



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.<sup>1</sup> O.C.G.A. § 51-12-33 is reasonably

---

<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.

---

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 Skelton, Jr. (Exhibit D-A).

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

---

<sup>4</sup> 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.<sup>5</sup>

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

---

<sup>5</sup> 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.

FILED IN THE CLERK'S OFFICE  
JAN 22 2009  
DeKalb County, Georgia  
TRO