

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

**CARRIE RAINES, Individually, and as)
Administrator of the Estate of)
KEITH TAYLOR,)**

Appeal No. A11A0793

Appellant,

vs.

**JOHN F. MAUGHAN, Individually and)
d/b/a VENETIAN HILLS)
APARTMENTS,)**

Appellee.

BRIEF OF APPELLEE JOHN F. MAUGHAN

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PART I: STATEMENT OF FACTS AND PROCEEDINGS

(A) Background Proceedings

The subject appeal was taken by Appellant Carrie Raines, individually and Administrator of the Estate of (her son) Keith Taylor (hereinafter “Appellant”) following the jury verdict rendered in favor of Appellee John F. Maughan (hereinafter “Appellee”) on January 25, 2010. R. 314, Vol. 2, 3693-95.

On February 7, 2007, Appellant brought a wrongful death case against Appellee related to the Taylor’s death which occurred at Venetian Hills Apartments on December 14, 2005. R. 8, Vol. 1, 40-46. Taylor was on the property visiting a woman he had just met, and as he was leaving he was shot and killed as part of an apparent botched armed robbery perpetrated by unknown assailants who specifically targeted Taylor. Although it does not specify it, the Complaint is grounded in premises liability with Appellant claiming that Appellant failed to keep the property safe for Taylor. Appellant sued only Appellee.

On April 23, 2009, more than 120 days prior to trial, Appellee served its Notice that a Non-Party Was or Non-Parties Were Wholly or Partially at Fault Pursuant to O.C.G.A. § 51-12-33(d) (hereinafter “Notice”) R. 124, Vol. 4, 987-91. In the Notice, Appellee identified the unknown assailants as John Does I, II and III and stated that that these unknown assailants “may have contributed to or caused the

mortal injury and ultimate death of [Appellant's] decedent son through negligent or intentional actions with respect to the incident at issue in this lawsuit.” On December 19, 2007, Appellant filed its Motion to Dismiss the Notice and to preclude any argument that damages should be apportioned and on May 28, 2009, the trial court denied the Motion to Dismiss. R. 138, Vol. 4, 1150-54; R. 149, Vol. 4, 1245-48. On June 27, 2008, Appellee filed a Motion for Partial Summary Judgment on the issue of apportionment arguing that the case should be tried as one where apportionment was considered by the jury. R. 93, Vol. 2, 570-73. Appellant opposed this motion by Brief on July 28, 2008 and on September 3, 2009, the trial court entered an Order granting Appellee's Motion for Partial Summary Judgment effectively allowing the jury to consider the issues of non-party fault and apportionment. R. 191, Vol. 5, 1547-48. Appellant filed a Motion for Reconsideration of the September 3, 2009 Order and the trial court denied that Motion as well. R. 192, Vol. 5, 1549-53; R. 194, Vol. 5, 1560-61.

Appellee filed Motions in Limine seeking to prevent evidence of 36 prior crimes, not including the “service call” reports discussed herein, at or near Venetian Hills from being introduced at trial. R. 234, Vol. 6, 1893-1903. In its carefully considered December 21, 2009 Order, the trial court partially granted

Defendant's Motions in Limine to exclude, but only as to evidence related to 11 different instances or prior criminal conduct, and even then, it still allowed parts of two of the incident reports of those instances to be admissible. The trial court otherwise authorized Appellant to seek to admit the overwhelming majority of evidence of alleged prior crimes. R. 277, Vol. 10, 3170-77.

That same Order also denied Appellee's Motion in Limine to Exclude evidence of service call records (Appellant's trial exhibits 38 and 39). In that Order, the trial court correctly determined that the service call records were evidence of a nature relied upon by the security experts that were to and did testify at trial. However, the trial court also held that because the facts and data actually contained in the service call records "comprised ... multiple layers of hearsay", "unexplained codes and terms" and "include many incidents and reported crimes which are simply not relevant to this case," the information contained within the service call lists themselves were not admissible. R. 277, Vol. 10, 3172-73. Thus, the trial court properly ruled that the experts were allowed to testify as to their reliance upon the service call lists, but not as to hearsay contained within those lists. R. 277, Vol. 10, 3173.

Another issue addressed in the December 29, 2009 Order relevant to this appeal

is the trial court's holding preventing Plaintiffs' security expert, John Harris, from testifying that the Taylor's death was foreseeable or that the alleged security deficiencies were the proximate cause of Taylor's death. R. 277, Vol. 10, 3175.

The case was tried before a jury and Appellant enumerates two alleged errors occurring at trial. First, she complains that Juror #19 should have been struck for cause; and second, that the trial court allegedly erred in failing to give two of her requested jury charges. Of critical importance is the fact that although Appellant makes several arguments in her brief regarding the impropriety of allowing the jury to consider apportioning fault, **the jury did not actually apportion fault in any manner and instead rendered a defense verdict.** R. 314, Vol. 11, 3693-95. Judgment was entered by the trial court in favor of Appellee the following day. R. 316, Vol. 11, 3698-99.

(B) Corrected Factual Background

As noted above, Taylor was shot and killed by unknown perpetrators that specifically targeted him for a robbery as he left the apartment of a woman at Venetian Hills that he had recently met. At the time of Taylor's death, Venetian Hills employed a security guard to patrol the premises. Vol. 13, T. 66-268. One security guard was sufficient for the size of the premises. Vol. 15, T. 787, 789, 830. The

security guard was required to live on the premises and was available and reachable via cellular phone and the apartment's answering service. Vol. 13, T. 268; Vol. 15, T. 791. Appellee provided adequate orders to the security guard to follow in terms of providing security. Vol. 13, T. 269. The security guard patrolled the premises randomly, on regular basis during the evening hours, Vol. 15, T. 789, and the security guard had patrolled the area where Taylor was shot approximately 45 minutes to an hour before the incident. Vol. 13, T. 288. In addition, there was a property manager who also lived on the property and supervised the security guard. Vol. 13, T. 272; Vol. 15, T. 790, 821. The security guard was required to report daily to the property manager and completed Daily Reports if anything happened on the property. Vol. 13, T. 296. Venetian Hills had video cameras at the apartment complex which were visible and obvious. Vol. 15, T. 788. In addition, there was adequate lighting which allowed persons and the security guard to see across the parking lot where the incident occurred and this lighting was enhanced by Georgia Power at Appellee's expense. Vol. 15, T. 789. Appellee implemented policies and procedures with respect to curfew times and a prohibition against loitering including fines. Vol. 15, T. 791. There was no non-opinion evidence that adding additional fencing or vehicular control gates, as contended by Appellant's expert, would have deterred the subject assailants

or kept them off Appellee's property. Vol. 15, T. 792-93. There was no non-opinion evidence that adding fencing, gates or additional lighting would have deterred the subject assailants or kept them off Appellee's property. Vol. 15, T. 792-94 & 808-10. Appellant can and has demonstrated no reversible error by the trial court.

PART II: ARGUMENT AND CITATION TO AUTHORITY

(A) The Trial Court Properly Excluded Any Expert Testimony Regarding the Hearsay and Irrelevant Contents of the Service Call Lists.

Appellant's first enumeration of error is that the trial court erred in excluding the contents of Plaintiffs' Exhibits 39 and 40, the "service call" lists obtained from Atlanta Police Department. R. 256, Vol. 7, 2428-31.

1. Standard of Review

A trial court's determination regarding admission of evidence is reviewed under the abuse of discretion standard. Kilpatrick v. Foster, 185 Ga. App. 543, 546 (1988).

2. Legal Argument

To understand Appellant's argument, this Court must first understand what is not at issue. The trial court did not prevent Appellant's expert from testifying to the fact that he had obtained the service call lists at issue or that the guidelines of the security

professionals' organization that he followed referenced obtaining such lists.¹

Additionally, Appellant's expert was not prevented from testifying that he had relied upon the information contained in those service call lists in forming his opinions. In denying Appellee's Motion in Limine to exclude any evidence of or reference to the service call lists, the trial court noted the long standing rule that "facts and data relied upon [by an expert] need not be admissible." R. 277, Vol. 10, 3172-73. The trial court properly recognized well-established Georgia law that

[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

R. 277, Vol. 10, 3173 (*citing* O.C.G.A. § 24-9-67.1).

In exercising its discretion that the service call lists' probative value did not substantially outweigh their prejudicial effect, the trial court determined that the facts and data actually contained in the service call records "comprised ... multiple layers

¹ It should be noted that despite the fact that Harris claimed to have followed the methodology of the International Association of Professional Security Consultants, he has never been accepted as a member of that organization. Vol. 14, T. 666.

of hearsay”, “unexplained codes and terms” and “include many incidents and reported crimes which are simply not relevant to this case,” and that the information contained within the service call lists themselves were not admissible. R. 277, Vol. 10, 3173.

As Appellant points out in her Brief, the service call lists for the 60 months preceding the subject incident purport to reference 5,800 calls for service. Brief at 10.

However, there was absolutely no evidence presented or proffered by Appellant that any of the incidents for which the calls were logged in anyway was substantially similar to the subject incident as is required for evidence of previous crimes to be admitted. Nalle v. Quality Inn, 183 Ga. App. 119, 120 (1987). Contrary to Appellant’s assertion, courts holding service call lists inadmissible do not do so merely because they are uncertified or unauthenticated. Appellant’s Brief at 11 (*citing* Wojcik v. Windmill Lake Apartments, Inc., 284 Ga. App. 766, 769 (2007)). Rather, under Georgia law, a service call list cannot be used to establish substantially similar crimes without evidence relating to the circumstances of the crimes contained therein. Grandma’s Biscuits, Inc. v. Baisden, 192 Ga. App. 816 (1989).

The information contained on the service call lists was insufficient to allow the trial court or even this Court to conduct any analysis of the substantially similar test. For example, these exhibits do not contain any information as to the location, nature

and extent of the alleged prior crimes and their similarity, proximity or other relationship to the shooting of Taylor. Walker v. St. Paul Apts., 227 Ga. App. 298, 300 (1997); Vega v. La Movida, Inc. 294 Ga. App. 311 (2008). In other words, these exhibits do not allow any Court to determine whether the event 1) occurred at a comparable location, (2) occurred under similar physical circumstances and conditions, and/or (3) is of a similar type. See, Burnett v. Stagner Hotel Courts, Inc., 821 F. Supp. 678 (N.D.Ga. 1993).

This proffered evidence is void of information as to details of the calls for service made or details of the alleged crimes reported to the Atlanta Police Department. In fact, from these exhibits it is impossible to determine if there was any crime committed. Instead, the service call lists merely log the calls being made and categorize the nature of the call into various groupings of “types” of alleged crimes based upon the subjective belief of the unknown telephone operators receiving the calls and logging them into the computer.

Additionally, there is no evidence in this case that Appellee knew about much if any of the information contained in the service call lists. As previously held by this Court, “[t]here is no authority in this State imposing a duty upon a property owner to investigate police files to determine whether criminal activities have occurred on its

premises[.]” Dolphin Realty v. Headley, 271 Ga. App. 479, 482 (2005), (citing Sun Trust Banks v. Killebrew, 266 Ga. 109 (1995)). See also, Johnson v. Atlanta Housing Auth., 243 Ga. App. 157 (2000); Wojcik v. Windmill Lake Apartments, Inc., 284 Ga. App. 766 (2007).

Finally, Appellant never proffered any foundation that Appellee knew about any prior substantially similar crime occurring off his premises and in the general area, and Plaintiff’s Exhibit 39 contains off property prior crime evidence. In Whitmore v. First Federal Sav. Bank of Brunswick, 225 Ga. App. 768 (1997), this Court held: “With regard to the police reports and printouts, although it is true they demonstrate that certain crimes of violence occurred in the area surrounding the bank over a two year period, they do not demonstrate that First Federal had any knowledge concerning such crimes. As the Supreme Court of Georgia held in Sun Trust Banks v. Killebrew, 266 Ga. 109, [110,] ‘[t]here is no authority in this State imposing a duty upon a property owner to investigate police files to determine whether criminal activities have occurred on its premises [or elsewhere].’ Absent such a duty or actual knowledge of the incidents, the reports and printouts do not create a material issue of fact regarding whether First Federal had reasonable grounds to foresee the criminal attack on Whitmore.” Id. at 769.

The trial court properly held that Plaintiffs' expert could testify as to the methodology he used, his following of the methodology by obtaining the service call lists and his reliance on the information contained therein. The trial court also properly determined that the information contained in the service call lists was inadmissible and any probative value they may have had did not substantially outweighs their prejudicial effect. O.C.G.A. § 24-9-67.1. As there was no error that occurred, this Court should affirm the jury's verdict

(B) The Judge Properly Prevented the Experts from Testifying that Taylor's Death was Foreseeable and Preventing Any Testimony the Alleged Security Deficiencies Were the Proximate Cause of Taylor's Death.

1. *Standard of Review*

A trial court's determination regarding admission of evidence is reviewed under the abuse of discretion standard. Kilpatrick v. Foster, 185 Ga. App. 543, 546 (1988).

2. *Legal Argument*

Although the trial court denied Appellee's motion to exclude all testimony from Appellant's security expert John Harris, it did grant Appellee's motion to prevent Harris from invading the province of the jury by testifying that the armed robbery and shooting of Taylor was foreseeable to Appellee and also to prevent Appellant from

asking the same questions of Appellee's security expert on cross-examination. R. 277, Vol. 10, 3175. The trial court also prevented Harris from testifying that any alleged negligence on the part of Appellee was the proximate cause of the shooting and resulting death of Plaintiff's son. R. 277, Vol. 10, 3175. As this ruling was consistent with Georgia law, the ruling of the trial court should be affirmed.

Appellant asserts that there "are no Georgia cases limiting a qualified security expert from talking about ... proximate cause...". Brief at 12. Yet, in the immediately previous paragraph, Appellant notes the trial court's reliance on Carlock v. Kmart Corp., 227 Ga. App. 256 (1997). In Carlock, this Court affirmed the exclusion of a security expert's testimony as to the question of foreseeability in a premises liability lawsuit arising from a shooting in a business's parking lot holding:

Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman.... However, it is equally clear that the scope of what is admissible as expert opinion testimony is not unlimited. It is the established rule in Georgia, that where (a) the path from evidence to conclusion is not shrouded in the mystery of professional skill or

knowledge, and (b) the conclusion determines the ultimate issues of fact in a case, the jury must make the journey from evidence to conclusion without the aid of expert testimony. A party may not bolster his (case) as to the ultimate issue with expert testimony when the jury could reach the same conclusion independently of the opinion of others.

Carlock, 227 Ga. App. at 361 (citations omitted). See also, Sotomayor v. TAMA I, LLC, 274 Ga. App. 323, 326 (2005) (physical precedent only) (expert testimony not required regarding duty of landlord to install barrier curbs in apartment parking lot); Rios v. Norsworthy, 266 Ga. App. 469, 473-74 (2004) (expert opinion not admissible to determine whether professional truck driver exercised ordinary care to discover and avoid collision with car passing it). Although Appellant seeks to rely on Brookwood Holdings v. Suarez, 285 Ga. App. 90 (2007), that case is distinguishable on its facts. Suarez focused on the propriety of summary judgment in a negligence based premises liability action and not whether the proffered opinion of the expert on foreseeability or proximate cause was admissible at trial.² Regardless, the Suarez court determined that because there was evidence the landlord continued to charge the tenants a security fee

² There is also no indication in that case whether the defendant sought to limit or strike the expert testimony provided in his affidavit opposing summary judgment.

yet stopped the security without notice to the tenants that “it is axiomatic that questions regarding proximate cause are undeniably a jury question....” *Id.* at 97

The ultimate issue of negligence in a premises security case is one which is not shrouded in mystery or professional skill and knowledge. Rather, the issue is one in which the jury can travel from the evidence to the conclusion without the testimony of the expert witness on the legal issues of foreseeability and proximate cause. Carlock, *supra*. See also, Van Blargan v. Williams Hospitality Corp., 754 F. Supp. 246, 249 (D.P.R. 1991). Harris was allowed to testify that he reviewed various documents and followed a particular methodology; his opinion regarding what was the appropriate level of security that Appellee should have had in place; and how Appellee’s security measures did not rise to what was his opinion of the appropriate level of security. Vol. 14, T. 644-64. The trial court correctly exercised its discretion and determined that any opinion testimony beyond that as to foreseeability and proximate cause was improper under Georgia law and otherwise would not assist the jury in reaching its verdict. There is no reason for this Court to determine the trial court abused its discretion, and the order of the trial court and the jury’s verdict should be affirmed.

(C) The Trial Court Properly Allowed the Parties to Argue and the Jury to Consider Apportionment Pursuant to O.C.G.A. § 51-12-33.

1. *Standard of Review*

Statutory interpretation presents a question of law and is subject to *de novo* review. Expedia, Inc. v. City of Columbus, 285 Ga. 684, 689 (2009).

2. *Legal Argument*

First and foremost, this Court should reject Appellant's argument because there is no issue properly presented for appeal. Although the trial court allowed the attorneys to argue for and against apportionment and for the jury to consider same, **the jury did not apportion damages in any manner or find any non-party in any way at fault.**

In fact, the jury verdict is perfectly clear that although there was a place on the verdict form for the jury to indicate that apportionment was an appropriate verdict, the jury instead found entirely for Appellee. R. 314, Vol. 11, 3693-95. Because the jury did not apportion fault, Appellant cannot now seek a reversal of a non-apportioned jury verdict as she cannot demonstrate that she was harmed in any manner by the apportionment arguments made or the presence of apportionment on the jury verdict form. "[I]t is axiomatic that harm as well as error must be affirmatively shown by the record to obtain reversal." Evans v. State, 233 Ga. App. 879, 880. See also, Sasser v. Adknison, 258 Ga. App. 699 (2002). Appellant even admits in her Brief that apportionment is discretionary. Brief at 16. Because the jury opted to exercise its

discretion and not apportion any fault in this matter, Appellant suffered no harm and cannot now seek redress of an alleged problem that obviously did not affect the jury's final determination.

However, should this Honorable Court wish to consider Appellant's various arguments regarding apportionment, Appellee will address the merits of these arguments herein.

O.C.G.A. § 51-12-33 establishes a framework for the fact finder to apportion damages among persons at fault, both named and unnamed in the action. As explained very recently by this Court,

[w]here damages are to be awarded in an action against more than one person for injury to person or property 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.

Cavalier Convenience, Inc. v. Sarvis, 305 Ga. App. 141, 143-44 (2010) (*cert. granted* January 2011)(citations omitted). "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.*" O.C.G.A. § 51-12-33(c) (emphasis added). Further, the

“trier of fact *shall* consider” the percentages of fault of non-parties in two situations:

1) if the plaintiff entered into a settlement agreement with a non-party or 2) if proper notice of fault of the non-party is given. O.C.G.A. § 51-12-33(d)(1).

Appellant does not (and cannot) dispute that the unknown robbers are “at fault” in causing Taylor’s death — but for the robbers’ actions, Taylor would not have been killed. Further, Appellant does not dispute that Appellee’s Notice complies with the procedural requirements of the statute. Instead, Appellant contends that a) Taylor must be shown to have been partially at fault for fault to be apportioned; b) apportionment does not apply to cases with one defendant; c) apportionment does not apply to non-parties; d) it is impossible to apportion fault between negligent and intentional conduct; and e) the apportionment statute is unconstitutional for a number of conclusory reasons.

a. A plaintiff does not have to be found at fault for fault to be apportioned.

Appellant acknowledges her position has been rejected categorically by Sarvis, but justifies her position nevertheless by contending *certiorari* has been granted and Sarvis will be decided by the Georgia Supreme Court. Brief at 17. This Court is bound by its prior ruling in Sarvis ruling unless and until the Supreme Court reverses. Ga. Const., Art. VI, ¶ III. Even if reversal were to occur, Sarvis did not involve the

fault of a non-party. Additionally, and in contrast to Appellant's position, there is evidence in the record that Taylor was, to some degree, at fault. For example, Janice Warren testified that she had been "real good friends" with Taylor "for about two and a half years" before he died; that Taylor took pride in his clothes; that he "loved to dress;" and that he wore "a necklace and earring in his ear" that "was flashy." Vol. 13, T. 250, 252, 254. She described the necklace as a gold chain and the earring as a diamond. Vol. 13, T. 254. Taylor's sister, Wanda Taylor, confirmed this in her testimony stating that Taylor usually wore a watch, necklace and earrings in both ears; and Appellant herself admitted under cross-examination that Taylor wore very expensive clothes and that he wore very expensive and noticeable jewelry . Vol. 15, T. 748, 762-63. Considering that Appellant's entire case focused around allegations that Venetian Hills was allegedly a high-crime neighborhood, it can also be inferred that by wearing expensive clothes and very expensive and noticeable jewelry, Taylor had to some degree placed himself in a position of danger which would allow a jury to determine him to be contributorily or comparatively negligent.

Sarvis mandates rejection of Appellant's argument. Even if it did not, Appellant's argument is still groundless because the record contains evidence of potential fault of Taylor and as such the trial court properly allowed the jury to consider apportionment.

b. Apportionment is proper in cases where there is more than one defendant.

While Appellant cites to O.C.G.A. § 51-12-33(b) for the proposition that apportionment does not apply in a one defendant case, she totally ignores the fact that subsection (a) applies “[w]here an action is brought against one or more persons for injury...” O.C.G.A. § 51-12-33(a). Although that subsection purports to limit its applicability to situations “where the plaintiff is to some degree responsible,” it has already been demonstrated herein that there is evidence of record that Taylor could have been determined to have some degree of fault. Additionally, because the jury did not apportion damages in this matter, Appellant’s argument is moot.

c. Juries can consider both parties and non-parties when apportioning fault.

Appellant’s reading of O.C.G.A. § 51-12-33 is contrary to common sense and the statute, when read in its entirety, clearly allows juries to apportion fault between parties and non-parties alike. Appellant even admits that the statute provides the very mechanism for allowing and determining the fault of non-parties in subsections (c), (d) and (f). Brief at 18. Although damages can only be determined against a party found to be liable, the jury’s first job is determine fault, not liability. Only if a party is found at fault can the jury determine the damages to award. However, the clear intent and clear language of this Code Section is to empower a jury to determine the

percentage of fault to a non-party as well as a party. See, Sarvis, supra. There is no merit to Appellant's contention that apportionment is not applicable to non-parties when the clear language of O.C.G.A. § 51-12-33 provides otherwise.

- d. The apportionment statute empowers the jury to apportion fault regardless of whether the fault is as a result of intentional or negligent conduct.

Appellant cites no binding law in Georgia for her position that it is “intellectually, logically and rationally inappropriate” for a jury to be empowered to apportion damages between negligent and intentional conduct in a premises liability case. Brief at 18-19. In fact, the argument that Appellant makes is the same argument that was made in an amicus briefs submitted by both the Georgia Trial Lawyers Association and the Dekalb Rape Crisis Center in Sarvis. See, Sarvis, 305 Ga. App. at n.24. Sarvis rejected that argument stating that it had no authority to adopt a construction contrary to the General Assembly's intent as plainly codified. Id. at 146-47.

Appellant's argument is without merit and should be overruled.

- e. O.C.G.A. § 51-12-33 does not violate the Due Process or Equal Protection Clauses of the Georgia Constitution.

Appellant's next argument is that O.C.G.A. § 51-12-33 somehow violates procedural and substantive Due Process rights guaranteed under the Georgia

Constitution. However, “[d]uly enacted statutes enjoy a presumption of constitutionality. A [statute] must be uph[e]ld 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 (2008). Appellant fails to demonstrate this. Under the rational basis test applied to a substantive due process claim, “a statute will be upheld in the face of a due process attack so long as it is reasonable related to the public health, safety or general welfare. Georgia Dept. of Human Res. v. Sweat, 276 Ga. 627, 629 (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.” Id. (citations and punctuations omitted). The state has a legitimate interest in apportioning damages among those determined to be at fault, whether or not a plaintiff chooses to name them as party-defendants, according to their respective degrees 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.

The legislative changes to O.C.G.A. § 51-12-33 do not violate due process because the Georgia Legislature has full constitutional authority to create and alter common law

remedies – even to eliminate specific causes of action altogether – and therefore within this plenary authority the legislature is authorized to eliminate joint and several liability awards, and it has done so by reasonably implementing a statutory requirement for allocating percentages of fault. In Gazaway v. Nicholson, 190 Ga. 345 (1940), the Court considered the former version of O.C.G.A. § 51-12-31 and reaffirmed prior rulings that it only applied to suits against more than one trespasser for property damage and not personal injury. The Court further declared that in suits for personal injury where several defendants were shown to be liable, the rule that “the jury shall assess damages against all of them jointly in one amount is a common law origin, and remains in force where it has not been changed by statute.” Id. at 248 (emphasis added).

Clearly, the Georgia Supreme Court has acknowledged the Legislature is not precluded by the Georgia Constitution from changing the doctrine of joint and several liability.

Appellant also argues that due process is implicated because there was “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 negligence of the defendant” and that to ask a jury to allocate an indivisible injury denied her due process rights. Brief at 20-21. However, Appellant’s argument is flawed for numerous reasons. First, contrary to Appellant’s assertion, there was

ample evidence at trial, as discussed above, that Taylor was at least partially at fault. Second, Appellant confuses two concepts: causation and fault. O.C.G.A. § 51-12-33 does not require the trier-of-fact to apportion causation. Instead, that Code Section simply requires percentage assessment of fault, and these percentages are then used to allocate a portion of the total damages to each of the defendants found liable, that is, to each defendant whose fault contributed to the injury.

“The power of the legislature to create, modify or abolish rights to sue has been clearly and repeatedly recognized both by the U.S. Supreme Court and by this Court.” Love v. Whirlpool Corp., 264 Ga. 701, 705 (1994). Even the abolishment of a cause of action does not deny due process of law because “[s]tates are free to create immunities and eliminate causes of actions, and that legislative determination provides all of the process that is due.” Santana v. Georgia Power Co., 269 Ga. 127, 129 (1998). Due process only “recognizes a citizen’s unfettered right to defend his or her life, liberty or property in accordance with the limitations constitutionally established by the General Assembly.” Couch, 280 Ga. at 582 (emphasis added). Couch, Love and Santana each held that the Legislature had acted properly in restricting plaintiffs’ rights to sue and these cases provide ample authority for holding that the Legislature acted within constitutional bounds when it eliminated joint and

several liability and substituted apportionment in personal injury lawsuits of the type filed by Appellant in this matter. See also, Williams v. Byrd, 242 Ga. 80 (1978), Henderson v. Hercules, Inc., 253 Ga. 685 (1985) and Smith v. Gortman, 261 Ga. 206 (1991) (regarding the constitutionality of the Georgia Worker's Compensation statute, O.C.G.A. § 34-9-11 and express rejection of both due process and equal protection challenges to the exclusive remedy provisions therein).

By enacting O.C.G.A. § 51-12-33, the Legislature did not go so far as to abolish a plaintiff's right to recover from any individual or entity for personal injuries. Nor did the Legislature limit the amount of any such recovery. Appellant still has the right to file suit against any party and the Legislature did not eliminate any substantive claim that she could have alleged; nor did it reduce by any amount the total damages Appellant might have been awarded as compensation for her alleged injuries had she been able to prove her case which she did not. Appellant had the full ability to sue for wrongful death and obtain a judgment; however, now to recover in full she should have pursued a claim against every contributing party.

Neither is O.C.G.A. § 51-12-33 unconstitutionally vague as the statute provides "fair notice" to those affected and its provisions "enable them to determine the legislative intent." Jekyll Island – State Park Authority v. Jekyll Island Citizens

Ass'n, 266 Ga. 152, 153 (1996). The statute clearly provides that liability for wrongful death should be apportioned according to jury assessments of relative fault, such that each defendant shall only be liable for the portion of the award of damages calculated based in that defendant's assigned percentage of fault. The statute is specific, as is the legislative intent if the statute is given a common sense meaning. Thus, the "vagueness" argument is also without merit.

Finally, Appellant's Equal Protection argument fails on its face. Initially, Appellant has failed to show that the apportionment statutes create two different classes of plaintiffs who are subject to different treatment as is required to demonstrate a violation of Article I, § I, ¶ II. Appellant cannot and does not demonstrate the statute creates "classifications that disadvantage a suspect class" or "interfere with the exercise of a fundamental right." In fact, plaintiffs affected by the statute do not make up a "suspect class" that has been historically subjected to discrimination and as common law tort claimants, personal injury plaintiffs have not historically had a "fundamental right" to recover 100% of their damages from a defendant who was not 100% at fault. Since Appellant is not a member of a suspect class and because no fundamental right is at issue, O.C.G.A. § 51-12-33 must only satisfy a rational basis test to pass constitutional muster in the face of an equal

protection challenge. Bickford v. Nolen, 240 Ga. 255 (1977). As discussed above, there is a rational basis for the switch from joint and several liability to apportionment as courts and commentators for years have recognized the inequities of holding a defendant liable for 100% of the damages when was not 100% at fault for the tort. See, e.g., Hudson v. Union Carbide Corp., 620 F. Supp. 558 (N.D.Ga. 1985). Because Appellant cannot demonstrate that apportionment violates equal protection, her arguments are without merit and should be overruled.

(D) The Trial Court did not Err in Excluding Evidence of the Prior, Nearby Alleged Carjacking.

1. *Standard of Review*

A trial court's determination regarding admission of evidence is reviewed under the abuse of discretion standard. Kilpatrick v. Foster, 185 Ga. App. 543, 546 (1988).

2. *Legal Argument*

Appellant's argument that the court's exclusion of evidence of this alleged "carjacking," documented as Exhibit P-42 should mandate reversal is without merit. The alleged crime did not occur on Appellee's premises. The location where it occurred does not border Venetian Hills nor did this crime occur under similar physical circumstances and conditions as the subject shooting of Taylor. R. 245, Vol.

7, 2087-125; R. 246, Vol. 7, 2126-30. Rather, this prior crime involved a person driving a car on a public street, the person being bumped by another vehicle and the stealing of a motor vehicle. Therefore, the trial court properly exercised its discretion in excluding this evidence and there has been no showing that this ruling was an abuse of discretion. Additionally, even if it was error to exclude this evidence, it is not reversible error because the evidence would merely have been cumulative of the 24 other allegedly substantially similar crimes which Plaintiff was allowed to introduce. R. 277, Vol. 10, 3171-74. See, Thomas v. Statewide Beverage Equip., 152 Ga. App. 293, 295 (1979).

(E) There Was No Error in Refusing to Dismiss Juror 19 for Cause.

1. *Standard of Review*

Once the trial court has conducted an adequate inquiry into the juror's partiality, the court's discretion in deciding whether to excuse the juror for cause is "extremely broad," and the court's decision may only be reversed upon a finding of "manifest abuse" of that discretion. Kim v. Wells, 275 Ga. 177, 178-79 (2002). A conclusion on an issue of bias is based on findings of demeanor and credibility which are peculiarly in the trial court's province, and those findings are to be given deference. Abdelaal v. Greens of Windy Hill, 285 Ga. App. 367, 369 (2007).

2. *Legal Argument*

Appellant cannot and has not pointed to any evidence in the record that the trial court manifestly abused its discretion in denying Appellant's motion to strike Juror 19 for cause. Despite Appellant's argument, even though Juror 19 stated that he would like to see further reforms in the civil justice system, the record reveals Juror 19 stated he would "absolutely" apply the law as instructed by the court even if his personal beliefs disagreed with the law. Vol. 12, T. 143-44, 183. Because Appellant can demonstrate no manifest abuse of discretion by the trial court, this issue does not present reversible error.

(F) No Error Occurred in Denying Appellant's Requested Charges #23 & 24.

1. *Standard of Review*

For review of a claim of failure to give requested jury charges, the "plain legal error" standard is applied. McWilliams v. State, 287 Ga. App. 585, 587 (2007).

2. *Legal Argument*

It is axiomatic that a jury charge need not be given in the exact language requested if the charge as given clearly covers the circumstances of the case. All that is necessary, provided the requested charge accurately states the relevant principles of law, is that these principles be fairly given to the jury in the general charge. When it

can be determined that the charge actually given conveys correctly the intent of the law and is so framed as to be applied with understanding to the fact situation, denial of a request for a specific charge is not reversible error. Horton v. Hendrix, 291 Ga. App. 416, 419-20 (2008). In this matter, instead of reading the requested Appellant's charge #23, R. 311, Vol. 11, 3660, the trial court found the concept to be contained therein regarding the purpose for which substantially similar crimes are admitted into evidence to be duplicitous of Appellant's charge #22 which was read. R. 311, Vol. 11, 3662; Vol. 15, T. 847. Similarly, the trial court properly excluded Appellant's charge #24 because it was argumentative containing phrases such as "brutal physical assaults," and especially when the jury had already been instructed regarding the purpose of admitting substantially similar crimes in Appellant's charge number 22 and pattern jury charge 60.202 (Torts; Proximate Cause; Foreseeability; Natural and Probably Consequence; Intervening Cause Rules). Vol. 15, T. 838-39; R. 311, Vol. 11, 3659.

Because Appellant can demonstrate no "plain legal error," the trial court's proper denial to give the requested charges does not constitute reversible error.

PART III: CONCLUSION

For the above-stated reasons, Appellee respectfully requests this Honorable Court

to affirm the rulings of the trial court and the verdict of the jury.

Respectfully submitted, this 1st day of February, 2011.



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CERTIFICATE OF SERVICE

This is to certify that counsel for Appellee has this day served a copy of *Brief of Appellee John F. Maughan* upon all counsel of record via electronic filing and via U.S. Mail as required by Georgia Court of Appeals Rule 6 to:

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