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January 26, 2011

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1700 Atlanta Plaza
950 East Paces Ferry Road
Atlanta, Georgia 30326

Re: Raines, et al. v. Maughan, et al.
Georgia Court of Appeals
Docket No. A11A0793

Dear Mr. Moffett:

Enclosed please find a copy of the Amended Brief of Appellants Carrie Raines, et al. which was mailed for filing on January 26, 2011.

This Amended Brief is different from the original Brief in the following two ways:

a. On page 2, in the paragraph at the bottom of the page, that begins "On December 2...", we moved the reference "(R-3050-3106)" from the end of the sentence, to the third line following "Evidence", and we inserted another cite to the Record (Supplemental Record No. 1, 49-85) at the end of that sentence, following "John Harris". (There was no cite to Plaintiff's Response to Defendant's Motion in Limine and Incorporated Brief Regarding Plaintiff's Expert John Harris in the original Brief because the trial court failed to include this pleading in the record. Fulton State Court sent Supplemental Record No. 1 up to the Court of Appeals on Monday, January 24, 2011.); and

b. On page 17, we have added a sentence to the end of the first paragraph.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

D. RICHARD JONES, III

III/ch
Enc. a/s

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January 26, 2011

Clerk
Court of Appeals of
The State of Georgia
47 Trinity Avenue
Suite 501
Atlanta, Georgia 30334

Re: Raines, et al. v. Maughan, et al.
Georgia Court of Appeals
Docket No. A11A0793

Gentlemen:

Enclosed please find the original and two copies of the Amended Brief of Appellants Carrie Raines, et al. which I would appreciate your filing in the above matter.

Also enclosed is an additional copy which I would appreciate your stamping "Filed" and returning to me in the enclosed, self-addressed, stamped envelope.

This Amended Brief is different from the original Brief in the following two ways:

a. On page 2, in the paragraph at the bottom of the page, that begins "On December 2...", we moved the reference "(R-3050-3106)" from the end of the sentence, to the third line following "Evidence", and we inserted another cite to the Record (Supplemental Record No. 1, 49-85) at the end of that sentence, following "John Harris". (There was no cite to Plaintiff's Response to Defendant's Motion in Limine and Incorporated Brief Regarding Plaintiff's Expert John Harris in the original Brief because the trial court failed to include this pleading in the record. Fulton State Court sent Supplemental Record No. 1 up to the Court of Appeals on Monday, January 24, 2011.); and

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cc: Matthew G. Moffett, Esq.

IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

DOCKET NO. A11A0793

CARRIE RAINES, ET AL

Appellant,

v.

JOHN F. MAUGHAN, ET AL

Appellees

ON APPEAL FROM THE STATE COURT OF FULTON COUNTY
CIVIL ACTION FILE NO. 2007EV001852A

AMENDED BRIEF OF APPELLANTS CARRIE RAINES, ET AL

Submitted by:

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Apartments. (T-494,l.19-23). John Maughan or his employees were aware of the following: a rape at Venetian Hills Apartments behind the "I" building in the summer of 2005 (T-300,l.25-305,l.19); individuals had threatened Mr. Morris, the security guard at Venetian Hills (T-311,l.17-312,l.6); Resident John Turner was robbed by armed gunmen as he was walking home on November 1, 2005 (T-363,l.2-365,l.16); and On July 1, 2005, John F. Maughan, the owner of Venetian Hills Apartments, was physically robbed of his briefcase at his Venetian Hills Apartments. (T-500,l.13-T-504,l.8).

Defendant John F. Maughan should also have known of other violent crimes at his apartments.(R-505-515). An armed robbery of a pizza delivery person occurred at Venetian Hills Apartments on May 19, 2005. (T-260,l.22-264,l.1). On October 31, 2005, armed gunmen robbed Terry Smith within a block of Venetian Hills. (T-256,l.24-259,l.19).

Defendant John F. Maughan or his employees were also aware of numerous other instances of violent crimes at Venetian Hills including some robberies on the premises before Keith Taylor's death. (T-499,l.13-17). Mr. Maughan wrote a letter six months before Keith Taylor was robbed, shot, and killed, complaining

about "multiple break-ins", "excessive loitering", "daily break-ins" and that an individual "threw a brick/rocks" at a security patrol car. T-520,l.6-25). Residents were involved in fights. (T-315,l.8-316,l.12, Transcript Exhibit p.557-559). Mr. Morris detained individuals selling and possessing drugs within five months before Keith Taylor was robbed, shot, and killed on Defendant's property. (T-507,l.7-508,l.24 Transcript Exhibit p.556,561).

Mr. Maughan in fact had a guard, but the guard did not perform his job properly.(T-496,l.2-9, T-660,l.2-661,l.5). The guard chose not to patrol when it was raining. (T-279,l.15-281,l.3). Mr. Maughan or his agent should have adequately supervised Mr. Morris and required him to patrol even in rain.(T-523,l.17-23, T-537,l.4-10, T-357,l.13-20). While the guard was cooking pork chops in his apartment on December 14, 2005, Keith Taylor was robbed, shot, and killed in the parking lot. (T-285,l.5-286,l.6, T-597,l.18-599,l.17. It was raining. (T-409,l.4-5).

Around 7:00 pm, Keith Taylor visited Doletha Johnson, a resident at Venetian Hills Apartments on December 14, 2005. (T-576,l.18-23, T-579,l.20-21, T-586,l.13-14, T-570,l.14-18). Keith

Taylor left Doletha Johnson's apartment around 8:30 p.m. and crossed the parking lot to get to his car. (T-388,l.15-21). Unknown persons robbed, shot, and killed Keith Taylor in the parking lot. T-597,l.18-599,l.17).

II. ENUMERATION OF ERROR

A. Jurisdiction

The Court of Appeals has jurisdiction over this Appeal as it involves subject matter upon which jurisdiction is not conferred upon the Supreme Court and it involves errors of law (except the Constitutional issues reserved in Section D.

B. Judge Roth erred in preventing both experts from disclosing the content of the service calls lists.

C. Judge Roth erred in holding John Harris and Norman Bates may not testify that Plaintiff's death was foreseeable and John Harris may not testify that Defendant's alleged security deficiencies were the proximate cause of Taylor's death.

D. Judge Roth erred in allowing Apportionment to be argued throughout the trial, to appear in Jury Instructions, and to Appear in Jury Verdict Form.

E. Judge Roth erred in excluding evidence of car jacking of Dierdee Hurst on a street nearby to Venetian Hills Apartments.

F. Judge Roth erred in failing to dismiss Juror #19 for cause.

G. Judge Roth erred in not giving Jury Charge No. 23 and 24.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Summary of the Argument

IAPSC methodology requires security experts to use a service call list and form opinions regarding forseeability and proximate cause. The jury was never told that both experts agree that this crime was foreseeable. Harris was not allowed to link Defendant's inadequate security measures to Keith Taylor's death. Apportionment should not have been argued to the jury, read in the jury instructions, and appear in the jury verdict form because apportionment is not required in this case: there is only one Defendant, Plaintiff was not at fault, and apportionment does not apply to Non-Parties. Even if apportionment did apply to this case, it is unconstitutional because it violates procedural and substantive due process and equal protection. Evidence of a prior similar crime occurring on a street nearby to Venetian Hills Apartments. Juror #19 should have been dismissed for cause because tried to mislead the court about his occupation and personal beliefs. Jury charges No. 23 and No. 24 are correct statements of the law, not duplicative, and were adjusted to the

facts of this case. They should have been read to the jury.

Standard of Review

Ennumeration of Error B, C, and E involve evidentiary rulings and the decision to admit or exclude evidence should be reviewed for abuse of discretion. Dept of Transp. v. Mendel, 237 Ga. App. 900, 902 (2) (517 SE2d 365) (1999).

Enumeration of Error F involves the selection of jurors and should be reviewed for abuse of discretion but trial court is no longer permitted to rehabilitate jurors by using "loaded" questions to justify retaining biased jurors. Walls v. Kim, 250 Ga. App. 259 (549 SE2d 797) (2001).

Enumeration of Error D and G involve questions of law and should be reviewed De novo or independent review on appeal. Since no deference is owed to the trial court's ruling on a legal question, the "plain legal error" standard of review is applied. Suarez v. Halbert, 246 Ga. App. 822, 824 (1) (543 SE2d 733) (2000).

Part of Enumeration of Error D involves a verdict form, which is normally reviewed for abuse of discretion. Southern Water Technologies v. Kile, 224 Ga. App. 717, 719 (1) (481 SE2d 826) (1997). This verdict form also involves questions of law.

B. Judge Roth erred in preventing any Expert from disclosing the content of the Service Calls Lists

Judge Roth ruled that service call list was "of a type reasonably relied upon by experts" in this field. Thus, the fact that these records are hearsay goes to weight, not admissibility. Roebuck v. State, 277 Ga. 200, 201 (2003). However, the court also ruled, "The service call lists are comprised of multiple layers of hearsay, cover an area of a nearly 1 mile radius, and include many incidents and reported crimes which are simply not relevant to this case. The list also contains unexplained codes and terms. Thus, the probative value of the information contained within the reports does not substantially outweigh its prejudicial potential. Therefore, the experts in this case may describe to the jury what a service call list is generally is and may tell the jury that they consulted such lists in forming an expert opinion. However, no expert may disclose the content of the lists to the jury." (R-3171-3173).

The trial court was concerned that the lists contains unexplained codes and terms. However, the Atlanta Police Department provided a key to explain what the codes mean. (R-1790-1791). Additionally, both John Harris and Norman Bates as

security experts are capable of understanding, explaining, and using such lists. (R-508). According to John Harris, within the sixty (60) months preceding the shooting of Keith Taylor, there had been over 5,800 Calls for Service from the premises and within a one (1) mile radius. These Calls for Service included 546 Aggravated Assaults, 571 Auto Thefts, 673 Burglaries - Residence, 9 Homicides, 739 Larcenies - From Vehicle, 605 Larcenies - Non Vehicle, 793 Narcotics - Possession, 128 Narcotics - Sales, 17 Prostitution, 21 Rapes, 72 Robberies - Commercial, 264 Robberies - Pedestrian, 48 Robberies - Residence, 89 Sex Offenses, 854 Vandalisms, and 111 Weapons Violations. (R-508-509).

On May 28, 2009, The trial court found that Harris met Georgia's legal requirements to testify as an expert and that his opinions are sufficiently reliable to present to a jury. (R-1246).

John Harris arrived at his opinion in this case using peer reviewed methodology, the Best Practice #2 of the International Association of Professional Security Consultants (IAPSC). (R-506-515, R-773-776, R-1104-1105, 800-803, T-645,1.2-25). Both John Harris and Norman Bates, Defendant's expert, use the same

methodology. They both use calls for service lists and police reports to arrive at their conclusions. (T-668). According to Bates there is no single definition of what constitutes a neighborhood or immediate vicinity within the field of crime analysis. (R-2958,l.24-2959,l.3). Bates used Beat 406 as the immediate vicinity in this case. (R-1014). John Harris used a one mile radius. (R-508).

Calls for Service List is admissible based on the expert testimony of John Harris. According to John Harris, Maughan was negligent in not performing a security risk analysis. The security risk analysis would have, among other things, shown Defendant the calls for service list for *1829 Campbellton Road for January 1, 2001 through December 31, 2005*. (R-507).

Courts holding calls for service lists inadmissible do so because they were not authenticated or certified, nor was there expert testimony relying on the calls for service list. See Wojicik v. Windmill Lake Apartments, Inc., 284 Ga. App. 766,769 (2007).

At trial, the court accepted Plaintiff's offer of proof that the calls for service lists were authenticated business records made in the ordinary course business. Defendant did not object.

(T-547,l.4-548,l.20, Transcript Exhibit p.128-388).

C. Judge Roth erred in holding Experts may not testify that Plaintiff's death was foreseeable or John Harris from testifying Defendant's alleged security deficiencies were the proximate cause of Taylor's death.

On December 21, 2009, The trial court ruled, **"Defendant's Motion in Limine Regarding Plaintiff's Expert John Harris** - this Court **GRANTS IN PART** Defendant's motion. Harris may not testify that Plaintiff's death was foreseeable, see Carlock v. Kmart Corp., 227 Ga. App. 356, 362 (1997), or that Defendant's alleged security deficiencies were the proximate cause of Taylor's death. This Court addresses the admissibility of the service call lists in section 1 above." (R-3173).

There are no Georgia cases limiting a qualified security expert from talking about the risk of crime on the property, whether a dangerous condition exists, proximate cause, and what a reasonable security owner should do to prevent crime. An expert may testify as to whether or not a dangerous condition exists. An expert may testify to danger. Little v. Georgia Power Co., 205 Ga. 51 (1949). John Harris should have been able to testify whether a dangerous condition existed at Venetian Hills, fully

describe what the danger is, describe how an owner should have reasonably anticipated the danger, and describe how such dangers can be remedied. (R-505-515). John Harris should have been allowed to link the armed robbery and death of Plaintiff's son to the apartment owner's failure to conduct a security risk assessment and implement adequate security procedures. (R-505-515). John Harris should have been allowed to state that more likely than not, this robbery-homicide would not have happened had adequate security measures been implemented. (R-505-515, R-776-795, and R-774). During cross examination, Plaintiff was prevented from asking Norman Bates, Defendant's expert, was this crime foreseeable? Why was this crime foreseeable? The jury should have been free to consider or reject the opinions of the security experts.

An expert may testify as to the cause of an occurrence or condition. Kirkland v. State, 253 Ga. App. 414 (2002) (police officers could give opinion testimony regarding state of sobriety of a DUI suspect).

In Carlock v. Kmart Corporation, 227 Ga. App. 356 (1997), the court found it was not an abuse of discretion to not allow the security expert to testify to foreseeability in a negligent

premises security case. The trial court excluded expert testimony *only* on the issue of whether the criminal act was foreseeable to Kmart. Carlock involved a fatal shooting of a woman in a parking lot after 9pm. That case involved the intentional and complete absence of security measures after 9pm. The appellate court reversed the trial court grant partial summary judgment on Plaintiff's claim's for punitive damages against Kmart.

Carlock was a limited holding and fact specific. This case is distinguishable from Carlock in that both Plaintiff's and Defendant's security experts agree that this crime was foreseeable. (R-2954-2955 and R-2934-2935). This case does not involve the issue of punitive damages. In Carlock, Kmart provided no security measures. This case involves both the absence of security measures and the inadequacy of existing security measures. (R-509-512).

The policy of Georgia is to admit evidence, even if admissibility is doubtful, because it is more dangerous to suppress the truth than to allow a loophole for falsehood." Whidby v. Columbine Carrier, Inc., 182 Ga. App. 638 (1987) (overruled on other grounds), citing Gibbons v. Md. Cas. Co., 114 Ga. App. 788, 796 (1966).

Numerous courts have allowed a security expert to testify because a security assessment is outside of the common knowledge of laypeople and that expert testimony will assist the jury to determine facts in issue. See Kerlec v. E-Z Serve Convenience Stores, Inc., No. CIV.A. 97-2577, 1998 WL 637244 (E.D. La. 1998), Glasscock v. Income Property Services, Inc. 888 S.W. 2d 176 (Tex Ct. App. 1994)(reversible error to exclude security expert).

In Brookview Holdings, LLC v. Suarez, 286 Ga. App. 90 (2007), the appellate court allowed the security expert to opine that it was reasonably foreseeable that Defendant's failure to provide security patrols could lead to an attack such as the one at issue.

Norman Bates and John Harris are both security experts. They both agree this robbery was foreseeable given the prior crime. (R-508, R-2954-2955, R-2934-2935). They disagree on whether Maughan actually provided adequate security. It is for the jury to determine whether, the crime was forseeable, what security measures were reasonable, and whether such measures would have deterred this crime. John Harris' and Norman Bates' opinions would have assisted the jury reach their decision.

Instead such opinions were hidden from the jury.

D. Judge Roth Erred In Allowing Apportionment to be Argued Throughout the Trial, to appear in Jury Instructions, and to Appear in Jury Verdict Form

STATUTORY CONSTRUCTION

The common law rule was, as far as the injured victim was concerned, that one cannot apportion compensatory damages. Georgia followed that rule until the 2005 passage of SB3 and the changes it made to O.C.G.A. §§51-12-31 and 51-12-33. Since these statutory changes are in derogation of common law, they should be strictly construed. Tuttle v. Watson, 1 Ga. 43 (1846).

APPORTIONMENT IS DISCRETIONARY

Under new §51-12-31, the jury may make a several award in both property and personal injury claims against several Defendants but, by this choice of words, it need not do so. Only in such cases where the jury does make a several award must the Judgment be entered severally. In other words, it is discretionary with the jury whether to make a several award.

APPORTIONMENT DOES NOT APPLY UNLESS PLAINTIFF IS AT FAULT

§51-12-33 begins, "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 damage claim, the trier of fact ...". §51-12-33 only applies if the Plaintiff is to some degree responsible. If the Plaintiff is not to some degree responsible, then there can be no mandatory apportionment of damages under §51-12-33. At trial Defendant John F. Maughan presented no evidence that Keith Taylor was at fault. Keith Taylor was not at fault; so apportionment does not apply. But see Cavalier Convenience Store v Sarvis, A10A0538 (July 9, 2010)where the court rejected this argument. However, that case did not involve non parties and was not an inadequate security case. On January 18, 2011, the Supreme Court of Georgia granted the Writ of Certiorari in Sarvis v. Cavalier Convenience, Inc., S10C1895, Georgia Supreme Court.

The trial court allowed Defendant to argue apportionment. The court read a jury charge on §51-12-33. The verdict form incorporated a section allowing the jury to apportion damages among Keith Taylor, John F. Maughan and John Does 1, 2, and 3. Defendant presented no Evidence Keith Taylor Knew and Assumed The Risk. In Vaughn v. Pleasant, 266 Ga. 862 (1996), Justice Sears, writing for the Court, reiterated assumption of the risk means "both actual and subjective knowledge on the plaintiff's part."

APPORTIONMENT DOES NOT APPLY TO CASES WITH ONLY ONE DEFENDANT

Under new §51-12-33, apportionment is not allowed if only one Defendant is sued. §51-12-33(b) is the only provision addressing apportionment. It applies only, "Where an action is brought against more than one person..." John F. Maughan is the only Defendant; so apportionment does not apply.

APPORTIONMENT DOES NOT APPLY TO NON-PARTIES

Under O.C.G.A. §51-12-33, apportionment only applies among parties, not non-parties. §51-12-33(b) is the only provision addressing apportionment. It allows apportionment of damages "among the persons who are liable." Although O.C.G.A §51-12-33 (c)(d)(f) does purport to require a consideration of the fault of non-parties, this action would be pointless, since the "damages to be awarded" are to be apportioned only "among the persons who are liable." Non-parties are not "persons who are liable." Subsection (f) prevents any apportionment of damages to non-parties.

IT IS THEORETICALLY IMPOSSIBLE TO APPORTION FAULT BETWEEN NEGLIGENT CONDUCT AND INTENTIONAL CONDUCT.

The concept of apportioning fault between negligent conduct and intentional conduct is intellectually, logically and

rationally inappropriate in inadequate security cases. A defendant can only be liable if the criminal act was foreseeable; for the defendant to blame the criminal suggests then he need not even guard against the crime itself. The apartment owner and manager eviscerates his duty by blaming the very hazard against which he must guard. The end result of allowing the property owner and manager to blame the criminal or to attempt to apportion fault between the criminal and the property owner is to eviscerate the duty itself. Restatement (Second of the Law of Torts § 449, Comment b(1965) ("...To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.")

Restatement (Third) of the Law of Torts, Apportionment of Liability, §14 states:

> 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.

O.C.G.A. § 51-12-33 VIOLATES DUE PROCESS CLAUSE OF THE GEORGIA CONSTITUTION (ART. 1, § 1, ¶ 1)

"No person shall be deprived of life, liberty, or property except by due process of law." Ga. Const. 1983 Art. 1, § 1, ¶ 1. The right to recover for personal injuries is "a substantial property right," Hunter v. North Mason School District, 85 Wash. 2d 810, 539 P.2d 845 (1975) and "an important substantive right" requiring constitutional protection. Carson v. Maurer, 120 NH 925 (424 A2d 825) (1980). This substantial property right is meaningless unless there is afforded an adequate remedy at law to enforce that right. O.C.G.A. §9-2-3, states that "[f]or every right there shall be a remedy; every court having jurisdiction of the one may, if necessary, frame the other."

Plaintiff filed suit against the named Defendant for Failing to Keep Premises Safe (O.C.G.A.§ 51-3-1). The evidence at trial showed Plaintiff was not negligent. As there is one, indivisible injury in this case, the defendant would be one hundred percent liable for all of the injuries suffered because the injury would

not have occurred but for the actions of the defendant. Requiring the jury to apportion damages in a case where the defendant bears one hundred percent responsibility by law is a deprivation of Plaintiff's due process rights.

The effect of the revision to O.C.G.A. § 51-12-33 is the removal of the plaintiff's right to remedy for a defendant landowner's failure to keep the premises safe pursuant to O.C.G.A. § 51-3-1. Ga. Const. Art. I, Sec. I, Para. II states that "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." Rather than protecting Plaintiff's property rights, the effect of the amendments is to deprive the Plaintiff of her vested property rights without due process of law.

O.C.G.A. § 51-12-33 is also unconstitutional because it forces a jury to do the impossible by requiring that they make a division of indivisible injuries. "[D]amages for personal injury may not be apportioned, for an injury to the body or feelings is manifestly not severable into parts. Moreover, where joint tortfeasors produce a single indivisible personal injury not subject to a rational apportionment, apportionment should not be

permitted." ITT Terryphone Corp. v. Tri-State Steel Drum, Inc., 178 Ga. App. 694, 700 (1986). Restatement (Second) of the Law of Torts § 433A, Comment i(1965). To ask a jury to do what the courts have acknowledged cannot be done is to deprive the plaintiff of a fair hearing, the right to redress wrongs and eradicates any meaningful access to courts guaranteed by Ga. Const. Art. I, Sec. I, Paragraphs I, II and XII.

O.C.G.A. §51-12-33 (c),(d)(1) AND (2) UNCONSTITUTIONALLY DENIES PROCEDURAL DUE PROCESS TO UNREPRESENTED NONPARTIES AND PLAINTIFFS

1. THE STATUTE IS VAGUE, OVERBROAD, UNCERTAIN AND UNCLEAR.

Due process under the Georgia Constitution requires that civil statutes "must provide fair notice to those to whom the statute is directed and its provisions must enable them to determine the legislative intent." Bell v. Austin, 607 S.E.2d 569, 574, 278 Ga. 844 (2005). A civil statute violates this requirement if it is "so vague and indefinite in its meaning that persons of ordinary intelligence must guess at its meaning and differ as to its application." Id. Therefore, the due process test for vagueness of a statute is whether men of common intelligence must guess at its meaning. O.C.G.A. § 51-12-33 runs afoul of this test. The

language in question here defies construction. It is irrational and paradoxical. Specifically, Subsections (b) and (c) are irreconcilably contradictory and these key provisions fail to provide clear standards.

However, Section (c) states the fault of all persons or entities who contributed to the alleged injury or damages must be considered in assessing percentages of fault. These nonparties are not legally obligated or accountable to Plaintiffs. Therefore, these nonparties are paradoxically "deemed liable," but not subject to liability under Section (f)(2).

2. O.C.G.A. 51-12-33 DENIES SUBSTANTIVE DUE PROCESS.

O.C.G.A. § 51-12-33 (c)(d)(1) and (2) violates substantive due process because it is not reasonably related to the needs of the state, and it irrationally punishes plaintiffs. O.C.G.A. §51-12-33(c), (d)(1), and (2) serves to protect wrongdoers at the expense of society at large. It creates no enforceable judgment against nonparties on the verdict form. It permits neither contribution nor indemnity. It precludes neither claims nor issues as to any person or party. It diminishes the amount of dollars the wrongdoer must pay in relation to the total damages the Plaintiff should be awarded. Section 51-12-33 requires

triers of fact to allocate "fault" or "liability" to unrepresented parties. These features of Section 51-12-33 are arbitrary and capricious, and they have the effect of denying a fair trial. Section 51-12-33 arbitrarily denies fair trial both to litigants and to the non-litigant nonparties.

3. O.C.G.A. § 51-12-33 DENIES EQUAL PROTECTION AMONG CLASSES OF BOTH PLAINTIFFS AND DEFENDANTS.

Equal protection analysis focuses on the manner in which a statute makes classifications among persons. A classification will be sustained if it is "rationally related to a legitimate state interest." Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 81 (1988); Ciak v. State, 278 Ga. 27, 597 S.E.2d 392 (2004). The Georgia Const. Art. I § 1, ¶ 2 provides that, "[p]rotection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be deprived of equal protection of the laws." Equal protection requires that all persons be treated alike under like circumstances and conditions. Blackmon v. Monroe, 233 Ga. 656, 212 S.E.2d 827 (1975). Inherent in that guarantee is that the legislature is barred from enacting special or class legislation. Id. See, Crovatt v. Mason, 101 Ga. 246, 28 S.E. 891 (1897);

Coper v. Rollins, 152 Ga. 592; 110 S.E. 726 (1922); Murphy v. West. 205 Ga. 116, 52 S.E.2d 600 (1949).

Under an equal protection analysis, a classification by the Georgia legislature is permitted "when the classification is based on rational distinctions and...bears a direct and real relation to the legitimate object or purpose of the legislation." Atlanta v. Watson, 267 Ga. 185, 188, 475 S.E.2d 896 (1996).

Here, the procedures established in O.C.G.A. § 51-12-33 (c), (d)(1) and (2) arbitrarily prejudice both plaintiffs and unrepresented nonparties, without any reasonable basis. Several aspects of this prejudice have been discussed above, with respect to substantive due process. Among other matters, individuals are exposed to formal adjudications of "fault" or "liability," without any right to appear and be heard, or to present evidence in their favor. Plaintiffs likewise are burdened with having to defend nonparties, to the prejudice of their own cases.

It is a denial of equal protection to allow the Defendant to blame a non-party who would never be liable to the Plaintiff. Moreover, in closing arguments named defendants are represented, they know which side they are on and who has the burden of proving a *prima facie* case against them. The nonparty accused of

negligence under Section 51-12-33 does not.

All Georgians who suffer injury or death due to the negligence of others are entitled to receive the same evenhanded treatment. Our statutes must assure that burdens are imposed equally upon every person within the class. Defendant would not have the same burden in asserting the liability of a non-party as Plaintiff does of JOHN F MAUGHAN. O.C.G.A. 51-12-33 classifies persons (including both plaintiffs and unrepresented nonparties) in ways not rationally related to any legitimate state interest. O.C.G.A. 51-12-33(c), (d)(1) and (2) is invalid, based upon equal protection grounds.

E. Judge Roth Erred in Excluding Evidence of Car Jacking of Diedree Hurst on a Street Nearby to Venetian Hills Apartments

Generally crimes occurring nearby are relevant as to whether or not a crime is foreseeable in that area. Matt v. Days Inns of America, 212 Ga. App. at 795. Walker v. St. Paul Apartments, Inc., 227 Ga. App. 298 (1997) quoting Walker v. Sturbridge Partners, 221 Ga. App. 36 aff'd, 267 Ga. 785 ,786.

Judge Roth granted Defendant's Motion In Limine to exclude exhibit P-42, which contained Dierdee Hurst's car jacking incident report dated 9/29/2005.(R-3172 and R-2228-2229).

Hurst was traveling on Venetian St. (runs parallel to Campbellton one block behind Venetian Hills) and was bumped from behind by car. The passenger got out, pointed a "black" gun at victim's face and stated "get away from the car". Victim got out of car and Suspect drove away with car. (R-2228-2229). The car jacking of Dierdee Hurst crime occurred in Beat 406 and within a one mile radius of Venetian Hills Apartments. (R-2228-2229).

F. Judge Roth Erred in Failing to Dismiss Juror #19 for Cause.

Sohail Saleem was identified as Juror #19 during voir dire. Juror #19 did not put down he was a medical doctor on his initial information sheet. He later admitted he was a medical doctor. (T-62, l.20-63,l.3 and T-138, l.18-10). During the group stage of voir dire questioning, he did not raise his hand to identify himself as agreeing with the statement that there is something wrong with our civil justice system that needs to be fixed through tort reform. (T-45,l.12-17 and T-139,l.16-140,l.3). However, he in fact did hold such beliefs. During the individual questioning of Juror #19, he admitted that he believes that there should be a cap in what can be awarded to a Plaintiff. (T-140, l.2-3 and T-142, l.8-24.) He also believed in a heightened standard for civil liability. "I think the reforms I would like

to see is that negligence needs to be proven very clearly. I think there needs to be looked at, really, the essence in terms of history, not just a lack of some documents or something like that because being in the medical profession there is nothing, right and wrong." (T-139, l.20-25). Very clearly means "Enough for me to convince that this was real negligence." He wanted it to be more objective. (T-143, l.17-18).

Plaintiff moved for Juror #19 to be struck for cause.(T-182,l.11-183,l.21). Juror #19 wanted to get on the panel in this case. He tried to hide his bias against Plaintiffs to try to get on the panel. Juror #19 tried to mislead both the attorneys and the court about his occupation and personal beliefs. "{W}hen a litigant asks a potential member of his trial jury a question he has a right to get a truthful answer." Pierce v. Altman, 147 Ga. App. 22, 23 (1978). Judge Roth denied Plaintiff's motion to strike Juror #19 for cause. (T-183,l.19-21). Plaintiff used all her preemptory challenges before the jury was struck and used one of her preemptory challenges to strike Juror #19 from the panel. "Where a Defendant uses all his preemptory challenges before a jury is struck and is forced to use a preemptory challenge on a juror who should have been stricken for cause, the error is

harmful and requires reversal." Parisie v. State, 178 Ga. App. 857, 859 (1986).

G. Judge Roth Erred In Not Giving Jury Charge No. 23 and 24

Plaintiff supplied a Request to Charge No. 24 regarding foreseeability. (R-3662-R-3663). Plaintiff supplied a Request to Charge No. 23, regarding prior similar crimes. (R-3660-R-3661).

Both charges are accurate statements of Georgia laws, are not duplicative, and are adjusted to the facts of this case.

This the 26th day of January, 2011

Respectfully Submitted,

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IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

CARRIE RAINES, ET AL,	)	
	)	
Appellant,	)	
	)	
v.	)	DOCKET NO. A11A0793
	)	
JOHN F. MAUGHAN, ET AL,	)	FULTON COUNTY STATE COURT
	)	CIVIL ACTION FILE NO.
Appellee.	)	2007EV001852A

CERTIFICATE OF SERVICE

I certify that I have served the within and foregoing Brief of Appellants upon all parties by depositing a copy of same in the United States mail, with sufficient postage affixed, addressed as follows:

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