. § 51-12-33 does not apply to the facts in the instant case, and, further, application of O.C.G.A. § 51-12-33 would be unconstitutional. Defendant filed a Brief in Opposition. The Court held a hearing on November 6, 2008. The Court granted counsel an extension of time in which to file additional briefs. Counsel for both parties filed supplemental briefs. The Court held a second hearing on January 9, 2009.

The case arises from a two-vehicle accident which occurred on October 29, 2005. Plaintiff was the front seat passenger in a vehicle driven by Robert Lamar. Mr. Lamar was driving in the opposite direction of Officer Terry Bernard McCord, a DeKalb County police officer. When Mr. Lamar attempted to make a left turn, his vehicle collided with Officer McCord's vehicle. As a result of the

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EXHIBIT "C"

collision, Plaintiff sustained injury and is claiming medical expenses in the amount of $923,839.56.

Legal Framework

O.C.G.A. § 51-12-33, which addresses the "reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties," provides the following:

> (a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.
>
> (b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.
>
> (c) 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, or could have been, named as a party to the suit.
>
> (d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.
> (2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

> (e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.
>
> (f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.
> (2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.
>
> (g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

A statute is presumed to be constitutional unless it is established that it "manifestly infringes upon a constitutional right or violates the rights of the people. . . ." Georgia Department of Human Resources v. Sweat, 276 Ga. 627, 580 S.E.2d 206 (2003). Where a statute does not infringe upon a fundamental right and the complaining party is not a member of a suspect class, substantive due process analysis of governmental action is performed under the "rational basis test." Id. at 628, 580 S.E.2d at 210. The rational basis test is the least rigorous level of constitutional scrutiny. Id. at 628, 580 S.E.2d at 210. Under this test, a statute will be upheld in the face of a due process attack so long as it is reasonably related to the public health, safety or general welfare. Id. at 628, 580 S.E.2d at 210.

Similarly, when neither a suspect class nor a fundamental right is affected by the challenged statute, an equal protection challenge is assessed under the rational relationship test. Roberts v. Burgess, 279 Ga. 486, 614 S.E.2d 25 (2005). The rational basis test requires that the classification drawn by the

legislation be reasonable and not arbitrary, and rest upon some ground of difference having a fair and rational relationship to the legislation's objective, so that all similarly situated persons are treated alike. Old South Duck Tours, Inc. v. Mayor & Aldermen of the City of Savannah, 272 Ga. 869, 535 S.E.2d 751 (2000). A classification will be upheld in the face of an equal protection challenge so long as under any conceivable set of facts, it bears a rational relationship to a legitimate end of government not prohibited by the United States Constitution. Id. at 873, 535 S.E.2d at 755. In this regard, the party who challenges legislation on equal protection grounds bears the burden of establishing that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decision maker. Id. at 873, 535 S.E.2d at 755.

Plaintiff's Contentions

Plaintiff contends that Defendant's purported Notice of Fault of Non-Party is not applicable to the facts of this case and, further, application of O.C.G.A. § 51-12-33 in this case would be unconstitutional. Plaintiff argues that Defendant's Notice should be disregarded by the Court and stricken from the record because O.C.G.A. § 51-12-33 applies only to causes of action where the Plaintiff is to some degree responsible for his injury. In the instant case, Plaintiff argues that there is no evidence that Plaintiff was responsible for his injuries.

Additionally, Plaintiff contends that applying O.C.G.A. § 51-12-33 to reduce Plaintiff's recovery due to the alleged fault of a nonparty would be unconstitutional. Plaintiff argues that O.C.G.A. § 51-12-33 is vague, overbroad,

uncertain and unclear; and it violates due process by denying a fair trial to litigants and nonparties. O.C.G.A. § 51-12-33 requires the jury to allocate fault or liability to unrepresented parties. However, the accused nonparty and the Plaintiff have no reasonable opportunity to defend against the naming of a nonparty who is allegedly at fault. There is no provision for discovery, and the nonparty cannot request a hearing. Further, although a Plaintiff's award may be reduced by the percentage of the nonparty's fault, the nonparty has no financial or pecuniary obligation to the Plaintiff.

Plaintiff also argues that O.C.G.A. § 51-12-33 denies equal protection because it allows the Defendant to blame a nonparty who will not be held liable to the Plaintiff. Plaintiff argues that procedural benefits cannot be granted to some litigants and capriciously denied to others without violating the Equal Protection Clause. Plaintiff argues that the statute classifies Plaintiffs and nonparties in ways not rationally related to any legitimate state interest; thus, the statute is invalid based upon equal protection grounds.

Defendant's Contentions

Defendant argues that Plaintiff's Motion to Strike must be denied because (1) there is at least some evidence that Plaintiff assumed the risk of injury and, therefore, is to some degree at fault; (2) O.C.G.A. § 51-12-33 provides for consideration of fault of all persons, including nonparties, regardless of whether Plaintiff is to some degree at fault; and (3) Plaintiff has failed to show that O.C.G.A. § 51-12-33 is unconstitutional.[1] O.C.G.A. § 51-12-33 is reasonably

[1] On July 5, 2007, in the State Court of Bulloch County, Judge Gary L. Mikell denied Plaintiff's Motion Regarding the Unconstitutionality and Inapplicability of All or Part of O.C.G.A. § 51-12-33

related to a permissible legislative purpose, and Plaintiff has failed to show how it violates substantive due process or equal protection.

Defendant argues that there is some evidence that Robert Lamar was impaired and that Plaintiff assumed the risk of injury by voluntarily riding in Mr. Lamar's vehicle. On Friday, October 28, 2005, the day before the accident, Plaintiff left work at 2:30 p.m. and at some point that evening, he went out to have "some beers" with Mr. Lamar. Mr. Lamar testified that he drank two or three drinks with vodka and orange juice and probably a margarita.[2] Defendant argues that to the extent O.C.G.A. § 51-12-33 requires Plaintiff to be to some degree at fault before the jury may consider the fault of a nonparty, which Defendant disputes, there is sufficient evidence here that Plaintiff is to some degree responsible for his injuries.[3] Therefore, O.C.G.A. § 51-12-33 applies.

Additionally, Defendant argues that O.C.G.A. § 51-12-33(d)(1) provides that the negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that "a nonparty was wholly or partially at fault." Plaintiff entered into a settlement agreement with Mr.

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in Sandra Bennett, Individually and as Mother and Duly Appointed Administratrix of the Estate of Toni S. Bennett, Deceased v. Wal-Mart Transportation, LLC, and Chester Skellon, Jr. (Exhibit D-A).

[2] Following the automobile accident, the record reflects that Robert Lamar was arrested and charged with DUI. Mr. Lamar subsequently pled guilty to making an improper turn.

[3] Defendant relies on Deloach v. Deloach, 258 Ga. App. 187; 573 S.E.2d 444 (2002), where the Court held that "[w]hen there is any evidence, however slight, upon a particular issue, it is not error for the court to charge the law in relation to the issue. A charge on assumption of the risk is appropriate where there is evidence that the plaintiff had subjective knowledge of the specific, particular risk of harm associated with the activity or condition that proximately causes injury, yet proceeded anyway."

Lamar. In Response to Defendant's Interrogatory No. 9, Plaintiff stated, "[a] policy limit in the amount of $25,000 was received from Progressive Insurance Company." Further, Defendant argues that based upon the clear language of O.C.G.A. § 51-12-33(d)(1), Plaintiff need not be found at fault before the jury can apportion its award according to the degree of fault of the parties and nonparties. Defendant argues that the statute applies to cases in which Plaintiff is not to any degree at fault.

Additionally, Defendant argues that Plaintiff has failed carry his burden to show that O.C.G.A. § 51-12-33 is unconstitutional. Applying the rational basis test to Plaintiff's constitutional challenge to the statute, Defendant argues that Plaintiff has not shown that the statute violates due process, i.e., that it is not reasonably related to the public health, safety or general welfare. Further, Plaintiff has not shown that the statute violates equal protection, i.e., that it classifies Plaintiffs and nonparties in ways not rationally related to any legitimate state interest. Defendant argues that O.C.G.A. § 51-12-33 in no way diminishes Plaintiff's meaningful access to courts; it does not abolish Plaintiff's right to recover from any individual or entity in any civil action; it does not limit the amount of recovery; it does not preclude Plaintiff from filing suit against any party; it does not eliminate any substantive claim Plaintiff might assert; and it does not reduce the total amount of damages Plaintiff might prove and be awarded as compensation for his injuries.[4]

[4] Defendant also emphasizes that the single nonparty, whose fault Defendant seeks to have assessed by the jury, entered into a settlement agreement with Plaintiff.

Defendant argues that the Georgia Legislature provided a reasonable statutory scheme by which Defendants would be held legally responsible for the damages caused only by their conduct based on the jury's apportionment of fault. O.C.G.A. § 51-12-33 provides for the apportionment of damages based on the fault of all responsible parties and, thereby, achieves the rational goal of ensuring that each person or entity responsible for Plaintiff's injury will be liable for only that portion of the total damages caused by that person's percentage of fault. Defendant argues that the statute clearly distinguishes between liability and fault because only party defendants can be liable for damages. Nonparties cannot be liable for damages, but their fault is considered for apportionment of damages.

Conclusions of the Court

The Court finds that Plaintiff's Motion to Strike Defendant's Notice of Fault of Non-Party must be denied. Plaintiff has failed to carry his burden to show that O.C.G.A. § 51-12-33 applies only where Plaintiff is to some extent responsible for his injury or damages claimed; or that O.C.G.A. § 51-12-33 violates due process or equal protection under the facts of this case. O.C.G.A. § 51-12-33 addresses the "reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties." O.C.G.A. § 51-12-33(c) 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(d)(1) provides in part that the "[n]egligence or fault of a nonparty shall be considered if the plaintiff entered into

a settlement agreement with the nonparty. . . ." There is no dispute that Plaintiff in the instant case entered into a settlement agreement with nonparty Robert Lamar, the driver of the vehicle in which Plaintiff was a passenger at the time of the collision.

Contrary to Plaintiff's contention that O.C.G.A. § 51-12-33 addresses reduction and apportionment of award only when Plaintiff is responsible for his injury or damages claimed, the statute also addresses apportionment of award when Plaintiff is not responsible for his injury or damages claimed. O.C.G.A. § 51-12-33(a) specifically addresses reduction and apportionment of an award where Plaintiff brings an action against one or more persons for injury to person or property, and Plaintiff is to some degree responsible for the injury or damages claimed. Under O.C.G.A. § 51-12-33(a), the trier of fact must determine the percentage of fault of the Plaintiff, and the judge must reduce the amount of damages in proportion to Plaintiff's percentage of fault. However, O.C.G.A. § 51-12-33(b) specifically addresses reduction and apportionment of an award where Plaintiff brings an action against more than one person for injury to person or property, and it does not require that Plaintiff is to some degree responsible. Under O.C.G.A. § 51-12-33(b), the trier of fact must determine the percentage of fault in its determination of the amount of damages to be awarded and "shall after a reduction of damages pursuant to subsection (a) of this Code section, *if any*, apportion its award of damages among the persons who are liable according to the percentage of fault of each person." Thus, even if the trier of fact does not find that Plaintiff is to some degree at fault, under subsection (b), the trier of fact

must apportion its award of damages among the persons who are liable according to the percentage of fault of each person.

Alternatively, since Plaintiff in the instant case has filed an action against only one Defendant, O.C.G.A. § 51-12-33(a) applies if Plaintiff is found to be to some degree responsible for his injury or damages claimed. Contrary to Plaintiff's contention that there is no evidence that Plaintiff was responsible for his injuries, the Court finds that there is at least some evidence from which a jury could find that Plaintiff assumed the risk of injury and is, therefore, to some degree at fault. Mr. Robert Lamar, the driver of the vehicle in which Plaintiff was a passenger at the time of the collision, testified that he had been drinking alcohol prior to the collision. If the trier of fact finds that Plaintiff is to some degree responsible for his injuries by knowingly getting into a vehicle driven by an intoxicated driver, the trier of fact must determine the percentage of fault of the Plaintiff, and the amount of damages must be reduced in proportion to Plaintiff's percentage of fault. Accordingly, Plaintiff's Motion to Strike Defendant's Notice of Fault of Non-Party based upon Plaintiff's contention that O.C.G.A. § 51-12-33 does not apply to the facts in the instant case must be denied.

Further, the Court has carefully considered Plaintiff's challenges to the constitutionality of O.C.G.A. § 51-12-33. A statute is presumed to be constitutional unless it is established that it "manifestly infringes upon a constitutional right or violates the rights of the people. . . ." Georgia Department of Human Resources v. Sweat, 276 Ga. 627, 580 S.E.2d 206 (2003). Plaintiff has failed to establish that O.C.G.A. § 51-12-33 manifestly infringes upon a

constitutional right, and Plaintiff is not a member of a suspect class. Where a statute does not infringe upon a fundamental right and the complaining party is not a member of a suspect class, substantive due process analysis of governmental action is performed under the "rational basis test." Georgia Department of Human Resources v. Sweat, 276 Ga. at 628, 580 S.E.2d at 210. Under this test, a statute will be upheld in the face of a due process attack so long as it is reasonably related to the public health, safety or general welfare. Id. at 628, 580 S.E.2d at 210.

The Court finds that Plaintiff has failed to show that O.C.G.A. § 51-12-33 is not reasonably related to the public general welfare such that it violates due process. Contrary to Plaintiff's argument that the statute violates due process by denying a fair trial to litigants and nonparties, O.C.G.A. § 51-12-33 does not diminish Plaintiff's meaningful access to courts; it does not eliminate any substantive claim Plaintiff might assert; and it does not reduce the total amount of damages Plaintiff might prove and be awarded as compensation for his injuries. With respect to nonparties, O.C.G.A. § 51-12-33(f)(2) provides that where fault is assessed against nonparties, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action. Further, notwithstanding Plaintiff's argument that he has no reasonable opportunity to defend against the naming of a nonparty who is allegedly at fault,

Plaintiff consummated a settlement agreement with the named nonparty Robert Lamar.[5]

Additionally, Plaintiff has failed to satisfy his burden with respect to his claim that O.C.G.A. § 51-12-33 violates equal protection. When neither a suspect class nor a fundamental right is affected by the challenged statute, an equal protection challenge is assessed under the rational relationship test. Roberts v. Burgess, 279 Ga. 486, 614 S.E.2d 25 (2005). The rational basis test requires that the classification drawn by the legislation be reasonable and not arbitrary, and rest upon some ground of difference having a fair and rational relationship to the legislation's objective, so that all similarly situated persons are treated alike. Old South Duck Tours, Inc. v. Mayor & Aldermen of the City of Savannah, 272 Ga. 869, 535 S.E.2d 751 (2000). A classification will be upheld in the face of an equal protection challenge so long as under any conceivable set of facts, it bears a rational relationship to a legitimate end of government not prohibited by the United States Constitution. Id. at 873, 535 S.E.2d at 755.

Plaintiff has failed to show how O.C.G.A. § 51-12-33 classifies Plaintiffs and nonparties in ways not rationally related to any legitimate state interest. O.C.G.A. § 51-12-33(c) 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." The statute provides for the

[5] Based upon Plaintiff's settlement agreement with nonparty Robert Lamar, the Court finds Plaintiff's constitutional challenge to the statute somewhat disingenuous. If there is a case that presents a constitutional challenge to O.C.G.A. § 51-12-33, this is not that case.

apportionment of damages based on the fault of all responsible parties, whether named as a defendant or identified through timely notice, and thereby achieves the rational goal of ensuring that each person or entity responsible for Plaintiff's injury will be liable for only that portion of the total damages caused by that person's percentage of fault. Nonparties cannot be liable for damages, but their fault is considered for apportionment of damages. The Court finds that Defendant has failed to carry his burden to establish that O.C.G.A. § 51-12-33 violates equal protection. Accordingly, Plaintiff's Motion to Strike Defendant's Notice of Fault of Non-Party based upon Plaintiff's claim that application of O.C.G.A. § 51-12-33 would be unconstitutional must be denied.

WHEREFORE, Plaintiff's Motion to Strike Defendant's Notice of Fault of Non-Party is **DENIED.**

SO ORDERED this 22 day of January, 2009.

JANIS C. GORDON, JUDGE
State Court of DeKalb County

cc: Michael M. Calabro, Esq.
Susan J. Levy, Esq.
H. Lee Pruett, Esq.

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

TERENCE L.D. MEDINA,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION
GPI MANAGEMENT SERVICES, INC.,	)	FILE NO.: 09A13159-1
Defendant.	)	

ORDER

This is a premises liability case where Plaintiff was shot in his leg by a third-party whose identity remains unknown and who has not been apprehended by law enforcement at an apartment complex managed by the Defendant. Plaintiff filed a motion in limine to preclude any apportionment of damages to a non-party pursuant to OCGA 51-12-33.

Plaintiff contends a premises owner or operator who fails to exercise ordinary care to keep the premises safe for invitees cannot be allowed to reduce its liability by seeking to apportion damages to the intentional tortfeasor whose conduct it had a duty to prevent.

Other jurisdictions facing the question of apportionment under these circumstances have reached different conclusions:

Some have refused to allow apportionment. See, e.g. Veazey v. Elmwood Plantation Assocs., 650 So. 2d 712, 719 (La. 1994), superseded by statute as stated in Thomas v. Sheridan, 977 So. 2d 303 (La. Ct. App. 2008) ("As a general rule, we find that negligent tortfeasors should not be allowed to reduce their fault by the intentional fault of another that they had a duty to prevent."); Brandon v. County of Richardson, 261 Neb. 636, 655 (2001) ("[I]t would be irrational to allow a party who negligently fails to discharge a duty to protect to reduce its liability because there is an

EXHIBIT "D"

intervening intentional tort when the intervening intentional tort is exactly what the negligent party had a duty to protect against.").

Others have taken the position that liability of the property owner should be reduced based on the percentage of fault attributed to a third-party tortfeasor. See, e.g, Barth v. Coleman, 118 N.M. 1, 3 (1994) ("Notwithstanding the importance of the premises owner's duty of care, we concluded that 'public policy would support a holding that the bar owner may reduce his liability by the percentage of fault attributable to a third party.'"); Rhinder v. Sun Co., 717 A.2d 202, 212 (Conn. 1998), superseded by statute as stated in Allard v. Liberty Oil Equip. Co., 756 A.2d 237 (Conn. 2000) (holding in case of robbery and murder of gas station employee: "It is consistent with the principles of apportionment to permit the allocation of fault in a negligence action between a negligent and an intentional tortfeasor.").

As aptly summarized by the Tennessee Supreme Court in Turner v. Jordan, 957 S.W.2d 815, 823 (1997), "the concern in cases that compare the negligence of a defendant with the intentional act of a third party is not burdening the negligent tortfeasor with liability in excess of his or her fault; conversely, the primary concern in those cases that do not compare is that the plaintiff not be penalized by allowing the negligent party to use the intentional act it had a duty to prevent to reduce its liability."

Under Georgia law, Code Section 51-12-33(b) requires apportionment of damages among "the persons who are liable according to the percentage of fault of each person"; Code Section 33 (c) requires "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, or could have been, named as a party to the suit"; and, Code Section 33 (d) sets forth the requirements necessary for consideration of the "[n]egligence or fault of a nonparty."

Although the meaning of "fault" is not defined in the statute, it is a word of general use and not a term of art and it should be given its ordinary and everyday meaning. According to Webster's Third New World Dictionary, fault is defined as "failure to have or do what is required" or "something done wrongly." Similarly, fault is defined by Black's Law Dictionary as "negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty, or rectitude." See A.A. Prof'l Bail v. State of Ga., 265 Ga. App. 42, 44 (2004) (interpreting the term fault as used in O.C.G.A. § 17-6-31(e) involving a surety's liability on a bond). Thus, the word "fault" denotes not only negligent conduct but also intentional acts.

As the statute requires apportionment "according to the percentage of fault of each person," it allows apportionment between persons who are liable due to negligence and those who are liable due to an intentional tort. And because it requires consideration of "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," that comparison can be made even where the criminal actor is a non-party.

In Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 228-30 (2011) (physical precedent only), the Court of Appeals rejected the argument that this Trial Court erred in instructing the jury pursuant to OCGA § 51-12-33. However, that ruling held the trial court was charging a Georgia statute, and the appellant was relying on Tennessee case law authority for the proposition that it is not rationally possible to apportion fault between a premises owner and the criminal perpetrator that the owner was supposed to protect against. The Pacheco ruling did not offer further clarification to the current apportionment quagmire of premises liability litigation involving third party criminal acts.

The Plaintiff in this case raises constitutional challenges and contends the strict scrutiny standard of review applies as the statute impedes a fundamental right "to remedy" and works particular hardship on the poor and minorities. Plaintiff contends by apportioning damages, he is denied the right to have a jury make a full and complete award for his injuries which violates his right to due process and equal protection.

No doubt, the right to a jury trial under the Georgia Constitution includes the right to have the jury determine the amount of damages awarded to the plaintiff. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 733-34 (2010). In Nestlehutt, the Supreme Court declared a cap on the amount of non-economic damages in medical malpractice cases unconstitutional. Id. at 738. The Supreme Court held a jury sits as the trier of fact in determining the amount of damages and putting a cap on the amount of damages awarded undermines the jury's basic function. See id. at 734-36.

Unlike a cap on non-economic damages, OCGA 51-12-33 does not limit the amount of damages a jury can award. Rather, the jury is asked to make an additional finding of fact – the extent to which each defendant or non-party is at fault. The limitation on the extent to which each defendant is responsible for the payment of damages does not nullify the jury's fact finding role nor does it impede a jury's ability to award damages. Therefore, OCGA 51-12-33 does not impede a fundamental or property right.

As to the claim that the statute involves a suspect classification, Plaintiff contends premises liability cases involving third party criminal acts usually occur in poor neighborhoods. Assuming this allegation to be true, our courts have held poverty alone is not a suspect classification. Walker v. Cromartie, 287 Ga. 511, 512 (2010).

Because OCGA 51-12-33 does not involve a fundamental right nor a suspect classification, it is subject to a rational basis rather than a strict scrutiny analysis as to Plaintiff's equal protection and due process claims.

Under the rational basis test, a statute does not violate equal protection as long as it is rationally related to a legitimate government interest; it is not arbitrary; and it has a fair and rational relationship to the government's objective such that all persons similarly situated are treated alike. Rhodes v. State, 283 Ga.361, 363 (2008); Benefit Support, Inc. v. Hall County, 281 Ga. App. 825, 829 (2006).

As to Plaintiff's substantive due process claim, the government action need only be reasonable in relation to the goal they seek to achieve. Unless the means adopted and the resulting classifications are irrelevant to the government's reasonable objective, or are altogether arbitrary, the government action does not offend due process. Benefit Support, 281 Ga. App. at 829.

As to Plaintiff's procedural due process claim based on vagueness, "'[a] statute violates due process if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" Rouse v. Dep't of Natural Res., 271 Ga. 726, 728-29 (1999).

Plaintiff argues there is a due process violation because the statute is vague. Plaintiff contends there is no instruction on apportionment between negligent and intentional acts. As discussed above, the plain language of the statute in the use of the word "fault" can be readily applied to negligent and intentional tortfeasors without a need for further instructions. Therefore, the statute is not vague on that ground.

Plaintiff claims the statute is vague because it requires apportionment of an indivisible injury and apportionment is unconstitutional as applied in this case because there is an indivisible injury for which the premises owner is fully liable and for which a rational apportionment of damages cannot be made. This Court does not find any merit in the argument.

Indivisible injury is tied to the concept of joint and several liability envisioned by Gilson v. Mitchell, 131 Ga. App. 321, 324 (1974), aff'd 233 Ga. 453 (1975), where the duties owed to the plaintiff by the defendants are separate, and may not be identical in character or scope, but the entire liability rests upon the obvious fact that each has contributed to the single result and that no rational division can be made.

In a third party criminal premises liability case, physical injury is caused by the conduct of the intentional actor - the criminal. A negligence claim against the premises owner or operator would not exist without the criminal act. The criminal or the intentional tortfeasor also bears responsibility for the injury caused to the plaintiff. Neither Gilson nor the fact that a premises owner or operator's negligence would not be actionable but for the criminal's conduct makes a comparison of fault constitutionally suspect. Apportionment under these circumstances is reasonable in light of the Legislature's goal of limiting an owner's damages to its share of fault.

Plaintiff's main equal protection claim alleges different treatment between criminal attack victims and other plaintiffs who recover fully where the defendant's liability is derivative.

In PN Express, Inc. v. Zegel, 304 Ga. App. 672, 680 (2010), the Court of Appeals held this Trial Court did not err by refusing to give an apportionment charge. In Zegel, the appellant corporate defendant asserted the truck driver was not its employee. That was the sole defense. The liability of the corporation for the driver was purely vicarious. In such a situation, the party being held vicariously liable and the actively negligent tortfeasor are regarded as a single tortfeasor. Id.

In this case, the intentional third party tortfeasor, the criminal, is not the agent or employee of the land owner. The wrongful conduct is not attributable to the land owner. Vicarious liability simply does not apply whether the concept is called "vicarious" or "derivative."

Limiting the amount of damages a defendant is responsible to pay to its proportionate degree of fault is a legitimate government interest. The wisdom of allowing a negligent actor to seek to reduce the damages he must pay by placing blame on the person whose conduct he had a duty to prevent is a question for the legislature, not this Court.

However, this Court cannot reconcile the co-existence of Sections 31 and 33:

Apportionment involves three statutes: OCGA 51-12-31, 51-12-32, and 51-12-33. Because this case does not involve contribution, an analysis of Section 32 is not necessary.

OCGA 51-12-31 existed before the enactment of SB 3. It is Georgia's statutory enactment of common law's joint and several liability. That statute states a jury *may* allocate damages among several defendants. In that event, judgment must be entered severally. The law was that a jury is not required to apportion damages when it cannot determine or allocate which of two or more acts was the causation of injury. In that instance, a jury is not required to apportion damages. That is the concept of joint and several liability.

Before the amendment generated by SB 3, OCGA 51-12-33 applied where the action was brought against more than one person for injury to person or property where the plaintiff was also to some degree responsible. And like OCGA 51-12-31, it also stated a jury *may* apportion damages among persons who are liable and whose degree of fault was greater than that of the injured party.

Under the former statutory scheme, it was clear when apportionment was invoked, OCGA 51-12-33 applied where the plaintiff was at fault and OCGA 51-12-31 applied if the plaintiff

was not at fault. In either situation, apportionment was discretionary.

After the amendment, OCGA 51-12-31 still provides a jury *may* specify the amount of damages to be recovered against each liable defendant. At the same time, Section 31 was also amended where "several trespassers" was changed to "several persons"; and "the plaintiff may recover damages for the greatest injury done by any of the defendants against all of them" was changed to "the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury." And the amended code section kept the language of "Except as provided in Code Section 51-12-33" which originally referred to discretionary apportionment after set-off for an at fault plaintiff. Other than these two changes, no additional subsections were added to Section 31.

Code Section 33 underwent a much more radical alteration. It is now compromised of seven subsections, (a) - (g). Subsection (a) mirrored the intent of the old Section 33 (a) that allows set-off for Plaintiff's fault. The use of the word "shall" in subsection (a) denotes the jury must set-off for the fault of the plaintiff if the jury so finds. This really is not different than the requirement of the pre-SB3 Section 33.

Section 33 (b) was amended with a complete re-write which requires mandatory apportionment among the defendants when more than one defendant is sued.

The Legislature clearly intended to change a jury's ability to decide a case based on discretionary joint and several liability to mandatory apportionment of fault when more than one defendant is sued. Inexplicably, the Legislature made apportionment under Sections 33 (a) and (b) mandatory with the use of the word "*shall*" but left apportionment discretionary under Section 31 by keeping the word "*may*".

The problem is further complicated when Sections 33 (c) and (d) were added to allow

the designation of at fault non-party or non-parties only in Section 33 but not in Section 31. Suffice it to say, none of the current flood of litigation involving apportionment and designation of non-party would exist if Sections 33(c) and (d) were added to Section 31.

The current language in Sections 31 and 33 presents several problems:

1. There is no benchmark for a trial court to determine if a case against multiple defendants should proceed under Section 31 as a discretionary apportionment case or under Section 33 as a mandatory apportionment case. This Court is unable to find a rational basis to make such a distinction. Moreover, if a case proceeds under Section 31 as a discretionary apportionment case, designation of a non-party otherwise allowed under Section 33(c) is not available as there is no similar provision in Section 31.

2. If mandatory apportionment under Section 33 only applies if a plaintiff is at fault, defendants sued by a plaintiff who is not at fault are only entitled to discretionary apportionment under Section 31 and cannot designate an at fault non-party. There is no rational basis to justify a defendant's ability to invoke mandatory apportionment in a multiple defendant case based on whether the plaintiff is at fault or not.

3. If mandatory apportionment applies whether a plaintiff is at fault or not (see Cavalier Convenience Inc. & Ken's Supermarkets, Inc. v. Sarvis, 305 Ga. App. 141 (2010), and McReynolds v. Krebs, 307 Ga. App. 330 (2010), cert. granted), then Section 31 is meaningless. This is a point raised by the appellant, acknowledged by but not ruled upon by the Sarvis Court.

4. Whether "more than one person" set forth in Section 33(b) is applied literally or interpreted in accordance with Schriever v. Maddox, 259 Ga. App. 558 (2003), to mean more than one person *at the time of trial*, there is no rational basis to apply apportionment based on the number of persons or entities sued.

Before SB 3, there was no mechanism for designation of a non-party. Joint and several liability came into play only when more than one defendant was sued. Now, the re-write has created the question of whether apportionment by the designation of an at fault non-party applies when suit is brought against only one defendant.

Heretofore, this Court relied on Section 33(c) to invoke apportionment regardless of the number of defendants sued as Section 33(c) is silent as to that requirement. This Court is now constrained from making that interpretation since McReynolds specifically held Section 33(c) and (d) are enabling provisions which explain the procedure to be used when applying apportionment to Section 33 (a) and (b).

If the language of "more than one person" used in Section 33(b) is applied literally, apportionment and designation of an at fault non-party are not available to lawsuits against a single defendant.

If "more than one person" is interpreted according to Schriever, a pre SB3 case, to mean more than one person at the time of trial, a defendant's ability to apportion fault among multiple defendants or to designate an at fault non-party or parties is subject to complete manipulation.

This case is a perfect example of the ills created by the re-write of Sections 31 and 33.

According to the Defendant, a witness in this case reported he saw the perpetrator pick something off the ground while the Plaintiff laid there after he was shot. Defendant further alleged the Plaintiff did not provide his correct name to the police and the Plaintiff was particularly concerned his cell phone was missing. Defendant contends that a jury could certainly infer something untoward - perhaps drugs - was involved. Of course, the Plaintiff denies this allegation.

These details illustrate the difficulty a trial court faces in managing a trial (if

apportionment under Section 33 only applies if a plaintiff is at fault.) Should the defendant be allowed to introduce evidence of the fault of the non-party before the jury decides if plaintiff is at fault?

Also, the Plaintiff originally sued the Defendant and several John Doe Defendants. The John Doe Defendants have been dismissed. This illustrates the problem created by the interpretation of "more than one." Do apportionment and designation apply when suit was brought against several persons but there is only one defendant remaining at the time of trial?

While policy decisions regarding whether a defendant's liability should be joint and several or proportionate to his degree of fault are reserved for the Legislature, the present statutory scheme leaves trial courts and litigants unable to determine the legislative intent as evidenced by the flood of litigation. This Court is aware of at least three cases dealing with apportionment pending in our appellate courts: Salinas et al v. Cora Realty Advisors, Fulton State Court, 10EV 009982, Mather J. ; Martin v. Six Flags Over Georgia, LLP, 09-A-55-4, Cobb State Court, Tanksley, J.; and a Northern District Certified Questions Request, 1:10-cv-00045-SCJ.

The Supreme Court of Georgia has instructed that the best indicator of the General Assembly's intent is the statutory text it actually adopted and that as long as the statutory language is clear and does not lead to an unreasonable or absurd result, it is the sole evidence of the ultimate legislative intent. Barnett v. Farmer, 308 Ga. App. 358, 361-62 (2011).

Clearly, OCGA 51-12-31 and OCGA 51-12-33 do not meet this criteria. This Court therefore finds OCGA 51-12-31 and OCGA 51-12-33 unconstitutionally vague and the uncertainty brought about deprives the citizens of this state of due process and equal protection of the law.

Plaintiff's motion in limine is seeking to eliminate a defense. Despite its nomenclature, it should be treated as a motion for partial summary judgment. Plaintiff's Motion In Limine, in the alternative, for partial summary judgment, to strike apportionment is **granted**.

SO ORDERED, this 11th day of January, 2012.

ALVIN T. WONG, Judge
State Court of DeKalb County

Copy To:

Andrew T. Rogers, Esq.
David C. Marshall, Esq.

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

ANN J. HERRERA, as Personal Representative of WESLEY N. HAGAN, Deceased and as Administratrix of the Estate of WESLEY N. HAGAN, Deceased,	*	Case No. 08A83964-6
Plaintiff,	*	
v.	*	
MILES PROPERTIES, INC.	*	
Defendant.	*	

ORDER

This case came before the Court on Defendant's Motion to seek apportionment against non-parties pursuant to O.C.G.A. § 51-12-33. During a previous hearing on December 17, 2009, the Court ruled that apportionment would not be allowed in this case. The Court reasoned that apportionment is inappropriate in premises liability actions because therein a plaintiff can seek to hold the defendant solely responsible for the damages caused by a third party. Liability, therefore, is predicated on the foreseeable, at fault acts of the property owner or other people. The property owner's or occupier's negligence is the basis for its responsibility for any damages caused by the foreseeable acts of a third party. Recently, however, the Georgia Court of Appeals

EXHIBIT "E"

issued its opinion in Cavalier Convenience v. Sarvis, Ga. App. (Case No. A10A0538, decided July 9, 2010).

Therein, the Court of Appeals addressed the issue of whether O.C.G.A. § 51-12-33 requires apportionment among multiple liable defendants when the plaintiff bears no fault. The Court found the language of O.C.G.A. § 51-12-33 unambiguous and held "that where damages are to be awarded in an action brought against more than one person for injury to person or property - - whether or not such damages must be reduced pursuant to O.C.G.A. § 51-12-33 (a) - - the trier of fact 'shall . . . apportion its award of damages among the persons who are liable according to the percentage of fault of each person.' Had the legislature intended for subsection (b) of O.C.G.A. § 51-12-33 to be triggered *only* upon a reduction of damages pursuant to subsection (a) of that Code section, it could have so stated; but it did not impose any such prerequisite." Id.

Although the specific holding of Cavalier, is not directly applicable to this case, the Court's discussion of the policy arguments against apportionment support a finding that apportionment is appropriate herein. One of the policy arguments presented to the Court of Appeals dealt with a premises liability hypothetical using the same rationale for not apportioning in premise liability cases that this Court used at the hearing in December, 2009. However, the Court of Appeals determined that it had "no authority to adopt a construction that is contrary to the General Assembly's intent as plainly codified." Implicitly applying the apportionment statute to premise liability cases.

Subsection (c) of O.C.G.A. § 51-12-33 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." Plaintiff's assertion that subsection (c) applies only after application of subsections (a) and (b) is without merit. The legislature neither stated nor indicated that such a construction was necessary. Additionally, Plaintiff brought the present action against more than one defendant and Defendant's Notice of Apportionment was filed prior to the dismissal of any defendants. Therefore, subsection (b) of O.C.G.A. § 51-12-33 also clearly applies as it requires only that an action be "**brought** against more than one defendant." (Emphasis supplied.)

Plaintiff contends that O.C.G.A. § 51-12-33 is unconstitutionally vague in that its application conflicts with that of O.C.G.A. §§ 51-12-31 and 51-12-32 and that O.C.G.A. § 51-12-33 is internally inconsistent and unclear. However, as set out in Defendant's responsive brief, the three statutes codify the Legislature's unambiguous intent to place tort litigants on notice that joint and several liability has been replaced with an equitable apportionment statute. "To withstand an attack of vagueness or indefiniteness, a civil statute must provide fair notice to those to whom the statute is directed and its provisions must enable them to determine the legislative intent." Jekyll Island State Park Auth. v. Jekyll Island Citizens Assoc., 266 Ga. 152, 153, 464 S.E.2d 808 (1996). The Legislature's intent is clear from codification of the three statutes which are applicable in

different circumstances. Additionally, the Court finds that the application of O.C.G.A. § 51-12-33 is not inconsistent. Nothing in O.C.G.A. § 51-12-33 prevents plaintiffs from bringing actions against all parties they contend were at-fault.

Plaintiff argues that O.C.G.A. § 51-12-33 denies substantive and procedural due process. "Duly enacted statues enjoy a presumption of constitutionality. A trial court must uphold a statue unless the party seeking to nullify it shows that it 'manifestly infringes upon a constitutional provision or violates the rights of the people.'" Rhodes v. State, 283 Ga. 361, 361, 659 S.E.2d 370 (2008). This the Plaintiff has failed to do. Under the rational basis test applied to this substantive due process claim, "a statute will be upheld in the face of a due process attack so long as it is reasonably related to the public health safety or general welfare." Ga. Dep't of Human Res. v. Sweat, 276 Ga. 627, 629, 580 S.E.2d 206 (2003). "In the arena of social welfare and economics . . . only if the means adopted, or the resultant classifications, are irrelevant to the [state's] reasonable objective, or altogether arbitrary, does the [statute] offend due process." (Citation and punctuation omitted.) Id. In the present case, the state has a legitimate interest in apportioning damages to defendants according to their respective degree of fault. The statute does not limit an injured party's ability to bring an action against a tortfeasor nor does it limit the application of the Civil Practice Act with regard to discovery from non-parties.

Plaintiff contends that O.C.G.A. § 51-12-33 denies equal protection among

classes of both plaintiffs and defendants. The rational basis test also applies to Plaintiff's equal protection arguments. See Rhodes, supra at 363. "It is fundamental that no equal protection violation exists unless legislation treats similarly-situated individuals differently." Sweat, supra at 630. The Plaintiff has not satisfied her burden that the apportionment statute creates a disparate classification. Additionally, the Court finds that the revisions to O.C.G.A. § 51-12-33 are legitimate in light of the specific purpose of the tort reform initiatives embodied in the legislative bill proposing the changes.

The Court finds that Plaintiff's arguments as to the constitutionality of O.C.G.A. § 51-12-33 are without merit. The issue of apportionment of fault among the Defendant herein and the named non-parties shall be presented to the jury upon proper evidence during the trial of this case.

SO ORDERED, this 16 day of Aug, 2010, nunc pro tunc 22 day of July, 2010.

Edward E. Carriere, Jr., Judge
State Court of DeKalb County

cc: Gilbert H. Deitch, Esq.
Edwin M. Saginar, Esq.
Christian J. Lang, Esq.

FILED IN THIS OFFICE
THIS 16th DAY OF Aug, 2010

Clerk, State Court, DeKalb County

IN THE STATE COURT OF BULLOCH COUNTY
STATE OF GEORGIA

SANDRA BENNETT, INDIVIDUALLY AND AS MOTHER AND DULY APPOINTED ADMINISTRATRIX OF THE ESTATE OF TONI S. BENNETT, DECEASED,	)	
Plaintiff,	)	
VS.	)	CASE NO. 2B06CV406
WAL-MART TRANSPORTATION, LLC, and CHESTER SKELTON, JR.,	)	
Defendant.	)	

ORDER

Plaintiff filed an Omnibus Motion Regarding the Unconstitutionality and Inapplicability of All or Part of O.C.G.A. section 51-12-33, as amended.

Plaintiff's deceased daughter Toni Bennett was a passenger in a vehicle driven by Moniquea Stanley. Bennett and Stanley were both killed when Stanley's vehicle was struck by a tractor/trailer driven by Defendant Chester Skelton, who was an employee of Defendant Wal-Mart Transportation, LLC. Plaintiff alleged in her complaint that the Wal-Mart driver was speeding in a vehicle that had defective brakes. Plaintiff only named driver Skelton and Wal-Mart Transportation, LLC. as defendants.

In addition to an answer, Defendants filed a Notice Pursuant to O.C.G.A. section 51-12-33(d). Defendants claim that driver Moniquea Stanley caused the collision by failing to properly stop

EXHIBIT "F"

at a stop sign and failing to field the right away when she pulled her vehicle into the path of the Defendants' tractor/tractor.

Plaintiff's Motion seeks relief in three forms: first, to strike the "Second Defense" of Defendants' answer which reserves the right to show a third party was at fault and the cause of the collision; second, to grant a partial judgment or summary judgment for the plaintiff on any issue of apportionment of damages involving a third party; and third, to order in limine that there be no presentation of evidence or argument concerning reduction of an award based on the negligence of any person who is not named as a party to this suit.

At the heart of the motion is O.C.G.A. section 51-12-33, which provides: "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, or could have been, named as a party to the suit." In a broader sense, the arteries feeding the dispute here flow from three statutes as reworded (or not, as the case may be)in 2005 revisions by the Georgia Legislature, to wit: O.C.G.A. sections 51-12-31, 51-12-32, 51-12-33.

The ultimate issue revolves around the current state of the age-old principle of joint and several liability among joint tortfeasors. Plaintiff claims joint and several liability lives because the 2005 legislative enactments are unconstitutional.

Defendants claim the joint and several liability in this context has been validly changed by the Georgia General Assembly in an exercise of its legislative power and discretion and wisdom.

This Court has carefully considered each challenge raised by Plaintiff to the constitutionality and efficacy of O.C.G.A. section 51-12-33(c)and its surrounding context. The Court finds that Plaintiff has posed admirable and interesting arguments to the wisdom of these statutory changes. However, the Court also finds the contentions fall short of establishing that the statutes are unconstitutionally deficient on any ground raised by Plaintiff.

Plaintiff's Omnibus Motion Regarding the Unconstitutionality and Inapplicability of All or Part of O.C.G.A. section 51-12-33, as amended, is therefore denied.

This 5th day of July, 2007.

Judge Gary L. Nikell,
State Court of Bulloch County

P.O. Box 1688
Statesboro, GA 30459

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

ANA JULIA MAYA SALINAS, et al., Plaintiff,	)	
	)	CIVIL ACTION FILE
v.	)	
	)	NO. 10 EV 009982
CORO REALTY ADVISORS, et al., Defendants	)	

ORDER

The above styled action came regularly before the Court on Defendant's *Motion For Clarification Of the Court's February 23, 2011 Order*. All parties were represented by counsel. After oral argument and consideration of the entire record, the Court hereby issues the following ruling:

At the hearing of this motion, the parties were asked to brief the following question: whether application of the apportionment statute, codified at O.C.G.A. § 51-12-33,[1] is

[1] § 51-12-33. *Reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties*

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) 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, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date

EXHIBIT "G"

compatible with the non-delegable duty imposed by O.C.G.A. § 51-3-1[2] upon premises owners toward their invitees. To briefly state the allegations of the Complaint, Plaintiff's decedent Ismael Cervantes Orta was visiting family members at the apartment complex owned by the Defendant when he was shot and killed by an unidentified assailant. Plaintiff has brought this premises liability action as a purported invitee of the Defendant and has alleged negligence in the failure to adopt sufficient security measures in light of the preceding criminal activity. The parties have fully briefed this issue post-hearing and have submitted that this as a question of law for the Court.

The defense has cogently responded to this Court's question with the following argument: That the duty owed by the landowner is independent of the duty owed by the assailant. While the duty owed by the landowner is to guard against foreseeable dangers to its invitees, the assailant breached an independent tortious duty to not harm Mr. Orta. Therefore, the Defendant contends that it is not seeking to "delegate" their duty under O.C.G.A. § 51-3-1

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of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

[2] § 51-3-1. Duty of owner or occupier of land to invitee

Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.

to the assailant.[3] The assailant owed separate duties under O.C.G.A. §51-1-13 and 51-1-14 and the apportionment statute merely allows the jury to assign the loss between the independent duties owed by the separate Defendants. After due consideration of this analysis, the question to be decided is answered, and perhaps proposed by this Court, too narrowly. Pretermitting whether the defense correctly analyzes the issue in terms of a non-delegable duty, the question to be decided is whether the particular species of liability in issue here- third party crime premises liability- is compatible with our apportionment statute.

The Court begins with the duty owed by a premises owner: "a landowner can be liable for third-party criminal attacks if the landowner has *reasonable grounds* to apprehend that such a criminal act would be committed but fails to take steps to guard against injury. Walker v. Aderhold Props., 303 Ga. App. 710 (2010). In cases of liability for third party crime, the elements of the action consider that the landowner will be concurrently responsible for causation. FPI Atlanta, L.P. v. Seaton, 240 Ga. App. 880 (1990) (physical precedent) ("Inherent in every case of liability for third-party criminal conduct is the existence of concurrent proximate cause of the landlord's prior negligent act or omission.") *Sutter v. Hutchings*, 254 Ga. 194, 197 (1) (327 S.E.2d 716) (1985); *Bradley Center v. Wessner*, 250 Ga. 199, 200 (296 S.E.2d 693) (1982); *Atlantic Coast Line R. Co. v. Godard*, 211 Ga. 373, 376-377 (1) (86 S.E.2d 311) (1955); *Williams v. Grier*, 196 Ga. 327, 336-338 (2) (26 S.E.2d 698) (1943); *Bozeman v. Blue's Truck Line*, 62 Ga. App. 7, 9-11 (7 S.E.2d 412) (1940). While the criminal actions of third parties are generally considered a supervening intervening cause, breaking the chain of causation, this does not relieve the landowner from liability

[3] For example, an operator of a grocery store may not contractually shift their statutory responsibility to exercise ordinary care in maintaining the premises to a cleaning company. Confetti Atlanta v. Gray, 202 Ga. App. 241 (1991); O.C.G.A. § 51-2-5 (4).

where the criminal conduct was the reasonably foreseeable consequence of the landowner's breach.

Significantly, in PN Express, Inc. v. Zegel, et al., 304 Ga. App. 672 (2010), a recent case that considered the trial Court's refusal to charge on apportionment in a respondeat superior context, the Court affirmed and noted:

> We note that the Zegels' action against PN Express is entirely based on notions of derivative liability: statutory employment and respondeat superior. Generally, where a party's liability is solely vicarious, that party and the actively-negligent tortfeasor are regarded as a single tortfeasor. Thus, where a defendant employer's liability is entirely dependent on principles of vicarious liability, such as respondeat superior, then "[u]nless additional and independent acts of negligence over and above those alleged against the servant or employee are alleged against the employer, a verdict exonerating the employee also exonerates the employer." (internal citations omitted).
>
> Other states have determined that comparative fault statutes do not apply where the defendant's liability is derivative, and we concur. *Since the corporation's liability for the accident was purely vicarious in nature for the acts of [Surlina] himself, rather than joint and several, it is obvious . . . that the comparative fault statute [does] not apply." Thus, the trial court did not err in declining to instruct the jury on OCGA § 51-12-33.* (emphasis supplied)

A premises liability action for third party crime is similar to other claims of vicarious or derivative liability in which the cause of action expressly contemplates responsibility for the damage caused by a third party's actions. The element of duty and breach on these claims may differ in analysis because a respondeat superior defendant is held liable for an agent's breach within the course and scope of his employment while a premises liability or a negligent retention defendant is held liable for their own breach of care in failing to prevent foreseeable harm. However, the causes of action share a common policy: the principal or landowner defendant is to be held liable for the harm caused more immediately by a third party actor. While a landowner is technically responsible for his own breach in failing to adopt sufficient security measures- the breach is not actionable without the element of harm

resulting from another's actions.[4] Thus, the elements of liability expressly incorporate the harm caused by third party criminality. Returning to *PN Express v. Zegel, infra*, the Court affirmed the trial Court and found that apportionment was misapplied in cases of derivative liability. While Defendant argues that the apportionment statute may be rationally applied here since the assailant owed and breach independent duties to the Plaintiff, the servant in *PN Express* also undoubtedly owed and breached independent duties to the Plaintiff. Yet, the Court found that it was "obvious" that the apportionment statute did not apply.

Notwithstanding the fact that the criminal, rather than the landowner, may be the more immediate cause of harm, the landowner's breach is still the proximate cause and it is he who bears responsibility for full consequences of the criminal act if the criminal act was the foreseeable result of the landowner's breach. Moreover, if there is a foreseeable act of crime resulting from the Defendant landowner's initial breach, the actions of a third party who "contributed to the alleged injury" (See O.C.G.A. § 51-12-33(c)) is not a supervening cause that relieves the Defendant landowner of full responsibility.[5] It is the intervening crime that the landowner is required to guard against. It would be incongruous to reduce or relieve the

[4] As is recognized in Defendant's brief, page 8.

[5] To use a contrasting example supplied by the defense, a defective product case may produce multiple defendants on various claims. These claims may range from manufacturing defects to a failure to warn. Since the jury may award damages in different amounts between the several defendants, the defense draws an analogy to the present facts and contends that allowing apportionment here would be equally unproblematic. However, this example does not address the central issue to be resolved here- whether vicarious liability for the actions of a third party is compatible with apportionment.

The defense also places emphasis on a recently decided case that considered an argument that apportionment was misapplied in a case of third party crime. For two reasons, the Court declines to find the case persuasive. First, the appellant failed to preserve any argument regarding this issue. Secondly, the portion of the opinion that lends some support to the defense is physical precedent only. See Pacheco v. Regal Cinemas, Inc., A11A0503 (July 14, 2011).

landowner of responsibility by the very harm that was to be deterred. Accordingly, apportioning fault to the assailant as a "contributing" non-party in these circumstances would be an incompatible result under Georgia law.

In accordance with the above, Defendant's motion for clarification is decided such that this Court will decline to apply the apportionment statute and will not charge the jury as to its application. See PN Express, Inc. v. Zegel, et al., 304 Ga. App. 672 (2010). As indicated at the hearing, the Court is disposed to grant the non-prevailing party a certificate of immediate review- should one be requested.

SO ORDERED this the 20th day of SEPTEMBER 2011

_____s/John Mather_____
The Honorable John R. Mather
Judge State Court of Fulton County

GRANTED

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

JEFFREY HOWARD TODD and TERESA TRAPP, as sole heirs and Administrators of the Estate of Jeffrey Brandon Todd, Deceased, Plaintiffs,	)	
v.	)	CIVIL ACTION FILE NO. 09 EV 006935
ACCOR NORTH AMERICA, INC., MOTEL 6 OPERATING LP, CAROLYN PUGH and LYNDON B. JOHNSON, JR., Defendants	)	

ORDER

The above styled action came regularly before the Court on Plaintiffs' *Motion For Partial summary Judgment That Defendant's Notice Of Fault Of Non-Parties Pursuant TO O.C.G.A. § 51-12-33 Is Not Applicable And O.C.G.A. § 51-12-33 Is Unconstitutional As Written Or As Applied.* All parties were represented by counsel. After consideration of the entire record, the Court hereby issues the following ruling:

In the present motion, Plaintiff brings a myriad of challenges to the operation of Georgia's apportionment statute codified at O.C.G.A. § 51-12-33. These include arguments regarding the application of the statute and challenges on due process and equal protection constitutional grounds. To briefly state the underlying facts, this action arises from a shooting incident at a hotel in which Jimmy Teemer and Lyndon Bernard Johnson burst into Jeffrey Todd's room. In the gunfight that followed, both Mr. Todd and Teemer were fatally wounded. Plaintiffs have brought this premises liability action against the hotel; the other assailant Mr. Johnson; and Ms. Pugh, the manager of the hotel. On December 17, 2009, the Defendants filed a "Notice of Fault of Non-Parties Pursuant to O.C.G.A. § 51-12-33." This notice designated Jimmy Teemer; Lyndon Johnson; and Patrick Jackson as individuals to be

EXHIBIT "H"

considered by the jury, in addition to the named Defendants, when apportioning fault. The subject provision of O.C.G.A. § 51-12-33, provides as follows:

> (c) 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, or could have been, named as a party to the suit.
>
> (d) (1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.
>
> (2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

Recently, this Court had occasion to decide a similar challenge to this statute in the context of third party crime. In *Salinas v. Carl Realty Advisors, et al.*, 10EV009982 (Order of September 22, 2011) the Defendant filed a third party notice of fault as to the unknown shooter that killed the plaintiff's decedent.[1] In considering whether apportionment with the assailant is compatible with the Defendant's duty toward invitees in regard to foreseeable third party crime, this Court drew heavily on the rationale of PN Express, Inc. v. Zegel, et al., 304 Ga. App. 672 (2010), and decided that the apportionment statute did not apply in this particular context. The Court's explanation in that Order is repeated here:

> The Court begins with the duty owed by a premises owner: "a landowner can be liable for third-party criminal attacks if the landowner has *reasonable grounds* to apprehend that such a criminal act would be committed but fails to take steps to guard against injury. Walker v. Aderhold Props., 303 Ga. App. 710 (2010). In cases of liability for third party crime, the elements of the action consider that the landowner will be concurrently responsible for causation. FPI Atlanta, L.P. v. Sexton, 240 Ga. App. 880 (1999) (physical precedent) ("Inherent in *every* case of liability for third-party criminal conduct is the existence of concurrent proximate cause of the landlord's prior negligent act or omission.") *Sutter v. Hutchings*, 254 Ga. 194, 197 (1) (327 S.E.2d

[1] The only analytical difference from the present facts is that the assailants were both known in this action and one is actually a party defendant.

716) (1985); *Bradley Center v. Wessner*, 250 Ga. 199, 200 (296 S.E.2d 693) (1982); *Atlantic Coast Line R. Co. v. Godard*, 211 Ga. 373, 376-377 (1) (86 S.E.2d 311) (1955); *Williams v. Grier*, 196 Ga. 327, 336-338 (2) (26 S.E.2d 698) (1943); *Bozeman v. Blue's Truck Line*, 62 Ga. App. 7, 9-11 (7 S.E.2d 412) (1940). While the criminal actions of third parties are generally considered a supervening intervening cause, breaking the chain of causation, this does not relieve the landowner from liability where the criminal conduct was the reasonably foreseeable consequence of the landowner's breach.

Significantly, in PN Express, Inc. v. Zegel, et al., 304 Ga. App. 672 (2010), a recent case that considered the trial Court's refusal to charge on apportionment in a respondeat superior context, the Court affirmed and noted:

We note that the Zegels' action against PN Express is entirely based on notions of derivative liability: statutory employment and respondeat superior. Generally, where a party's liability is solely vicarious, that party and the actively-negligent tortfeasor are regarded as a single tortfeasor. Thus, where a defendant employer's liability is entirely dependent on principles of vicarious liability, such as respondeat superior, then "[u]nless additional and independent acts of negligence over and above those alleged against the servant or employee are alleged against the employer, a verdict exonerating the employee also exonerates the employer." (internal citations omitted).

Other states have determined that comparative fault statutes do not apply where the defendant's liability is derivative, and we concur. *Since the corporation's liability for the accident was purely vicarious in nature for the acts of [Surling] himself, rather than joint and several, it is obvious . . . that the comparative fault statute [does] not apply." Thus, the trial court did not err in declining to instruct the jury on OCGA § 51-12-33.* (emphasis supplied)

A premises liability action for third party crime is similar to other claims of vicarious or derivative liability in which the cause of action expressly contemplates responsibility for the damage caused by a third party's actions. The element of duty and breach on these claims may differ in analysis because a respondeat superior defendant is held liable for an agent's breach within the course and scope of his employment while a premises liability or a negligent retention defendant is held liable for their own breach of care in failing to prevent foreseeable harm. However, the causes of action share a common policy: the principal or landowner defendant is to be held liable for the harm caused more immediately by a third party actor. While a landowner is technically responsible for his own breach in failing to adopt sufficient security measures- the breach is not actionable without the element of harm resulting from another's actions. Thus, the elements of liability expressly incorporate the harm caused by third party criminality. Returning to *PN Express v. Zegel, supra*, the Court affirmed the trial Court and found that apportionment was misapplied in cases of derivative liability. While Defendant argues that the apportionment statute may be rationally applied here since the assailant owed and breached independent duties to the Plaintiff, the servant in *PN Express* also undoubtedly owed and breached independent duties to the Plaintiff. Yet, the Court found that it was "obvious" that the apportionment statute did not apply.

> Notwithstanding the fact that the criminal, rather than the landowner, may be the more immediate cause of harm, the landowner's breach is still the proximate cause and it is he who bears responsibility for full consequences of the criminal act if the criminal act was the foreseeable result of the landowner's breach. Moreover, if there is a foreseeable act of crime resulting from the Defendant landowner's initial breach, the actions of a third party who "contributed to the alleged injury" (See O.C.G.A. § 51-12-33(c)) is not a supervening cause that relieves the Defendant landowner of full responsibility. It is the intervening crime that the landowner is required to guard against. It would be incongruous to reduce or relieve the landowner of responsibility by the very harm that was to be deterred. Accordingly, apportioning fault to the assailant as a "contributing" non-party in these circumstances would be an incompatible result under Georgia law.

While the Defense has sought to draw distinctions between *Safiwas* and the present facts, no differences compel a different result here. Accordingly, the Plaintiff's *Motion For Partial Summary Judgment* is GRANTED and the jury will not be charged as to any apportionment with third parties. Moreover, it light of the above resolution, it is unnecessary to address the constitutional challenges advanced by the Plaintiff.[2]

SO ORDERED this the 10th day of NOVEMBER 2011

John Mather

The Honorable John R. Mather
Judge, State Court of Fulton County

[2] "The Court will not pass upon a constitutional question although properly presented by the record, if there is also presentsome other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." Ashwander v. TVA, 297 U.S. 288 (1935)

IN THE STATE COURT OF COBB COUNTY
STATE OF GEORGIA

JOSHUA R. MARTIN,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION**
VS.	)	
	)	**FILE NO. 09-A-55-4**
SIX FLAGS OVER GEORGIA II, L.P.,	)	
SIX FLAGS OVER GEORGIA, LLC,	)	
SFOG II, INC., SFG-II, LLC,	)	
MIDTOWN LANIER PARKING, INC.,	)	
WILLIE GRAY FRANKLIN, JR.,	)	
BRAD MCGAIL JOHNSON,	)	
DEANDRE EVANS,	)	
CLAUDE MOREY III, and JOHN DOES	)	
NOS. 1-15,	)	
	)	
Defendants.	)	

COBB COUNTY, GA
FILED IN OFFICE
11 SEP 12 PM 4:30
DIANE G. WEBB
STATE COURT CLERK-02

ORDER

This case is before the Court on the "Plaintiff's Motion for Partial Summary Judgment that O.C.G.A. § 51-12-33 is Not Applicable and is Unconstitutional as Written or as Applied, or in the Alternative Motion in Limine to Exclude All Evidence and All Arguments of Apportionment Pursuant to O.C.G.A. § 51-12-33."[1] Specifically, Plaintiff seeks a ruling from this Court that the 2005 Amendment to O.C.G.A. § 51-12-33 does not mandate that the fact finder apportion any damages based on the percentage of fault of each Defendant in cases where one Defendant has committed a criminal act. Upon consideration of all matter filed of record, the Court enters this order as follows:

In that there is no Georgia appellate case law addressing the exact issue before this Court, the undersigned is constrained by the following language cited in Cavalier

[1] As the issue currently before the Court specifically relates to the exclusion of evidence and argument at trial on the issue of apportionment, the Court hereby enters this Order in response to Plaintiff's Motion in Limine only.

EXHIBIT "I"

Convenience, Inc. and Ken's Supermarkets, Inc. v. Sarvis, 305 Ga. App. 141, 142 (2010), which states:

> The cardinal rule in construing a legislative act is 'to ascertain the legislative intent and purpose in enacting the law, and then to give it that construction which will effectuate the legislative intent and purpose.' 'In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.' The Supreme Court of Georgia has instructed that the 'best indicator of the General Assembly's intent is the statutory text it actually adopted' and that '[a]s long as the statutory language is clear and does not lead to an unreasonable or absurd result, it is the sole evidence of the ultimate legislative intent.'

Additionally, the Court finds the following language instructive in the present case: "Statutes in derogation of the common law are construed strictly." Heard v. Neighbor Newspapers, 259 Ga. 458, 459 (1989).

While Defendant argues that the issue presently before the Court was conclusively resolved in the Cavalier case, the Court is unable to agree with that position. In that case, the Court of Appeals was specifically addressing the question of whether the fact finder should apportion damages in cases where there is no allegation that Plaintiff was at fault. In the present case, the issue before this Court is whether the legislature intended to eliminate joint and several liability in premises liability cases where one Defendant is alleged to have committed an intentional tort.

This Court believes that a thorough analysis of O.C.G.A. § 51-12-31, and the subsequent code sections, reveals that allowing apportionment in cases such as this would "lead to an unreasonable or absurd result." Allowing apportionment in the present case would effectively allow the premises owner to shield itself from any potential liability based on an alleged breach of its own duty, if any, because the fact finder would apportion all damages against the criminal actor. If Six Flags did owe a duty in the

present case, it would be to protect Plaintiff from foreseeable, intentional conduct. As a jury may find that the Six Flags Defendants owed such a duty to Plaintiff in this case, it would be a patently "absurd result" to allow Six Flags to shield itself from liability for any breach of that duty based on the very criminal act that Six Flags owed a duty to prevent.

Additionally, the Court notes that within the statute at issue, the Legislature specifically references "negligence or fault" in subsection (d)(1). It appears to this Court that the intention of the Legislature in the statute at issue was only to address cases alleging negligence, and not in cases where there is an allegation of intentional tort.[2] Therefore, the presumption is that the common law remains as to joint and several liability in cases such as the one currently before this Court.

Accordingly, the Court hereby grants Plaintiff's Motion in Limine on the issue of apportionment.

So Ordered, this 12 day of Sept, 2011.

Kathryn J. Tankesley, Judge
State Court of Cobb County

[2] A thorough evaluation of the legislative history shows that the intention of the legislature was to address tort reform in the specific context of healthcare. "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act." See Editor's Notes Ga. L. 2005, p. 1, § 1.

CERTIFICATE OF SERVICE

This is to certify that I have this day mailed true and exact copies of the foregoing

ORDER

through the Cobb County Mail System, to the following:

Gilbert H. Deitch, Esq.
DEITCH & ROGERS, LLC
5881 Glenridge Drive
Plaza 400, Suite 160
Atlanta, Georgia 30328

Michael L. Neff, Esq.
THE LAW OFFICES OF MICHAEL L. NEFF, P.C.
1770 Resurgens Plaza
945 E. Paces Ferry Road
Atlanta, Georgia 30326

Wayne D. McCrew, III, Esq.
CARLOCK, COPELAND, SEMLER & STAIR, LLP
2600 Marquis Two Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303

Earl W. Gunn, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
950 East Paces Ferry Road, Suite 3000
Atlanta, Georgia 30326

Ian R. Rapport, Esq.
LAW OFFICES OF IAN R. RAPPORT
2435 Commerce Avenue, Suite 102
Duluth, Georgia 30096

This 12th day of September, 2011.

Ericka Kemp

Ericka Kemp, Judicial Administrative Assistant to
Judge Kathryn J. Tanksley

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

JOETTA JOHNSON, Individually and as Surviving spouse of Joseph Johnson; and Jessica Johnson and Betty Boyd, as Personal co-representatives of the ESTATE OF JOSEPH JOHNSON, Plaintiffs,	)	CIVIL ACTION FILE
v.	)	10 EV 009486
JARVIS GIBSON, et al., Defendants,	)	

ORDER

The above styled action came regularly before the Court on the Plaintiff's *Response To Defendant Gibson's Statutory Notice Of Negligence Of a Non-Party*. All parties were represented by counsel. After considering the entire record, the Court hereby issues the following ruling:

In the present matter, which the Court will treat as a motion, the Plaintiff seeks a judicial determination that the Defendant's statutory *Notice Of Negligence Of A Non-Party* is an affirmative defense for which he bears the burden of proof at trial. This notice was filed in compliance with the apportionment statute enacted at O.C.G.A. § 51-12-33 (d)(2), which is set forth, in relevant part, as follows:

> § 51-12-33. *Reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties*

EXHIBIT "J"

(c) 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, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

In the Notice filed with the Court, the Defendant contends that a Joe Doe driver is wholly or partially the cause of the collision.

Plaintiff contends that raising the liability of other parties, or raising any specific theory beyond a denial of the Complaint, is an affirmative defense. In language that appears in several cases, it has been noted:

"The burden of proof generally lies upon the party asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. If a negation or negative affirmation be so essential, the proof of such negative lies on the party so affirming it." Purcell v. Hill, 111 Ga. App. 256 (1965); Hubert v. Domino's Pizza, Inc., 239 Ga. App. 370 (1999).

It has several times been held that, where a defendant goes further in his answer than merely denying the allegations of negligence set forth in plaintiff's petition, and sets up in his answer an affirmative defense that the plaintiff's injuries or damages were caused by certain specific acts of negligence on the part of the plaintiff or that the plaintiff by the exercise of ordinary care in specified particulars could have avoided the negligence of the defendant, the burden rests upon the defendant to establish the truth of such affirmative defense by a preponderance of the evidence. Purcell v. Hill, 111 Ga. App. 256 (1965).

In response, Defendant contends that the statutory notice is not an affirmative defense for several reasons: (1) that O.C.G.A. § 51-12-33 (d)(2) does not classify itself as an affirmative defense; (2) that it is not listed among the affirmative defenses set forth in O.C.G.A. § 9-11-8; (3) that the cases cited by the Plaintiff pertain only to allegations of the Plaintiff's negligence; (4) that the cases predate the Civil Practice Act; and (5) that the Defendant is merely presenting an "alternative possibility for the jury to consider: that a non-party may be responsible for the accident." Defendant's brief, page 4.

The Court finds the Defendant's responsive arguments unpersuasive. First, O.C.G.A. § 51-12-33 (d)(2) is silent on which party has the burden of proof and O.C.G.A. § 9-11-8 does not purport to provide an exhaustive list of affirmative defenses. In fact, neither contributory negligence nor comparative negligence are listed. While it is true that several of the cases cited by the Plaintiff involved defensive allegations of a plaintiff's negligence, affirmative defenses clearly cover many defenses other than contributory negligence. Further, Plaintiff cited to Lewis v. Smith, 238 Ga. App. 6 (1999) in which it was held that an act of God defense- that the Defendant became unforeseeably unconscious just before the collision- was affirmative defense which he bore the burden of proving. As far as these cases predating the CPA, Defendant ignores Plaintiff's citation to Hubert v. Domino's Pizza, Inc., 239 Ga. App. 370 (1999). Lastly, while the Defendant argues that he would merely be presenting an alternative theory- the Defendant bears the burden of proving an alternative theory of causation. See Moresi v. Evans, 257 Ga. App. 670

(2002); Steele v. Atlanta Maternal Fetal Med., 271 Ga. App. 622 (2005)(rev. on other grounds).

Whether the introduction of a third party's responsibility is classified as an affirmative defense or an alternative theory of causation, it is the Defendant who bears the burden of proof. Accordingly, the Plaintiff's "motion" is GRANTED. While the Plaintiff has also asked for a specific jury charge to be given, it is premature to begin the process of crafting jury charges. At trial, the Plaintiff may submit a charge consistent with this Court's Order.

IT IS SO ORDERED THIS THE 17th DAY OF FEBRUARY 2011

s/John Mather
John R. Mather
Judge, State Court Fulton Count

GEORGIA LAW ON THE LIABILITY OF COMPONENT PART MANUFACTURERS

By Dart Meadows

Dart Meadows is a partner in the firm of Balch & Bingham LLP in Atlanta, Georgia. Dart has a national practice representing manufacturers, distributors and dealers in product liability litigation throughout the United States. He is the Chair of the Product Liability Committee of the Georgia Defense Lawyers Association and past Chair of the Product Liability Section of the State Bar of Georgia. Special thanks goes to Lorna Norton and Joe Leavens for their assistance with this article.

The potential liability of manufacturers or suppliers of component parts for harm caused by the product into which the parts have been incorporated poses difficult questions. Generally, the maker of a component part incorporated into another product is deemed a manufacturer as to its component and subject to strict liability under Georgia's products liability statute for injuries proximately caused by a defect in the particular component.[1] Component part manufacturers may also be liable for negligence and failure to warn of dangers associated with their particular component parts. But under what circumstances will the component part manufacturer or supplier be liable for defects in the end product into which its part has been incorporated or for the failure to provide warnings to assemblers or ultimate consumers of the end product? This article examines the circumstances under which the manufacturer of a component part is deemed to be a "manufacturer" subject to liability under Georgia's strict liability statute (including the degree of involvement of the component part manufacturer in the integration of its component into a final product that will cause it to be deemed a "manufacturer"), the policy rationale for shielding component part manufacturers from strict liability, and the circumstances under which a component part manufacturer has a duty to warn of dangers associated with the finished product.

1. When is a Component Part Manufacturer Liable under O.C.G.A. § 51-1-11?

To understand the issues surrounding the liability of the component part manufacturer, it is best to start with general Georgia products liability law. A manufacturer is liable in tort, irrespective of privity, to any person injured by the normal use of a product produced by the manufacturer. *See* O.C.G.A. § 51-1-11(b). In order to establish a claim based on strict liability, a plaintiff is required to demonstrate that, when sold, the defendant's product "was not merchantable and reasonably suited to the use intended, and its condition when sold [was] the proximate cause of the injury sustained." O.C.G.A. § 51-1-11(b)(1). "[T]his statute, by its explicit terms, applies only to those persons or entities who *manufacture* and sell personal property." *Morgan v. Mar-Bel, Inc.*, 614 F. Supp. 438, 440 (N.D. Ga. 1985) (emphasis in original); *see also Chicago Hardware & Fixture Co. v. Letterman*, 236 Ga. App. 21, 23, 510 S.E.2d 875 (1999).

More specifically, to establish a defendant's strict liability, the plaintiff must prove that the defendant is the manufacturer of the component part, that the part when sold by the manufacturer was not merchantable and reasonably suited to the intended use, and that its condition when sold was the proximate cause of the injury sustained. *See Chicago Hardware*, 236 Ga. App. at 23; *Tomlinson v. ResQline, Inc.*,

No. 2:04-CV-122-WCO, 2006 WL 1097833, **3-4 (N.D. Ga. April 24, 2006). "Under Georgia law, strict liability applies only to 'actual manufacturers – those entities that have an active role in the production, design, or assembly of products and placing them in the stream of commerce.'" *Tomlinson*, 2006 WL 1097833 at * 4 (quoting *Freeman v. United Cities Propane Gas of Ga., Inc.*, 807 F. Supp. 1533, 1540 (M.D. Ga. 1992)). There are three basic scenarios under which an entity is deemed to be a manufacturer under Georgia law:

(a) where the entity is the actual manufac turer or designer of the product;
(b) where the entity is a manufacturer of a component part which failed and caused injury to the plaintiff; and
(c) where the entity is an assembler of component parts who then sells the item as a single product under its own trade name.

See id. (citing O.C.G.A. § 51-1-11(b)). Georgia courts strictly construe the strict liability statute, however, and "do not accept an expansive reading of the term 'manufacturer.'" *Id.* Plaintiffs have the burden of pleading and proving a defendant's status as a manufacturer. *See Mullins v. M.G.D. Graphics Sys. Group*, 867 F. Supp. 1578, 1583 (N.D. Ga. 1994) (holding, in an action by employee for injuries suffered using paper cutter, that defendant company could not be strictly liable where complaint did not allege any facts showing company was a manufacturer).

Thus, a significant focus of Georgia cases involving component part manufacturers is whether they are "manufacturers" within the meaning of Georgia's strict liability statute. There are two ways in which a component part manufacturer may be strictly liable. First, it may be strictly liable if its part was defectively designed and that defect caused the plaintiff's injuries. The maker of a component part that is incorporated into another product is deemed a manufacturer as to that component and is subject to strict liability under Georgia's products liability statute for injuries proximately caused by a defect in the component part that existed when it left the component supplier's control. *See Tyler v. PepsiCo, Inc.*, 198 Ga. App. 223, 224, 400 S.E.2d 673 (1990); *Beauchamp v. Russell*, 547 F. Supp. 1191, 1197 (N.D. Ga. 1982); *see also Moore v. ECI Management*, 46 Ga. App. 601, 604, 542 S.E.2d 115 (2000) (while defendant manufactured washer/dryer at issue, it did not manufacture the allegedly defective power cord, and thus to extent plaintiffs claimed their son was electrocuted because of the defective power cord, their wrongful death suit would be against manufacturer of power cord, not manufacturer of washer/dryer).

Second, the "seller"[2] of a component part may become a "manufacturer" and thus become subject to statutory liability by having input into or being actively involved in the conception, design, or specification of the end product. *See Tomlinson*, 2006 WL 1097833 at *4; *Buchan v. Lawrence Metal Prods., Inc.*, 270 Ga. App. 517, 520, 607 S.E.2d 153 (2004). A component part manufacturer may become liable because of its design or improvement suggestions, even though it is not the producer or assembler of the end product. In order to find liability in these circumstances, Georgia courts generally require extensive involvement by the component part manufacturer.

For instance, in *Davenport v. Cummins Alabama, Inc.*, 284 Ga. App. 666, 644 S.E.2d 503 (2007), the operator of a wood chipper sued the manufacturer of the wood chipper and the manufacturer of the engine that went into the chipper for injuries he received when the chipper caught fire, allegedly from the use of flexible tubing in the hydraulic pumps. The engine manufacturer's only input into the final design

of the chipper was limited to advising that the particular engine would perform adequately in a chipper with the intended hydraulic load only if the hydraulic system was connected to the rear of the engine and not to the front of the engine. *See* 284 Ga. App. at 671-72. The court held that, "as a matter of law, such input does not constitute the type of active role in the design of the final product as will subject the distributor of a component part to liability as a manufacturer of the allegedly defectively designed product." *Id.* at 672. The engine manufacturer was not strictly liable because it "did not actively participate in the conception, design, or specification of the chipper" or have anything to do with the choice of materials used for the hydraulic piping or the placement of the piping in the chipper. *Id.* at 671.

Similarly, in *Morgan v. Mar-Bel, Inc.*, 614 F. Supp. 438 (N.D. Ga. 1985), the plaintiff was injured when his hand was caught in an allegedly defective formica slitting machine and sued the defendant Mar-Bel. The court granted summary judgment to Mar-Bel, finding that Mar-Bel only supplied a component part to the machine, and the plaintiff had not contended that Mar-Bel's component part was defective or malfunctioned so as to injure him. *See* 614 F. Supp. at 441. The design and manufacture of the slitting machine were done by other parties, not by Mar-Bel. Even though Mar-Bel offered improvement suggestions, inspected, and otherwise tested the finished product during its assembly, any supervision or suggestions by Mar-Bel were not substantial enough to rise to the level of manufacture or design of the product. *See id.* at 440-41.

In *Tomlinson v. ResQline, Inc.*, No. 2:04-CV-122-WCO, 2006 WL 1097833 (N.D. Ga. April 24, 2006), the court held that a component part manufacturer could not be held liable for an injury resulting from use of an industrial "evacuation system" in the absence of evidence that the defendant manufactured or was in any way responsible for the allegedly defective part that caused the plaintiff's injury. The plaintiff's injury occurred while he was attempting to use the evacuation system, which was comprised of a cable and harness used to lower a person to the ground. *See* 2006 WL 1097833 at *1. The plaintiff sued, among others, Sava Industries, which the plaintiff alleged manufactured a component part of the system that failed and caused his injuries. *See id.* at *2. As to the plaintiff's strict liability claim, the evidence showed that Sava did not manufacture the component part that allegedly failed (the cable), but rather purchased it from another company which, in turn, purchased it from a third, unknown company. *See id.* at *4. Sava only supplied components that attached to the cable and that were not alleged to have been defective. *See id.* Nor was there any evidence that Sava participated in the integration of the cable assembly into the system, or played an active role in the selection of the particular cable used in the system. Thus, there was no genuine issue of material fact with regard to whether Sava was the manufacturer of a component part the failure of which caused injury to the plaintiff. *See id.* at *5.

By contrast, in *Buchan v. Lawrence Metal Products, Inc.*, 270 Ga. App. 517, 607 S.E.2d 153 (2004), the plaintiff had been standing in line at the airport when the vinyl retractable tape on a crowd-control barrier became detached from a metal post and struck him in the arm. The plaintiff sued the purported manufacturer of the crowd-control system for strict liability and negligence. *See* 270 Ga. App. at 517. The defendant moved for summary judgment, arguing that it did not manufacture the crowd-control system, that another company designed and manufactured the retractable tape cassette, and that the defendant merely produced the metal posts in which the cassettes were inserted. *See id.* The lower court granted the motion, but the Georgia Court of Appeals reversed, finding that there was

evidence that the defendant "had an active role in the production, design, and assembly of the … crowd-control system" that the plaintiff alleged was defective. *Id.* at 521. Specifically, the crowd-control system consisted of cassettes and posts and could not serve its purpose without both components. While the defendant had no part in the design or assembly of the retractable tape cassettes, it did design the posts necessary to secure the cassettes, and it did so with no input from the cassettes' manufacturer. "Therefore, there was evidence that [the defendant] had a real role in the creation of the system. And, in his complaint, [the plaintiff] has alleged that the *system*, not just the tape cassette, was defective." *Id.* (emphasis in original).

Thus, under Georgia law, "strict liability applies only to those actively involved in the design, specifications, or formulation [1] of a defective final product or [2] of a defective component part which failed during use of a product and caused injury." *Davenport*, 284 Ga. App. at 671; *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 5(b).[3] It follows that "component sellers who do not participate in the integration of the component into the design of the product should not be liable merely because the integration of the component causes the product to become dangerously defective." RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 5(b). It is generally acknowledged that a component manufacturer is not required to analyze the design of the completed product that incorporates its non-defective component part or to anticipate hazards that might develop as a result of the non-defective component's incorporation into an assembled product. *See* AM. L. PROD. LIAB. 3D § 8:10; 63 AM. JUR. 2D PRODUCTS LIABILITY § 150.

2. Policy Reasons for Shielding Component Part Manufacturers from Strict Liability

There is sound policy reasoning for shielding component part manufacturers from strict liability. Georgia cases recognize that a manufacturer cannot insure the reliability of a product it does not make. *See Hall v. Scott USA, Ltd.*, 198 Ga. App. 197, 200, 400 S.E.2d 700 (1990); *Talley v. City Tank Co.*, 158 Ga. App. 130, 134, 279 S.E.2d 264 (1981). "A manufacturer has the absolute right to have his strict liability for injuries adjudged on the basis of the design of its own marketed product and not that of someone else." *Hall*, 198 Ga. App. at 201 (quoting *Talley*, 158 Ga. App. at 135). As one treatise has explained:

[W]hile the law of design defect clearly extends liability to finished product manufacturers, it rarely imposes strict liability on component part suppliers who merely sell their multi-use parts to manufacturers of finished products. The critical inquiry focuses on determining the reason why the component part turned out to be unsuitable for use in the finished product. If the failure was due to a flaw in the component part, then the component part is itself defective and the cause for the assembled product being defective, in which case, the component part maker may be held strictly liable. If, on other hand, the finished product was unreasonably dangerous because the component part was unsuited for the particular use that the finished product manufacturer chose to make of it, then the defect is in the design of the finished product rather than in the design of the component part. In these cases, it

> the finished product manufacturer and not the component part supplier that may be held strictly liable.

63 AM. JUR. 2D PRODUCTS LIABILITY § 152.

The Restatement explains that some component parts "have no functional capabilities unless integrated into other products." RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 5, Comment a. Therefore, it would be "unjust and inefficient" to hold component manufacturers liable because an end product manufacturer integrated a component with no inherent capabilities into an unreasonably dangerous product. *See id.* If component suppliers were subject to liability in these instances, they would be forced to scrutinize every end product for safety and proper integration prior to delivery of their component parts. *See id.* This would likely do two things. First, it would likely slow down production of marketable products, as end manufacturers would be forced to seek approval from component manufacturers. Second, it would require component manufacturers to either have or gain knowledge and understanding of any and all possible integrations of their components. This is a heavy burden for component manufacturers to bear when many of the components are general-purpose products that can be integrated into numerous end products. Neither possibility is particularly desirable. *See id.*

An important policy consideration of component part manufacturer liability is that finished product manufacturers know exactly what they intend to do with a component part and therefore are in a better position to guarantee that the part is suitable for their particular applications. Thus, "[i]f the alleged 'danger' or 'defect' in a component part is simply its unsuitability for another company's finished product, the responsibility for that 'danger' or 'defect' must rest with the finished product manufacturer. That is true even if the risk in the finished product is foreseeable to the component part manufacturer." Edward M. Mansfield, "Reflections on Current Limits on Component and Raw Material Supplier Liability and the Proposed Third Restatement," 84 KY. L.J. 221, 239 (1996).

On the other hand, under Georgia law if the component part manufacturer has knowledge that a purchaser intends to use its part in a way that could be hazardous, the supplier of the component part and the manufacturer of the finished product are both subject to strict liability in tort. *See Chicago Hardware & Fixture Co. v. Letterman*, 236 Ga. App. 21, 510 S.E.2d 875 (1999). The issue of component manufacturer foreseeability was a substantial factor in *Chicago Hardware & Fixture Co.*, a case in which the plaintiff was injured when a portion of a tree-stand on which he was standing broke and he fell. The plaintiff sued the manufacturer of the stand and the manufacturer of a turnbuckle, which was a component part on the tree stand. See 236 Ga. App. at 21. The court reversed the lower court's grant of summary judgment to the component manufacturer, finding that a jury question existed as to the component manufacturer's knowledge of the potentially dangerous use of its component. "[K]nowledge on the part of the seller of a component part that a purchaser intends to use it in a way that is found to be unreasonably dangerous subjects the supplier of the component part to strict liability in tort, as well as the assembler." *Id.* at 24.

In the absence of foreseeability, however, courts are unlikely to impose liability on component manufacturers. For example, when the finished product manufacturer or a third party has altered the component part, it is unfair to impose liability on a party who has no control over the end use of its product. In *Hall v. Scott USA, Ltd.*, 198 Ga. App. 197, 400 S.E.2d 700 (1990), a motorcyclist suffered injuries to

his eye when he fell and a third party's lens cleaning device, which was subsequently attached to the defendant manufacturer's lens, broke apart upon impact with the ground. The plaintiff sued the lens manufacturer, which in turn filed a third-party complaint against the manufacturer of the cleaning system. *See* 198 Ga. App. at 197. The court affirmed the lower court's grant of summary judgment to the lens manufacturer, finding that there was insufficient evidence to establish that the manufacturer's lens was the proximate cause of the plaintiff's eye injury. *See id.* at 201. Although there were allegations that the cleaning device was defective, no defects were alleged with respect to the original design of the lens or goggles, and there was no evidence that the lens manufacturer had designed, fabricated, manufactured, marketed, or distributed the lens cleaning device; or that the lens manufacturer played any role in the design, fabrication, manufacture or installation of the cleaning device onto the plaintiff's goggles. *See id.* The part that the plaintiff contended was defective and caused his injury was added to the lens after it was sold by the defendant. "One of the conditions for imposition of strict liability against a manufacturer of 'defective' products is that the product is expected to and *does reach the user or consumer without substantial change* in the condition in which it is sold." *Id.* (emphasis in original; internal punctuation omitted).

The *Hall* court relied heavily on its earlier decision in *Giordano v. Ford Motor Co.*, 165 Ga. App. 644, 299 S.E.2d 897 (1983). In *Giordano*, believing his stalled Jeep to have run out of gas, the plaintiff purchased gasoline from a service station, poured most of it into the vehicle's tank, and used a small amount to prime the carburetor. When the engine did not start, the plaintiff repeated the process, priming the carburetor with another small amount of gasoline while a service station employee turned on the ignition. A ball of fire erupted from the carburetor, igniting the plaintiff's shirt and resulting in severe burns. The vehicle's carburetor was manufactured by Ford and sold to Jeep, which had assembled the vehicle. Neither company had warned about the proper methods or the risks of priming the carburetor. The plaintiff sued Ford and Jeep for strict liability. The court reversed the lower court's grant of summary judgment to Ford, finding that questions of fact existed as to whether Ford may escape liability because its carburetor was merely a component of Jeep's vehicle. *See* 165 Ga. App. at 644.

> Generally, the determination of whether the component manufacturer is insulated from liability depends upon the extent to which the product is altered by the assembler before it reaches the ultimate user. … [I]t would be "an unwarranted extension of the theory of strict liability" to ignore significant changes to the product made by an intermediary. However, where the product reaches the ultimate user essentially in its original state, as the carburetor in the instant case apparently did, the manufacturer is not necessarily absolved from the duty to warn, if such a duty would otherwise exist. Normally, the determination of the extent and effect of any modifications made to a component will be a matter for jury resolution and, in some situations, a duty to warn may be shared by both the component manufacturer and the assembler. In the case before us now, the undisputed facts of record do not establish as a matter of law that the [plaintiff's] injury resulted

from the installation of the carburetor rather than from its original design. *Id.* at 644-45 (quoting *Talley v. City Tank Corp.*, 158 Ga. App. 130, 137, 279 S.E.2d 264 (1981)) (citations omitted).

3. When Does a Component Part Manufacturer Have a Duty to Warn?

As recognized by the *Giordano* court, a component part manufacturer generally does not have a duty to warn of dangers associated with the finished product. Under Georgia law, a component part manufacturer may nevertheless be subject to liability to ultimate users for failure to warn of dangers from reasonably foreseeable uses of the component. *See Giordano*, 165 Ga. App. at 644; *Beauchamp v. Russell*, 547 F. Supp. 1191, 1197 (N.D. Ga. 1982)). Whether a duty to warn exists depends upon the foreseeability of the use of the part in question, the type of danger involved, the foreseeability of the user's knowledge of the danger, and the extent to which the component is altered by the assembler before it reaches the ultimate user. *See Giordano*, 165 Ga. App. at 644-45.

The Restatement recognizes that "[t]he component seller is required to provide instructions and warnings regarding risks associated with the use of the component product." RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 5, Comment b. "However, when a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or ultimate consumers of dangers arising because the component is unsuited for the special purpose to which the buyer puts it." *Id.* "To impose a duty to warn in such a circumstance would require that component sellers monitor the development of products and systems into which their components are to be integrated." *Id.*

In *Beauchamp v. Russell*, 547 F. Supp. 1191 (N.D. Ga. 1982), for instance, the court addressed the question whether the manufacturer of a component part of a finished product can be strictly liable to a user of the product for failure to provide proper packaging and instructions or to warn of dangers attendant upon a foreseeable use of its part. The plaintiff was injured while using an industrial palletizer to stack cases of cans at his place of employment, and he sued, among others, the manufacturer of an air valve that was incorporated into the finished palletizer. *See* 547 F. Supp. at 1193-95. The plaintiff alleged that the component manufacturer failed to adequately instruct how to install the air valve and to warn users that the valve retains air pressure even when it is de-energized. *See id.* at 1195. The court noted that "[t]he responsibility for information collection and dissemination should rest on the party who has the greatest access to the information and who can make it available at the lowest cost. Where a component part is incorporated into another product, without material change, the manufacturer of the part is in the best position to bear this responsibility." *Id.* at 1197. Thus, the court held that "a manufacturer of a component part has a duty to warn of a danger that may result from a reasonably foreseeable use of its product." *Id.* The court ultimately denied the defendant component part manufacturer's motion for summary judgment, finding that fact issues existed as to whether it was reasonably foreseeable to the manufacturer how its air valve would be used in the finished palletizer. *See id.* at 1198-99.

In *Tomlinson v. ResQline, Inc.*, No. 2:04-CV-122-WCO, 2006 WL 1097833 (N.D. Ga. April 24, 2006), discussed above, the plaintiff claimed that Sava was liable for its failure to warn consumers of the danger that might result from the use of the cable assembly in the evacuation system. *See* 2006 WL 1097833 at *6. After stating the general rule in Georgia

that a component manufacturer has a duty to warn of a danger that may result from a reasonably foreseeable use of its product, the court held that Sava had no duty to warn consumers of the danger of a component part that it assembled according to the manufacturer's specifications and then sold to the manufacturer for integration into the completed product. *See id.* The danger against which the plaintiff alleged he should have been warned was related to the allegedly insufficient strength of the cable used in the evacuation system. *See id.* Since Sava neither manufactured the cable itself (the component part that failed) nor actively participated in its design or selection, Sava did not have a duty to warn the ultimate consumer of this particular danger. *See id.*

In *Parker v. Brush Wellman Inc.*, Nos. 1:04-CV-606-RWS, 1:08-CV-02725-RWS, 2010 WL 3418365 (N.D. Ga. August 25, 2010), the plaintiffs were employees of Lockheed Martin Corporation allegedly exposed to beryllium. The defendants were manufacturers of aircraft parts and assemblies that were supplied to Lockheed to build aircrafts. *See* 2010 WL 3418365 at *2. The issue before the court was whether the defendant component manufacturers had a duty to warn the plaintiffs about hazards associated with beryllium contained in their products and whether the provided warnings were adequate. *See id.* at *5. The defendants argued that they sold finished component assemblies and that it was thus not reasonably foreseeable to assume that such assemblies would be machined by Lockheed so as to release respirable beryllium. *See id.* In response, the plaintiffs argued that the completed component assemblies often required sanding or polishing in order to properly install the component into the finished product and that such operations presented an inhalation risk to those performing the work or those working nearby. *See id.* Because the court found issues of fact as to whether the machining of the component parts was foreseeable, it denied the defendants' motions for summary judgment. *See id.*

4. Negligence Claims

In a products liability case alleging negligence, the plaintiff must show that the manufacturer of the component failed to use reasonable care and skill in designing it so that it would be reasonably safe for the purposes for which it is intended and for other reasonably foreseeable uses. *See In re Stand 'N Seal, Products Liability Litigation*, No. 1:07MD1804-TWT, 2009 WL 2145911, *4 (N.D. Ga. July 15, 2009); *Hall*, 198 Ga. App. at 201; *Tomlinson*, 2006 WL 1097833 at *5. In *Collins v. Newman Machine Co., Inc.*, 190 Ga. App. 879, 380 S.E.2d 314 (1989), for instance, the plaintiff's son had been employed by Zarn, Inc., as a machine mechanic and as part of his regular duties performed maintenance work on Zarn's blow molders, machines used in the manufacture of plastic flower pots. The plaintiff's son was electrocuted and died after working on the blow molders. Zarn's in-house engineer had designed modifications to its blow molders, and Zarn purchased component parts needed for the design modifications from, among others, the defendant, Newman Machine, whom the plaintiff sued for products liability after his son's death. *See* 190 Ga. App. at 879-80. Newman argued that the issue was governed by the "contract specification defense," which provides that "a contractor is not liable for damages resulting from specifications provided by his employer unless those specifications are so defective and dangerous that a reasonably competent contractor would realize that there was a grave chance that his product would be dangerously unsafe." *Id.* at 880-81(internal punctuation omitted). While the contract specification defense has been adopted in other jurisdictions, it has not been recognized in Georgia. *See id.* at 880. The court reversed the lower court's grant of summary judgment to Newman on the plaintiff's

negligence claim, finding that, even assuming the applicability of the contract specifications defense in Georgia, material questions of fact remained as to whether the specifications were so defective that Newman should have realized that its parts might be dangerously unsafe when incorporated into the blow molder, thereby precluding application of the defense in that case. *See id.*

5. Indemnification and Contribution

The fact that an injured plaintiff recovers damages from the manufacturer of an end product does not foreclose liability against the component manufacturer. Georgia courts have allowed the manufacturer of an end product to seek contribution or indemnification from its component supplier if it can prove that a component part was defective and that the part was a proximate cause of injury. For example, in *Independent Manufacturing Company, Inc. v. Automotive Products, Inc.*, 141 Ga. App. 518, 233 S.E.2d 874 (1977), a man's arm was injured when it was caught in an auger. During discovery, the manufacturer of the auger learned that a component part of the auger might have contributed to the plaintiff's injury, and it filed a third-party complaint for contribution and indemnity against the manufacturer of the component part. The court reversed the lower court's dismissal of the third-party complaint even though the statute of limitations had expired with respect to the original products liability complaint and finding that the third-party complaint could be maintained without prior judgment against the manufacturer. *See* 141 Ga. App. at 519-20.

6. Conclusion

There is sound reasoning for limiting the liability of a component part manufacturer for defects in an end product, particularly because a component manufacturer cannot insure the reliability of a product it does not make. When the component part itself is defectively designed and that defect caused the plaintiff's injuries, the manufacturer or supplier of that part is liable under Georgia law. In addition, if the component part manufacturer actively participates in the conception, design, or specification of the end product into which its component part is integrated, the component manufacturer will similarly be liable, although merely offering improvement suggestions to the assembler of the end product will not give rise to liability. Beyond these unique situations, however, manufacturers and suppliers of component parts should not be liable under Georgia law to users of other entities' finished products.

ENDNOTES:

1. The Northern District of Georgia has recognized the Restatement's "component parts manufacturer doctrine," pursuant to which a supplier of a non-defective part that becomes defective when integrated into another manufacturer's product, cannot be held liable for the defect. *See Parker v. Brush Wellman Inc.*, Nos. 1:04-CV-606-RWS, 1:08-CV-02725-RWS, 2010 WL 3418365, *5 (N.D. Ga. August 25, 2010) (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5).

2. The term "product seller" is defined in O.C.G.A. § 51-1-11.1(a) as a person who "leases or sells and distributes; installs; blends; packages; labels; markets; or assembles pursuant to a manufacturer's plan, intention, design, specifications, or formulation."

3. Section 5(b) of the Restatement provides that "one engaged in the business of selling or otherwise distributing product components is subject to liability for harm to persons or property caused by a product into which the component is integrated if:

> (1) the component is defective in itself and the defect causes the harm; or

(2) (a) the seller or distributor of the component substantially participates in the integration of the component into the design of the product;
(b) the integration of the component causes the product to be defective; and
(c) the defect in the product causes the harm."

Coverage for Alleged Copyright Infringement of Architectural Plans for Builders Under General Liability Policies

By Alexander T. ("Alec") Galloway III and Tammi L. Brown

Alec is a partner with the law firm of Moore Ingram Johnson & Steele, LLP and is licensed in both Georgia and Tennessee. He represents clients in construction defect litigation, insurance coverage matters, trucking accidents, products liability and other serious injury cases. He received his B.S. in 1990 from Susquehanna University and his J.D., cum laude, in 1993 from the Walter F. George School of Law of Mercer University.

Tammi is an associate with Moore Ingram Johnson & Steele, LLP and is an honors scholar of the Thomas M. Cooley School of Law. She represents clients in construction defect litigation, insurance coverage matters, trucking accidents, products liability and other serious injury cases

Your client is a homebuilder who, like many homebuilders today, struggles to make ends meet. The market has just started to pick up for new homes in the lower price range, and your client is hopeful for the first time since 2007. However, one day he comes to you with a lawsuit which has just been served against him by another builder, alleging that ten homes he built in the last year infringe upon the copyrights of the Plaintiff builder. Your client is very distraught over this situation, and you wisely instruct him to immediately send the suit to his general liability insurance carrier. Is there coverage for such infringements? Even if there is coverage, is the exposure within your client's $1 million policy limits? This article addresses these concerns.

First, this article delves into the substantive law of copyright infringement as it applies to architectural works. This includes a discussion of the elements of such claims, the defenses available and the exposure should liability be imposed against your client.

Second, this article addresses insurance coverage for such activity pursuant to a standard ISO commercial general liability policy.

I. COPYRIGHT PROTECTION OF ARCHITECTURAL PLANS

Historically, the Copyright Act (title 17 of the *United States Code*) did not protect architectural works. However, on December 1, 1990, the Copyright Act was amended to give architectural works two levels of protection. The 1990 Amendment to the Copyright Act, also known as the Architectural Works Copyright Protection Act, added the new protectable category of "architectural works" defined as:

> [T]he design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

17 U.S.C. § 102(a)(5) now provides protections to architectural plans as "pictorial, graphic, or sculptural works" which protects diagrams, models and technical drawings. Protection is also afforded under 17 U.S.C. § 102 (a)(8) for the design of the building as embodied in plans or the building itself.

Architectural works created on or after December 1, 1990, qualify for this protection. Act of Dec. 1, 1990, Pub. L. No. 101-650, Sec. 706(1), 104 Stat. 5089. Architectural

plans registered before 1990 are protected as pictorial, graphic, or sculptural works, but their protection does not extend to copying of the three-dimensional building as opposed to the plans themselves. 1-2 *Nimmer on Copyright* § 2.08 (2009).

Common design features such as the fact that a home has a bedroom or a kitchen are not copyrightable. *See Frank Betz Associates, Inc. v. D.R. Horton, Inc.*, No. 1:03-CV-2005, Doc. 333 at 23 (N.D. Ga. June 27, 2005). However, the "overall form as well as the arrangement and composition of spaces and elements in the design" are protected. 17 U.S.C. § 101. As stated in the legislative history of the Act, "[t]he phrase 'arrangement and composition of spaces and elements' recognizes that creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectible elements into an original, protectible whole[.]" H.R. Rep. No. 101-735, 101st Cong., 2d Sess. 21 (1990).

The mass-produced homes of today are commonly protected by copyright despite the fact that these homes are comprised of standard features. *Lindal Cedar Homes, Inc. v. Ireland,* Civ. No. 03-6102-TC, 2004 WL 2066742, at *7 (D.Or. Sept. 14, 2004). It is the shape, location, proportion and arrangement of the individual elements which makes the architectural works original and creative. *Id*. at *6-7. Further, numerous courts have rejected the argument that standard home design plans do not qualify for copyright protection because they are merely compilations of unprotectible ideas, holding that home design-plans constitute protectable tangible expressions of ideas. *Id*. at *9-13.

The owner of a copyright has the exclusive right to reproduce the copyrighted work, prepare derivative works, distribute copies of the work, and publicly display the work. 17 U.S.C. § 106. To show infringement of any of these exclusive rights, a plaintiff must demonstrate both "(1) ownership of a valid, copyright; and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 1296, 113 L. Ed. 2d 358 (1991).

The first prong of the *Feist* standard examines the originality and non-functionality of the work. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 534 (6th Cir. 2004. The existence of a copyright registration certificate is typically *prima facie* evidence of the existence of a valid copyright. 17 U.S.C. § 410(c); *Donald Frederick Evans & Associates, Inc. v. Cont'l Homes, Inc.*, 785 F.2d 897, 903 (11th Cir. 1986). A valid copyright registration also presumptively establishes the originality and non-functionality of the work. *Lexmark*, 387 F.3d at 534.

The second prong of the *Feist* standard examines the factual issue of whether any copying occurred, and the legal issue of whether the portions of the work copied were entitled to copyright protection; these two elements are respectively referred to as "factual copying" and "legal copying." *Peter Letterese and Associates, Inc. v. World Inst. Of Scientology Enterprises*, 533 F.3d 1287, 1300 (11th Cir. 2008).

Where no direct proof of factual copying exists, it may be inferred either through establishing that the works are "strikingly similar," or through "proof of access to the copyrighted work and probative similarity." *Id*. at 1300-01 (internal quotation and citation omitted). Once factual copying is established the court conducts the legal copying inquiry, asking whether the factual copying is "legally actionable; that is, whether there is substantial similarity between the allegedly offending [works] and the protectable, original elements" of the protected work. *Id*. (internal quotations and citations omitted).

II. DEFENSES TO COPYRIGHT INFRINGEMENT CASES

A. Is the copyright valid?

In any judicial proceedings, the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court. 17 U.S.C. § 410(c).

Once the Plaintiff has offered proof of such a certificate of registration, the burden then shifts to Defendant to rebut this presumption. *Donald Frederick Evans*, 785 F.2d at 903. Thus, a certificate of registration does not create an irrebuttable presumption of copyright validity, as the Copyright Office has no authority to give opinions or define legal terms. *See Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 166, 167 n.22 (2d Cir. 2003). Rather, the Copyright Office's examination of copyright applications is "necessarily limited" and a certificate of registration does not represent any factual determinations regarding acts occurring outside the Office. *Id.* at 166. In this respect, the issuance of a copyright registration differs from the Patent and Trademark Office's more thorough process for issuing patents. *Id.*

Additionally, the presumption of copyright validity does not automatically arise if the registration was not filed within 5 years of the first use of the design. However, even if the design was first used more than 5 years before the registration was issued, the court will have discretion pursuant to § 410(c) to award the same presumption of validity to the such certificates. *See Frank Betz Assocs., Inc. v. Signature Homes, Inc.*, Mo. 3:06-0911, 2009 U.S. Dist. LEXIS 59354, at *24 (M.D. Tenn. July 13, 2009) *Frank Betz Associates, Inc. v. Signature Homes, Inc.*, 3:06-0911, 2010 WL 1373268 (M.D. Tenn. Mar. 29, 2010) (deeming copyrights registered within about six years presumptively valid). This presumption of validity includes the presumption that the designs are sufficiently original and non-functional to be awarded copyright protection. *Lexmark*, 387 F.3d at 534.

In the event that the registration occurred many years after first use (such as 10 or more years), Plaintiff will ***not*** be entitled to a presumption that they have a valid copyright. However, Plaintiff can still meet the *Feist* test with proof that the design was independently created and has original elements to it.

Defendant can argue that Plaintiff does not own valid copyrights to the home design at issue because they are simply standard plans whose arrangements and composition are the natural result of functional, utilitarian, and market-driven factors. In other words, Defendant can argue that the designs are insufficiently original and non-functional to be awarded copyright protection. However, Defendant will need affirmative proof to refute the facts stated in the registration certificates or to show that Plaintiff did not, in fact, create the designs.

Copyright law does not require that an architectural design be unique or novel to be worthy of copyright protection; therefore, a presumptively valid copyright registration certificate is not invalidated based on the existence of other similar home design plans.

Defendant can argue lack of access to Plaintiff's designs. In this context, the access requirement is satisfied if no material factual dispute exists as to whether the Defendant had a "reasonable opportunity" to view the plaintiff's design. *See Stromback v. New Line Cinema*, 384 F.3d 283, 293 (6th Cir. 2004).

However, the precise manner in which Defendant had access to the design is not material to the access inquiry. The access inquiry does not require that Plaintiff show precisely how

Defendant obtained the designs. Rather, access along with probative similarity is used by the court as a means to infer factual copying where no direct evidence of copying exists. *See Peter Letterese*, 533 F.3d at 1300-01. The standard for access is low: reasonable opportunity to view the copyrighted designs. *See Stromback*, 384 F.3d at 293.

B. Lack of substantial similarity

The court will look for different degrees of similarity between the designs throughout the inquiry to determine copying. Factual copying can be shown by either "striking similarity" between the designs or "access plus probative similarity." Legal copying is shown if there is "substantial similarity" between the allegedly infringing works and the protectable elements of the protected work. *See Peter Letterese*, 533 F.3d at 1300-01.

As the United States Court of Appeals for the Eleventh Circuit has noted, the term "substantial similarity" in copyright infringement actions has been subject to imprecise use. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 n.4 (11th Cir. 1994).

The second prong of the *Feist* test will be satisfied if Plaintiff can show that the designs are probatively similar such that factual copying is shown, and as to whether there is "substantial similarity" between Defendant's design and the protectable elements of the Plaintiff's design such that legal copying is shown. *See Peter Letterese*, 533 F.3d at 1300-01.

i. Probative Similarity

Probative similarity "exists where an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Peter Letterese,* 533 F.3d at 1301 n.16 (quotation and citation omitted). On summary judgment, Plaintiff must show that the design plans are so similar that no reasonable jury could conclude that the allegedly infringing designs were not appropriated from the Defendant's designs. As one treatise states, summary judgment is appropriate on this issue where the degree of similarity between the designs is overwhelming. 3-12 *Nimmer on Copyright* § 12.10(B) (3).

ii. Substantial Similarity of Protectable Elements

The second element of the copying prong of the *Feist* test requires a showing of legal copying, meaning Plaintiff must show that there is "substantial similarity" between Defendant's designs and the protectable elements of the Plaintiff's designs.

C. Independent Creation

In order to prove independent creation, the Defendant will have to have verifiable proof to trace the origin of the plan in order to show credibly that the design was independently created despite the fact that the Defendant's plans are very close in arrangement with the Plaintiff's plans.

III. Joint & Several Liability Under the Copyright Act

It is well settled that all participants in an infringement are jointly and severally liable. *See e.g., Screen Gems-Columbia Music. Inc. v. Meltis & Lebow Corp.*, 453 F.2d 552 (2d Cir. 1972) . Further, a defendant may be held vicariously liable for an infringement if he or she has the ability to supervise the infringing activity and has a financial interest in that activity. *See S. Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 811 (11th Cir. 1985).

IV. Secondary Liability Under the Copyright Act

Although the Copyright Act does not expressly render anyone liable for infringement committed by another, doctrines of secondary liability emerged from common law principles

and are well established in the law. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

There are two bases for the imposition of secondary liability: (1) vicarious liability; and (2) contributory infringement, both of which are addressed below.

A. Vicarious Liability: Benefit & Control

Vicarious Liability exists when two elements are present:

> the defendant must possess the right and ability to supervise the infringing conduct; and the defendant must have an obvious and direct financial interest in the exploitation of copyrighted materials, even if the defendant lacks knowledge of the infringement.

Metro-Goldwyn-Mayer, 545 U.S. at 930-31. *See S. Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 811 (11th Cir. 1985); *Playboy Enterprises, Inc. v. Starware Pub. Corp.*, 900 F. Supp. 438, 411 (S.D. Fla. 1995).

These elements constitute independent requirements; each must be demonstrated to render the defendant vicariously liable. *Nimmer on Copyrights* § 12.04[A][2].

B. Contributory Infringement: Knowledge & Participation

Contributory infringement, unlike vicarious liability, requires scienter.

1. A party with knowledge of the infringing activity who

2. Induces, causes, or materially contributes to the infringing conduct of another, is liable as a contributory infringer. *Gershwin Pub.Corp. v. Columbia Artists Mgmt., Inc.,* 443 F.2d 1159, 1161-62 (2d Cir. 1971).

V. DAMAGES UNDER THE COPYRIGHT ACT

The Plaintiff has the right to choose either statutory damages pursuant to 17 U.S.C. § 504(c) or actual damages.

A. Statutory Damages

17 U.S.C. § 504(c) provides in relevant part:

> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.
>
> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200. [Remainder of subsection excluded due to inapplicability to the facts at hand.]

Factors considered by the Court:

1. Purpose of infringing use (i.e., were you

2.

selling bootleg copies of floor plan to other developers, or were you building a home for a customer?)

2. The value of the work that was infringed.

3. The (alleged) infringer's state of mind.

B. Actual Damages

If Plaintiff feels he cannot prove willful infringement, and the statutory damages do not offer the best solution for the Plaintiff, they can and will most likely elect actual damages. Using the actual damages calculations, Plaintiffs are entitled to recoup what their profit would have been if they had built the ten homes **and** a disgorgement of Defendant's profits from the sale of those homes. 17 U.S.C. § 504 (b).

Finally, the copyright act gives the trial court the right to award the prevailing party attorneys' fees and costs. 17 U.S.C. § 505. Hourly rates for IP attorneys usually run at a rate of at least $500 per hour; thus, the potential exposure to a client under such a suit could be overwhelming, and, depending upon the number of homes alleged to have been built using infringing designs, the damages could well exceed the policy limits of your client.

VI. COVERAGE UNDER A COMMERCIAL GENERAL LIABILITY ("CGL") POLICY

A. What part of a General Liability Policy Provides coverage?

Copyright infringement is not covered under a CLG policy's Coverage A, because this coverage only covers bodily injury and property damage liability. Rather, one must first turn to the Coverage B portion of the CLG policy, "Personal and Advertising Injury."

"Personal and Advertising Injury" is a defined term under the policy as follows:

"Personal and advertising injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or liabels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement;" or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

The only possible portion of that definition which would apply to a copyright infringement case would be g. "Infringing upon another's copyright, trade dress or slogan in your 'advertisement.'"

"Advertisement" is defined as:

"Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

However, policy exclusion 2.i. under Coverage B provides that the insurance does not apply to:

> i. Infringement Of Copyright, Patent, Trademark or Trade Secret
>
> "Personal and advertising injury" arising out of the infringement of a copyright, patent, trademark, trade secret or other intellectual property rights.
>
> However, this exclusion does not apply to infringement, in your "advertisement", of a copyright, trade dress or slogan.

Thus, the key issue is to determine if the alleged infringing activity was a simple infringement or if it was an infringement in an "advertisement."

B. Is the building of a home an "advertisement?"

If a builder infringes upon an architectural plan and publishes the drawings of such an infringement plan in a sales brochure, floor plan/flier, or on a web site, this would constitute an "advertisement" such that the infringement to be covered by the insuring agreement. However, it is not quite as self-evident that a building of a home, in and of itself, without such other literature or publications would constitute an "advertisement" for purposes of CLG coverage.

i. The Evolution of "Personal and Advertising Injury Coverage"

This type of insurance coverage, advertising injury was first introduced into commercial general liability policies in 1973. *See* Matthew J. Schelsinger & Bikram Brady*, Advertising Injury Coverage: Analyzing Its Historic Evolution and Its Changing Scope*, 702 PLI/Lit. 83, 85 (2004 Practicing Law Institute). The 1973 form specifically defined "advertising injury" as infringement of copyright, title or slogan. In 1986, the form was changed again, yet those changes were immaterial to the issue at hand. In 1998, two significant changes took place, one being that the definition of "advertising injury" changed from "infringement of copyright, title or slogan" to "infringement upon another's copyright, trade dress or slogan." The second change was that the 1998 form defined "advertisement" for the first time. The most recent change took place in 2001, which expanded the definition of "advertisement" to clarify that electronic advertisements were within the scope of the advertising injury coverage. In addition, the 2001 form, more commonly referred to as CG 0001 0798, added the intellectual property exclusion, which specifically eliminates any coverage whatsoever for any type of intellectual property infringement outside of the insured's "advertisement."

ii. Is it an "advertisement"?

In the case law examining such insurance coverage, when a policy contains a definition for "advertising injury" and/or "advertisement", the courts do not alter or revise the definitions. In fact, such definitions are not even questioned but merely analyzed to determine whether coverage is appropriate under a particular set of facts. Typically, when an opinion delves into the proper scope and definition of a term involved in the determination of advertising injury coverage, it is due to the fact that such term was not explicitly defined in the underlying policy. Therefore, the definitions as

stated above and in the instant policy are the proper definitions for analysis of the issue at hand.

Courts have consistently held that advertising injury coverage encompasses claims for copyright infringement. *See Schelsinger & Brady*, 702 PLI/Lit. 83 (*citing Ryland Group, Inc. v. Travelers Indem. Co. of Ill.*, 2000 WL 33544086 (W.D. Tex. Oct. 25, 2000); *W. Am. Ins. Co. v. Moonlight Design*, 95 F. Supp. 2d 838 (N.D. Ill. 2000); *Amway Distributors Benefits Ass'n v. Fed. Ins. Co.*, 990 F. Supp. 936 (W.D.Mich. 1997); *Stratford Homes, Inc. v. Lorusso*, 94-CV-0517E(M), 1995 WL 780977 (W.D.N.Y. Dec. 29, 1995); *Irons Home Builders, Inc. v. Auto-Owners, Ins. Co.*, 839 F. Supp. 1260 (E.D. Mich. 1993); *Tri-State Ins. Co. v. B & L Products., Inc.*, 964 S.W.2d 402 (Ark.Ct.App. 1998). *Tri-State Ins. Co. v. B & L Products, Inc.*, 61 Ark. App. 78, 964 S.W.2d 402 (1998). Nevertheless, some courts have adopted narrow readings of "advertising" or causation to deny coverage for copyright infringement claims despite the fact that the copyright infringement is specifically listed as an enumerated offense. *See Schlesinger & Brady*, 702 PLI/Lit.at *93-94 (citing Robert Bowden, Inc. v. Aetna Cas. & Sur. Co.*, 977 F. Supp. 1475 (N.D. Ga. 1997)).

As discussed earlier, in order to prevail on a claim for copyright infringement, the registrant must prove two basic elements: (1) ownership of copyright by plaintiff; and (2) copying of work by defendant. *See Milliken & Co. v. Shaw Indus., Inc.*, 978 F. Supp. 1155, 1158 (N.D. Ga. 1997). Furthermore, in order to receive advertising injury coverage for an act of copyright infringement, the insured must fulfill three elements: (1) the suit must have alleged a cognizable advertising injury; (2) the infringing party must have engaged in advertising activity; and (3) there must have been some causal connection between the advertising activity and the alleged advertising injury. *See State Farm Fire and Cas. Co. v. Steinberg,* 393 F.3d 1226, 1231 (11th Cir. 2004).

Typically, "advertising injury" refers to injury resulting from the commission of a certain specified tort, more commonly referred to as an "offense." *See* Scott Devries & Yeliza V. Colon, *Principles of Advertising Injury Coverage*, at 2. Such injury does not depend upon an "accident" or an "occurrence" as typically required for bodily injury and property damage coverage. *Id*. (*citing Mez Indus., Inc. v. Pac. Nat. Ins. Co.*, 76 Cal.App.4th 856 (1999); *General Acc. Ins. Co. v. West Am. Ins. Co.*, 42 Cal. App. 4th 95 (1996)). Therefore, the advertising injury clause can provide coverage for the intentional acts of the insured. *Id.*

In Georgia, the duty to defend and the duty to indemnify are separate obligations. *See Interface, Inc. v. Standard Fire Ins. Co.,* 2000 WL 33194955 (N.D.Ga.). *Interface, Inc. v. Standard Fire Ins. Co.,* 1:99-CV-1485-MHS, 2000 WL 33194955 (N.D. Ga. Aug. 15, 2000). An insurer is obligated to defend even if the claim "potentially" falls under the policy. *Id.* at 3. In *Interface*, the Northern District of Georgia recently held that the insurer had a duty to defend the insured against underlying copyright infringement litigation. *Id.* at 5. In addition, the court ordered the insurer to reimburse the insured for the cost of the defense thus far and to defend the underlying litigation. *Id.* The policy involved was the 1991 form, so the language was substantially similar to the 2001 form. *Id.* at 1. In *Interface*, the plaintiff alleged copyright infringement of carpet patterns in violation of § 501 of the Copyright Act. *Id.* at 3. However, the insurer denied any obligation to defend or indemnify the litigation. *Id.* at 2.

The insurer claimed that the advertisements are a "mechanism by which the infringement is exploited" and that the real injury is the loss of sales due to the infringement. *Id.* at 3. Since it is clear that the insured advertised the infringing patterns and that copyright infringe-

ment is listed as one of the offenses from which advertising injury may arise, the only remaining question is whether the advertising activity has a causal connection to the advertising injury. *Id.* Because the advertising itself infringed on the copyrights, the causal connection could not be more clear. *Id.* at 4. Therefore, the Northern District of Georgia held that the insurer did indeed have a clear duty to defend the underlying suit for copyright infringement. *Id.*

In contrast, the same court concluded that the copyright infringement in *Robert Bowden* was not committed in the course of advertising and that the infringement did not cause the advertising injury. 977 F. Supp. 1475. Therefore, the insurer was not obligated to defend or indemnify the insurer based on the underlying copyright infringement suit. *Id.* The distinction between *Interface* and *Robert Bowden* is that the latter copied software that was eventually used to create advertising as opposed to actually using the infringing work in the actual advertising. *See Id.* Therefore, since the misappropriated software was not physically manifested in the advertising, the copyright infringement did not qualify for advertising injury coverage. Under Georgia law, for an injury to occur in the course of advertising so as to permit advertising injury coverage, the advertising must have actually caused the injury. *Id.* at 1480.

In *Irons Home Builders*, the insured built three homes based on someone else's copyrighted architectural plans. 839 F. Supp. 1260. However, because the homes in *Irons Home Builders* were physical manifestations of the very plans that had been pirated, the homes themselves constituted advertisement for purposes of advertising injury coverage. *Id*.

In terms of the first element of advertising injury coverage, the U.S. District Court for the Northern District of California held that a plaintiff's allegations in a complaint were sufficient to trigger an insured's duty to defend. *See* Jon P. Kardassakis, *Understanding Advertising Injury Insurance: Application to Protect Against Business Torts*, Defense Counsel Journal, Apr. 1, 2004, at 13 (*citing Specific Impulse, Inc. v. Hartford Cas. Ins. Co.*, 5:02-CV-02849-JW, 2002 WL 32052699 (N.D. Cal. Sept. 17, 2002)). The plaintiff's charges included copyright infringement by way of advertisement of the infringing works on the insurer's website as well as direct injury from such advertisement. *See Id.* As mentioned above, the Northern District of Georgia is very clear that an insurer has a duty to defend if the underlying claims fall "potentially" within coverage. *See Penn-Am. Ins. Co. v. Disabled Am. Veterans, Inc.*, 268 Ga. 564, 565 (1997). Therefore, as a general rule, there must be clear allegations of actual advertising activity that caused the injury in question in order to meet one of the required elements for advertising injury coverage. Under Georgia law, such a determination is based on the allegations contained in the plaintiff's complaint. *See Robert Bowden* at 1478. When a Georgia court does not impose a duty to defend on an insurer, one of the three elements has generally not been satisfied. *See, generally, Steinberg*, 393 F.3d 1226 (11th Cir. 2004)(allegations of the underlying lawsuit constitute neither "infringement of copyright, title or slogan" nor "misappropriation of advertising ides or style of doing business"); *Transp. Ins. Co. v. Freedom Electronics, Inc.*, 264 F.Supp.2d 1214 (injury did not occur in the course of advertising and there is no causal connection between the injury and the advertising activity undertaken by the insured).

In addition, other courts have declined to impose such a duty on an insurer based upon the fact that the infringing work was never advertised to the general public or that there was no causal connection between the advertising injury and the advertising activity. *See Rhein Bldg. Co. v. Gehrt*, 21 F.Supp.2d 896 (E.D.

Wisc. 1998); *Farmington Cas. Co. v. Cyberlogic Technologies, Inc.*, 996 F.Supp. 695 (E.D. Mich. 1998); *Constr. Mgmt. Sys., Inc. v. Assurance Co. of Am.*, 23 P.3d 142 (Idaho 2001) *Constr. Mgmt. Sys., Inc. v. Assurance Co. of Am.*, 135 Idaho 680, 23 P.3d 142 (2001; *IDG, Inc. v. Cont'l Cas. Co.*, 275 F.3d 916 (10th Cir. 2001); *IDG, Inc. v. Cont'l Cas. Co.,* 275 F.3d 916 (10th Cir. 2001; *Winklevoss Consultants, Inc. v. Fed. Ins. Co.,* 991 F. Supp. 1024 (N.D. Ill. 1998). However, following the three element analysis, Georgia courts have held that an insurance company does indeed have a duty to defend when the suit alleges a cognizable advertising injury, the insured engages in advertising activity and a causal connection exists between the advertising injury and the advertising activity. *See Elan Pharm. Research Corp. v. Employers Ins. of Wausau,* 144 F.3d 1372 (11th Cir. 1998); *Colony Ins. Co. v. Corrosion Control, Inc.,* 187 F. App'x 918 (11th Cir. 2006); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.,* 157 F. App'x 201 (11th Cir. 2005). The Court of Appeals for the Eleventh Circuit, interpreting Florida law, held that trademark infringement that took place in the insurer's advertising activities resulted in an advertising injury, which clearly resulted in a causal connection between the advertising activities engaged in by the insurer and the advertising injury suffered by the trademark holder. *See Hyman v. Nationwide Mut. Fire Ins. Co.,* 304 F.3d 1179 (11th Cir. 2002).

In terms of whether the underlying suit alleges a cognizable advertising injury, references in the underlying complaint to terms such as "marketed," "distributed" and "sale" are often insufficient to create an obligation to indemnify. *See Id. (citing Sentry Ins. v. R.J. Weber Co.,* 2 F.3d 554 (5th Cir. 1993) (allegations of copying, publishing, distributing and selling of copyrighted materials did not trigger duty to defend)).

Often, it is difficult to demonstrate that the advertising caused the copyright violation when the advertising itself does not constitute the means by which the insured infringed another's copyright. *See Devries & Colon*, *Principles of Advertising* at 4. In fact, most courts have reasoned that the causal requirement is not met where the advertising activities do not "cause" the injury, but merely expose it. *See Id.* (*citing Farmington,* 996 F. Supp. 695 at 705; *Robert Bowden,* 977 F. Supp. 1475 at 1480-81). However, because the building of a house, in and of itself, can be an "advertisement" which will satisfy the second element required for advertising injury coverage, the hypothetical given at the beginning of this article would be sufficient to satisfy this prong.

As for the third element, Georgia courts view the causation requirement very strictly in that they require a strong and direct causal link between the insured's advertising activities and the advertising offense. *See Schlesinger & Brady*, 702 PLI/Lit. 83 at 92. In *Robert Bowden*, the insured argued that the copyright infringement claim based on the duplication of copyrighted software onto business computers fell within the scope of "advertising injury" based on the fact that the pirated computer programs were used in the course of an advertising campaign. However, the Northern District of Georgia held that in order to be a covered copyright offense, "an insured's advertising must have been the cause of whatever injury is alleged in the underlying suit." *See Robert Bowden, supra.* at 1480. Therefore, the causation between the advertising and the offense alleged was too tangential to support advertising injury coverage.

In terms of damages, unlike the more familiar coverage for bodily injury and property damage liability, advertising injury coverage is not triggered by the type of damage but instead applies to all damage caused by covered offenses. *See Kardassakis,* 2004 Defense Counsel Journal at 1. Therefore, if an offense was sufficient to satisfy the three step analysis as

explained above, thus prompting advertising injury coverage, it appears as though the damage caused by such offense would be subject to complete indemnification by the insurer. For example, in *State Farm Fire & Cas. Ins. Co. v. White*, copyrighted architectural plans were misappropriated and the insurer attempted to show that such conversion should be covered as "property damage." 777 F. Supp. 952 (N.D. Ga. 1991). However, since the policy defined "property damage" in relation to only tangible property, the court held that the only tangible component of the plans was the paper and ink used to memorialize those plans. *See, also, Rhein*, 21 F. Supp. 2d 896 at 902 (rights conferred by copyright are intangible, intellectual property, not tangible property). Therefore, the policy only covered the conversion action to the extent of the value assigned to the paper and ink. *Id.* In other words, the copyright itself was intangible property not subject to coverage under the policy. Under Georgia law, coverage afforded under liability policies for property loss does not extend to claims of copyright infringement of architectural plans. *Id.* at 954-55. However, the insured in *White* notably did not make the assertion that the copyright infringement claim should have been covered under the policy as an advertising injury. Therefore, coverage for advertising injury was unfortunately not discussed.

According to 17 U.S.C. § 504(a), an infringer of a copyright is liable for either: (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or (2) statutory damages, as provided by subsection (c). Under 17 U.S.C. § 504(b), "[t]he copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."

Conversely, subsection (c)(1) allows "the copyright owner [to] elect, at any time before a final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum not less than $750 or more than $30,000 as the court considers just." 17 U.S.C. § 504(c)(1). Furthermore, "[i]n a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sun of not less than $200." 17 U.S.C. § 504(c)(2).

In determining the amount of damages to award a registrant based on copyright infringement, especially in light of possible advertising injury coverage, the case law reflects that various registrants are seeking and receiving damages, such as lost profits, actual money damages and statutory damages, pursuant to the Copyright Act, 17 U.S.C. § 504. *See Rhein*, 21 F. Supp. 2d 896 at 899; *see, generally, Stratford Homes*, 1995 W.L. 780977 (W.D. N.Y. Dec. 29, 1995). A district court has wide discretion in setting the amount of statutory damages under the Copyright Act, if the registrant so elects. *See Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1010 (9th Cir. 1994).

Under § 504(c)(1), a copyright registrant may elect which measure of damages to recover, whether it be actual or statutory. *Id.* However, if the registrant elects to recover statutory damages, actual damages are no longer recoverable under the Copyright Act. *Id.* To further explain the codified provisions above, actual damages consist of profits lost by the registrant, profits made by the infringing party or diminution in value of copyright. *Id.* at 1011. Such damages are designed to compensate the registrant and prevent unjust enrichment of the infringing party. *Id.*

On the other hand, statutory damages serve many different purposes. For instance, statutory damages may be appropriate when lost profits would be an inadequate measure of damages. *Id.* In addition, if the infringement is willful according to § 504(c)(2), statutory damages are designed to penalize the infringer and deter future violations. *Id.* However, as mentioned above, if a court finds that the underlying offense was indeed willful, the policy may include an exclusion for such intentional behavior. If a registrant elects to recover actual damages under the Copyright Act, a court must determine what portion of the infringing party's profits are "attributable to factors other than the copyrighted work." *See Id.* at 1012. However, apportionment is simply not an option when statutory damages are elected. *See Id.* That being said, if infringing and non-infringing elements of a work cannot be readily separated, all of the infringing party's profits should be awarded to the registrant. *See Id.*

C. Prior Publication Exclusion

Exclusion 2.c. of the standard form CGL policy provides that:

This insurance does not apply to:

D. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

While this is standard for virtually all policies, it can have a unique application in cases of architectural infringement. For example, suppose that prior to the effective date of the policy an insured builder builds three homes using an infringing plan. Clearly those three homes would not be covered. However, suppose that after coverage takes effect, the insured builder builds another 10 homes using the very same design.

There is a strong argument that the plain language of the exclusion would preclude coverage because it excludes publication of material whose ***first*** publication took place prior to the policy period. Courts have taken two different approaches to this question after the seminal case on this issue was decided in *Irons Home Builders, Inc. v. Auto-Owners Insurance Co.,* 839 F. Supp.1260 (E.D. Mich. 1993).

In *Irons Home Builders*, a lawsuit was filed against an insurer for failing to defend and indemnify its insured pursuant to its advertising injury coverage in a copyright infringement lawsuit. 839 F. Supp. 1260. The underlying lawsuit involved an allegation that the insured had copied a set of copyrighted house plans and built three houses based on those same plans. *See Id.* at 1262. The court found that the insured had engaged in copyright infringement by making copies of the plans and then using those plans to construct houses. *Id*. The court held that each instance of copying of plans and each instance where copied plans are used to construct a home constitutes an infringement of copyright. *See Id.* at 1265 *(citing Robert R. Jones Associates, Inc. v. Nino Homes*, 858 F.2d 274 (6th Cir. 1988) (in computing copyright infringement damages, all of infringing party's home sales were counted as sales lost by registrant)).

The insurer relied upon the prior publication exclusion. The policy at issue had effective dates from August 8, 1988 to August 8, 1989. The copyright infringement suit was filed on April 21, 1989, right in the middle of the policy period. The copyright owner alleged than an individual visited one of their copyrighted homes, and that individuals asked Irons to draft plans for and build a house virtually identical to the copyright owner's home. Discovery showed that the local building department approved construction of the homes based upon the infringing plans prior to July 2, 1988—which was prior to the inception date of the policy, and approval was granted for the construction of those two homes during the policy period at issue.

During trial, Irons made a settlement offer of $17,500, which was accepted by the Plaintiff, and final judgment was entered by the District Court. Based upon consent of the parties, the court made a finding that Irons had infringed on the copyright by making copies of the house plan and then using the copied plans to construct three houses.

Irons tendered the settlement of $17,500 plus over $34,000 in attorneys' fees and defense costs to its general liability carrier, which denied same.

The insured argued that the underlying Complaint by the copyright owner presented four allegations of copyright infringement. The first was for the actual copying of the plans themselves, which occurred prior to the policy period, and the other three, which were the actual building of the homes, took place during the coverage period. However, the insurer argued that because the first instance of copyright infringement occurred before the effective date of the policy, coverage was excluded under the prior publication exclusion.

The district court sided with the insured, and held that the exclusion did not apply. In reaching its decision, it noted that the exclusion refers to "oral or written publication of material." The court noted this particular language mimicked the provisions of the policy that relate to "advertising injury" involving libel, slander, and invasion of privacy. In each case of libel, slander, or invasion of privacy, "advertising injury" is defined as the "oral or written publication of material" that is slanderous, libelous, or invades privacy.

Thus, the district court held that the prior publication exclusion only applies to advertising that involves libel, slander, or invasion of privacy. This interpretation of the prior publication exclusion is the current state of the law in Florida, Illinois, Louisiana, and Pennsylvania. However, New Jersey, Vermont, Minnesota, Michigan, and Texas reached an opposite conclusion, with California (not surprisingly) putting its own unique twist on this exclusion.

The seminal case which reached a different holding than that of the *Irons Home Builders case* is *Applied Bolting Tech. Products, Inc. v. U.S. Fid. & Guar. Co.,* 942 F. Supp. 1029 (E.D. Pa. 1996). In this case, a district court in Pennsylvania interpreted Vermont law.

In *Applied Bolting,* the insured manufactured "direct tension indicators" ("DTIs") which are round washers with protrusions spaced around the surface of the washers. The insured was sued by J.M. Turner, Inc. ("Turner") for, among other things, false advertising and unfair competition under the Lanham Act, 15 U.S.C. § 1125(a). Turner alleged that Applied Bolting infringed upon their slogan.

Applied Bolting tendered the defense of the Turner suit to their general liability carrier, USF&G which denied coverage on the basis that Applied Technology first advertised their DTIs prior to the inception of coverage by USF&G.

Applied Bolting contended that USF&G had a duty to defend because the Turner suit alleged an "advertising injury" and argued that the first publication exclusion did not apply because it maintained that Turner's suit alleged a "continuous tort." Thus, it argued that while Turner may have "first" suffered an "advertising injury" prior to the policy period, Turner also suffered advertising injury after the policy was in effect.

The court in *Applied Bolting* rejected this argument. The policy at issue in *Applied Bolting* had an effective date of coverage of January 18, 1995, and Applied Bolting first published the relevant infringement issue sometime prior to that date. In rejecting the continuous tort argument espoused by Applied Bolting, the court held that the "first publication" date is a landmark, and held that "if the injurious advertisement was 'first published' before the policy coverage began, then policy coverage for the 'advertising injury' is excluded." *Applied Bolting*, 942 F. Supp. 1029 at 1036 (citations omitted). Significantly, the court also held that it was irrelevant that later publications, which were made after the policy date became effective, may have caused advertising injury, because once the offending materials are first published, all identical offending materials are excluded from coverage.

In terms of the California case law, surprisingly, California follows the holding of *Applied Bolting*, for the most part. While most California cases directly follow the holding of *Applied Bolting,* there is at least one line of cases in California which holds that while the "first publication" exclusion applies to all "advertising injury" offenses (not just libel, slander and invasion of privacy), the date of each advertisement had to be considered separately, with those occurring after the policy inception date being covered. *See e.g., United Nat. Ins. Co. v. Spectrum Wordwide, Inc.,* 555 F.3d 772, 774 (9th Cir. 2009).

Unfortunately, in the only Georgia case in which this exclusion was at issue, the Court declined to interpret this exclusion. *See Colony Ins. Co. v. Corrosion Control, Inc.,* 187 F. App'x 918, 2006 WL 1785108 (11th Cir. 2006). Therefore, the prior publication exclusion remains an open question.

E. Intentional Conduct Exclusion

Because copyright infringement can involve intentional conduct, insurers often try to deny coverage based upon this exclusion. The relevant exclusion is exclusion 2. a. under Coverage A, which provides as follows:

> 2. Exclusions
>
> This insurance does not apply to:
>
> a. Knowing Violation Of Rights Of Another
>
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."

Most courts have held that "[a]n intentional acts exclusion generally is enforced only when the act was intentional and the result was expected." In *Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, the preceding rule was applied in the context of copyright infringement. 165 Ariz. 31 (1990). In *Phoenix,* the issue was "whether the insured intentionally acted wrongfully thus resulting in no coverage or whether his intentional act unintentionally resulted in wrongful conduct and thus is within the policy coverage" basically intent to act (coverage) vs. intent to harm (no coverage). *Id.* The facts in *Phoenix* involved an insured bringing a declaratory judgment action against the insurer regarding its duty to defend an underlying action for copyright infringement. *See generally, Id.* The insurer at issue maintained

that it had no duty to defend insured because the alleged copyright infringement did not occur in connection with advertising injury as well as the fact that such activity fell within the policy's intentional acts exclusion. *Id.* at 33. "Although intent is not necessarily required for copyright infringement, an intentional act is often involved. Thus, if [insurer's] intentional acts clause is applicable to such torts at all, the clause must be construed narrowly so that the exclusion for intentional acts does not totally eliminate the coverage for intentional torts. In this case, the fact that the insured intended to use the copyrighted material should no more place his act under the intentional acts exclusion than if he intended to confine an individual and was later found to have acted wrongfully." *Id*. at 36. The court held that "[d]etermining whether insured acts intentionally for purposes of insurance law is different than for purposes of tort law, as there is no presumption in insurance law that person intends the ordinary consequences of his actions." *Id*. Further, "[t]o determine insured's intent, insured's subjective desire to cause harm must be looked at and if nature and circumstances of insured's intentional act were such that harm was substantially certain to result, intent may be inferred as a matter of law." *Id.*

In a recent Arizona case, the intent to act vs. intent to harm principle from the *Phoenix* decision was applied in *Wilshire Ins. Co. v. S.A.,* 224 Ariz. 97, 227 P.3d 504, 507 (Ct. App. 2010). In *Wilshire,* the court stated that "although the insured intentionally had used the software at issue, whether coverage was barred by the intentional-act exclusion hinged on whether the insured intended to cause harm by using protected intellectual property." *Id.* at 100, 227 P.3d at 507 The record in *Wilshire* indicated that the defendant at issue "'intentionally acted wrongfully' rather than committed an 'intentional act unintentionally result[ing] in wrongful conduct.'" *Id.* at 508.

In addition, a New York court stated that while the underlying complaint asserted willfulness, "intent is not a required element of copyright infringement, and the copyright statute clearly distinguishes between acts of infringement which are willful and those which are not. Since it is possible that defendant may be liable for copyright infringement in the [underlying action] without being found to have acted willfully and knowingly, plaintiff cannot establish that [the] infringement claim against defendant falls 'solely and entirely' within either one, or both, of the exclusions cited." *GRE Ins. Group v. GMA Accessories, Inc.,* 180 Misc. 2d 927, 928, 691 N.Y.S.2d 244 (Sup. Ct. 1998).

In 2004, an insurer declined to defend and/or indemnify an insured for advertising injury based on copyright infringement. *See Atlas Fencing v. Hartford Ins. Co.,* 2004 WL 1925892 (Conn. Super. Ct. July 23, 2004). In *Atlas Fencing,* the underlying complaint included "a claim for both willful and non-willful copyright infringement, the latter falling within the coverage for personal and advertising injury liability and is not precluded by any of the exclusions …" *Id.* at 4. "Based on the policy coverage section, copyright infringement is a cause of action within an advertising injury and is a covered act under the policy. The policy, however, excludes coverage for the expectation of inflicting advertising injuries or if the acts are done with the knowledge of their falsity. Thus, whether any of the exclusions apply depend on if the exclusions are clear and unambiguous in the policy…Even if this exclusion were to apply, [insured] still claims that [insured] had a duty to defend the underlying action because the complaint in count one also alleged non-willful copyright infringement which fell within the coverage under 'personal and advertising' injury." *Id.* Essentially, under count one, "a plaintiff need only allege ownership of a copyright and that the defendant copied the

copyright protected material; and, therefore, willfulness need not be alleged as one of the required elements." *Id.*

The following excerpt from "*Insurance Coverage for Intellectual Property Claims: The California vs. The New York Approach*" from the AIPLA Quarterly Journal is quite telling: "[u]nder this rule, intellectual property infringement claims involving acts of innocent infringement will not be excluded under the intentional acts exclusion, but acts of willful infringement may be. This can create a predicament for plaintiff's counsel. There are well-known benefits to proving that defendant has infringed willfully. Such a showing, for example, may entitle the plaintiff to recover enhanced damages or attorney's fees. At the same time, however, proof of willful misconduct may exclude the defendant's insurance coverage making an award of money damages difficult, if not impossible to collect. Defendants as well as plaintiffs must weigh the implications of this risk. From the defendant's point of view, the risk of losing coverage may be so unacceptably high as to create an incentive for settlement." 19 AIPLA Q.J. 189 (1991).

Additionally, in *Irons Home Builders, supra,* the Insured relied upon this very exclusion. In determining that the insurer could not rely upon this exclusion to avoid a duty to defend, the court noted that copyright infringement allows for damages for either willful or incidental infringement. The court held as follows:

> In its complaint, Star alleges that Irons' infringement of its copyright was willful. Based on that single allegation, Auto-Owners claims that it had no duty to defend. Under copyright law, however, incidental infringement of Star's design by Irons was potentially a basis for recovery. Given that fact, a fair reading of the complaint would have taken the possibility of incidental infringement into account and, therefore, would not have relieved Auto-Owners of its duty to defend. As a result, Auto-Owners was not relieved of its duty to defend based on the mere allegation of willfulness in Star's complaint.

The court held that the duty to indemnify on this issue was an issue of fact:

> Auto-Owners also contends that it is relieved of its duty to indemnify based on another exclusionary provision of the policy. It claims that Irons' copyright infringement arose out of a willful violation of a penal statute or ordinance. Because the policy excludes such liability, Auto-Owners argues it has no duty to indemnify damages that resulted from Irons' willful violation of the copyright laws, *citing* 17 U.S.C. § 506(a) and 18 U.S.C. § 2319 as the applicable penal statutes.
>
> The court finds, however, that there remains a genuine issue of material fact concerning whether Irons' infringement of Star's copyright was a willful violation of a penal statute so as to exclude coverage of the resulting damages under the policy. The stipulated judgment entered in 1991 provides no guidance on the issue. In addition, neither party has demonstrated the absence of a genuine issue of fact concerning whether Irons' conduct was willful under the policy's exclusionary provision. As a result, the court finds that it is for the trier of fact to determine whether the facts of [this] case fall within the scope of coverage." *Marr Inv., Inc. v. Greco,* 621 So.2d 447, 448 (Fla.Dist.Ct.App.1993).

III. CONCLUSION

In closing, Georgia appellate courts will likely

interpret the intentional acts exclusion in a similar manner to the holding of the district court in *Irons Home Builders*.

However, with regard to the prior publication exclusion, they will likely follow the line of reasoning in *Applied Bolting* because this line of cases makes the most sense given the plain language of the exclusion.

In response to a report of a copyright infringement claim, your client's insurer will closely examine whether coverage may be denied based on the prior publication exclusion (an undecided question in Georgia.) and/or the intentional acts exclusion. Using the logic employed by other states, the insured, depending on the facts, may be entitled to both a defense and to coverage.

HOW NOT TO GET BURNED WHILE INVESTIGATING A FIRE CLAIM: A PRIMER ON EXCULPATING YOUR PRODUCT AS THE CAUSE OF A FIRE

By Dennis Keene

Dennis Keene is a partner with the Savannah, Georgia firm of Hunter-Maclean, where he concentrates in product liability law. He has completed concentrated training in the area of fire investigation through the University of Wisconsin College of Engineering, and he has handled fire claim cases for a variety of manufacturers.

Mr. Keene would like to give special recognition and thanks to Caycee Hampton, a graduate of the University of Florida Levin College of Law, and summer associate at Hunter-Maclean, for her time in assisting with the research and writing of this article.

"With few exceptions, the proper methodology for a fire or explosion investigation is to first determine and establish the origin(s), then investigate the cause."[1] The methodology is fully explained in the widely accepted guide to fire investigations published by the National Fire Protection Association: NFPA 921. Anyone handling any aspect of a fire claim must be familiar with the content of this publication. This article provides an overview of origin and cause determinations as discussed in NFPA 921 and explores how to support or attack an expert's opinions in a fire claim case.

Before we begin the overview of basic fire investigation, a few important pointers need to be mentioned. First, time is of the essence in preserving and examining a fire scene. Inclement weather, a desire to repair the burned structure (particularly if it is a residence), and other factors may destroy evidence. The sooner the investigation begins, the greater the likelihood that evidence will be preserved.

Second, all of the important players should be present during the fire scene investigation. Often, a plaintiff's lawyer or insurer will conduct an initial, non-destructive inspection that may reveal the general area of origin of the fire and potential ignition sources. Manufacturers of products found in the area of origin may be notified and offered the opportunity to participate in the investigation before any fire debris or other evidence is moved. As a manufacturer whose product may be the suspect cause of the fire, have your team assembled and be prepared to try to exculpate your product at the fire scene. Send a qualified origin expert as well as a technical representative who is very familiar with the product at issue, and, depending on the size of the claim, consider sending an in-house or outside counsel to help evaluate potential evidentiary concerns and to advocate your position during the investigation. If you can persuade the opposing investigator of your position at the scene, you may avoid lengthy litigation. Since this is the time to begin developing your defense, it is important to have the main players on your fire investigation team in place from the start.

Finally, if after inspecting the fire scene it looks like your product may be a target, be prepared to continue the investigation and analysis after leaving the scene. Obtain copies of all official reports and photographs; send a spoliation letter, if appropriate; determine the size of the loss; and continue to attempt to exculpate your product by determining the origin of the fire and testing your own hypothesis as to why your product could not have been the cause.

With these points in mind, let's turn to the two main components of the investigation: deter-

mining the origin and cause of the fire.

DETERMINING THE ORIGIN OF THE FIRE

"The origin of a fire is one of the most important hypotheses that an investigator develops and tests during the investigation."[2] The origin is the physical location where a heat source and fuel come in contact with each other and a fire begins. Investigators should never look for heat sources first and then look for the fire origin. The area of origin is merely the broader space where the fire originated; it may contain several potential sources of the fire. For example, the photograph below shows that the general area of origin is most likely on the left half of the home based on the relative lack of apparent fire damage to the right half of the home.

Testing this hypothesis should result in finding that the fire origin is contained within that area. As a caveat, one cannot make any assumptions about an opponent's origin determination as some investigators are more concerned with finding a deep pocket to pay for the damage, rather than finding the area of origin.

The fire origin is often determined by considering eyewitness accounts, fire patterns, arc mapping, and fire dynamics. An eyewitness can be a person who witnessed the ignition or spread of the fire, police, first responders, neighbors or even fire reconstruction personnel. Many times eyewitnesses are overlooked and they typically do not come forward to volunteer information so an aggressive, early effort must be made to secure witness perceptions and observations. Although eyewitness accounts can be relevant in determining origin, their reliability must always be consistent with other findings. When witness statements are not supported by the investigator's interpretation of the physical evidence, the investigator should evaluate each separately.

Flames, radiation, hot gases, and smoke create patterns that may lead investigators to the area of fire origin.[3] These patterns often show the history and direction of a fire. Each time another fuel source is ignited or the ventilation to the fire changes, the rate of energy production and heat distribution will change.[4] When observed by a trained investigator, these pattern changes can expose the point of origin. There are two basic types of fire patterns: movement and intensity patterns.[5] Flame and heat movement patterns are produced by the growth and spread of fire away from an initial heat source, whereas flame and heat intensity patterns are produced by the response of materials to the effects of various intensities of heat exposure.[6] As shown in the photograph below, fire patterns can produce lines of demarcation that can indicate, but are not definitive of the direction of fire spread:

However, as the size and duration of the fire increase, following fire patterns to locate the area of origin becomes increasingly difficult, particularly in rooms completely engulfed in the fire.

In addition to fire patterns, electrical arcs can point to the area of origin. An arc is a high-

temperature luminous electric discharge across a gap or through a medium such as charred insulation or wires. It is but one source of potential heat generation that must be examined.[7] The disparity in temperatures within an arc is thousands of degrees, depending on circumstances including current, voltage drop, and metal involved, but the heat can dissipate very rapidly and can only start a fire a with sufficient fuel nearby. Investigators look for evidence of arcing, usually in the form of "beads" left at the ends of wires:

However, the formation of these beads can be the *result of* the fire, and not necessarily its cause.

"Arc mapping" is the technique by which an investigator uses the identification of arc locations to aid in tracing the area of fire origin. For example, if arcing is found on one side of a room, it is clear that electrical current was still flowing through the affected wires when the fire hit it. It may also indicate the source of the fire when looked at in conjunction with other evidence.

The final key to help identify the fire origin is having an understanding of fire dynamics, that is, the physics and chemistry of fire initiation and growth, and the interaction between the fire and the building's systems. Without a solid grasp of fire dynamics, an investigator may miss or overstate the relevance of fire patterns, arcing and witness accounts.

In some cases no single item of evidence will be sufficient to establish the area of origin.[8] In those cases the investigator should use all available resources to develop potential fire scenarios and determine which scenarios plausibly fit all of the available evidence. In other cases it will be impossible to unquestionably fix the origin of a fire[9], and an investigator should not make a determination of a single point of origin unless the evidence is conclusive.

DETERMINING THE CAUSE OF THE FIRE

Generally speaking, if the origin cannot be determined, the cause cannot be determined. Once an origin is determined, the investigation turns to the cause of the fire and should identify all heat-producing devices, appliances, or equipment within the area of origin that could have caused the ignition.[10] These heat-producing components are potential competent ignition sources and each should be eliminated from consideration only if there is definite evidence that it could not be the ignition source for the fire.[11]

In order to identify and eliminate competent ignition sources, and to understand the cause of the fire, one must have a good understanding of the principles of fire and fire spread. Fire can result only from the combination of a fuel and an ignition source. Neither one alone can start a fire. Determining the cause of a fire requires the identification of a competent ignition source, the identification of the material first ignited (the fuel that first sustains combustion beyond the igniting source), and the circumstances that allowed these factors to come together to allow the fire to occur. With respect to the material first ignited, investigators must consider its (1) ignition temperature, (2) combustion properties, and (3) the size, shape, and orientation of the material.[12] Identifying the initial fuel is critical to understanding the events that caused the fire and investigators must do so by employing the scientific method discussed in NFPA 921 when gather-

ing this data, and developing and testing various hypotheses.[13] For example, if an investigator hypothesizes that an electrical wire shorted and ignited a wooden beam, testing must confirm that the electrical wire is a competent ignition source that could generate sufficient temperature and energy and will be in contact with the beam (the first material ignited) long enough to raise it to its ignition temperature. If the heated electrical wire reaches 300 degrees, but the ignition temperature of the wooden beam is 600 degrees, there is no likelihood the beam is sufficient fuel for ignition.

Any determination of fire cause should be based on evidence rather than on the absence of evidence; however, when the origin of a fire is clearly defined, it is occasionally possible to make a credible determination regarding the cause of the fire, even when no physical evidence of the ignition source is available.[14] This finding may be accomplished through credible elimination of all other potential ignition sources provided that the remaining ignition source is consistent with all known facts. Elimination, which involves the developing, testing, and rejection of alternate hypotheses, becomes more difficult as the degree of destruction in the area of origin increases. If the level of certainty of the investigator's opinion is only "possible" or "suspected," the cause should be listed as undetermined.[15]

THE ADMISSIBILITY OF EXPERTS' ORIGIN AND CAUSE DETERMINATIONS

The U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), ruled that the Federal Rules of Evidence serve as the proper source for evaluating the admissibility of expert testimony and specifically addressed the regulation of scientific evidence admissible under F.R.E. 702. Under F.R.E. 702 an expert opinion is admissible "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Presley v. Lakewood Engineering and Mfg. Co.*, 553 F.3d 638 (8th Cir. 2009). When determining the reliability of an expert's opinion, courts may examine whether the theory has been tested, whether the theory has been subjected to peer review and publication, the known potential rate of error, and the method's general acceptance. *Daubert, supra,* at 593-94.

As courts have recognized, NFPA 921 is the industry guideline for fire investigations. *See Presley v. Lakewood Engineering and Mfg. Co.*, 553 F.3d 638 (8th Cir. 2009); *Fireman's Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054 (8th Cir. 2005). Accordingly, the admissibility of an expert's opinion regarding a fire investigation may hinge on that expert's adherence to the methodology described in NFPA 921. Assuming you are in a jurisdiction that has adopted *Daubert* and its progeny, a fire investigator's methods, as applied following NFPA 921, will be analyzed under *Daubert.* Courts, and federal courts in particular, are apt to strike fire investigators' origin and cause opinions if they are not sufficiently reliable. *See, e.g.*, *Presley, supra.* (affirming exclusion of expert's opinion due to expert's failure to conduct appropriate data analysis and testing); *Fireman's Fund*, *supra.* (affirming exclusion of expert testimony because the expert did not apply reliably the standards of NFPA 921); *Bryte v. American Household, Inc.*, 429 F.3d 469 (4th Cir. 2005)(affirming exclusion of expert's opinion because expert did not examine lamp or wiring at issue, and failed to exclude another competent ignition source); *Truck Insurance Exchange v. Magnetek, Inc*., 360 F.3d 1206 (10th Cir. 2004)(affirming exclusion of expert's opinions about cause of fire as they were not based on a sufficiently reliable scientific theo-

ry).

Application of an expert's investigative technique to the particular facts of the case is crucial to the admissibility of an expert's testimony. NFPA 921 requires the investigator to "compare . . . his or her hypothesis to all known facts" and to examine the fire theory against empirical data obtained from the fire scene and appropriate testing.[16] Even if an expert claims to address the particular facts of the case, a speculative opinion is insufficient for admissibility of a fire expert's testimony. For example, the court in *Weisgram v. Marley Co.*, 169 F.3d 514 (8th Cir. 1999), excluded an otherwise qualified fire investigator's opinion that was based on general observations regarding fire origin rather than specific evidence substantiating the chain of events in the fire causation theory. The court explained that an expert's "qualification as a fire investigator [does] not give him free rein to speculate before the jury as to the cause of the fire by relying on inferences that have absolutely no record support." 169 F.3d at 519; *see also State Farm Fire & Gas Co. v. Holmes Prods, Inc.*, No. 04-4532 (3d Cir., Jan. 31, 2006) (unpublished)(excluding expert's opinion where expert had no methodological or factual basis to support opinion that lamp came into contact with drapes).

So when should the principles of *Daubert* and F.R.E. 702 be considered in a fire claim case? From the moment you receive notice that your product is suspected of having caused a fire you and your team should be developing and challenging all expert opinions in light of the principles in NFPA 921. In order to do so, consider the following questions that all origin and cause experts should be able to address:

Origin Experts:

- Have fire patterns been reliably interpreted?
- How was the fire suppressed/fought (direction and methods)?
- What ventilation was available to spread the fire?
- Have all the witnesses been interviewed and reports/photos obtained?
- Is the growth and spread of the fire consistent with the origin hypothesis?
- Are the first fuel ignited and secondary fuel sources consistent with fire growth?
- Has arc mapping been completed?
- Have all sources of heat within the area of origin been identified?

Cause Experts:

- Can the temperature of the ignition source be validated?
- Can the first material ignited be properly identified?
- What is the temperature of the ignition source compared to the temperature needed to ignite the first material?
- Can the ignition source transfer enough energy to the first material ignited to start the fire?
- Was the ignition source generating heat prior to the ignition (i.e., was it turned on or capable of heating at the moment the fire occurred)?
- Have all other causes of the fire been eliminated?

Although not exhaustive, these questions serve not only as the foundation to determine the reliability and admissibility of any fire expert's opinions, but also to determine whether your case should be settled or tried.

ENDNOTES:

[1]NFPA 921: *Guide for Fire and Explosion Investigations*, ¶ 4.1 (National Fire Protection Association; 2011 Ed.)(hereinafter "NFPA § ___").

[2] NFPA 921 § 17.1.

[3] NFPA § 6.3 *et seq.*

[4] *See generally, Id.*

[5] NFPA § 6.4.

[6] NFPA §§ 6.4.1.1, 6.4.1.2.

[7] NFPA § 8.9.4.1.

[8] NFPA § 17.2.1.2.

[9] NFPA § 17.2.1.3.

[10] NFPA § 18.3.2.

[11] NFPA § 18.5.

[12] In evaluating the material's combustion properties, the investigator must consider, in part, whether the material is of "char formation," as opposed to "melting formation," and whether the material is "self-propagating," as opposed to "self-extinguishing". A discussion of these concepts is beyond the scope of this article, but they are defined and discussed in NFPA 921.

[13] NFPA § 18.5.

[14] NFPA § 18.2.1.

[15] NFPA § 18.7.4.

[16] NFPA § 18.6.2.

TEN DAYS OF TTD FOR FREE?
A Critical Look at the Ten Day Notice Provision of O.C.G.A. §34-9-221(i)

By Clay Robertson

Clay Robertson is a partner with the Atlanta firm of McLain & Merritt. He is an honors graduate of the University of Florida and the Florida State University College of Law. Mr. Robertson specializes in workers' compensation defense and currently serves as Chair of GDLA's Workers' Compensation Law Committee. Mr. Robertson is also a Lt Colonel in the U.S. Air Force Reserve where he serves as a Judge Advocate.

In Georgia, when claimants are receiving workers' compensation income benefits, employer/insurers must generally prove a change in condition for the better before suspending benefits. This usually requires a hearing in order to get an Order from an Administrative Law Judge finding that a change in condition for the better has occurred. However, employer/insurers are entitled to suspend income benefits without a Board Order when an employee actually returns to work or is released to regular/full duty work by the authorized treating physician. Nevertheless, in the case of a full duty release where the claimant does not actually return to work, the employer/insurer must pay an additional ten days of benefits, regardless of whether the claimant has any remaining disability.

O.C.G.A. § 34-9-221(i) states "[w]here compensation is being paid with or without an award and an employer or insurer elects to controvert on the grounds of a change in condition or newly discovered evidence, the employer shall, **not later than ten days** prior to the due date of the first omitted payment of income benefits, **file** with the board and the employee or beneficiary a **notice** to controvert the claim in the manner prescribed by the board." (emphasis added) Board Rule 221(i)(1) puts it a little clearer by simply stating "[s]uspension of benefits at any time on the ground of change in condition requires advance notice of 10 days unless the employee has actually returned to work."

A plain reading of the statute and Board Rule reveals that at least 10 days of additional temporary total disability (TTD) benefits must be paid to a claimant after they are released to full duty work, unless they actually return to work. However, O.C.G.A. § 34-9-261 provides that TTD benefits are due "while the disability to work from an injury is temporarily total," and O.C.G.A. § 34-9-262 provides that temporary partial disability (TPD) benefits are due "where the disability to work resulting from the injury is partial in character but temporary in quality." If TTD and TPD benefits are only to be paid to the disabled, why does the law require that **every** employer pay 10 days of additional TTD to **every** claimant who is paid benefits and then gets a full duty release but does not actually return to work?

It seems that when the Georgia Workers' Compensation system changed from an agreement system to a direct payment system, a disparity was created regarding commencement and suspension of TTD benefits. After all, if an employer is expected to directly commence TTD benefits when the authorized treating physician "takes a claimant out of work," it stands to reason that they should be permitted to immediately suspended TTD benefits when the same physician issues a full duty release. While there is a seven-day waiting period before TTD benefits are commenced, the claim-

claimant is still entitled to those seven days of benefits after twenty-one consecutive days of disability. There is no similar provision regarding the employer's potential recoupment of benefits after notice of the suspension. In other words, the employer MUST pay ten extra days of TTD benefits whether the claimant is disabled, or not, and that money is never recoverable.

What's the big deal? It's only ten days, right? Well, this provision entitles every claimant receiving the current maximum TTD rate to an extra $714.29. However, to understand the real problem, we have to look at the bigger numbers. According to the 2011 Annual Report from the State Board of Workers' Compensation, there were 37,167 lost time claims in Georgia in 2010. Assuming an average compensation rate of only 50% of the maximum rate for that year ($250.00) and that only 50% of injured workers received full duty releases, employer/insurers could have paid approximately $6,636,911.19 in TTD benefits to give each of these claimants ten days notice before suspension. Obviously, this number is only an estimate and could vary significantly from actual expenditures depending on the actual number of full duty releases and the number of claimants who received multiple releases to full duty work (i.e multiple 10 days notice).

Recently, the Georgia Court of Appeals addressed the 10 day notice issue and stated "Pursuant to O.C.G.A. § 34-9-221(i) and Board Rule 221(i), the employer must give ten days' advance notice before suspending benefits on the grounds of change in condition." *Reliance Electric Co. v. Brightwell*, 284 Ga. App. 235 (2007). the Court noted "[t]he Act requires 10 days notice before the suspension of benefits." Id. (*citing Jackson v. Peachtree Housing*, 187 Ga. App. 612 (1988)). Certainly, this is an accurate statement of the law. However, in *Brightwell*, the Court failed to extend the penalty beyond payment of the 10 days, as long as a Board Form WC-2 (Notice of Suspension) was actually filed. In a more recent case, the Court of Appeals awarded fifteen months of additional benefits after a release to return to work because no Board Form WC-2 was filed at all. *S&B Engineers & Constructors, Ltd v. Bolden*, 304 Ga. App. 534 (2010). More importantly, the Court only addressed the effect of insufficient notice and was not asked to address the underlying constitutionality of the statute.

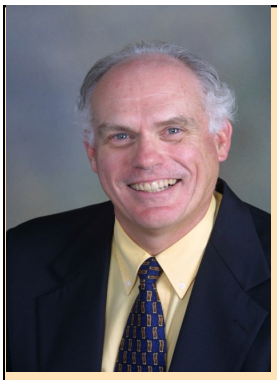
O.C.G.A. § 34-9-221(i) and Board Rule 221 (i) go too far by conclusively determining that ALL claimants are entitled to 10 days of additional benefits after the authorized treating physician has found no disability. This requirement is at odds with O.C.G.A §§ 34-9-261 and 34-9-262 which require payment of TTD and TPD benefits only to the disabled. Certainly, medical opinions as to disability are advisory only and the Board is free to reject the opinion of the authorized treating physician. *Mix v. Allied Readymix*, 248 Ga. App. 261 (2001); *Zurich Ins. Co. v. Robinson*, 123 Ga. App. 582 (1971). However, the statute and Board Rule do this conclusively for at least ten days and leave the Board no discretion to order the claimant to repay the benefits if the authorized treating physician's opinion on the lack of further disability is ultimately accepted by the Board.

Importantly, this statute violates due process by abrogating the employer/insurer's substantive rights to prove that the claimant is no longer disabled. The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of... property without due process of law." Similarly, the Georgia Constitution provides that "no person shall be deprived of ... property, except by due process of law." Because the statute provides no means for the employer to recoup the ten days of benefits after the claimant's disability is shown to have ceased, it deprives the employer of these benefits without due process.

In many claims, Georgia's ten-day notice requirement pursuant to O.C.G.A. § 34-9-221(i) and Board Rule 221(i) results in a windfall of benefits to claimants. While there are some claims where the full duty releases issued by the authorized treating physicians are in error, in many claims the claimant simply gets paid an additional ten days of TTD benefits without any burden on the claimant to prove disability during that period. At the very least, the statute and Board Rule need revision to allow for recoupment of benefits if the Board determines that the full duty release was proper. Perhaps, the employer/insurer could be authorized to take a credit against future income benefits and/or any permanent partial disability benefits due pursuant to an impairment rating issued after the suspension.

Labor and Employment Law

By: W. Melvin Haas III
William M. Clifton III
W. Jonathan Martin II
Alyssa Peters Morris



Mel Haas is an equity partner of Constangy, Brooks & Smith LLP and head of the Macon office. Constangy Brooks & Smith has over 100 labor and employment lawyers nationwide. Mel has practiced management labor law for over 40 years, including 2 years as a trial attorney with the National Labor Relations Board and 2 years as in-house counsel for a major corporation. Some of Mel's noted accomplishments include: Fellow in the College of Labor and Employment Lawyers, Fellow of the American Bar Association, AV® Preeminent™ Peer Review Rated By Martindale-Hubbell, Vice-Chair of the Labor Relations Committee of the U.S. Chamber of Commerce, and Boards of Directors for the U.S. Chamber of Commerce, the Georgia Employers' Association, and the Georgia State Chamber of Commerce. He is also President of the Georgia Defense Lawyers' Association. He is a Georgia Super Lawyer, has been recognized in the publication Best Lawyers in America, and has been recognized by Labor Relations Institute and the Human Resources Executive Magazine several times as one of the "Top 10 Most Powerful Labor Attorneys."

A noted author and speaker, Mel has successfully handled over 100 elections, (five of which involved units of over 1500 employees), hundreds of campaigns, numerous arbitrations, NLRB trials, appeals, and oral arguments before the United States Courts of Appeals. Mel has also represented employers in hundreds of EEOC charges and other Title VII matters, and litigated numerous employment discrimination, wage and hour, and other related matters. With Mel's extensive experience, he provides clients with creative business solutions to workplace legal issues.

Alyssa is an attorney with the Macon office of Constangy, Brooks and Smith. Constangy, Brooks and Smith, LLP limits its practice to labor and employment law counseling and management. It has done this, exclusively, since 1946, when it was founded in Atlanta. Constangy, Brooks and Smith, now has twenty-three offices in fourteen states and it represents management throughout the United States.

Alyssa graduated second in her class from Georgia State University College of Law. While in school, she was a member of the Georgia State Law Review and Phi Alpha Delta. Alyssa practices in all areas of employment and labor law with an emphasis in employment litigation and management training. She is an active participant with the Georgia Employers' Association, the Georgia Defense Lawyers Association, and a contributing Editor for the annual Developing Labor Law.

Bill Clifton of Constangy, Brooks & Smith, LLP is a senior litigator who has tried to jury verdict cases involving every aspect of the employment relationship. He has defended cases involving claims of sexual harassment, retaliatory discharge, disability, age, religion, race and sex discrimination, equal pay violations, as well as cases involving claims of defamation, invasion of privacy, negligent supervision, intentional infliction of emotional distress, fraud, and breach of contract. Bill assists employers in problem prevention and legal analysis of complex employment issues. Bill also represents employers in matters involving confidentiality and covenants not to compete. Bill is a frequent Speaker for the EEOC's Employer outreach program. He earned his JD degree from Columbia University in New York.

Jonathan Martin is an equity partner with Constangy, Brooks & Smith, LLP. He works in the Macon, Georgia office. Constangy, Brooks & Smith limits its practice to labor and employment law for management. It has done this since 1946, when it was founded in Atlanta. Constangy, Brooks & Smith now has twenty offices in thirteen states and it represents management throughout the United States.

A graduate of the Terry School of Business, University of Georgia, (B.B.A.- Banking & Finance, cum laude), and a graduate of the Walter F. George School of Law, Mercer University, (J.D., magna cum laude), he served as the administrative editor of the Mercer Law Review.

Jonathan focuses his practice in employment discrimination litigation for management, defending corporations in law suits arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), as well as related state laws. Jonathan also represents management in traditional labor law issues under the National Labor Relations Act (NLRA) and in wage & hour issues under the Fair Labor Standards Act (FLSA).

I. INTRODUCTION

This Article surveys recent developments in the state statutory and common law that affect labor and employment relations of Georgia employers. Accordingly, it surveys published decisions interpreting Georgia law from June 1, 2010 to May 31, 2011.[1] This Article also includes highlights of certain revisions to the Official Code of Georgia Annotated (O.C.G.A.).[2]

II. RECENT LEGISLATION

A. Modification of Restrictive Covenants

On May 11, 2011, Georgia Governor Nathan Deal signed into law Georgia House Bill 30,[3] which became effective on that date.[4] The express purpose of House Bill 30, together with the previous amendment to the Georgia Constitution,[5] is to clarify the law on restrictive covenants.[6] House Bill 173,[7] a 2009 legislative action, significantly changed Georgia law on covenants not to compete.[8] House Bill 173 authorizes courts to "blue-pencil" otherwise unenforceable covenants rather than invalidate them entirely.[9] House Bill 30 was enacted to remove any ambiguity following House Bill 173.[10] House Bill 30, like House Bill 173, permits a court to modify a covenant so long as the modification is not more restrictive than the original.[11] In determining relief, a court must consider what is reasonable and the parties' original intent.[12] This legislation allows enforcement of a restrictive covenant by third party beneficiaries or assignees.[13]

B. Employment Eligibility Verification

On May 13, 2011, Governor Deal signed House Bill 87, also known as The Illegal Immigration Reform and Enforcement Act of 2011 (Act).[14] The Act became effective on July 1, 2011, and amends Chapter 60 of Title 36 of the O.C.G.A.[15] The Act requires most private employers to use the federal work authorization program,[16] also known as "E-verify."[17] Prior to the Act, only those employers who conducted work on federal projects were required to use E-verify.[18] Private employers will be phased into compliance over a period of a year and a half.[19]

III. PENDING LEGISLATION

Although not enacted in the 2011 Georgia legislative session, the following public laws represent potential trends for employer-employee legislation in coming years.

A. Parent Protection Act

Georgia House Bill 311,[20] still in committee, proposes an amendment to Chapter 1 of Title 34 of the O.C.G.A.[21] If enacted,[22] this legislation will provide a twenty-four hour paid or unpaid leave for employees to attend school conferences and medical appointments of a spouse or child.[23] The employee must give reasonable notice to the employer.[24] An employer with three or fewer employees may limit such leave.[25] Also, eligible employees should take leave under the federal Family Medical Leave Act of 1993,[26] if possible.[27]

B. Sick Leave for Immediate Family Care

Georgia House Bill 432[28] also proposes changes to Chapter 1 of Title 34.[29] This legislation would require an employer to allow sick leave for employees to care for immediate family members.[30] If a sick leave policy exists, the employee must comply.[31]

C. Collective Bargaining by Public Employees

Georgia House Bill 416,[32] still in committee, would amend Chapter 6 of Title 34[33] if enacted.[34] This legislation would prohibit contracts between public employers or employees and labor organizations.[35] Any contract with a

labor organization would be void.[36]

IV. WRONGFUL TERMINATION

A. Employment-at-Will

At-will employment refers to employment that either an employer or an employee may terminate at any time with or without cause.[37] Employment at-will in other jurisdictions may be weakening,[38] but in Georgia, the presumption remains that all employment is at-will unless a statutory or contractual exception exists.[39] "[T]his bar to wrongful discharge claims in the at-will employment context 'is a fundamental statutory rule governing employer-employee relations in Georgia.'"[40] Particularly, O.C.G.A. § 34-7-1[41] provides that "[a]n indefinite hiring" is at-will employment.[42] The definition of an indefinite hiring includes contract provisions specifying "permanent employment, employment for life, [and] employment until retirement."[43] Further, a contract specifying an annual salary does not create a definite period of employment.[44] However, if an employment contract does specify a definite period of employment, any employment beyond that period becomes employment-at-will subject to discharge without cause.[45]

Regardless of an employer's motives, the general rule in Georgia allows the discharge of an at-will employee "without acquiring a cause of action for wrongful termination."[46] Oral promises between an employer and employee will not modify the relationship between the two; absent a written contract, an employee's status remains at-will.[47]

B. Elements of Employer-Employee Contracts

During the survey period, the Georgia Court of Appeals addressed the strict interpretation of employment-at-will in Georgia. In *Tackett v. Georgia Department of Corrections*,[48] the court addressed the requirements to demonstrate a valid employment contract and overcome the default employment-at-will doctrine.[49] In *Tackett*, following an internal group grievance regarding the compensation paid to investigators, the Georgia Department of Corrections (DOC) instituted a "new salary schedule to be applied equally to all investigators."[50] Tackett was one of two investigators who had his annual salary reduced. Tackett claimed that the DOC violated his employment contract and he brought suit to obtain relief. To establish that an employment contract existed, Tackett introduced three documents to be read in concert with one another: a letter from Tackett stating he would take a demotion in title as long as he was paid the same salary as his previous job, an internal DOC memorandum stating that Tackett's experience and qualifications justified the higher salary, and portions of the DOC employee manual stating that salaries may be reduced for disciplinary, budgetary, or voluntary reasons.[51]

The court of appeals, however, did not share Tackett's reading of the documents. First, the court held that Tackett's letter and the subsequent memorandum justifying his salary did not constitute a contract because the documents did not guarantee a salary over the course of Tackett's employment.[52] Second, the court held that an employee manual does not necessarily constitute an employment contract.[53] Because none of these documents amounted to an employment contract between the parties, Tackett lacked an actionable claim against the DOC.[54]

C. Exceptions to the At-Will Doctrine

The statute creating the at-will doctrine accounts for specific exemptions.[55] When employment is not at-will, a termination of employment suit typically requires a breach of contract.[56] However, during the survey period, the Georgia Supreme Court, in *City of McDonough v. Campbell*,[57] examined whether an employment contract binds a successor municipal council in violation of Georgia law.[58] In August of 2005, McDonough's city council

passed a resolution authorizing employment contracts with several city employees. These contracts would renew automatically, contained generous severance packages, and required that any vote authorizing termination of employment be made prior to October 30th of that calendar year. Less than a year later, a new city council declared the previous employment contracts null and void. Campbell, the city's chief building inspector, brought suit for breach of contract to recover severance pay.[59]

In examining the validity of the employment contracts, the supreme court applied O.C.G.A § 36-30-3(a)[60] to the facts.[61] That statute provides that "[o]ne council may not, by an ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government."[62] The court acknowledged that while municipalities may enter into valid employment contracts, the contract must "continue for a *reasonable* time beyond the official term of the officers entering into the contract."[63] However, the court held that the onerous financial obligations had "the effect of binding the hands of successor councils."[64] The court held that because of the automatic renewal and the unreasonable financial terms, the contract itself was ultra vires and void.[65]

D. Breach of Contract (Other than At - Will Contracts)

The basic rules of contract law apply in creating a valid employment contract: competency to contract, offer, acceptance, and valid consideration.[66] Further, for an employment contract to be valid, the terms must define the nature and character of the services to be performed, the place of employment, the time period for which the employee is to work, and the compensation to be owed to the employee.[67] In addition, an employment contract's enforceability requires sufficient definiteness in the terms of the contract.[68]

During the survey period, the court of appeals affirmed that basic contract rules, including parol evidence, apply to the formation of an employment contract. In *McKinley v. Coliseum Health Group, LLC*,[69] the court examined whether additional evidence could be used to explain portions of the agreement.[70] The employee, McKinley, and the employer, Coliseum Health Group, LLC (Coliseum), entered into an employment contract, which addressed the calculation of McKinley's salary and allowable monthly draw. When the contract ended, Coliseum claimed that McKinley had received excess compensation and sent demand letters to recover the full amount. McKinley failed to comply and counterclaimed for compensation based on the assessment of unauthorized fees.[71]

The court held that the contract was partially integrated and allowed parol evidence to explain ambiguities.[72] Under Georgia law, contract construction involves three steps:

> First the trial court must decide whether the contract language is clear and unambiguous. If it is, the trial court simply enforces the contract according to its clear terms; the contract alone is looked to for meaning. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construc-tion, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.[73]

A contract is partially integrated where there is ambiguity, so a court can use parol evidence to resolve the confusion.[74] In this case, the contract language was extremely broad, and the court used the conduct of the employer to conclude

that the contract intended fees to be charged.[75] As a result, the parol evidence resolved the ambiguity, and the court affirmed summary judgment.[76]

V. NEGLIGENT HIRING OR RETENTION

Under O.C.G.A § 34-7-20,[77] "[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency."[78] The Georgia Court of Appeals has held that this statute imposes a duty on the employer to "warn other employees of dangers incident to employment that 'the employer knows or ought to know but which are unknown to the employee.'"[79] For a plaintiff to sustain an action for negligent hiring or retention, the plaintiff must show that the employer hired an individual who "the employer knew or should have known posed a risk of harm to others where it [was] reasonably foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff."[80] Typically, "the determination of whether an employer used ordinary care in hiring an employee is a jury issue"[81] and is only a question of law "where the evidence is plain, palpable and undisputable."[82]

During the survey period, the United States Court of Appeals for the Eleventh Circuit affirmed in *Doe v. Fulton DeKalb Hospital Authority*[83] that to sustain a negligent hiring action, the plaintiff must demonstrate that the employer knew or should have known that the employee "was not suited for the particular employment."[84] In *Fulton DeKalb*, three female patients receiving treatment in Grady Hospital's methadone clinic claimed they were sexually harassed by a male substance abuse counselor.[85] An internal investigation conducted by Grady Hospital revealed that the counselor made inappropriate sexual comments outside the standard regimen of treatment. The investigation also revealed the counselor's similar misconduct at other facilities. The counselor was terminated by Grady Hospital upon the close of the investigation.[86] The trial court granted Grady Hospital's motion for summary judgment on the negligent hiring and retention claims, and the patients appealed.[87] The Eleventh Circuit affirmed the trial court and held that preemployment background screening did not indicate that the counselor had any propensity to commit acts of sexual misconduct.[88] Therefore, the "plain, palpable and undisputable" evidence demonstrated that Grady Hospital was not liable to the plaintiffs for damages.[89]

VI. RESPONDEAT SUPERIOR

Under the doctrine of respondeat superior, an employer may be held vicariously liable for the negligence or intentional torts committed by his or her employee within the scope of employment.[90] To hold an employer vicariously liable for the torts of an employee, the court must find the following two elements: (1) the employee was acting in furtherance of the employer's business, and (2) the employee was acting within the scope of the employer's business.[91]

A. Private Enterprise

Under Georgia law,

> If a tort is committed by an employee not by reason of the employment, but because of matters disconnected therewith, the employer is not liable. Furthermore, [i]f a tortious act is committed not in furtherance of the employer's business, but rather for purely personal reasons disconnected from the authorized business of the master, the master is not liable.[92]

In the survey period, the Georgia Court of Appeals determined, in *BT Two, Inc. v. Bennett,*[93] that an employee was not acting within the scope of his employment when he assaulted another person.[94] Several individuals hosted a fundraising event at a private home for a BT Two, Inc.

(Buffalo's) manager. Multiple Buffalo's employees were in attendance, but there was no evidence that Buffalo's had itself financially supported the event in any way. The party had a bartender, who was married to a Buffalo's employee named Justin King. Hunter Bennett, a cousin of a Buffalo's employee, arrived at the party and convinced an individual leaving the party to give him the required wristband for free. Bennett subsequently demanded unlimited beer from the bartender, King's wife. After a minor confrontation, Bennett received the beer, but King later assaulted Bennett, who sustained serious injuries. Bennett claimed that Buffalo's was liable for King's actions under the theory of respondeat superior. The trial court denied Buffalo's motion for summary judgment.[95]

The court of appeals reversed the trial court upon determining that liability could not be imputed to the employer.[96] The true test of an employee acting within the scope of employment is "whether it was done within the scope of the actual transaction of the master's business for accomplishing the ends of his employment."[97] In this case, the evidence was clear and indisputable; even if Buffalo's had sponsored the event, the assault on Bennett was not "within the scope of [King's] employment or in furtherance of Buffalo's business."[98] The court affirmed precedent, holding that assaults generally are not in furtherance of the master's business, even when the place and time would likely be considered within the scope of employment.[99]

B. Employer-Owned Vehicle

Generally, an employee is not acting within the scope of employment when commuting to and from work.[100] Therefore, an employer is typically not vicariously liable for the actions of a commuting employee.[101] However, when an employer owns the vehicle involved in the tort, the general rule changes:

> Where a vehicle is involved in a collision, and it is shown that the automobile is owned by a person, and that the operator of the vehicle is in the employment of that person, a presumption arises that the employee was in the scope of his employment at the time of the collision, and the burden is then on the defendant employer to show otherwise.[102]

The presumption may "be overcome by uncontroverted evidence."[103]

In *Farzaneh v. Merit Construction Co.*,[104] the Georgia Court of Appeals held that an employer could not be held liable for the negligence of an employee driving a vehicle that was previously owned by the employer.[105] Merit Construction Company (Merit) employed laborers who would travel from home to various job sites. Redic purchased a company truck from Merit at a reduced price with favorable payment terms. While Redic had paid in full and maintained insurance on the truck, Merit occasionally paid for repairs and issued a cell phone. While on his way to work, Redic struck and injured Farzaneh, who brought suit against Merit.[106]

Under Georgia law, an employer is only liable for the torts of an employee when the action is in furtherance of the master's business and not a personal matter.[107] While an employer is not liable for the actions of a commuting employee,[108] an employer-owned vehicle shifts the burden to the employer to overcome this presumption.[109] However, "special circumstances" may impute liability, even when the employee is engaged in a personal matter.[110] Also, liability may attach to an employer when the act involved was a special mission.[111] The special mission exception requires "that the errand or mission itself be a special or uncustomary one, made at the employer's request or direction."[112]

In *Farzaneh* the court of appeals affirmed the trial court in finding the vehicle was not employer owned.[113] Because Merit no longer owned the vehicle, the burden remained on the plaintiff to show ownership.[114] The Merit-issued cell phone and possible vehicle repair allowance were not enough to establish ownership or a special circumstance.[115] In addition, there was no special mission exception, as the commute to work was customary.[116] Therefore, the court held that no liability could be imputed to the employer since the vehicle was not employer-owned.[117]

C. Independent Contractor or Employee

Vicarious liability under respondeat superior generally does not apply to the acts of independent contractors.[118] Therefore, in determining vicarious liability, a court must initially resolve whether an individual is an independent contractor or an employee.[119]

In *Yancey v. Watkins*,[120] the Georgia Court of Appeals considered whether a crop-duster was an independent contractor and whether the employer could be held liable for his negligence.[121] Ussery and Watkins were neighboring farmers. Ussery hired Bloodsworth to spray his crops. After Bloodsworth had aerially applied the chemical, Watkins claimed that the excess drifted onto his farm and destroyed his crop.[122]

To determine liability, the court examined whether Bloodsworth was an independent contractor.[123] O.C.G.A. § 51-2-4[124] states that an employer is generally not liable for the torts of his employee when the employee exercises an independent business.[125] The chief test to determine independent contractor status is "whether the contract gives, or the employer assumes, the right to control the time, manner, and method of performance of the work, as distinguished from the right merely to require certain definite results in conformity with the contract."[126] In this case, Bloodsworth was an independent contractor and operated an independent business.[127] Ussery had limited control over Bloodsworth's crop-dusting plane, hired him on a one-time basis, and designated no specific time for the crop-dusting.[128] Also, Bloods-worth operated his crop-dusting business as a separate entity.[129]

Notwithstanding the general rule, this case shows an exception to independent contractor liability. Even though the court determined that Bloodsworth was an independent contractor, the employer could still possibly be held liable for his negligence.[130] Citing O.C.G.A. § 51-2- 5 (2),[131] the court noted that an employer is still liable for negligence "[i]f according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed."[132] The court determined that there was substantial evidence as to the danger of crop-dusting and Ussery's knowledge of that danger.[133] As a result, there were material issues of fact, and the court affirmed the denial of summary judgment.[134]

VII. RESTRICTIVE COVENANTS

A. Covenants Not to Compete

On November 2, 2010, voters ratified an amendment to the Georgia Constitution that authorizes enforcement of covenants that restrain in a reasonable manner.[135] Prior to this constitutional amendment, agreements that placed general restraints on trade were void as against public policy.[136] Courts disfavored noncompete agreements on contractual relations because any restriction on trade reduces competition.[137] Pursuant to the 2010 amendment to the Georgia Constitution, a judge has "the power to limit the duration, geographic area, and scope of prohibited activities provided in a contract or agreement restricting or regulating competitive activities . . . ."[138] During the 2011 regular session, the Georgia General Assembly passed House Bill 30,[139] which amended Chapter 8 of Title 30 of the

O.C.G.A. to authorize the use of reasonable

restrictive covenants.[140] Prior to these changes in the law, covenants were valid as a partial restraint on trade if the agreement was specific and reasonable in duration, territorial coverage, and scope of activities prohibited.[141]

Whether the terms of a noncompete agreement are reasonable is a question of law that takes into account "the nature and extent of the trade or business, the situation of the parties, and all other relevant circumstances."[142] A questionable restriction, if not void on its face, may require the introduction of additional facts to determine whether it is reasonable.[143] However, depending on the type of contract, courts apply different levels of scrutiny in determining the reasonableness of the contract.[144] If a noncompete agreement is ancillary to an employment agreement, a stricter standard applies; if any portion of the agreement is considered overbroad or unreasonable, the entire agree-ment becomes invalid.[145] If the agreement is pursuant to a contract for the sale of a business, a less stringent standard permits broader provisions; even if provisions of the agreement are deemed overbroad or unreasonable, the court may "blue-pencil" the agreement, rewriting or severing the overly broad provisions.[146] However, "in restrictive covenant cases strictly scrutinized as employment contracts, Georgia does not employ the 'blue pencil' doctrine of severability."[147]

B. Scope of Prohibited Activities

During the survey period, the Georgia Court of Appeals held, in *Cox v. Altus Healthcare & Hospice, Inc.*,[148] that restrictive covenants which contain neither geographical, temporal, nor personnel contact limitations constitute an unlawful restraint on trade.[149] In *Altus Healthcare*, Edwin Cox began negotiations to purchase a hospice care facility. During these negotiations, Altus and Cox entered into non-disclosure and non-solicitation restrictive covenants. The parties broke off negotiations, and Cox purchased a different hospice provider. Altus moved to enforce the covenants, and the trial court issued an interlocutory injunction.[150] In determining the reasonableness of the restraints, the court of appeals examined "the nature and extent of the trade or business, the situation of the parties, and all the other circumstances."[151] Because the particular covenants lacked a terminable time period to be enforced, the covenants were invalid and unenforceable.[152]

Because the covenants were conditional upon employment, the court rejected any arguments that an agreement may be blue-penciled.[153] A strict scrutiny standard is applied to covenants that are conditional on employment.[154] Even if the covenants were not conditional upon Cox's employment, the court would have rejected blue-penciling the agreement because the sale was never consummated.[155]

C. Specification with Particularity

During the survey period, the Georgia Court of Appeals continued to apply a four-part test to determine the enforceability of a restrictive covenant: whether "(1) the restraint is reasonable; (2) founded upon valuable consideration; (3) is reasonably necessary to protect the party in whose favor it is imposed; and (4) does not unduly prejudice the interests of the public."[156] In *Gordon Document Products, Inc. v. Services Technology, Inc.*,[157] two employees left Gordon Document Products (GDP) to work for a competitor, Services Technology, Inc. (STI). During their employment with GDP, the employees signed agreements that contained non-compete restrictive covenants.[158] The court of appeals held that the agreements were overly broad because the covered territory represented the entire GDP sales area.[159] One employee assisted in sales, and the other was a sales representative that only worked in a portion of the covered area.[160] The court held that a territory where the employer does business, but an employee does not, is overly broad, absent a specific business justification from the employer.[161]

D. Choice of Law Provisions

The Georgia Court of Appeals held in *Bunker Hill International, Ltd. v. Nationsbuilder Insurance Services, Inc.*[162] that the question of venue is a procedural issue to be determined by the rule of lex fori.[163] In *Bunker Hill*, Kevin Cunningham entered into an employment agreement with Nationsbuilder that contained a non-compete clause. Cunningham left his position with Nationsbuilder and began work for a direct competitor, Bunker Hill. In Georgia, Bunker Hill moved for a declaratory judgment that the covenants were unenforceable. Nationsbuilder claimed that, due to a choice of law provision in the contract, Illinois, not Georgia, was the proper venue for this litigation.[164] Forum-selection clauses in Georgia "are prima facie valid and should be enforced unless the opposing party shows that such enforcement would be unreasonable under the circumstances."[165] The court of appeals stated that a party could overcome the forum-selection clause by showing "at least one of the covenants violate[d] Georgia public policy and . . . such a covenant would likely be enforced against him [or her] by an Illinois court."[166] The court's examination of recent Illinois precedent regarding restrictive covenants revealed that Illinois courts invalidate only the most broad covenants and will sustain covenants lacking certain restrictions.[167] Cunningham demonstrated that Illinois courts would enforce the agreement, which would be unenforceable under Georgia law for public policy reasons.[168] Thus, under the rule of lex fori, the court applied Georgia law and invalidated the restrictive covenants.[169]

Non-disclosure Agreements

In *Fine v. Communication Trends, Inc.*,[170] the Georgia Court of Appeals examined the enforceability of nondisclosure agreements.[171] Lynette Fine worked for Communication Trends (CTI), and her contract contained several restrictive covenants. During a meeting with the CEO of Allscope, a competitor, Fine discussed the possibility of employment and demonstrated projected earnings based on that employment. Fine used competitive research and her knowledge of billing rates charged to CTI's clients to show potential earnings. Fine left CTI and joined Allscope.[172] CTI brought action against Fine for disclosing confidential client and billing information to a competitor.[173] Because Georgia had not yet adopted the blue-pencil theory of restrictive covenants, the court rejected CTI's argument.[174] Additionally, CTI introduced no evidence that confidential information was released.[175]

D. Non-solicitation Agreements

The court of appeals held in *Fine* that a restrictive covenant is overly broad when former employees are barred from accepting business without active solicitation, regardless of which party initiated con -tact.[176] The day after Fine left employment with CTI, she distributed business cards at an industry dinner to former clients, informing them that she could not actively solicit their business. Furthermore, Fine told former clients that, to continue a business relationship, a statement that Fine did not solicit their business would be necessary. Later, CTI found that several clients switched their accounts.[177]

CTI commenced an action to enforce the non-solicitation restrictive covenant. The trial court found that the restrictive covenant was overbroad because it prohibited Fine from merely accepting business from former clients.[178] The court of appeals held that "a covenant prohibiting a former employee from merely accepting business, without any solicitation, is not reasonable" and, therefore, was not reasonably limited in the scope of activities prohibited.[179] Additionally, CTI failed to establish that Fine breached her fiduciary duty and loyalty by accepting business from CTI's former clients or destroying CTI client files.[180] There is no breach of fiduciary duty when an employee makes plans to work for a competitor so long as the employee

does not engage in direct competition before the original employment relationship ends.[181] The court found no evidence that Fine engaged in direct competition prior to leaving CTI's employment.[182] However, the court of appeals remanded the issue of destroyed client files to the trial court because of circumstantial evidence.[183]

VIII. CONCLUSION

Although labor and employment issues in Georgia law often are not as complex as their federal counterparts, the issues arising under state law are becoming more challenging with each passing year. Adding to this challenge is the growing overlap between state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, or trial law, it is important to recognize that any one law or legal proceeding can and does impact relations between employer and employee.

ENDNOTES:

1. For analysis of Georgia labor and employment law during the prior survey period, see W. Melvin Haas III et al., Labor and Employment Law, Annual Survey of Georgia Law, 62 MERCER L. REV. 181 (2010).
2. Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See, generally,* THE DEVELOPING LABOR LAW (John E. Higgins, Jr. et al. eds., 5th ed. 2006 & Supp. 2009); BARBARA T. LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (C. Geoffrey Weirich et al. eds., 4th ed. 2007 & Supp. 2009); W. Christopher Arbrey et al., Labor and Employment, Eleventh Circuit Survey, 60 MERCER L. REV. 1281 (2009); Bureau of Nat'l Affairs, Daily Labor Report, BNA.COM, http://www.bna.com/products.labor/ dlr.htm (last visited Aug. 13, 2011). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article only covers legislative and judicial developments arising under Georgia state law during the survey period.
3. Ga. H.R. Bill 30, Reg. Sess. (codified at O.C.G.A. §§ 13-8-2, 13-8-50 to 59 (Supp. 2011)).
4. Id.
5. Ga. H.R. Res. 178 § 1, Reg. Sess., 2010 Ga. Laws 1260, 1260-61 (amending GA. CONST. art. III, § 6, para. 5(c)(3)).
6. Ga. H.R. Bill 30 § 1 ("During the 2010 legislative session the General Assembly enacted HR 178 (Ga. L. 2010, p. 1260), the constitutional amendment necessary for the statutory language .... [T]here may be some question about the validity of that legislation."); see also Carl Cannon, W. Wright Mitchell & Alyssa Peters Morris, Client Bulletin #427: Georgians Vote to Make Restrictive Covenants Easier to Enforce, CON¬STANGY.COM (Nov. 5, 2010), http://www.constangy.com/communications-305.html. See discussion in further detail infra Part VII(A).
7. Ga. H.R. Bill 173, Reg. Sess., 2009 Ga. Laws 231 (codified at O.C.G.A. §§ 13-8-2, 13- 8-50 to -59 (2010)).
8. Id. § 3, 2009 Ga. Laws at 243 (codified at O.C.G.A. § 13-8-54(b) (2010)). The bill stated,

   > [I]f a court finds that a contractually specified restraint does not comply with [certain provisions of the O.C.G.A.], then the court may modify the restraint provision and grant only the relief reasonably necessary to protect [a legitimate business interest established by the person seeking enforcement] and to achieve the original intent of the contracting parties . . .

9. Id. Previously in Georgia, all covenants

within an agreement were unenforceable where any one covenant was unenforceable. *See Ward v. Process Con trol Corp.,* 247 Ga. 583, 584, 277 S.E.2d 671, 673 (1981) ("If any covenant not to compete within a given employment con tract is unreasonable either in time, territo ry, or prohibited business activity, then all covenants not to compete within the same employment contract are unenforceable.").

10. Ga. H.R. Bill 30 § 1 ("It is the intention of this Act to remove any such uncertainty by substantially reenacting the substantive provisions of HB 173 (Act No. 64, Ga. L. 2009, p. 231), but the enact ment of this Act should not be taken as evidence of a legislative determination that HB 173 (Act No. 64, Ga. L. 2009, p. 231) was in fact invalid.").
11. Id. § 4 (codified at O.C.G.A. § 13-8-54) ("[T]he court may modify the restraint provision and grant only the relief reasonably necessary to protect such interest or interests and to achieve the original intent of the contracting parties to the extent possible.").
12. Id. § 4.
13. Id. (codified at O.C.G.A. § 13-8-58) ("A court shall not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or Successor to a party to such contract.").
14. Ga. H.R. Bill 87, Reg. Sess. (codified in relevant part at O.C.G.A. §§ 13-10-90, 36- 60-6 (Supp. 2011)).
15. Id. pmbl., § 22.
16. The Act applies to private employers with more than ten employees, requiring them to use E-verify for all newly hired employees. Id. § 12 (codified at O.C.G.A. § 36-60 -6).
17. Id. § 2 (codified at O.C.G.A. § 13-10-90).
18. Exec. Order No. 13465, 3 C.F.R. 192 (2008), amending Exec. Order No. 12989, 3 C.F.R. 163 (1996). Since 2008, federal contractors and subcontractors have been required to use E-Verify. See generally UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, http:// www.uscis.gov/portal/site/uscis/menuitem (last visited Aug. 4, 2011).
19. Ga. H.R. Bill 87 § 12 (codified at O.C.G.A. § 36-60-6). Employers will be phased in according to their size: 1) By January 1, 2012, employers with 500 or more employees must comply; 2) By July 1, 2012, employers with more than 100 but fewer than 500 employees; 3) By July 1, 2013, employers with more than 10 but fewer than 100 will be required to comply. Id.
20. Ga. H.R. Bill 311, Reg. Sess. (2011) (unenacted).
21. O.C.G.A. tit. 34, ch. 1 (2008 & Supp. 2010).
22. Ga. H.R. Bill 311 § 2.
23. Id. § 2(b).
24. Id. § 2(d)(1) ("An eligible employee requesting leave under subsection (b) of this Code section shall provide reasonable notice to the employer prior to the absence and make reasonable effort to plan the absence so as not to unduly disrupt the operations of the employer.").
25. Id. § 2(d)(3) ("An employer with three or fewer employees at the same location may reasonably limit the number of employees allowed to take a planned absence on the same calendar day.").
26. 29 U.S.C. §§ 2601-2654 (2006 & Supp. 2008).
27. Ga. H.R. Bill 311 § 2(g).
28. Ga. H.R. Bill 432, Reg. Sess. (2011) (unenacted).
29. Id. § 1.
30. Id. § 1(b).
31. Id. § 1(c) ("Any employee who uses such sick leave shall comply with the terms of

the employer's employee sick leave policy.").
32. Ga. H.R. Bill 416, Reg. Sess. (2011) (unenacted).
33. O.C.G.A. tit. 34, ch. 6 (2008).
34. Ga. H.R. Bill 416 § 1.
35. Id. § 2(b).
36. Id. ("Any contract or agreement between a public employee and a labor organization or between a public employer and a labor organization shall be void."); see O.C.G.A. §§ 34- 6-20 to -28 (2008) (regarding labor unions and employment contracts in Georgia).
37. BLACK'S LAW DICTIONARY 604 (9th ed. 2009).
38. Haas, supra note 1, at 186 & n.37 ("[T]he employment-at-will doctrine is weakening in many jurisdictions.").
39. See, e.g., Wilson v. City of Sardis, 264 Ga. App. 178, 179, 590 S.E.2d 383, 385 (2003) ("In the absence of a contractual or statutory 'for cause' requirement . . . the employee serves 'at will' and may be discharged at any time for any reason or no reason... .").
40. Reid v. City of Albany, 276 Ga. App. 171, 172, 622 S.E.2d 875, 877 (2005) (quoting Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 280, 528 S.E.2d 238, 240 (2000)).
41. O.C.G.A. § 34-7-1 (2008).
42. Id.
43. Ga. Power Co. v. Busbin, 242 Ga. 612, 613, 250 S.E.2d 442, 443-44 (1978) (internal quotation marks omitted).
44. Ikemiya v. Shibamoto Am., Inc., 213 Ga. App. 271, 273, 444 S.E.2d 351, 353 (1994) (quoting Gatins v. NCR Corp., 180 Ga. App. 595, 597, 349 S.E.2d 818, 820 (1986)).
45. Schuck v. Blue Cross & Blue Shield, Inc., 244 Ga. App. 147, 148, 534 S.E.2d 533, 534 (2000).
46. H&R Block E. Enters., Inc. v. Morris, 606 F.3d 1285, 1294 (11th Cir. 2010) (quoting Nida v. Echols, 31 F. Supp. 2d 1358, 1376 (N.D. Ga. 1998)); see also Fink v. Dodd, 286 Ga. App. 363, 365, 649 S.E.2d 359, 362 (2007) (alteration in original) ("The employer[] with or without cause and regardless of its motives may discharge the employee without liability.").
47. Balmer v. Elan Corp., 278 Ga. 227, 228-29, 599 S.E.2d 158, 161 (2004).
48. 304 Ga. App. 310, 696 S.E.2d 359 (2010).
49. Id. at 312-13, 696 S.E.2d at 361-62.
50. Id. at 311, 696 S.E.2d at 361.
51. Id. at 310-12, 696 S.E.2d at 361.
52. Id. at 313, 696 S.E.2d at 362.
53. Id. at 312, 696 S.E.2d at 362 (quoting Doss v. Savannah, 290 Ga. App. 670, 677, 660 S.E.2d 457, 463 (2008)).
54. Id. (quoting Brown v. Rader, 299 Ga. App. 606, 611, 683 S.E.2d 16, 21 (2006)) (explaining that the doctrine of promissory estoppel did not apply to Tackett's claim because there can be no application "to a promise that is vague, indefinite, or of an uncertain duration").
55. See O.C.G.A § 34-7-1.
56. See JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW 45 (4th ed. 2008).
57. 289 Ga. 216, 710 S.E.2d 537 (2011).
58. Id. at 216, 710 S.E.2d at 538.
59. Id. at 217, 710 S.E.2d at 538.
60. O.C.G.A § 36-30-3(a) (2006).
61. Campbell, 289 Ga. at 217, 710 S.E.2d at 538.
62. O.C.G.A § 36-30-3(a).
63. Campbell, 289 Ga. at 219, 710 S.E.2d at 539 (quoting Jonesboro Area Athletic Ass'n v. Dickson, 227 Ga. 513, 518, 181 S.E.2d 852, 856 (1971)).
64. Id. at 218, 710 S.E.2d at 539.
65. Id. at 219, 710 S.E.2d at 540.
66. See WIMBERLY, supra note 56, at 6.
67. Id.; see supra Part IV(A).
68. See WIMBERLY, supra note 56, at 6.
69. 308 Ga. App. 768, 708 S.E.2d 682 (2011).
70. Id. at 770-71, 708 S.E.2d at 684-85.
71. Id. at 768-70, 708 S.E.2d at 683-84.

72. Id. at 770-71, 708 S.E.2d at 684-85.
73. Id. at 770, 708 S.E.2d at 684 (quoting Record Town, Inc. v. Sugarloaf Mills Ltd. P'ship, 301 Ga. App. 367, 368, 687 S.E.2d 640, 642 (2009)).
74. Id. at 770-71, 708 S.E.2d at 684 (quoting Andrews v. Skinner, 158 Ga. App. 229, 230, 279 S.E.2d 523, 525 (1981)).
75. Id. at 771, 708 S.E.2d at 685.
76. Id.
77. O.C.G.A § 34-7-20 (2008).
78. Id.
79. Tecumseh Prods. Co. v. Rigdon, 250 Ga. App. 739, 740, 552 S.E.2d 910, 912 (2001); O.C.G.A § 34-7- 20.
80. Munroe v. Universal Health Servs., Inc., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004) (internal quotation marks omitted).
81. Tecumseh Prods. Co., 250 Ga. App. at 741, 552 S.E.2d at 912.
82. Munroe, 277 Ga. at 864, 596 S.E.2d at 607 (quoting Robinson v. Kroger Co., 268 Ga. 735, 739, 493 S.E.2d 403, 408 (1997)) (internal quotation marks omitted).
83. 628 F.3d 1325 (11th Cir. 2010).
84. Id. at 1337 (quoting Munroe, 277 Ga. at 862, 596 S.E.2d at 605).
85. Id. at 1327.
86. Id. at 1330.
87. Id. at 1332.
88. Id. at 1338.
89. Id. (quoting Munroe, 277 Ga. at 862, 596 S.E.2d at 605) (internal quotation marks omitted).
90. CHARLES R. ADAMS III, GEORGIA LAW OF TORTS 270 (2010-2011 ed.).
91. Id. at 272.
92. Dowdell v. Krystal Co., 291 Ga. App. 469, 470, 662 S.E.2d 150, 153 (2008) (alteration in original) (quoting Piedmont Hosp., Inc. v. Palladino, 276 Ga. 612, 613-14, 580 S.E.2d 215, 217 (2003))(internal quotation marks omit ted).
93. 307 Ga. App. 649, 706 S.E.2d 87 (2011).
94. Id. at 649-50, 706 S.E.2d at 88-89.
95. Id. at 650-51, 706 S.E.2d at 89-90.
96. Id. at 653, 706 S.E.2d at 91.
97. Id. at 652, 706 S.E.2d at 90 (quoting Brownlee v. Winn-Dixie Atlanta, 240 Ga. App. 368, 369, 523 S.E.2d 596, 597-98 (1999)).
98. Id.
99. Id. at 653, 706 S.E.2d at 90-91; see, e.g., Drury v. Harris Ventures, Inc., 302 Ga. App. 545, 547, 691 S.E.2d 356, 358 (2010); Dowdell, 291 Ga. App. at 470-71, 662 S.E.2d at 153; Worstell Parking, Inc. v. Aisida, 212 Ga. App. 605, 606, 442 S.E.2d 469, 470 (1994).
100. Hunter v. Modern Cont'l Constr. Co., 287 Ga. App. 689, 690-91, 652 S.E.2d 583, 584 (2007).
101. Id. at 691, 652 S.E.2d at 584 (quoting Clo White Co. v. Lattimore, 263 Ga. App. 839, 839, 590 S.E.2d 381, 383 (2003)).
102. Allen Kane's Major Dodge, Inc. v. Barnes, 243 Ga. 776, 777, 257 S.E.2d 186, 188 (1979) (quoting W. Point Pepperell, Inc. v. Knowles, 132 Ga. App. 253, 255, 208 S.E.2d 17, 19 (1974)) (internal quotation marks omitted).
103. Id. at 778, 257 S.E.2d at 189 (quoting F.E. Fortenberry & Sons, Inc. v. Malmberg, 97 Ga. App. 162, 165, 102 S.E.2d 667, 671 (1958)).
104. 309 Ga. App. 637, 710 S.E.2d 839 (2011).
105. Id. at 640, 710 S.E.2d at 843.
106. Id. at 637-38, 710 S.E.2d at 841-42.
107. Id. at 639, 710 S.E.2d at 842 (quoting Clo White Co., 263 Ga. App. at 840, 590 S.E.2d at 383).
108. Id. (quoting Riel v. Paulding County Bd. of Educ., 206 Ga. App. 230, 231, 425 S.E.2d 305, 307 (1992)).
109. Id. at 640, 710 S.E.2d at 843 (citing Allen Kane's Major Dodge, 243 Ga. App. at 777, 257 S.E.2d at 188).

110. Id. at 640-41, 710 S.E.2d at 843-44 (citing Hunter, 287 Ga. App. at 691, 652 S.E.2d at 584).
111. Id. at 643, 710 S.E.2d at 845.
112. Id. (quoting Patterson v. Se. Newspapers, Inc., 243 Ga. App. 241, 242, 533 S.E.2d 119, 121 (2000)).
113. Id. at 643-44, 710 S.E.2d at 845.
114. Id. at 640, 710 S.E.2d at 843.
115. Id. at 641, 710 S.E.2d at 843.
116. Id. at 643, 710 S.E.2d at 845.
117. Id. at 643-44, 710 S.E.2d at 845.
118.. See O.C.G.A § 51-2-4 (2000) ("An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and is not subject to the immediate direction and control of the employer.").
119. See id.; see also ADAMS, supra note 90, at 295 ("An 'independent contractor' is one who, in the pursuit of his own in dependent business, under takes to per form a task for another, while retaining for himself the right to control the means, method, and manner of its ac complishment.").
120. 308 Ga. App. 695, 708 S.E.2d 539 (2011).
121. Id. at 697, 708 S.E.2d at 542.
122. Id. at 695, 708 S.E.2d at 541.
123. Id. at 697, 708 S.E.2d at 542.
124. O.C.G.A § 51-2-4 (2000).
125. Yancey, 308 Ga. App. at 697, 708 S.E.2d at 542; see also O.C.G.A. § 51-2-4.
126. Yancey, 308 Ga. App. at 697, 708 S.E.2d at 542.
127. Id. at 698, 708 S.E.2d at 543.
128. Id.
129. Id.
130. Id. at 699-700, 708 S.E.2d at 544.
131. O.C.G.A. § 51-2-5(2) (2000).
132. 308 Ga. App. at 698, 708 S.E.2d at 543 (internal quotation marks omitted); O.C.G.A. § 51-2-5(2).
133. Yancey, 308 Ga. App. at 699-700, 708 S.E.2d at 544.
134. Id. at 700, 708 S.E.2d at 544.
135. Ga. H.R. Res. 178 § 1, Reg. Sess., 2010 Ga. Laws 1260, 1260-61 (amending GA. CONST. art. III, § 6, para. 5© (3)); see supra Part II(A).
136. See O.C.G.A. § 13-8-2(a)(2) (2010), amended by O.C.G.A. § 13-8-2(a)(2) (Supp. 2011).
137. WIMBERLY, supra note 56, at 115.
138. GA. CONST. art. III, § 6, para. 5(c)(3).
139. Ga. H.R. Bill 30, Reg. Sess. (codified at O.C.G.A. §§ 13-8-2 13-8-50 to 59 (Supp. 2011)).
140. Id. § 4 (codified at O.C.G.A. § 13-8-50).
141. Cox v. Altus Helathcare & Hospice, Inc., 308 Ga. App. 28, 31, 706 S.E.2d 660, 664 (2011)(quoting Orkin Exterminating Co. v. Walker, 251 Ga. 536, 537, 307 S.E.2d 914, 916 (1983); see also O .C.G.A. § 13-8-2.1(a) (2010), re pealed by Ga. H.R. Bill 30 § 3; W.R. Grace & Co. v. Mouyal, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992).
142. Sysco Food Servs. of Atlanta, Inc. v. Chupp, 225 Ga. App. 584, 585, 484 S.E.2d 323, 325 (1997).
143. Koger Props., Inc. v. Adams-Cates Co., 247 Ga. 68, 69, 274 S.E.2d 329, 331 (1981).
144. See WIMBERLY, supra note 56, at 115.
145. Drumheller v. Drumheller Bag & Supply, Inc., 204 Ga. App. 623, 626, 420 S.E.2d 331, 334 (1992) (quoting Watson v. Waffle House, Inc., 253 Ga. 671, 672, 324 S.E.2d 175, 177 (1985)) (discussing that courts have held covenants not to compete "to be nonseverable and ha[ve] held that overbreadth of one portion of the covenant so taints the entire covenant as to make it unenforceable").
146. Id.
147. Advance Tech. Consultants, Inc. v. RoadTrac, LLC, 250 Ga. App. 317, 320, 551

S.E.2d 735, 737 (2001). The court in Advance Technology also stated that "Georgia courts have traditionally divided restrictive covenants into two categories: 'covenants ancillary to an employment contract, which receive strict scrutiny and are not blue-penciled, and covenants ancillary to a sale of [a] business, which receive much less scrutiny and may be blue-penciled.'" Id. at 319, 551 S.E.2d at 736 (quoting Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 289, 90, 498 S.E.2d 346, 349 (1998)). How ever, the recent amendment to the Georgia Constitution permits courts to blue-pencil restrictive covenants ancillary to employment contracts. See supra Part II(A); see also supra text accompanying note 11.

148. 308 Ga. App. 28, 706 S.E.2d 660 (2011).
149. Id. at 31, 706 S.E.2d at 664.
150. Id. at 29, 706 S.E.2d at 662-63.
151. Id. at 31, 706 S.E.2d at 664 (quoting Habif, 231 Ga. App. at 292, 498 S.E.2d at 350).
152. Id.
153. Id.
154. Id.
155. Id.
156. Gordon Document Prods., Inc. v. Serv. Tech., Inc., 308 Ga. App. 445, 447, 708 S.E.2d 48, 52 (2011)(quoting Hostetler v. Answerthink, Inc., 267 Ga. App. 325, 328, 599 S.E.2d 271, 274 (2004)).
157. 308 Ga. App. 445, 708 S.E.2d 48 (2011).
158. Id. at 445, 708 S.E.2d at 50.
159. Id. at 447, 708 S.E.2d at 51-52.
160. Id. at 446 n.2, 448, 708 S.E.2d at 51 n.2, 52.
161. Id. at 448, 708 S.E.2d at 52 (quoting Dent Wizard Intl. Corp. v. Brown, 272 Ga. App. 553, 556, 612 S.E.2d 873, 876 (2005)).
162. 309 Ga. App. 503, 710 S.E.2d 662 (2011).
163. Id. at 506, 710 S.E.2d at 665 (quoting Brinson v. Martin, 220 Ga. App. 638, 638, 469 S.E.2d 537, 538 (1996)) ("Under the rule of lex fori, procedural or remedial questions are governed by the law of the forum, the state in which the action is brought.").
164. Id. at 503, 710 S.E.2d at 664.
165. Id. at 506, 710 S.E.2d at 665 (quoting Iero v. Mohawk Finishing Prods., Inc., 243 Ga. App. 670, 671, 534 S.E.2d 136, 138 (2000)).
166. Id. at 507, 710 S.E.2d at 665-66.
167. Id. at 507, 710 S.E.2d at 666 (quoting Eichmann v. Nat. Hosp. & Health Care Servs., Inc., 719 N.E.2d 1141, 1144, 1148 (Ill. App. Ct. 1999)).
168. Id. at 508, 710 S.E.2d at 666.
169. Id. at 508, 710 S.E.2d at 667.
170. 305 Ga. App. 298, 699 S.E.2d 623 (2010).
171. Id. at 298, 699 S.E.2d at 627.
172. Id. at 299-300, 699 S.E.2d at 627-28.
173. Id. at 307, 699 S.E.2d at 633
174. Id. at 307, 699 S.E.2d at 632.
175. Id. at 307, 699 S.E.2d at 633.
176. Id. at 306, 699 S.E.2d at 632.
177. Id. at 300, 699 S.E.2d at 628.
178. Id. at 306, 699 S.E.2d at 632.
179. Id. (quoting Waldeck v. Curtis 1000, Inc., 261 Ga. App 590, 592, 583 S.E.2d 266, 268 (2003)) (internal quotation marks omitted).
180. Id. at 309, 699 S.E.2d at 634.
181. Id.
182. Id.
183. Id. at 311, 699 S.E.2d at 635.

AT THE CROSSROADS: HIPAA, THE PRIVACY RULE, AND INFORMAL DISCOVERY IN GEORGIA

By Eric J. Frisch and Douglas W. Smith

Eric is an "AV" rated lawyer and Partner with the firm Carlock Copeland in Atlanta, Georgia.

He is in the firm's Health Care and Commercial Litigation practice groups. Since graduating in 1996, Eric has steadily built his practice around the trial of complex medical malpractice, personal injury, and commercial cases. He has tried more than 15 cases in the Federal and State courts of Georgia, representing both plaintiffs and defendants.

Doug is a Partner with the firm Carlock Copeland in Atlanta, Georgia.

He has practiced in the insurance defense arena for many years concentrating in the areas of Medical Malpractice, General Liability and Long Term Care. Currently, he has a very active practice in the defense of doctors, nurses, dentists, optometrists, chiropractors and long term care facilities. Doug also represents a number of hospitals in the State of Georgia. He has tried over fifty malpractice cases to a jury, and more than one hundred cases overall.

Since the Georgia Supreme Court issued its second opinion in *Baker v. Wellstar*,[1] litigants and courts have struggled to find consistency in the law and a zone of comfort regarding the interviewing of healthcare providers during litigation. Some have narrowly interpreted *Baker II* as providing a substantive right of privacy; others have interpreted the decision as providing procedural guidance to govern discovery; and still others have used the decision as a new source for awarding sanctions. What is clear, however, is that HIPAA,[2] the Privacy Rule,[3] and Georgia case law have met at a crossroads and consideration of all three is extremely important in deciding when, and under what circumstances, litigants can interview healthcare providers outside of formal discovery procedures.

In this article, we first look at the HIPAA source legislation and the Privacy Rule. Next, we examine the progression from *Orr v. Sievert* to *Baker II*. Finally, we offer some suggestions for qualified protective orders based on our collective experience in various state and superior courts around the state.

I. DISCOVERY BEFORE HIPAA

Before April of 2003, the issue of whether defense counsel could interview a healthcare provider "off the record" about a claimant's personal health information was a matter of state law regarding physician-patient confidentiality, the rules governing discovery in a civil lawsuit, and the admission of evidence at trial. Many states had statutes prohibiting so-called "*ex parte*" physician interviews in civil lawsuits. Such statutes were based on public policy, reasoning that communications between a doctor and a patient are private, confidential, and therefore not subject to discovery in the absence of formal, written authorization by the patient.

Other states, including Georgia,[4] did not have such a statute and, in fact, enacted a statute creating a waiver of expectation of privacy when a lawsuit is filed to recover damages for a personal injury.[5] The rationale is that a physician witness is like any other witness in a civil case and the parties are free to interview the witness informally before trial.

As we will discover, HIPAA did not change

any of these rules or address the issue of "*ex parte*" communications at all. However, it did provide a springboard for claimants and litigants to try to "turn the tables" on their opponents in personal injury litigation.

II. HIPAA AND THE PRIVACY RULE

Our analysis begins with the ubiquitous piece of legislation known as the Health Insurance Portability and Accountability Act of 1996 or "HIPAA." The stated purpose of the bill was to allow employees to keep their health insurance when they changed jobs and to provide "administrative simplification," by providing uniform standards for electronic communications and transactions related to health care, including payment and electronic medical records.

Part of the "administrative simplification" portion of the statute included a set of standards for protecting the privacy of "private health information" ("PHI"), primarily in the context of electronic transactions.

Tucked away in a corner of the "administrative simplification" rules was a requirement that the Department of Health Services ("DHS") create rules for standardizing the protection of PHI across the country. This requirement, in turn, gave rise to a set of administrative rules collectively known as "The Privacy Rule." In April of 2003, the final Privacy Rule, 45 CFR §164, et seq., became effective. The purpose of the Privacy Rule was to standardize the procedure governing *when* a covered entity may disclose PHI (generally, provider or health insurer), *to whom* the covered entity may disclose the PHI, *what* the covered entity may disclose, and limitations on the secondary use of PHI by covered entities.

Primarily, DHS ruled that covered entities may disclose PHI *without* any patient involvement for treatment, payment, and "health care operations." Significantly for litigation, the definition of "health care operations" *includes* claims investigation and engaging counsel by a covered entity. Furthermore, when the covered entity is disclosing PHI for treatment, payment and/or health care operations, the entity does *not* need written permission from the patient or notice and an opportunity to object.

However, DHS did limit the circumstances under which a covered entity may disclose PHI outside of the rubric of treatment, payment or health care operations. In general, DHS ruled that a covered entity must obtain a written authorization before a covered entity can disclose PHI to a third party of any kind. DHS also required that the authorization be revocable and must provide the patient with the opportunity to object to a given disclosure. Significantly, the Privacy Rule acts as a floor, meaning that it preempts less stringent state laws governing the disclosure of health information to third parties. However, DHS left open the opportunity for states to enact more stringent state laws.

DHS recognized the potential impact of the Privacy Rule on litigation. For example, in Section 164.512(a), DHS ruled that a covered entity *may* disclose PHI *without* consent, written authorization or notice and an opportunity to object in judicial or administrative proceedings *when* the disclosure is "required by law." However, the disclosure must be made in compliance with the specific law and limited only to the disclosures necessary for compliance.

The Department also ruled that a covered entity may disclose PHI under the supervision of a court or administrative tribunal (a court order). In addition, a covered entity may disclose PHI in response to a subpoena, discovery request,

or other lawful process *without a court order* provided that the party seeking the disclosure gives satisfactory assurances that it has given notice to the patient or has made reasonable efforts to secure a qualified protective order. The Department required that a qualified protective order including provisions prohibiting the parties from using or disclosing the PHI for any purpose other than the litigation or proceeding for which such information was requested and requiring the return to the covered entity or destruction of the PHI (including all copies made) at the end of the litigation or proceeding.

Significantly, the Department did not address explicitly the issue of the disclosure of "oral" PHI and informal discovery in litigation. The Department's Office of Civil Rights maintains a website (www.hhs.gov/ocr/hipaa) that provides information about the Privacy Rule, along with official interpretations. To date, the Office of Civil Rights has never posted any interpretation of the Rule regarding *ex parte* interviews.[6] Accordingly, the issue has been left to the various state and Federal courts.

Notably, HIPAA and the Privacy Rule were refined further in an update known as the HITECH Act,[7] which was part of an economic stimulus package enacted in 2009. Relevant to litigation, the HITECH Act extended certain compliance requirements from covered entities to their business associates, which includes law firms and expert witnesses, among others.

III. CASE LAW - FROM *ORR* TO *BAKER II* AND BEYOND

Since 1978, the prevailing rule in Georgia was that healthcare provider witnesses were like any other fact witness in litigation. This was based primarily on the fact that there was no true patient-physician privilege under Georgia law. Rather, the prevailing rule was that a healthcare provider could not be required to disclose patient information absent written authorization or other waiver, court order, or subpoena *except* when the patient placed "care and treatment or the nature and extent of his or her injuries" at issue in litigation. O.C.G.A. §24-9-40(a). When a patient placed his health at issue, he waived any right to prevent a healthcare provider from disclosing that information (except for mental and psychiatric care).

Based on this statutory scheme, in 1982, the Georgia Court of Appeals decided *Orr v. Sievert*, 162 Ga.App. 677 (1982), holding that Section 24-9-40(a) permitted treating physicians to disclose any opinions they had about the care provided to a patient by another provider when the patient sues for malpractice. In *Orr*, the patient sued two providers for malpractice. The defense called some of the subsequent treating physicians to render opinions about the care provided by the defendants. Relying on Section 24-9-40, the Court held that the patient's waiver meant that the treating physicians were free to offer their opinions without an authorization from the patient. To date, *Orr* has never been overruled.

The Georgia Supreme Court did, however, address the interaction between Section 24-9-40, *Orr*, and the Privacy Rule in the 2008 case of *Moreland v. Austin*, 284 Ga. 730 (2008). In that case, the Court held that the Privacy Rule did not prevent informal discovery per se. However, following the central tenant that the Privacy Rule set forth certain minimum procedural requirements, the Court held that such interviews can only be conducted when the patient signs a written authorization or when a trial court enters a qualified protective order.

After *Moreland*, the battle moved from wheth-

er informal interviews could be conducted at all to the circumstances under which a trial court can permit such interviews. In 2010, the Supreme Court took two opportunities in the same case to outline what Georgia law requires for qualified protective orders permitting the disclosure of PHI in litigation in the case of *Baker v. Wellstar Healthsystem*, 2010 WL 2159372 ("*Baker I*")[8] and, on reconsideration, *Baker v. Wellstar Healthsystem*, 288 Ga. 336 (2010) (*Baker II*).

In *Baker*, the Court addressed the question of *how* litigants may informally interview healthcare providers in injury cases. The defendant had sent third party requests for production of documents under Section 9-11-34(c) to various healthcare providers. The defense then obtained a qualified protective order from the trial court, which permitted informal interviews. The trial court conditioned the interviews by ruling that the providers were not required to speak with the defense, prohibiting the redisclosure of the information after the litigation ended, and requiring the return of any written materials at the end of the litigation. The Court held that this part of the trial court's order complied with the Privacy Rule.

However, the *Baker I* Court ultimately reversed and remanded back to the trial court because the qualified protective order permitted the defense to discuss "any past, present, or future care and treatment." The Court reasoned that under Georgia substantive law, Section 24-9-40(a), an injury claimant only waives the right of privacy to medical information regarding a condition that they put into issue in the case. The Court held that the qualified protective order was too broad as a result.

The plaintiff moved the Court to reconsider the scope of the qualified protective order. In *Baker II*, the Court focused on the Privacy Rule's purpose "[t]o protect and enhance the rights of consumers by providing them access to their health information and controlling the inappropriate use [thereof]." 65 Fed.Reg. 82462, 82463 (Dec. 28, 2000). The Court was concerned that the qualified protective order was too broad in that it permitted the defense to discuss *any* aspect of the patient's health with any number of unnamed providers without any further notice to the patient. The Court also expressed concern that such an order would expose the patient to the "dangers associated with ex parte interviews," which included, in the Court's opinion, the potential for unwarranted probing into sensitive matters, the potential disclosure of information by the provider to the defense but not the patient, and the potential that the defense will somehow influence the provider to team up with other healthcare providers.

To avoid the associated "dangers," the Court set forth certain minimum requirements for a valid qualified protective order. According to the Court, the orders should state:

(1) the name(s) of the health care provider(s) who may be interviewed,

(2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed,

(3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation, and

(4) the fact that the health care provider's participation in the interview is voluntary.

At first glance, these rules are pretty basic and reasonable. However, the Court took an additional step and cautioned trial courts to examine whether there is "any evidence indicating that ex parte interviews have or are ex-

pected to stray beyond their proper bounds." In so doing, the Court wrote that trial courts should consider whether the circumstances warrant the defense providing the patient with notice and an opportunity to be present or, alternatively, requiring a transcript of the interview. It is section 3(b) of the *Baker II* decision that has probably resulted in the most litigation and headaches for the defense.

IV. RECOMMENDATIONS FOR IN FORMAL DISCOVERY AFTER *BAKER*

Since *Baker II*, trial courts have split on whether to sign qualified protective orders and, if they do sign such orders, the circumstances under which informal discovery is to be conducted. The orders are as numerous as the trial courts in Georgia and range from the permissive (consistent with *Moreland*) to the restrictive (following *Baker II* to the letter). From the myriad of orders, however, some general principles for drafting orders that should pass muster under *Baker II* can be gleaned.

First, a qualified protective order should be complete and comprehensive as to which healthcare providers to which it is directed. In the past, the names of the affected providers were frequently left out of the qualified protective order or the order was signed in blank. Litigants should now direct the order to specific healthcare providers.

Second, the order should set forth the nature and extent of the conditions, injuries, and/or treatment "at issue." Additionally, this recommendation is circular - often the point of conducting informal interviews is to figure out whether a condition is or is not "at issue" in the case. To address this, begin with the complaint to see what the claimant alleges as the condition, injury, or treatment "at issue." Next, review early discovery requests to narrow or broaden the issues as needed. For example, a set of requests to admit can help eliminate some conditions as being "at issue" in the case. Alternatively, interrogatories and depositions can help determine what the plaintiff/patient thinks is "at issue" in the case. Using the responses to such discovery as a jumping off point, the trial courts should hopefully see the necessity to interview treating providers to obtain their opinions about such issues, including causation and future damages.

When all else fails, remember that HIPAA does not prevent formal discovery of *any* kind from covered healthcare providers. In other words, if a court denies a request for a qualified protective order, the litigation should not end as a result. Rather, there is still the opportunity to take depositions, issue subpoenas, and obtain medical narratives from healthcare providers.

V. CONCLUSION

The battle over informal interviews in litigation is not over in Georgia. The Court of Appeals is currently considering whether the denial of a qualified protective order violates the constitutional rights of the defendant in the case of *Ehrlich v. Tender Loving Healthcare* (Case No. A11I0198). Litigants should follow the letter of any qualified protective order they obtain when conducting informal interviews of healthcare providers.

ENDNOTES:

[1] 288 Ga. 336 (2010)

[2] Health Insurance Portability and Accountability Act of 1996, Pub.L. 104-191, 110 Sta. 1936 (1996), codified as amended in scattered sections of Title 42 United States Code.

[3] 45 C.F.R. Part 160 and Part 164, Sub-parts A and E.

[4] Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982).

[5] O.C.G.A. § 24-9-40; O.C.G.A. § 24-12 -1, effective January 1, 2013.

[6] The authors have emailed the OCR through the website several times on this issue, but have never received a response.

[7] Health Information Technology for Economic and Clinical Health Act, enacted as part of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 226 (2009), codified in 42 U.S.C. § 17931 (effective 2012); 45 C.F.R. Part 160 and Part 164, Subparts A and C.

[8] The Supreme Court has withdrawn and superseded the opinion in Baker I.

STANDARDS OF REVIEW ON APPEAL: TREAT THEM LIGHTLY AT YOUR PERIL

By: Todd C. Alley

Todd C. Alley is Of Counsel at Hawkins Parnell Thackston & Young LLP in Atlanta, focusing on mass tort litigation. He recently joined Hawkins Parnell after serving 12 years as an Assistant United States Attorney in the Northern District of Georgia and 3 years as an Assistant District Attorney for Paulding, Polk, and Haralson Counties in Georgia. He is a 1990 graduate of Vanderbilt University and 1993 graduate of the University of Georgia School of Law.

You took the case to trial. The trial court made errors, according to you: sustaining a *Batson* challenge to your selection of jurors; improperly admitting evidence against your client; denying your motion for mistrial; and, denying your motion for directed verdict . . . all before lunch break on the first day of trial. Or at least that's how it felt. After the partial grant of summary judgment before trial and, the jury verdict against your client after trial, with a whopping damages award to boot, you quickly order the transcripts in the case, file a timely notice of appeal,[1] and tee-up your argument. Ahead of schedule, you file your appeal brief, which can only be described as a masterpiece – synthesizing your detailed factual rendition with sure-to-persuade authority and argument. In due course, you get the opinion from the Court of Appeals. But, rather than the Court lauding you as the next Ted Olson,[2] you read the opinion to find these words:

> This appeal is deficient in several respects. [Insert Your Name Here] has failed to provide a concise statement of the applicable standards of review as required by Court of Appeals Rule 25(a)(3).[3]

Or perhaps:

> [Insert Your Name Here] failed to provide the appropriate standard of review in his appellate brief, in violation of Court of Appeals Rule 25(a)(3).[4]

Or maybe even:

> The attention of appellate counsel is further drawn to Court of Appeals Rule 15 (a) (3), providing that the portion of the brief containing the argument and citation of authorities "shall include a concise statement of the applicable standard of review for each issue presented in the brief."[5]

Or quite possibly:

> At the outset, we address multiple and flagrant deficiencies in appellant's brief. . . Appellant's brief also omits "a concise statement of the applicable standard of review with supporting authority for each issue presented in the brief."[6]

These are not words you ever want to read about your brief in an opinion by the Court of Appeals. But aside from avoiding the slings and arrows of the Court of Appeals, why, you may ask, is it important to include the standards of review in your appellate brief? Quite

simply, the standard of review states what kind of error you think occurred at the trial court level and sets up your argument to show that error. Setting forth the standards of review for each enumeration of error sets the bar over which your argument must hurdle. It sets the goal line across which your argument must carry the ball. If your standard of review is abuse of discretion, a highly deferential standard, your argument must demonstrate that the trial court manifestly abused the great level of discretion vested in it – a steep mountain to climb. Conversely, if you set the bar incorrectly (particularly too low) or fail to set it at all and ignore the standard of review altogether, your argument will very likely fail.

Moreover, as shown above, the Court's rules demand a statement as to standard of review. The requirements for appellate briefs are clearly set forth in the Court rules and, as the Court has stated, "were created, not to provide an obstacle, but to aid parties in presenting their arguments in a manner most likely to be fully and efficiently comprehended by this Court."[7] The purpose of this article is to introduce you (or *re*-introduce you, hopefully) to the rule requiring an appellate brief to have a statement of the applicable standard of review, to familiarize you with the often incorrectly applied standards of review to be used when appealing, and to provide you with the knowledge and tools to avoid having the above-cited verbiage, or language similar thereto, directed at your appeal brief.

I. GEORGIA COURT OF APPEALS RULE 25.

A. The Rule.

Rule 25 sets forth the requirements for the structure and content of the brief of the appellant. The Rule requires there be three parts to appellant's brief. Part One is "a succinct and accurate statement of the proceedings below and the material facts relevant to the appeal," together with citations to the record to support the factual recitation.[8] Part Two is the "enumeration of errors."[9]

Part Three, as contained in Rule 25(a)(3), is "the argument and citation of authorities" - the meat of the brief, though the impact and importance of the factual statement should not be diminished. In addition to allowing for argument and authorities, Rule 25(a)(3) *requires* "a concise statement of the applicable standard of review with supporting authority *for each issue presented in the brief*."[10]

B. The Meaning of Rule 25(a)(3).

What does it mean to write a concise statement of the applicable standard of review? At the very least, at the outset of the argument section on each issue, or enumeration of error,[11] you, as the appellant, should write a brief statement as to the standard of review applicable to that issue or enumeration of error only, along with a citation of authority to support that statement as to standard of review. You may then proceed on to argue and cite authority. Such a statement in a brief might look something like this:

> ISSUE ONE: THE TRIAL COURT ABUSED ITS DISCRETION BY QUALIFYING STERLING ARCHER[12] AS AN EXPERT IN HOME CONSTRUCTION MATERIALS.
>
> a. Standard of Review.
>
> This Court reviews the trial court's decision to qualify a witness as an expert for abuse of discretion. *Williamson v. Harvey Smith, Inc.*, 246 Ga. App. 745, 749 (2000).
>
> b. Argument and Citation of

Authority.

> The trial court abused its discretion by qualifying Mr. Sterling Archer, a handyman by trade, as an expert in home construction materials….

The process would then be repeated for each successive enumeration of error. Another way to set out the standards of review would be to add a section in the brief, after the enumeration of errors section and before the argument section, entitled "Standards of Review," in which the standard of review applicable to each enumeration of error would be listed in order, with numbers matching those of the enumeration of errors. However, if this practice is followed, the appropriate standard of review should again be referenced within the argument section, but need not be set apart as illustrated above.

C. The Consequences of Failing to Follow Rule 25(a)(3).

The bad news is, because Rule 25(a)(3) is mandatory, failure to set forth the applicable standard of review could result in your being held in contempt of court, your arguments being deemed abandoned, or your appeal being dismissed.[13] The good news is that the Appellate Practice Act dictates that appeals "shall be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case,"[14] and the Court of Appeals has followed that dictate.[15]

You can rest assured, however, that at the very least, failure to comply with Rule 25(a)(3) or any of the other structural rules will cause the Court to vividly point out your failings, as shown above, or in this example:

> As a threshold matter, we must address [Insert Your Name Here]'s disregard of this Court's rules as they pertain to his brief. . . ."This Court does not look with favor upon one who fails to follow the rules of this Court. In fact, the failure to comply with this Court's rules may subject the offending party to contempt and may subject the appeal to dismissal or cause the appellant's brief to be stricken." In this case, however, we nonetheless endeavor to discern and address the enumerations of error that are supported by argument.[16]

II. DIFFERENT STANDARDS OF REVIEW.

Now that you understand the requirement to set forth the applicable standard of review for each enumeration of error in your brief, as well as the seriousness with which the Court of Appeals views this requirement, it is imperative to know what standards of review exist and in what circumstances they are to be applied. There are essentially four standards of review: abuse of discretion (probably the most common), *de novo* review, the "any evidence" test, and the clearly erroneous standard.[17] Sometimes, rulings by the trial court require the Court of Appeals to employ more than one standard of review. Each standard, and its application, will be discussed below.

A. Abuse of Discretion Standard.

Whenever the trial court exercises its broad discretion, typically in the areas of trial management and conduct, the review will be for abuse of that discretion. "No principle is better settled than that in the conduct of trials, both civil and criminal, a broad discretion is vested in the judge below, and that that discretion will not be controlled by this court unless it is manifestly abused."[18] This is a highly deferential standard – meaning the Court of Appeals will typically not reverse a trial court's use of its discretion absent some manifest abuse.[19] Indeed an appellate court will not reverse a trial court's discretionary decisions so

long as some reasonable evidence supports the trial court's decision,[20] nor even if the appellate court would have reached a different conclusion.[21] In other words, the Court of Appeals will not substitute its own judgment for that of the trial court in matters within the trial court's broad discretion, so long as some reasonable evidence supports the trial court's decision.

Some instances where the standard of review is for abuse of discretion:

1. Discovery rulings.[22]
2. Bifurcation or severance of trial.[23]
3. Selection of jurors.[24]
4. Evidentiary ruling.[25]
5. Qualifying witness as expert.[26]
6. Denial of motion for mistrial.[27]
7. Submission of special verdict form or special interrogatories to the jury.[28]

Whenever you have an issue that arises in the lead-up to trial, such as discovery or the manner in which the trial is going to proceed; during the conduct of the trial itself, such as matters involving admissibility of evidence or testimony of witnesses; or, in any situation involving the jurors or the attorneys during trial, you should be thinking "abuse of discretion" as your standard on appeal.

A good example of the broad deference shown to a trial court in matters reviewed under the abuse of discretion standard is in *Coe v. Carroll & Carroll, Inc.*, a suit by the widow of a driver who crashed his car into the back of a tractor-trailer that was stopped on the side of the road, partially protruding onto the roadway. The trial court overruled objections by the plaintiff to admission of evidence regarding her deceased husband's use of methadone on the day of the accident, as well as evidence of his prior drug use. In finding no abuse of discretion in the trial court's decision to allow the evidence, the Court of Appeals painstakingly detailed the measurements of the roadway, the truck, and the driver's vehicle, as well as discussing the medical testimony, in concluding that the evidence was correctly admitted as bearing upon the deceased's contribution to the accident.[29]

Because the trial court's discretion is so broad (and because the harmless error standard also applies to decisions by the trial court which may be an abuse of discretion), successful appeals based upon issues reviewed under the abuse of discretion standard are hard to find. However, in *Saye v. Provident Life & Accident Ins. Co.*, the trial court admitted, over objection, hearsay statements which went to the ultimate issue of the case, that being whether or not the plaintiff's disability resulted from sickness or from an injury. The hearsay testimony was that plaintiff had described his disability as a "sickness." The Court of Appeals reversed the trial court, finding the admission of the hearsay statements was *both* an abuse of discretion *and*, because it went to the ultimate issue in a case in which the evidence was "not overwhelming either way," it was not harmless error.[30]

B. *De Novo* Review Standard.

Whenever the trial court reaches conclusions of law, such determinations are not due the deference the Court of Appeals gives the trial court on discretionary matters, and the Court of Appeals will review the conclusions of law *de novo*, meaning "anew" or "from the beginning."[31] A strictly *de novo* review will be conducted only when there is no dispute as to the evidence or the credibility of the witnesses *and* the trial court decides a question of law. [32] In this instance, the trial court is owed no deference whatsoever, and the Court of Appeals will review the legal matter "anew" and determine whether or not "plain legal error" exists.[33]

Some instances where the *de novo* review has been utilized are:

1. Whether attorney's fees may be determined based on disparity of income in action under the Family Violence Act.[34]
2. Whether a settlement is an enforceable agreement.[35]
3. When the construction of a contract is in question.[36]
4. Trial court's ruling on motion to dismiss.[37]
5. Trial court's conclusions of law as to confirmation in a foreclosure proceeding.[38]
6. Summary Judgment.

Perhaps the most often appealed issue in which the *de novo* review standard is used is the trial court's granting or denying of a motion for summary judgment. Summary judgment is appropriate when the materials of record show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[39] Thus, because the trial court has made a legal judgment that "no genuine issue as to any material fact" exists, the Court of Appeals must review the trial court's decision about the evidence from the beginning, *de novo*, to determine whether the trial court erred.[40] In so doing, the Court views "the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant."[41] Moreover, the Court of Appeals will affirm a summary judgment determination if it is "right for any reason."[42] That is, if there exists an alternative basis which would support the trial court's determination, though not advanced by the parties, the Court will affirm the summary judgment determination on that basis.[43]

Because the appellate courts review under the *de novo* standard gives no deference to the decision of the court below, an appeal seeking reversal of the trial court under this standard has a greater chance of success. In *Thomas v. HL-A Co.*, the Court of Appeals reversed the trial court's grant of summary judgment in favor of the defendant, HL-A, and determined that, based on the record, there was sufficient circumstantial evidence from which a jury could conclude that the plaintiff was wrongfully terminated and that the trial court erred in granting summary judgment. In so doing, the Court reiterated that "summary judgments enjoy no presumption of correctness on appeal, and an appellate court must satisfy itself *de novo* that the requirements of [summary judgment] have been met."[44]

In appeals from summary judgment determinations, because the Court will be examining the evidence, the statement of facts and citations to the trial court record will be crucial and should not be given short-shrift. Also, because of the "right for any reason" rule, you should advance any and all arguments in support of the summary judgment determination (if that is your posture). Though it may be disregarded by the Court, it is better to advance a proper basis upon which the Court can rule in your favor, even if it was not raised below, and attempt to convince the Court of the propriety of your position.

C. "Any Evidence" Standard.

While it may be difficult to successfully challenge the legal conclusions of the trial court under the abuse of discretion or *de novo* standard, it is perhaps more difficult to successfully challenge the trial court's or jury's findings in situations where the "any evidence" standard applies. The "any evidence" standard typically will apply to post-trial, post-verdict, results and determinations. The "any evidence" standard essentially means that a jury verdict will be upheld if any evidence, when viewed in the light most favorable to the victorious

party, supports the jury verdict.[45] In other words, in order to be successful in situations arising under the "any evidence" standard, the challenger must show that "a contrary judgment *was demanded*" – not simply authorized, but demanded.[46] The "any evidence" standard, a very high standard, indeed, is utilized mainly in these post-trial situations:

1. Denial of motion for directed verdict.[47]
2. Denial of directed verdict motion or judgment n.o.v.[48]
3. Challenge to a jury verdict.[49]
4. Grant or denial of a motion for new trial.[50]

In *Yi v. Li*, an action in contract, the seller of a Bruster's Ice Cream franchise and the buyer agreed that approval by Bruster's of the sale of the franchise was a condition precedent to the contract. The buyer took over the ice cream store, but when Bruster's did not approve the sale of the franchise, the buyer demanded that the seller return the purchase money and take back possession of the ice cream store. The seller refused, and the buyer brought suit. The case went to a jury trial, and the jury found in favor of the buyer. The trial court denied the seller's motion for judgment n.o.v., and the seller appealed. Prior to deciding the issue, the Court of Appeals set forth a concise statement on why making proper objections and a record at trial and setting forth solid enumerations of error and standards of review on appeal is important:

> As an initial matter, we note that this Court is constrained by what the law says we can review, which in this case, is the question of whether there was any evidence to support the Purchasers' claim for rescission of the contract. We are limited on appeal to those grounds presented to and ruled upon by the trial court and then enumerated as error. [51]

The Court then went on to find that the failure of the condition that Bruster's approve the sale of the franchise did not support a rescission claim and, thus, there was no evidence to show a breach of contract by the seller. The Court, having found no evidence to support the jury's verdict, found that judgment n.o.v. should have been granted upon the seller's motion and reversed the trial court.[52]

D. "Clearly Erroneous" Standard.

A trial court's findings of fact, typically as a result of a bench trial, will not be set aside unless those findings are clearly erroneous. In other words, if there is any evidence to sustain the trial court's findings of fact, they will not be set aside.[53] Because the "clearly erroneous" standard is very similar to the "any evidence" standard, the two are often used synonymously.[54] This standard of review is frequently seen in criminal cases, but only seen in civil cases in which the trial court "heard live testimony and was called upon to act as the ultimate finder of fact."[55] If the trial court made its decision of law based upon the motions, "documents, affidavits, depositions and other evidence in the record," then the decision would be reviewed *de novo*, rather than under the clearly erroneous standard.[56]

A common situation in which the clearly erroneous standard is applied is when a trial court acts as the fact finder in a bench trial. In *Allen v. Santana*, a suit involving payment of debts and foreclosure on security for a loan, namely a Rolls-Royce vehicle, the trial court heard the evidence at a bench trial and found facts that established that the plaintiff was entitled to a writ of possession for the Rolls-Royce, as well as a money judgment for the loan and interest. The court's factual findings, including credibility determinations, were not clearly erroneous.[57]

In a rare instance wherein a trial court's findings were set aside based on clearly erroneous findings of fact occurred in *Richmond County Hospital Authority, et al v. Richmond County, et al*, which involved the lease of a hospital by the Hospital Authority to four private corporations it had formed. In reversing the trial court's decision to declare the lease null and void, the Georgia Supreme Court stated, "[t]he 'clearly erroneous' standard requires reversal of a trial court's findings of fact if there is no evidence to support them," and then went on to point out that "[t]here was no evidence that the lease will not promote the community's public-health needs," and thus, the trial court's factual determination was clearly erroneous.[58]

E. Standard of Review for Damages Awards.

The standard of review for damages awards is such that the appellate court will "not interfere with the jury's damages award unless it is so small or excessive that it justifies an inference of gross mistake or undue bias,"[59] or "so excessive or inadequate as to shock the judicial conscience."[60]

F. Harmless Error.

While not, in and of itself, a separate standard of review, the doctrine of "harmless error" is critical to consider as appellant when deciding the viability of certain issues on appeal or as appellee when defending decisions favorable to you. Harmless error simply means that an error committed by the trial court, usually an error involving abuse of discretion, did not affect the outcome of the case.[61] You may argue harmless error by either conceding that the trial court erred but the error was harmless (a "yes . . . but . . ." argument) or by arguing the trial court did not err, but if it did, then the error was harmless (a "no . . . but even if . . ." argument).

As appellant, if you are evaluating which errors of the trial court to appeal, it is wise to consider whether the errors were substantial or prejudicial or affected the outcome of the case – if not, it may not be worth the effort to include and may actually dilute your appeal on other, more meritorious, issues. As appellee, you must evaluate the errors appealed to determine if you must concede that the trial court committed error and to determine, if such a concession is necessary, whether you can argue that the error was harmless and did not affect the outcome of the case. Oftentimes, as appellee, if you defend a decision of the trial court that is clearly an abuse of discretion, such as admitting rank hearsay statements over objection, you risk losing credibility with the appellate court, which may infect the Court's view of your entire argument. However, if you demonstrate both knowledge of the law and reasonableness by conceding error where appropriate and arguing harmless error instead, this may serve to bolster your credibility with the Court and enhance your arguments.

III. CONCLUSION.

When determining the proper standard of review, use the outline above or, in conjunction with the substantive research consider the standard cited therein.

Finally, in addition to this article, and the case law cited, several other excellent resources exist within which you can easily find appellate standards of review. One, cited in this article, is McFadden, Brewer & Sheppard's Georgia Appellate Practice book, and another is the Georgia Court of Appeals website, which has a comprehensive and updated outline, with citations, of standards of review in civil and criminal cases.[62] This will ensure that you do not use the incorrect standard of review.

Just as a trial lawyer would likely never consider presenting evidence to a jury without first giving them an opening statement to serve

as an outline for the case-in-chief; a football coach would never select a play without knowing the down-and-distance; and a chef would not begin cooking a meal without first selecting the proper ingredients, when writing an appellate brief, you should never begin your argument and citation of authority without first *knowing* the proper standard of review *and setting forth* that proper standard of review at the outset of each enumeration of error in your brief. Not only do the appellate court rules require it, but common sense and the desire to forge a winning appellate brief demand it.

ENDNOTES:

1 O.C.G.A. § 5-6-38(a).

2 http://www.gibsondunn.com/lawyers/tolson

3 Keita v. K & S Trading, 292 Ga. App. 116, 117 (2008).

4 Vickers v. Meeks et al, 273 Ga. App. 293, 294 n.1 (2005).

5 Robinson v. State, 210 Ga. App. 278, 278-279 (Ga. Ct. App.1993) (citing former rule requiring that statement of standard of review be included in appeal brief).

6 Parekh v. Wimpy, 288 Ga. App. 125-26 (2007).

7 *Id*. at 126.

8 Court of Appeals Rule 25(a)(1); The Court of Appeals has stated "it is not our responsibility to cull the record on [appellant's] behalf. Williams v. State, 208 Ga. App. 153, 155 (1993).

9 Court of Appeals Rule 25(a)(2).

10 Court of Appeals Rule 25(a)(3) (emphasis added).

11 Court of Appeals Rule 25(c)(1) requires that the sequence of the arguments in the brief follow the order of the enumeration of errors from Part Two of the brief and "shall be numbered accordingly."

12 Archer, FX Network (September 17, 2009 – present).

13 Rathbone v. Ward, 268 Ga. App. 822, 823 (2000).

14 O.C.G.A. § 5-6-30.

15 Parekh v. Wimpy, 288 Ga. App. at 126.

16 Rathbone v. Ward, 268 Ga. App. at 823.

17 McFadden, Brewer & Sheppard's Georgia Appellate Practice, § 17.12 (West 2009-2010 Ed.).

18 May v. State, 120 Ga. 497 (1904).

19 *Id*.

20 Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 279 (Ga. 2008).

21 See United States v. Brown, 415 F3d 1257, 1264-1266 (11th Cir. 2005) (explaining deference accorded to decision of district court to admit or exclude expert testimony under Daubert).

22 Time Warner Entertainment Co. v. Six Flags Over Georgia, 245 Ga. App. 334, 350 (2000).

23 Whitley v. Gwinnett County, 221 Ga. App. 18, 19 (1996); York v. State, 242 Ga. App. 281, 287 (2000).

24 Walls v. Kim, 250 Ga. App. 259 (2001); Brown v. Egleston Chidren's Hosp., 255 Ga. App. 197, 198 (2002) (review of trial court rulings on

Batson challenges).

[25] Dep't of Transportation v. Mendel, 237 Ga. App. 900, 902 (1999).

[26] Williamson v. Harvey Smith, Inc., 246 Ga. App. 745, 749 (2000).

[27] Whitley v. Gwinnett County, 221 Ga. App. 18, 25 (1996).

[28] S. Water Techs. v. Kile, 224 Ga. App. 717, 719 (1997).

[29] Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 787-88 (2011).

[30] Saye v. Provident Life & Accident Ins. Co., 311 Ga. App. 74, 77-79 (2011).

[31] http://dictionary.law.com

[32] Suarez v. Halbert, 246 Ga. App. 822, 824 (2000).

[33] *Id.*

[34] *Id.*

[35] Auto-Owners Ins. Co. v. Crawford, 240 Ga. App. 748, 750 (1999); Morrow v. Vineville United Methodist Church, 227 Ga. App. 313, 317 (1997).

[36] Sagon Motorhomes v. Southtrust Bank N.A., 225 Ga. App. 348, 349 (1997).

[37] Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145 (2009).

[38] Farmer v. Branch Banking & Trust Co., 312 Ga. App. 519, 520 (2011).

[39] Hutto v. CACV of Colo., LLC, 308 Ga. App. 469 (2011).

[40] Rubin v. Cello Corp., 235 Ga. App. 250 (1998).

[41] Matjoulis v. Integon Gen. Ins. Corp., 226 Ga. App. 459 (1997).

[42] Lowry v. Cochran, 305 Ga. App. 240, 241 (2010).

[43] *Id.*; But see McFadden, Brewer & Sheppard's Georgia Appellate Practice, § 17.13 (West 2009-2010 Ed.) (citing two cases in which the Georgia Supreme Court seemed to narrow the "right for any reason" rule by giving the appellate courts the discretion to refuse to consider arguments raised for the first time on appeal).

[44] Thomas v. HL-A Co., 313 Ga. App. 94, 95 (2011).

[45] Signsation, Inc., v. Harper, 218 Ga. App. 141, 142 (1995).

[46] Professional Consulting Svcs. of Georgia v. Ibrahim, 206 Ga. App. 663, 665 (1992)(emphasis added).

[47] F.A.F. Motor Cars v. Childers, 181 Ga. App. 821 (1987).

[48] St. Paul Mercury Ins. Co. v. Meeks, 270 Ga. 136, 137 (1998).

[49] Horan v. Pirkle, 197 Ga. App. 151, 153 (1990).

[50] Jordan v. Stephens, 221 Ga. App. 8, 10 (1996).

[51] Yi v. Li, 313 Ga. App. 273, 276 n.12 (2011) (internal quotes and citations omitted).

[52] *Id.*

[53] Sam's Wholesale Club v. Riley, 241 Ga. App. 693 (1999); City of McDonough v. Tusk Partners, 268 Ga. 693, 696 (1997).

[54] McFadden, Brewer & Sheppard's Georgia Appellate Practice, § 17.12

(West 2009-2010 Ed.); White Oak Homes, Inc. v. Cmty. Bank & Trust, 2012 Ga. App. LEXIS 221 (Mar. 1, 2012)(contrary to the parties arguments, the "clearly erroneous" standard and the "any evidence" standard are the same).

[55] Brooks v. Ironstone Bank, 2012 Ga. App. LEXIS 231 (Mar. 2, 2012).

[56] Id.

[57] Allen v. Santana, 303 Ga. App. 844, 845 (2010).

[58] Richmond County Hospital Authority v. Richmond County, 255 Ga. 183, 191 (Ga. 1985).

[59] Green v. Proffitt et al, 248 Ga. App. 477, 478 (2001).

[60] Hospital Authority of Gwinnett County et al., v. Jones et al., 259 Ga. 759, 766 (1989) (a most unfortnate set of facts – after being nearly burned to death in an auto accident, the victim was then in the process of being air lifted to a burn center when the helicopter he was in crashed – and here you thought you were having a tough day).

[61] Toole v. Georgia-Pacific, LLC, 2011 Ga. App. LEXIS 810 (2011).

[62] McFadden, Brewer & Sheppard's Georgia Appellate Practice, §§ 17.12–17.16 (West 2009-2010 Ed.);http://www.gaappeals.us/standards_of_review.php.

OFFERS OF SETTLEMENT: WHAT IS GOOD FAITH?

By Stephanie Collings Patel

Stephanie Collings Patel is a Partner at Dennis, Corry, Porter & Smith, L.L.P. specializing in the defense of motor carriers and their insurers. Patel is a 1996 graduate of Emory University School of Law and a 1992 graduate of New York University. While at Emory, she was a member of the Order of Advocates and Moot Court Special Teams. She is also a member of Phi Beta Kappa and Phi Delta Phi. Prior to joining DCPS in 1999, she was a Law Clerk for the Honorable James H. Weeks, Superior Court of DeKalb County.

This Article examines the first reported case in Georgia where a court has rejected the fee-shifting provisions of the Georgia Offer of Settlement law under O.C.G.A. §9-11-68 on the basis that the offer of settlement was not made in "good faith."

In *Great West Casualty Company, et al. v. Bloomfield*, 313 Ga. App. 180, 721 S.E.2d 173 (2011), the Court of Appeals, in a 5-2 decision, upheld a trial court's decision to deny fees under O.C.G.A. § 9-11-68, Georgia's Offer of Settlement statute, even though the moving party received a defense verdict at trial.

The trial court found that the winning Defendant's $25,000.00 Offer of Settlement was not made in good faith and the Court of Appeals found no abuse of discretion. The appellate court did not define good faith or provide any guidance as to how the offer is to be analyzed. A Petition for Certiorari is pending in the Georgia Supreme Court, Case No. S12C0624.

The underlying action for wrongful death was filed on December 13, 2006 against two trucking companies, their drivers, and their insurers. The case arose out of two separate motor vehicle collisions that occurred on Interstate 85 South in Gwinnett County on June 23, 2006. The Great West Defendants were involved in a collision with a non-party that caused traffic to slow in the right lane. Several minutes later, the co-defendants rear-ended the car in which the decedent was a passenger. The co-defendants admitted liability.

The Great West Defendants denied liability from the outset, contending that these were two separate accidents that occurred several minutes apart. One year after the collisions occurred and six months into litigation, Great West sent an Offer of Settlement for $25,000.00 pursuant to O.C.G.A. § 9-11-68. Plaintiffs rejected the Offer of Settlement in writing, never made a settlement demand, and would not agree to attend mediation.

After three days of trial, Plaintiffs obtained a judgment against the co-defendants in the amount of $10.67 million. During trial, the Great West Defendants verbally offered $1 million in settlement. Plaintiffs rejected the offer. The jury found in favor of the Great West Defendants, validating the liability defense. The trial court denied Great West's Request for Fees without explanation on February 4, 2009, necessitating an appeal. Plaintiff argued that Great West's Offer of Settlement was withdrawn during trial, that the offer did not comply with the statute, and that the statute was unconstitutional. The Court of Appeals rejected Plaintiffs' claims and remanded the case to the trial court for a finding on good faith. *See Great West Casualty Company v. Bloomfield*, 303 Ga. App. 26, 693 S.E.2d 99 (2010). After a hearing, the trial court again denied the Request for Fees. Great West filed a second Notice of Appeal and argued before Judge Blackwell, Judge Adams, and Judge Barnes on July 13, 2011. The panel was split 2-1, and the case went to a seven Judge panel. On December 1, 2011, Judge

Barnes authored the majority opinion, with Judge Adams and Judge Blackwell dissenting.

The majority held that the trial court did not abuse its discretion in finding that Great West's settlement offer was not made in good faith. However, the majority opinion fails to set forth any guidelines as to when settlement offers can be extended, what constitutes a reasonable offer, and what factors a trial court can and should consider when reviewing the reasonableness of an offer. The majority opinion also fails to consider the factors listed by the trial court.

Great West argued that a settlement offer is reasonable as a matter of law when the offeror obtains a defense verdict as provided in dicta in *Smith v. Salon Baptiste*, 287 Ga. 23, 694 S.E.2d 197 (2010). In *Smith*, the Defendant's $5,000.00 Offer of Settlement was rejected and Defendant later obtained summary judgment. Justice Nahmias, in a Special Concurrence noted: "That final judgment, by the way, determines as a matter of fact and law that the value of appellees' claims was zero, so that appellants' settlement offer of $5,000.00 was reasonable." *Id.* at 38.

Great West also argued that a settlement offer validated by the jury verdict is reasonable when made after one year of investigation and six months of discovery, referencing *Cohen v. Alfred and Adele Davis Academy*, 310 Ga. App. 761, 714 S.E.2d 350 (2011). In *Cohen*, the Defendant's $750.00 Offer of Settlement was rejected and Defendant later obtained summary judgment. The Court of Appeals upheld an award of fees in the amount of $84,104.63 when the Offer was made four months after the Complaint was filed. *Id.* at 761-762.

Great West argued that Offers of Settlement can be made early in litigation, can be made for "nominal" amounts, and are not rendered unreasonable when subsequent higher settlement offers are extended. The majority did not address these arguments, but deferred to the discretion of the trial court.

GOOD FAITH:

1. FLORIDA LAW:

Good faith is well defined in Florida where the Offer of Settlement statute has been litigated for a number of years. "The obligation of good faith merely insists that the offeror have some reasonable foundation on which to base the offer." *Schmidt v. Fortner*, 629 So.2d 1036, 1039 (Fla. 4th Dist. Ct. App. 1993); *see also Wagner v. Brandeberry*, 761 So.2d 443 (Fla. 2nd Dist. Ct. App. 2000) (whether an offer is made in good faith turns on whether the offeror had a reasonable foundation upon which to make his offer and whether it was made with the intent to settle the claim should the offer be accepted). "The offer need not equate with the total amount of damages that might be at issue." *Nants v. Griffin*, 783 So.2d 363 at 365 (Fla. 5th Dist. Ct. App. 2001).

Florida courts have upheld Offers of Settlement made for nominal amounts. *Gurney v. State Farm Mut. Auto. Ins. Co.,* 889 So.2d 97 (Fla. 5th Dist. Ct. App. 2004) (finding Offer of Settlement in the amount of $1,750.00 was made in good faith after insurer received a defense verdict); s*ee also Allstate Ins. Co. v. Silow*, 714 So.2d 647 (Fla. 4th Dist. Ct. App. 1998) (finding $100.00 offer made in good faith based on IME report); *Weesner v. United Services Auto. Ass'n*, 711 So.2d 1192 (Fla. 5th Dist. Ct. App. 1998) (finding $100.00 offer to be made in good faith); *State Farm Mut. Auto. Ins. Co. v. Marko*, 695 So.2d 874 (Fla. 2nd Dist. Ct. App. 1997) (finding $1.00 offer to be made in good faith).

Nominal offers made in the face of large damages are found consistent with good faith where the defendant has a reasonable basis for believing its liability to be nominal. "[A] minimal offer can be made in good faith if the evidence demonstrates that, at the time it was

made, the offeror had a reasonable basis to conclude that its exposure was nominal." Nants v. Griffin, 783 So. 2d 363 at 364-65 (Fal. 5th Dist. Ct. App. 2001). *See Peoples Gas System, Inc. v. Acme Gas Corp.,* 689 So. 2d 292 (Fla. App. 1997) ($2,500 offer made in good faith even though it was only .00142857% of the $3.5 million settlement demand); *Hall v. Lexington Ins. Co.,* 895 So.2d 1161, 1166 (Fla. 4th Dist. Ct. App. 2005), (the insurer's offer of $30,000.00 was upheld despite claimed loss in excess of $300,000.00). In *Dept. of Highway Safety & Motor Vehicles v. Weinstein*, 747 So.2d 1019, 1020 (Fla. 3rd Dist. Ct. App. 1999, the Court reversed the trial court's finding that a $1,000.00 offer of judgment was not made in good faith, stating: "The offeror had a reasonable basis to conclude that its exposure was nominal. Specifically, the defendant could reasonably believe, as it stated it did believe, … because its investigation revealed substantial evidence that its trooper had not, as alleged, been guilty of any causative negligence, … that it was not liable at all, so that the case was worth no more than a nuisance value to settle." *Id*. at 1020 (cit. omitted).

Florida courts have also upheld offers of settlement made early in the litigation, as have Georgia courts. *See Downs v. Coastal systems Int'l, Inc*., 972 So.2d 258 (Fla. 3rd Dist. Ct. App. 2008) (reversing trial court's denial of fees on a $5,001.00 offer of settlement made less than one year into the litigation). That case was a shallow dive case whether the plaintiff was rendered a quadriplegic and the defendant successfully obtained summary judgment. *Id*. at 259; *see also Cohen v. Alfred and Adele Davis Academy*, 310 Ga. App. 761 92011) (upholding an award of fees on a $750.00 Offer of Settlement made four months after the Complaint was filed).

2. GEORGIA LAW:

Under Georgia law, good faith means reasonableness. Black's Law Dictionary defines good faith as follows: "an honest belief, the absence of malice, and the absence of design to defraud or to seek an unconscionable advantage." *Black's Law Dict.* 693 (6th ed.1991). Good faith in insurance law implies honesty, fair dealing and full revelation while bad faith implies dishonesty, fraud and concealment. *Id.* "Bad faith" generally implies or involves fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or contractual obligation. *Id.* at 139.

In *Great West*, *supra*, the trial court relied on four factors in disallowing fees under O.C.G.A. § 9-11-68(d)(2): (1) The initial offer was not a realistic settlement in relation to the damages for a wrongful death, (2) Great West's driver paid a traffic ticket fine, the first police officer on the scene, (3) one of several investigating officers, was not deposed before trial, and (4) a policy limits offer of $1 million was made during trial, "showed the bad faith intent of the defendant's initial offer." 313 Ga. App. at 181.

This last finding arguably ignores the statutory language of O.C.G.A. § 9-11-68(c), which specifically permits subsequent offers to be made. *See also*, *Great West Cas. Co. v. Bloomfield*, 303 Ga. App. 26 (2010). The Court of Appeals correctly found in the first appeal that the second offer, which was also rejected by Plaintiffs, did not supersede or withdraw the written Offer of Settlement. *Id*. at 29-30. By finding that a second substantially higher offer made during trial demonstrated that the initial offer was made in bad faith, the trial court appears to be suggesting that that an increased offer at trial is tacit recognition of potential liability, despite Great West's contention that it was responding to trial events as they unfolded and which were not present at

the time of the initial offer. This finding puts insurers in a bind during the development of a case. If the appellate court's opinion holds, an insurer may forfeit its right to recover under the Offer of Settlement statute if it extends a higher offer during trial.

The dissent correctly noted that payment of a traffic fine does not render a settlement offer unreasonable. Great West's defense at trial was lack of proximate cause and superseding, intervening cause. Whether Great West's driver was presumed negligent by paying a fine for improper lane change in a separate collision was completely irrelevant. The jury had to find that his negligence proximately caused the decedent's death. The jury did not do so.

The dissent correctly noted that failing to depose one of several investigating officers prior to trial does not render a settlement offer unreasonable. The officer in question was not a member of Gwinnett County's Accident Investigation Unit and did not investigate the collision that resulted in the decedent's death, and therefore, was not anticipated to render an opinion as to that accident. A litigant can extend a settlement offer without deposing a witness. The failure to depose a witness prior to making an Offer of Settlement does not equate with a lack of "good faith."

3. CONCLUDING THOUGHTS AND RECOMMENDATIONS

Even under the abuse of discretion standard, Florida trial courts have been reversed for denying fees on nominal offers. *See, e.g., Levine v. Harris*, 791 So.2d 1175, 1179 (Fla. 4th Dist. Ct. App. 2001) (holding that trial court abused its discretion by finding a $500.00 offer was not made in good faith); *Wagner v. Brandeberry*, 761 So.2d 443, 446-447 (Fla. 2nd Dist. Ct. App. 2000) (having a reasonable foundation to make an offer equates to the legal conclusion that it was made in good faith); *State Farm Mut. Ins. Co. v. Marko*, 695 So.2d 874, 875-876 (Fla. 2nd Dist. Ct. App. 1997) (upholding insurer's $1.00 Offer of Settlement).

It is disappointing that the Georgia Court of Appeals did not find such an abuse where the jury found in favor of the Great West Defendants. Where the value of Plaintiffs' claim against Great West was found to be zero, a settlement offer of $25,000.00 based on a valid liability defense is objectively reasonable. It was not only a realistic assessment of Great West's liability exposure, the offer was more than its liability exposure.

Plaintiffs' primary argument was that the statute is not meant to be "loser pays." However, the statute is designed to reward those who try to settle cases. If the losing party rejects all settlement offers, which are thereafter determined to be reasonable, they should be required to pay.

In the future, defendants and insurers who extend Offers of Settlement should explain the basis of their offer in writing to avoid any misunderstanding. If the Georgia Supreme Court grants certiorari, additional guidance will hopefully be provided so that all parties will know which factors which may be considered in determining if an offer of settlement is made in "good faith."