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IN THE STATE COURT OF BULLOCH COUNTY, GEORGIA

SANDRA BENNETT, INDIVIDUALLY AND AS MOTHER AND DULY APPOINTED ADMINISTRATRIX OF THE ESTATE OF TONI S. BENNETT, DECEASED,	*	
Plaintiff	*	
v	*	CIVIL ACTION NO: 2B06CV406
WAL-MART TRANSPORTATION, LLC and CHESTER SKELTON, JR.,	*	
Defendants	*	

OMNIBUS MOTION REGARDING THE UNCONSTITUTIONALITY AND INAPPLICABILITY OF ALL OR PART OF O.C.G.A. §51-12-33, AS AMENDED

On the grounds that O.C.G.A. §51-12-33, as amended, is unconstitutional on its face and as applied, and is otherwise inapplicable to this case, plaintiff hereby files this Omnibus Motion asking the Court for the following relief:

A. To strike the "SECOND DEFENSE" of Defendants' Consolidated Answer;

B. To grant partial judgment on the pleadings and/or partial summary judgment in favor of plaintiff and against defendants as to any issue of apportionment of damages pursuant to O.C.G.A. §51-12-33, as amended; and

C. To order, in limine, that defendants, their counsel and witnesses not present evidence of, or in any way argue or insinuate, in the presence of the jury that any damages to be awarded in this case should or could be reduced because of any negligence on the part of Moniquea Q. Stanley, or any other person

not named as a party in this case.

This 3rd day of April, 2007.

RONALD W. HALLMAN, P.C.

Ronald W. Hallman
Attorney for Plaintiff
State Bar No. 319825

P. O. Box 980
Claxton, GA 30417
912-739-4825

CERTIFICATE OF SERVICE

This is to certify that I have this day served GLEN M. DARBYSHIRE and SUSANNAH ROGERS PEDIGO, P. O. Box 1368, Savannah, Georgia 31402-1368, with a copy of the foregoing Omnibus Motion Regarding The Unconstitutionality And Inapplicability Of All Or Part Of O.C.G.A. §51-12-33, As Amended, by placing same in the U.S. Mail with sufficient postage affixed thereon.

This 3rd day of April, 2007.

Ronald W. Hallman
Attorney for Plaintiff
P. O. Box 980
Claxton, GA 30417
912-739-4825
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BRIEF IN SUPPORT OF OMNIBUS MOTION REGARDING THE UNCONSTITUTIONALITY AND INAPPLICABILITY OF ALL OR PART OF O.C.G.A. §51-12-33, AS AMENDED

Plaintiff shows in this Brief that the abolition or modification of the "joint and several rule" by the 2005 Tort Reform Act (Senate Bill 3), codified as O.C.G.A. §51-12-33 is unconstitutional on its face and as applied. Accordingly, plaintiff seeks relief in the form of an order striking a certain defense, granting partial summary judgment or partial judgment on the pleadings, and ordering in limine that certain evidentiary matters and arguments be excluded in order to prevent application of this unconstitutional statute. Plaintiff contends that O.C.G.A. §51-12-33 is unconstitutional in its entirety, and more specifically, that Subsection (c) which allows consideration of negligence of a third party is unconstitutional even if the remainder of the statute should pass judicial scrutiny.

I. FACTS AND ISSUE

This is a suit involving the injury and death of Toni S. Bennett in an automobile collision which occurred in Bulloch County

on December 15, 2005. The defendant is Wal-Mart Transportation, LLC, (the owner of the tractor/trailer which struck the vehicle in which plaintiff's decedent was a passenger) and Chester Skelton, Jr. (the employee of Wal-Mart Transportation, LLC and driver of the tractor/trailer). This wreck occurred at the intersection of U.S. Highway 301 and State Route 46. Plaintiff has alleged in her complaint that the Wal-Mart driver was speeding and had defective brakes, and that this was the proximate cause of the collision and resulting injuries and death. Wal-Mart and its driver are the sole defendants in this action. In their "SECOND DEFENSE", the defendants raised the "comparative fault of a third party" presumably Moniquea Q. Stanley, the driver of the vehicle in which plaintiff's decedent was riding.

Further, in discovery responses, defendants answered an interrogatory seeking contributing acts of negligence by any party by stating that "Ms. Stanley [driver of the vehicle in which the decedent was riding] failed to properly stop at the stop sign". The defendants in their answers further allege that this third party driver "caused the accident by pulling into the path of Mr. Skelton's tractor/trailer". (See Answer to Interrogatory 17(b)). It is apparent that the defendants are seeking to minimize their liability in this action by seeking to apportion damages between the defendants and a third party, Moniquea Q. Stanley. This will necessarily require the application of the new O.C.G.A. §51-12-33. As this Brief will show, this statute is unconstitutional and should not be applied in this case. Accordingly, the relief sought

in plaintiff's omnibus motion should be granted. While plaintiff contends that the entire statute is constitutional, Subsection (c) of the statute which allows a jury to "consider" the fault of a person not a party to the case or present in Court is particularly repugnant to due process and is further unconstitutionally vague since it fails to give guidance to the court and jury as to the consequences of such "consideration". See, Denton v. Con-Way Southern Express, Inc., 261 Ga. 41, 401 S.E.2d 269 (1991), which is more fully discussed later in this Brief. As a final matter, even if the statute is held to be constitutional, it does not require apportionment of damages.

II. ARGUMENT AND CITATION OF AUTHORITY CONCERNING UNCONSTITUTIONALITY OF O.C.G.A. §9-11-33 AS A WHOLE

A. BRIEF HISTORY OF JOINT LIABILITY

1. Common Law

The concept of joint liability was recognized in England almost 400 years ago in Sir John Heydon's Case, 77 Eng. Rep. 1150 (1613). Initially, it applied where there was a concert of action or breach of a common duty, "all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present." Id. at 1151. The Court reasoned that when "the jury find(s) for the plaintiff... the jurors cannot assess several damages against the defendants because all is one trespass." Id.

Initially, the rule was applied strictly, and even where two tortfeasors acted independently to create one indivisible injury, the plaintiff was limited to bringing a single action against only one of the tortfeasors, which led to untenable results. W. Page

Keeton, et al., Prosser and Keeton on the Law of Torts, §47 at 325 (5th Ed. 1984). Although the law in America followed the English rule initially, over time the States adopted a more practical approach. In 1916, the Virginia Supreme Court held that joint liability included cases involving multiple tortfeasors whose actions or inactions combined to cause an indivisible injury. Carolina, Clinchfield & Ohio Ry. Co. v. Hill, 89 S.E. 902 (Va. 1916). Several years later, the Georgia Court of Appeals followed in the case of Bonner v. Standard Oil Co., 22 Ga. App. 532, 96 S.E. 573 (1918). In Bonner, the Court held that "the principle of law is well settled that, where two concurrent causes operate in causing an injury, there can be a recovery against both or either one of the parties responsible for the concurrent causes. Barrett v. Savannah, 9 Ga. App. 642, 643, 72 S.E. 49." 96 S.E. 574.

The Supreme Court reiterated joint liability in Gooch v. Georgia Marble Co., 151 Ga. 462, 107 S.E. 47, 48 (1921). Quoting a New York case, the Gooch court stated:

> It is well settled that an action may be maintained against two joint tort-feasors whose negligence contributes to produce an injury, even though the same obligations do not rest upon each with respect to the person injured. It is sufficient to support a recovery if the negligence of both be a contributing cause, even though one owes to the person injured a higher degree of care, and even though there be differing degrees of negligence by each.

2. Georgia's Joint Liability Statutes

Georgia's legislature codified joint and several liability and contribution among jointly liable defendants in O.C.G.A. §§51-12-31 through 33. In 2005, the legislature passed SB 3, (Tort Reform Act) which altered O.C.G.A. §51-12-31 and 51-12-33, ostensibly

reversing laws that preceded the founding of the State.

a. O.C.G.A. §51-12-31

The 2005 Amendment changed O.C.G.A. §51-12-31 as follows:

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

b. O.C.G.A. §51-12-32

Senate Bill 3 did not alter O.C.G.A. §51-12-32, which provides for contribution between or among joint tortfeasors. The code section provides:

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

c. O.C.G.A. §51-12-33

The 2005 Amendment changed O.C.G.A. §51-12-31 as follows:

> (a) ~~Where an action is brought against more than one person for injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if~~

~~any, may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if apportioned by the trier of fact as provided in this Code section, shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.~~ 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) ~~Subsection (a) of this Code section shall not affect venue provisions regarding joint actions.~~ 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 sub-section (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) This Code section shall apply only to causes of action arising on or after July 1, 1987.~~
(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 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 bases 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 and 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."

B. O.C.G.A. §51-12-33 DEPRIVES PLAINTIFF OF A SUBSTANTIAL PROPERTY RIGHT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE GEORGIA CONSTITUTION (ART. I, §I, ¶1)

"No person shall be deprived of life, liberty, or property except by due process of law." Ga. Const. 1983 Art. I, § I, ¶ 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); Accord, Shessel v. Stroup, 253 Ga. 56, 316 S.E.2d 153 (1984) (holding that the running of the statute of limitations in a wrongful death action before the cause of action accrued was unconstitutional). This substantive property right is meaningless unless there is afforded an adequate remedy at law to enforce that right.

The concept of a remedy for every right is deeply imbedded in the laws of this State. The right to remedy has been traced back to the Great Charter in 1215 and later codified in Chapter

29 of the Magna Carta in 1225. When Georgia's constitutional committee gathered in 1861, it referred to the right to remedy on at least three separate occasions. First, on January 28, 1861, a "Bill of Rights" was published and distributed to members of the Convention. It included the principle that "For every right there should be provided a remedy, and every citizen ought to obtain justice without purchase, without denial, and without delay, conformably to the laws of the land." On March 16, 1861, in an "Enunciation of Fundamental Principles" put before the Convention, the twelfth such principle stated that "it is the indispensable duty of a good government, to provide an easy, prompt, and adequate remedy for the infraction of every right; and a just, but certain punishment for every wrong or crime." Five days later, the right to remedy rule became a part of the Constitution in Article I, paragraph 10, which stated that "[f]or every right, there should be provided a remedy; and every citizen ought to obtain justice without purchase, without denial, and without delay--conformably to the laws of the land." See generally, Journal of the Public and Secret Proceedings of the Convention of the People of Georgia, Held in Milledgeville and Savannah in 1861, together with the Ordinances Adopted: Electronic Edition, http://docsouth.unc.edu/imls/georgia/georgia.html. The right to remedy is found in Georgia's Constitution at Article I, Sec. I, Para. I; Article I, Sec. I, Para. II; and Article I, Section I, Para. XII.

Georgia's right to remedy rule was further expanded in

O.C.G.A. §9-2-3, which states that "[f]or every right there shall be a remedy; every court having jurisdiction of the one may, if necessary, frame the other."

In this case, it is anticipated that the defendants will argue that Moniquea Q. Stanley, not a party to this suit, was negligent and that the liability of the defendants should be reduced accordingly. Plaintiff has chosen to sue only the Wal-Mart defendants and Wal-Mart has chosen not to add the other driver, Moniquea Q. Stanley, as a party to this action or to directly assert any right of contribution against her estate. (Moniquea Q. Stanley was also killed in this collision). Instead, the defendants are seeking to use the new O.C.G.A. §51-12-31(d)(1) which on its face purports to allow a jury to apportion damages based upon the fault of a non-party regardless of whether the third party was named in the suit or even could be named in the suit. Plaintiff contends that Wal-Mart's liability is governed by the "but for" rule and that she may recover her full damages if she would not have been injured "but for" the negligence of the named defendants.

Georgia has typically followed the rule that proximate cause exists where the plaintiff would not have been injured "but for" the negligence of the defendant. See, e.g. Studio X, Inc. v. Weener, Mason & Nathan, LLP, 276 Ga. App. 652, 624 S.E.2d 157 (2005) ("Proximate cause in a malpractice action requires the plaintiff to demonstrate that but for the attorney's error, the outcome would have been different.") Accordingly, in a case such

as this one, a determination that any individual defendant is liable is a finding that plaintiff would not have been injured but for the action of that defendant. As there is one, indivisible injury in this case, the named defendants would therefore be one hundred percent liable for all of the injuries suffered because the injury would not have occurred but for the actions of these defendants. Requiring the jury to apportion damages in a case where each defendant bears one hundred percent responsibility by law is a deprivation of plaintiff's due process rights, particularly where the apportionment is with a third party, not another defendant.

The effect of the revision to the statute is the removal of the plaintiff's preexisting right to recover her injuries from any party who proximately caused such injuries. 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.

In the alternative, proportional liability reduces that incentive which will lead to more injuries. More claims will lead to more litigation and greater expenses which is the exact opposite of which the Legislature states is its intent.

More importantly, the stated purpose of SB3 was to improve

health services and that goal has absolutely nothing to do with the issues involved in this traffic accident case. The Legislature abused its power by attempting to use an alleged malpractice crisis to take away tort rights of drivers and passengers lawfully traveling the roadways of this State.

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). 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.

There can be no question that the limitation imposed by the revision of O.C.G.A. §51-12-33 deprives plaintiff of a substantial property right and freedom granted by the Georgia Constitution. See, e.g. Shessel v. Stroup, 352 Ga. 56, 316 S.E.2d 155 (1984) and Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484 (1983) (holding that the running of the statute of limitations in a wrongful death action before the wrongful act was discovered depriving plaintiffs of their cause of action was

unconstitutional). In Schad v. Borough of Mount Ephraim, 452 U.S. 61, 71 (1981), the United States Supreme Court stated the heavy burden the legislature must meet when curtailing rights guaranteed by the due process clause. "When the government intrudes on one of the liberties protected by the Due Process Clause of the Fourteenth Amendment, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation," (quoting Moore v. East Cleveland, 431 U.S. 494, 499 (1977).

The legislature stated that the governmental interest in the passage of SB3, including the amendments to O.C.G.A. §§51-12-31 and 33 was as follows:

> The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.
>
> Senate Bill 3, Section I.

The stated purposes of the amendments, namely to "promote

predictability and improvement in the provision of quality health care services and the resolution of health care liability claims" and to "assist in promoting the provision of health care liability insurance by insurance providers" are not served by the abolition of joint liability. In the health care context there are few insurers, so an apportionment among healthcare providers will change little in who pays, and accordingly will not promote the provision of healthcare liability.

Further proportional liability will not improve the provision of quality healthcare services because it does not promote greater care on the part of medical providers. As the Supreme Court noted in Carringer v. Rodgers, 276 Ga. 359, 364 (2003):

> It is not beyond the power of the legislature to attempt to preserve human life by making [negligence] expensive. It may impose...liability...not only upon those at fault, but upon those who, although not directly culpable, are able nevertheless in the management of their affairs to guard substantially against the evil to be prevented.

Joint liability gives individuals incentive to exercise the care required of all citizens not to injure others. In the alternative, proportional liability reduces that incentive, which will lead to more injuries and more claims will lead to more litigation and greater expenses and insurance premiums, the exact opposite of what the legislature states is its intent.

It is fundamental to any concept of justice that a wrongdoer who is proven even partially at fault should bear the burden of loss in preference to a plaintiff who is completely innocent.

O.C.G.A. §§23-1-14 and 23-1-15. The Legislature has disregarded its own statutory authority and well over 100 years of established common law in its revision of O.C.G.A. §51-12-33. There is no indication that the legislature considered any other, lesser alternatives, but has overstepped its constitutional authority in depriving plaintiff of her rights without due process of law.

C. O.C.G.A. §51-12-33 IS IMPERMISSIBLY VAGUE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE GEORGIA CONSTITUTION (ART. I, §I, ¶ 1)

In Jekyll Island State Park Auth. V. Jekyll Island Citizens Assoc., 266 Ga. 152, 153 (1996) the Supreme Court stated the test for determining whether a statute is unconstitutionally vague:

> A statute must be definite and certain to be valid, and when it is "so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law." [Cit.]" Hartrampf v. Ga. Real Estate Comm., 256 Ga. 45-46(1) (343 SE2d 485) 1986). To withstand an attack of vagueness or indefiniteness, a civil statute must provide fair notice to those to whom the statute is directed and its provisions must enable them to determine the legislative intent. Hartrampf, supra at 45; Bryan v. Ga. Public Svc. Comm., 238 Ga. 572, 574 (234 SE2d 784) (1977).

Applying this standard, O.C.G.A. §51-12-33 is unconstitutionally vague. O.C.G.A. 51-12-33 must be read in conjunction with O.C.G.A. §§51-12-31 and 32. SB3 amended both O.C.G.A. §51-12-31 and O.C.G.A. §51-12-33. Prior to the amendment, O.C.G.A. §51-12-31 provided for apportionment only in cases involving property damage where the plaintiff was not at fault, and any apportionment was at the jurors' discretion.

O.C.G.A. §51-12-33 provided for apportionment at the jury's discretion where the plaintiff was partially at fault. The statute applied to both personal injury and property damage cases. O.C.G.A. §51-12-33(a) and (b) purportedly requires the jury to apportion damages in all cases, regardless of whether the plaintiff is negligent.

In requiring apportionment in all cases, O.C.G.A. §51-12-33 conflicts with O.C.G.A. §51-12-31, which states that "[i]n its verdict, the jury may specify the particular damages to be recovered of each defendant." It also conflicts with O.C.G.A. 51-12-32, which provides for contribution among joint tortfeasors. While both of these statutes retain the language "except as provided in O.C.G.A. §51-12-33," that exception swallows the rule. Why would the legislature amend O.C.G.A. 51-12-31 if their true intent was to repeal it? There is simply no way to harmonize all three of these statutes without ignoring portions of the statutes and violating the "basic rule of construction that a statute or constitutional provision should be construed to make all its parts harmonize and to give a sensible and intelligent effect to each part, as it is not presumed that the legislature intended that any part would be without meaning."

Because "men of common intelligence must necessarily guess at its meaning and differ as to its application." O.C.G.A. §51-12-33 "violates the first essential of due process of law." It is therefore unconstitutional and damages may not be apportioned in this case.

D. O.C.G.A. §51-12-33 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE GEORGIA CONSTITUTION (ART. I, §I, ¶2)

1. Two Classes of Plaintiffs

Senate Bill 3 creates two classes of recovery for damages: those involving "injury to person or property" (O.C.G.A. §51-12-33 and, except as provided in O.C.G.A. §51-12-33, an "action" (O.C.G.A. §51-12-31). The only differentiating factor between these two classes is undefined, vague and uncertain. Plaintiff queries what other type damages there are in Georgia jurisprudence other than personal injury and property damages; however, the legislature repealed and re-enacted O.C.G.A. §51-12-31, thus such other actions exist and those plaintiffs are treated differently than plaintiffs claiming damages for injury to person or property.

The classifications disadvantage a suspect class, interfere with the exercise of a fundamental right and do not bear a reasonable relationship to a legitimate state purpose. City of Atlanta v. Watson, 267 Ga. 185 (1996):

> If the State's classification operates to the disadvantage of a suspect class or impedes the exercise of a fundamental right, it is tested under a standard of strict judicial scrutiny. We agree with the Court of Appeals, however, that because there is no showing that the classification in this appeal involves either a suspect class or the exercise of a fundamental right, we must examine it under the lesser "rational basis" test and determine only whether it bears a reasonable relationship to a legitimate purpose of government. 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.

The distinction creating the two classes of recoveries by

plaintiffs impedes a fundamental right of our plaintiff to fully recover her damages and bears no rational basis to any legitimate purpose. Consequently, application of O.C.G.A. §51-12-33 to plaintiff violates the constitutional guarantee of equal protection found in Ga. Const., Art. I, § I, Para. 2.

2. Apportionment is not Required by O.C.G.A. §51-12-31

"Georgia follows the common law rule against apportionment of damages among joint and several tortfeasors.... "Walker v. Bishop, 169 Ga. App. 236, 240, 312 S.E.2d 349 (1984). Georgia's common law rule of joint and several liability is still codified at O.C.G.A. §51-12-31 which now states:

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

O.C.G.A. §51-12-31 does not abolish joint and several liability, but instead it reaffirms it. It is important to note that the procedure under O.C.G.A. §51-12-31 does not require the jury to apportion damages among joint tortfeasors. In Branch v. Alliance Syndicate, Inc., 220 Ga. App. 561, 564 (1996), the Court of Appeals affirmed a verdict that was entered jointly and severally against joint tortfeasors. In so doing, the Court further held that joint tortfeasors are not entitled to a special verdict form which would permit the jury to specify the particular damages to be recovered of each defendant severally. Id. The Court stated at 220 Ga. App. 564:

> Branch contends the trial court erred in failing to provide a jury verdict form which would permit the jury to specify the particular damages to be recovered of each defendant severally. But the construction of O.C.G.A. §51-12-31 (formerly Code Ann. §105-2011) upon which this contention is predicated has been rejected by our Supreme Court. "In Ivey v. Cowart, 126 Ga. 159(6) (52 SE 436) [the Supreme Court of Georgia] stated that, 'The jury in their verdict may specify the particular damages to be recovered of each [defendant], and judgment will then be entered severally. But the defendants are not entitled to require damages to be apportioned by the verdict.'" Standard Oil Co. v. Mount Bethel United Methodist Church, 230 Ga. 341, 344 (5) (196 SE2d 869).

3. Joint Liability Has Not Been Expressly Repealed.

Since joint and several liability is embodied in the common law, any attempt by the General Assembly to abolish joint and several liability with proportional fault must be done expressly. See, Fortner v. Town of Register, 278 Ga. 625, 626, 604 S.E.2d 175 (2004). To the contrary, the statute states: "the plaintiff may recover damages for an injury done by any of the defendants against only the defendant or defendants liable for the injury." Joint tortfeasors are all liable for an injury by definition and therefore the plaintiff in this case can recover against any of the defendants against whom a verdict is rendered for all of the damages in this case.

As a practical matter, it is difficult to imagine how the jury in this case could determine that any given portion of plaintiff's damages flowed from any one specific tortfeasor. Plaintiff has sued the Wal-Mart defendants alleging that their conduct (it is expected to be undisputed in this case that the Wal-Mart driver was traveling well over the speed limit, in the rain, talking on his radio, and driving with defective brakes)

proximately caused the injuries and death to plaintiff's decedent. Either the Wal-Mart defendants were negligent or not. If they were negligent, then that negligence either was or was not a proximate cause of the collision. These are jury questions and do not require an apportionment of damages, particularly where neither party has elected to make the "other" driver a party to this action.

As stated previously, "the damages 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, 344 S.E.2d 686 (1986).

III. ARGUMENT AND CITATION OF AUTHORITY SPECIFICALLY PERTAINING TO SUBSECTION (c) OF O.C.G.A. §51-12-33

Denton v. Con-Way Southern Express, Inc., 261 Ga 41, 401 S.E.2d 269 (1991) mandates the striking of a statute such as O.C.G.A. §51-12-33 (c) which allows a jury to "consider" certain evidence without setting a specific standard as to the use the jury should make of such evidence. The new statute has three separate provisions which set forth three separate procedures for use of fault by persons other than the named defendant asserting apportionment. Subsection (a) sets forth a type of comparative negligence procedure whereby the jury determines the total amount of damages awarded, the percentage of fault of the plaintiff and

then the Judge reduces the damages in proportion to that percentage of fault. Subsection (b), dealing with co-defendants, provides that the jury shall, after the reduction provided for in Subsection (a) (comparative negligence) apportion its award of damages among the defendants based upon the apportioned fault (presently without intervention by the Judge). Still a third standard is given in Subsection (c) dealing with third parties. The text is as follows:

> (c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the personal entity was, or could have been, named as a party to the suit.

This Subsection (c) is unconstitutionally vague because it does not set a standard as to what use the jury should make of any negligence they find on the part of a third party except to "consider" the fault of such persons. This is the same fatal defect which existed in the statute struck down in the Denton, supra, case.

Denton struck a portion of an earlier "Tort Reform Act", O.C.G.A. §51-12-1, which, as then worded, purported to allow a jury to "consider" collateral source benefits or payments made from a third party for the benefit of an injured plaintiff. The Georgia Supreme Court noted that the Collateral Source Rule was strongly rooted in Georgia's common law (just as the joint and several rule here) and went on to hold that the due process clause of the Georgia Constitution demands that statutes be definite and certain. Since O.C.G.A. §51-12-1(b) did not give

the jury any suggestion as to what to do with collateral source evidence other than to "consider" it, "people of common intelligence must necessarily guess at its meaning and differ as to its application", citing City of Atlanta v. Southern Railway Company, 213 Ga. 736, 738, 101 S.E.2d 707 (1958). The Court further opined that "the statute's lack of standards, specific factors to be considered, and failure to offer guidelines invites uncontrolled, intrinisically arbitrary, disparate and unfair decisions". Denton, supra, fn 4.

The majority opinion in Denton ended with the following public policy holding in Footnote 5:

> Some have argued that the plaintiff might get a windfall if a jury is denied the right to know about the collateral sources, however, "[i]f there must be a windfall, it is usually considered more just that the injured person should profit, rather than let the wrongdoer be relieved of full responsibility for his wrongdoing. [Cit.]" 22 Am Jur 2d 639, Damages, §566.

A special concurrence by Justice Fletcher in the case contains the following analyses::

> A vague law impermissibly delegates basic policy matters to...juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-109 (92 S. Ct. 2294, 33 L. Ed. 2d 222(1972). The vagueness doctrine "requires [*** 15] legislatures to set reasonably clear guidelines for...triers of fact" to apply to statutes. Smith v. Goguen, 415 U.S. 566, 572-573 (94 S. Ct. 1242, 39 L. Ed. 2d 605) (1974). O.C.G.A. §51-12-1 (b) not only fails to establish any means of calculating the measure of damages in a given case, it also provides no clear guidelines to assist the trier of fact in determining for what purposes evidence of collateral sources should be considered. As such, the statute is too vague to be enforced and is, therefore, unconstitutional under the due process clauses of the Georgia and United States

constitutions.

It is crystal clear that the Denton holding applies to O.C.G.A. §51-12-33(c). By failing to set forth a procedure for the jury to follow when "considering" evidence of a third party's fault, and further, by failing to give direction for either the jury or the court as to whether and in what manner damages should be apportioned between a defendant and a third party, the statute is unconstitutionally vague and should be struck.

A second constitutional defect to Subsection (c) of §51-12-33 centers around the fact that non-parties are not present to defend their own actions. This puts an unfortunate plaintiff in the position of having to take on the defense of various and sundry other parties, even if the named defendant is clearly a joint tortfeasor who proximately caused the injuries in question. Traditionally, under the joint and several rule, the at-fault party has had the burden of finding and proving such "other" negligence in the context of an action for contribution where such other person is allowed to appear, be represented by counsel, and present evidence and argument on his or her own behalf. This "empty chair" due process argument has been addressed by a couple of law review articles (62 Wash L. Rev. 681 and 76 U. Det. Mercy L. Rev. 571), copies of which are attached hereto as Exhibits A and B respectively.

IV. CONCLUSION

O.C.G.A. §51-12-33 violates both the equal protection and due process clauses of the Georgia and United States

constitutions. Even if the statute as a whole is not unconstitutional, Subsection (c) is unconstitutionally vague under the standard set forth in the Denton, supra, case for its failure to specify the use a jury is to make of third party fault and for its failure to provide procedural safeguards to such third parties, which indirectly deprives plaintiff of a protected property interest without due process.

For the foregoing reasons, the Court should grant the Omnibus Motion Regarding The Unconstitutionally And Inapplicability Of All Or Part Of O.C.G.A. §51-12-33, As Amended, striking the Second Defense of defendants answer, granting partial summary judgment or judgment on the pleadings, and further granting a motion in limine prohibiting use of evidence or arguments pertaining to third party fault.

Respectfully submitted this 3rd day of April, 2007.

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CERTIFICATE OF SERVICE

This is to certify that I have this date served GLEN M. DARBYSHIRE and SUSANNAH ROGERS PEDIGO, P. O. Box 1368, Savannah, Georgia 31402-1268, with a copy of the foregoing Brief In Support Of Omnibus Motion Regarding The Unconstitutionality And Inapplicability Of All Or Part of O.C.G.A. §51-12-33, As Amended, by placing same in the U.S. Mail with sufficient postage affixed thereon.

This 3rd day of April, 2007.

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IN THE STATE COURT OF BULLOCH COUNTY
STATE OF GEORGIA

SANDRA BENNETT, INDIVIDUALLY AND AS MOTHER AND DULY APPOINTED ADMINISTRATRIX OF THE ESTATE OF TONI S. BENNETT, DECEASED,	)	
Plaintiff,	)	
v.	)	Civil Action No. 2B06CV406
WAL-MART TRANSPORTATION, LLC, and CHESTER SKELTON, JR.,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S OMNIBUS MOTION

INTRODUCTION

Plaintiff's Omnibus Motion seeks a declaration by this Court that O.C.G.A. § 51-12-33, as amended in 2005 by the Georgia Legislature through Senate Bill 3,[1] is unconstitutional in its entirety, or in part, such that the previous version of that statute as interpreted by Georgia appellate courts would govern the outcome of this case. At bottom, the Plaintiff seeks to have the Defendants, Wal-Mart Transportation, LLC, and Chester Skelton (the "Wal-Mart Defendants"), each held jointly and severally liable for 100% of the injuries sought by the Plaintiff, regardless of any proportionate fault of the individual whom the Plaintiff has elected not to name as a co-defendant in this action -- Moniquea Stanley.

Ms. Stanley was the driver of the car in which Plaintiff's decedent, Toni Bennett, was riding as a passenger. Ms. Stanley was undeniably careless when she disregarded a stop sign and a flashing red light, and ignored the plainly visible oncoming Wal-Mart tractor-trailer, before

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1 Senate Bill 3 is codified at Session Laws 2005, at 1, §12, and took effect on February 16, 2005. A copy of Senate Bill 3 is attached at Tab 1.

pulling out from an intersection into the right-of-way of the tractor-trailer so suddenly that its driver (Mr. Skelton) could only veer away and slam on brakes moments before impact.[2] Plaintiff alleges that Mr. Skelton was speeding and his tractor-trailer brakes were defective, and that these circumstances were the proximate cause of Plaintiff's damages. (Complaint for Damages ¶ 8). Mr. Skelton has admitted only the alleged speeding, and the Wal-Mart Defendants deny that this speeding or any alleged equipment defect proximately caused the accident. (See Defendants' Answer ¶ 7). Neither the speeding nor any condition of the tractor-trailer brakes caused Ms. Stanley to run the stop sign and flashing red light and enter the tractor-trailer's right-of-way. Had Ms. Stanley simply yielded at the intersection as required by law, there would have been no collision at all.

Nonetheless, the Plaintiff has elected to sue only the Wal-Mart Defendants, and she now seeks to have the amendments in Senate Bill 3 to O.C.G.A. § 51-12-33 declared unconstitutional so that she can try to collect 100% of the alleged damages from the Wal-Mart Defendants without regard to Ms. Stanley's contributing fault. She further seeks to exclude from evidence and argument at trial any mention whatsoever of Ms. Stanley's negligent conduct. This latter request, submitted through a motion in limine, is not the governing law of evidence. Even before Senate Bill 3 was enacted, a defendant could contend that the cause of a collision was the conduct of someone who was not named as a defendant in the lawsuit, see, e.g., Bridges v. Schier, 195 Ga. App. 583, 584-85, 394 S.E.2d 408, 410 (1990), and Senate Bill 3 has in no way altered the relevance or admissibility of evidence or argument to that effect.

The more important argument in Plaintiff's Omnibus Motion is that the tort reform amendments contained in Senate Bill 3, providing for apportionment of damages according to

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2 Copies of the Georgia Uniform Accident Report documenting this collision and a statement obtained by investigating officers from an eyewitness are attached at Tab 2.

the relative percentages of fault of those who contributed to the injuries, are unconstitutional for a variety of reasons ranging from violations of due process and equal protection to vagueness. These arguments are scattered throughout the Plaintiff's Brief in Support of her Omnibus Motion, along with various policy arguments and other non-constitutional attacks, and they are supported only minimally by any reported appellate decisions, none of which are controlling. The Wal-Mart Defendants will respond to these arguments in the order in which they are captioned in the Omnibus Motion.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE AMENDMENTS TO O.C.G.A. § 51-12-33 DO NOT DEPRIVE PLAINTIFF OF A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT, MUCH LESS A "VESTED" PROPERTY RIGHT WHEN APPLIED PROSPECTIVELY AS IN THIS CASE, AND THEREFORE SENATE BILL 3 DOES NOT VIOLATE THE DUE PROCESS CLAUSE FOUND IN ARTICLE I, § 1, ¶ I OF THE GEORGIA CONSTITUTION.

The legislative changes to O.C.G.A. § 51-12-33, which eliminate joint and several liability and implement apportionment of fault among the parties and non-parties whose conduct is determined to have contributed to the alleged injuries, do not deprive Plaintiff of a vested property right in violation of the due process clause of the Georgia Constitution as she claims. (See Omnibus Motion, pp. 7, 10). Plaintiff's contention that the amendments to O.C.G.A. § 51-12-33 violate due process should fail because: (1) 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 reasonably by implementing a statutory requirement for allocating percentages of fault, and (2) the Plaintiff has not been deprived of a vested property right since her cause of action did not accrue until after the amendments to O.C.G.A. § 51-12-33 took effect.

The Plaintiff begins by defining her "property right" to pursue claims against only the Wal-Mart Defendants for 100% of her damages as a fundamental "right to remedy," and she explores some historical sources to support her contention that this right is constitutionally based and not simply derived from a legislative enactment. (See Omnibus Motion pp. 7-8). The inference is that a constitutional source of this "right to remedy" (even assuming it is broadly defined as a right to recover 100% against a single defendant who is not fully at fault) precludes the legislature from modifying that remedy by statute. However, the historical sources cited by the Plaintiff for this "right to remedy" are all from the Georgia Constitution of 1861. (Omnibus Brief pp. 7-8). That Constitution has been superceded by subsequent constitutions (1865, 1868, 1877, 1945, 1976 and 1983), none of which even contain the word "remedy" (based on our search through the texts of those documents on the University of Georgia Carl Vinson Institute of Government website, http://www.cviog.uga.edu/projects/gainfo/gacontoc.htm). Moreover, contrary to Plaintiff's assertion (Omnibus Brief, p. 8), this "right to remedy" rule is simply not found in the present Georgia Constitution at Article I, § 1, ¶ I (due process), ¶ II (equal protection) or ¶ XII (self-representation). Instead, the "right to remedy" provision now appears in a Georgia statute, O.C.G.A. § 9-2-3, having first been legislatively enacted back in 1863. In other words, this "right to remedy" under Georgia law (whatever its scope) has been derived for over 140 years from statutory authority, and therefore the Georgia General Assembly clearly has the power to define, modify or even eliminate this right through subsequent legislation. Accordingly, even if this "right to remedy" provision could be said to encompass a right so extensive as to guarantee recovery of 100% of damages against a tortfeasor who was not 100% at fault, the legislature would have the authority to define the extent of that right differently, and it has done so in Senate Bill 3. Indeed, the Georgia Supreme Court has previously foreshadowed the possibility that the Georgia Legislature would redefine the liability of joint tortfeasors. In

Gazaway v. Nicholson, 190 Ga. 345, 9 S.E.2d 154 (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 of force where it has not been changed by statute." Id. at 348, 9 S.E.2d at 156 (emphasis added). Clearly, the Georgia Supreme Court has acknowledged that the Legislature is not precluded by the Georgia Constitution from changing the doctrine of joint and several liability.

Plaintiff argues elsewhere in her Brief that "any attempt by the General Assembly to abolish joint and several liability with proportional fault must be done expressly." (Omnibus Brief, p. 18) (citing Fortner v. Town of Register, 278 Ga. 625, 626, 604 S.E.2d 175 (2004)). Fortner, however, does not mandate that this change "be done expressly," for it also recognizes that changes in common law can result "by necessary implication." Id. at 626, 604 S.E.2d at 177. Under either analysis, the change from joint and several liability to a rule of proportional fault has been clearly achieved through Senate Bill 3. There can be no doubt that the express provisions O.C.G.A. § 51-12-33 require the trier of fact to make percentage assessments of fault. The revisions to O.C.G.A. § 51-12-31 quoted by Plaintiff on page 18 of her Omnibus Brief must be interpreted consistent with these express provisions in O.C.G.A. § 51-12-33 (see discussion infra at pages 16-17, and footnote 7), and therefore by necessary implication any inconsistent interpretation that might retain a rule of joint and several liability must be rejected. And finally, any remaining doubt regarding the Legislature's intent to repeal conflicting common law can be set aside based on the additional express language in Senate Bill 3 providing that "[a]ll laws and parts of laws in conflict with this Act are repealed." Session Laws 2005, at 21, § 16 (Tab 1).

Plaintiff also argues at various points in her Brief that it is "impossible" or "difficult to imagine how" a jury can allocate "indivisible" injuries, and, therefore, if this task is required of a jury, it will deprive her of a "fair hearing," her "right to redress wrongs" and her "right to meaningful access to courts." (Omnibus Brief, pp. 11, 18-19). In making this argument, however, the Plaintiff confuses two concepts: causation and fault. Senate Bill 3 does not require the trier of fact to apportion causation (or as Plaintiff argues, to "determine that any given portion of plaintiff's damages flowed from any one specific tortfeasor") (Omnibus Brief, p. 18) (emphasis added). Instead, Senate Bill 3 simply requires percentage assessments 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.

As for the Plaintiff's contention that the provisions of Senate Bill 3 violate the due process clause of the Georgia Constitution, the Wal-Mart Defendants acknowledge that Georgia courts have historically recognized the right of individuals "to be heard in matters affecting one's life, liberty, or property" as an essential element of due process of law, but this right to be heard "is not absolutely unrestricted." Couch v. Parker, 280 Ga. 580, 582, 630 S.E.2d 364, 366 (2006). As succinctly declared by the Georgia Supreme Court: "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 Corporation, 264 Ga. 701, 705, 449 S.E.2d 602, 606 (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, 498 S.E.2d 521, 523 (1998). Due process only "recognizes a citizen's unfettered right to defend his or her life, liberty, or property in accordance with limitations constitutionally established by the General Assembly." Couch, 280 Ga. at 582, 630 S.E.2d at

366 (emphasis added). Couch, Love, and Santana each held that the Georgia Legislature had acted properly in restricting plaintiffs' rights to sue,[3] and these cases provide ample authority for holding that the Georgia Legislature acted within constitutional bounds when it eliminated joint and several liability awards in personal injury lawsuits of the type filed by Plaintiff here.

A particularly instructive example of the constitutional exercise of the Georgia Legislature's authority to modify or eliminate rights to recover for personal injuries can be found in the Georgia Supreme Court's rejection of constitutional challenges to the state's workers compensation laws. Under O.C.G.A. § 34-9-11, an employee's right to recover workers compensation benefits from his employer for a job-related injury "shall exclude all other rights and remedies" of the employee, "at common law or otherwise," except that the employee can bring an action against any third-party tortfeasor other than a fellow employee. Thus, by enacting this statute, the Georgia Legislature abrogated the employee's common law right to pursue a negligence claim against his employer or against his fellow employees, and it created a statutory compensation scheme that sets maximum amounts the employee can recover for specific types of injuries. In other words, not only does this statute preclude the employee from filing claims against certain individuals and entities, it also limits the amount of any recovery regardless of the degree of fault of those individuals or entities. Nonetheless, the Georgia

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[3] Couch held that the plaintiffs had no standing to pursue an appeal of an order issued by the Director of the Environmental Protection Division and that the Georgia Legislature's authority to establish the "permissible parameters" of the due process right to be heard in matters affecting property extended to standing to maintain a claim. 280 Ga. at 582, 630 S.E.2d at 366. Love held that Georgia's ten-year statute of repose for products liability actions is constitutional even though it shortens the statute of limitations for plaintiffs whose injuries arose more than eight years after the sale of the product and bars the claims of plaintiffs whose injuries occur more than ten years after the sale. 264 Ga. at 706, 449 S.E.2d at 607. Santana held that the High Voltage Safety Act (HVSA) was constitutional, despite eliminating liability for the owner or operator of the high voltage line when the plaintiff failed to give notice in accordance with the Act that he would be working near the line. 269 Ga. 127, 498 S.E.2d 521.

Supreme Court has expressly rejected due process (and equal protection) challenges to this exclusive remedy provision in the workers compensation statute. See Williams v. Byrd, 242 Ga. 80, 247 S.E.2d 874 (1978); Henderson v. Hercules, Inc., 253 Ga. 685, 324 S.E.2d 453 (1985); Smith v. Gortman, 261 Ga. 206, 403 S.E.2d 41 (1991); see also Massey v. Thiokol Chemical Corp., 368 F. Supp. 668, 676 (S.D. Ga. 1973).

By enacting Senate Bill 3, the Georgia Legislature did not even 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. Senate Bill 3 has not curtailed the present Plaintiff's right to file suit against any party; nor has it eliminated any substantive claim that the Plaintiff might allege; nor has it reduced by any amount the total damages that the Plaintiff might be awarded as compensation for her alleged injuries. The Plaintiff here is still able to sue for personal injuries and wrongful death and obtain a judgment against every person or entity whose negligence proximately caused the alleged injuries and death. The right to a judgment awarding full recovery for the injuries and death remains unchanged.

Senate Bill 3 simply requires that fault be allocated among those defendants whose fault contributed to the injuries and death and that the named defendants be required to pay only their respective shares of the final award. Thus, while Plaintiff can still recover in full, to do so she must now pursue a claim against every contributing party. She can still obtain an award of 100% of her alleged damages, but she can no longer recover that 100% from any one defendant regardless of that defendant's degree of fault.[4]

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[4] Of course, in the past a plaintiff only had the right to insist upon joint and several liability if it was found that the plaintiff did not also contribute to the cause of her injuries. If the plaintiff was also negligent and did contribute to the cause of her injuries, then the jury was authorized to apportion damages. O.C.G.A. § 51-12-33(a) (1987); U.S. Fidelity & Guaranty Co. v. Paul Associates, 230 Ga. App. 243, 248, 496 S.E.2d 283 (1998). Therefore, under the pre-amendment statute, the Plaintiff here would be entitled to seek a joint and several recovery only if it was found at trial that her daughter did not negligently contribute to the cause of the accident at issue. See

This new rule requiring the apportionment of fault is rational. Since the General Assembly has the power to create, modify, or abolish causes of action outright, it necessarily has the authority to impose this reasonable limit on Plaintiff's recovery against the persons or entities whose conduct contributed to the alleged injuries that the Plaintiff has elected to sue. Again, the total recovery is not limited by the amended statute -- only the ability to recover that total solely from any one of the persons or entities who contributed to the alleged injuries. The due process protections afforded to the Plaintiff (who is no different from any other personal injury plaintiff) are inherent in the deliberative process followed by the General Assembly in the passage of Senate Bill 3, and that enactment reasonably limits a tortfeasor's liability according to his proportionate contributing fault. This compensatory scheme is the rational result of the legislature's deliberative process in which competing interests and arguments about fairness and litigation costs to both plaintiffs and defendants were considered, and it rests on a legislative finding that it was one of several "needed reforms" affecting not only health care liability "but also other civil actions." Senate Bill 3, Session Laws 2005, at 1 § 1.

Moreover, O.C.G.A. § 51-12-33 is constitutional as applied in this case because it operates only prospectively, and as such, its application cannot be said to deprive Plaintiff of any vested property rights. There is no question here concerning the possible retroactive application of the 2005 amendments to O.C.G.A. § 51-12-33, as these were enacted and took effect prior to the time the accident at issue occurred. "The enactment of a statute delineating, or indeed even abolishing a cause of action, before it has accrued, deprives the plaintiff of no vested right." Love, 264 Ga. at 705, 449 S.E.2d at 606 (emphasis added). The Plaintiff's ability to recover

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Thyssen Elevator Co. v. Drayton-Bryour Co., 106 F. Supp. 2d 1342 (2000). On this point, it should be noted that Plaintiff's comparison of the old version of § 51-12-33 to the amended version of that section at the bottom of page 5 of the Omnibus Brief omits the phrase in the old version of § 51-12-33(a) that requires a finding that the plaintiff was also to some degree responsible for the alleged injuries.

only proportionately from any party at fault was defined well before her daughter made a decision to ride as a passenger in Moniquea Stanley's vehicle. Therefore, Plaintiff's separate claim that she has lost a "vested" property right to pursue only the Wal-Mart Defendants for joint and several liability is not supported under the due process clause of the Georgia Constitution.

Appellate Courts in other states have reached similar conclusions in response to constitutional challenges to tort reform legislation in those states that also abolished joint and several liability. For example, in Church v. Rawson Drug & Sundry Co., 173 Ariz. 342, 842 P.2d 1355 (1993) (copy attached at Tab 3), the Arizona Supreme Court considered a number of challenges to the constitutionality of a 1987 statute that abolished the doctrine of joint and several liability in Arizona. As in the present action, the plaintiff in that lawsuit argued that the new statute "takes away the tort victim's common law right to recover full damages from each tortfeasor who proximately caused the injury." Id. at 348, 842 P.2d at 1361. Applying the "rational basis test" for evaluating a due process challenge, the Arizona Court considered the plaintiff's claim that "placing the entire burden of an immune, absent or insolvent tortfeasor on the plaintiff is irrational." Id. at 350, 842 P.2d at 1363. The Court, however, also acknowledged the "competing principle" that it was "unjust to place the entire burden of loss on one party when that party was only partially at fault." Id. at 348, 842 P.2d at 1361. The Court concluded:

> We recognize the competing values that the plaintiff advances. There may be other, and perhaps better, ways of achieving the goal of fairness in this area. However true that may be, it does not mean that the method the legislature selected is irrational. Even if the classification results in some inequality, it is not unconstitutional if it rests on some reasonable basis.

Id. at 350-51, 842 P.2d at 1363-64. In response to the Plaintiff's insistence that there was, in fact, no "insurance crisis" to justify enactments of a tort reform statute that abolished joint and several liability, the Arizona Supreme Court further held: "[W]e cannot substitute our judgment

for the legislature's and conclude that the 'crisis' was a fiction and the cure would not at least tend to alleviate it." Id. at 352, 842 P.2d at 1364. For these reasons, among others, the Arizona Supreme Court rejected the plaintiff's constitutional challenges and declared that "[a] party to an accident does not have the vested right to a particular remedy or mode of procedure," and the provisions of the Arizona Constitution do not provide "a guarantee of the collectability of a judgment." 173 Ariz. at 346, 347, 842 P.2d at 1359, 1360.

For the same reasons, the Wal-Mart Defendants here respectfully submit that this Court should reject the Plaintiff's due process challenge and not entertain her request that this Court re-balance the policy considerations that were before the Georgia Legislature when Senate Bill 3 was enacted. There is no constitutional right in Georgia to a fully collectable judgment. The Georgia Legislature has considered the competing policy interests, as well as other factors such as the costs of litigation and their effects on insurance premiums (especially in the health care industry),[5] and has decided that the risk of injury caused by an insolvent or underinsured

[5] Plaintiff argues that "[j]oint liability gives individuals incentive to exercise the care required of all citizens not to injure others," while "[i]n the alternative, proportional liability reduces that incentive, which will lead to more injuries and more claims will lead to more litigation and greater expenses and insurance premiums, the exact opposite of what the legislature states is its intent." (Omnibus Brief, pp. 13, 10). No evidence is cited to support this assertion, and it is not self-evident that imposing joint liability on a party who is only minimally at fault will somehow make a more-at-fault party act more safely in the future, especially where the minimally-at-fault party has no control over the conduct of the more-at-fault party. And when the consequences of fault can be so great as to include death, as with Moniquea Stanley here, it seems incredulous to argue that imposing 100% liability on the Wal-Mart Defendants would somehow have made Ms. Stanley a safer driver. To the contrary, from a purely economic standpoint, it could be argued that imposing 100% liability on the Wal-Mart Defendants would in essence give other negligent drivers "free" insurance (paid for by Wal-Mart, of course), thereby decreasing their incentives to drive safely.

Nor will proportional liability necessarily increase the number of lawsuits and associated litigation costs. Instead of a joint-and-several system that encourages a plaintiff to sue only the perceived deepest pocket for 100% recovery and then entertaining subsequent lawsuits by that defendant against other parties who also contributed to the loss, a proportional fault system encourages the plaintiff to sue all of the contributing parties in a single action, thus minimizing the number of lawsuits and associated litigation costs.

Although policy arguments such as these are appropriately left to the province of the Georgia Legislature, they do show that the Legislature acted with a rational basis in enacting Senate Bill 3, and therefore the amendments to O.C.G.A. § 51-12-33 do not violate due process.

tortfeasor should be borne by the injured plaintiff and not by others. This policy decision, while perhaps debatable,[6] is nonetheless a rational decision, and it is a policy decision that is properly (and constitutionally) within the legislative authority of the Georgia General Assembly. See, e.g., Wilson v. Board of Regents, 246 Ga. 649, 650, 272 S.E.2d 496 (1980) (regarding matters of public policy within the legislative arena, the supreme authority regarding the wisdom of legislation rests in the General Assembly); Garmon v. Health Group of Atlanta, Inc., 183 Ga. App. 587, 359 S.E.2d 450 (1987) (holding that employee had no basis for claim of wrongful

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Plaintiff argues that the fortuity of being injured by a number of tortfeasors, including insolvent or uninsured tortfeasors, should not unfairly cause plaintiffs to suffer the consequences of the uncollectable portions of damages attributed to the in solvent or uninsured tortfeasors based on their percentages of fault. Instead, Plaintiff argues that the remaining solvent and well-insured tortfeasors should be required to pay the full share of any other tortfeasor, which she hopes to achieve in this action by not naming that tortfeasor as a party in the action. Simply put, Plaintiff has not named Moniquea Stanley as a defendant because she does not wish to have any percentage of fault allocated to Ms. Stanley and she likely perceives Ms. Stanley's ability to pay any judgment as substantially less certain than the ability of the Wal-Mart Defendants to pay that judgment.

This solvency question, however, is not entirely one of fortuity in the present action. While it is true that the Plaintiff's decedent, her daughter Toni Bennett, could not predict the solvency or insured status of the operator of any other motor vehicle with which Ms. Stanley might collide, it is also true that the Wal-Mart driver could not predict the solvency or insured status of the operator of any motor vehicle which might suddenly pull out in front of him. However, the Plaintiff's decedent, Ms. Bennett, did know Ms. Stanley personally and therefore she did have an opportunity to consider the possible solvency or insured status of Ms. Stanley before deciding to ride as a passenger in Ms. Stanley's car. From a policy standpoint, therefore, as between the Plaintiff and the Wal-Mart Defendants in this case, an argument could be made that it is more fair to assign the risk of an insolvent or underinsured driver of that car to the Plaintiff.

Nor has it even been established on the current record that Ms. Stanley is insolvent or underinsured. This is simply implicitly assumed by the Plaintiff, apparently, for if Ms. Bennett had been a passenger in a vehicle driven by a fabulously wealthy or overly insured driver, then the Plaintiff no doubt would have named that driver as a co-defendant in this lawsuit and would not be advancing any argument here that Senate Bill 3 deprives her of a constitutionally protected "right to remedy." This hypothetical exposes the core due process argument presented in the Omnibus Motion -- (i.e., that Georgia Legislature did not rationally decide who should bear the risk of an insolvent or underinsured tortfeasor) -- and it belies the Plaintiff's claim that the Legislature can only be rational if it gives her the right to select and sue any one defendant and recover 100% from that party, and that this is constitutionally required in order to ensure that she has not lost a "fundamental" property right to a full tort recovery.

termination when legislative pronouncement of O.C.G.A. § 34-7-1 applied only to individuals having a written employment contract); Blackstone v. Blackstone, 282 Ga. App. 515, 639 S.E.2d 369 (2006) (holding that a court could not "cloak" itself with power to make policy decisions reserved to the legislature and regarding which legislature had remained silent).

The Georgia Supreme Court expressly recognized the power of the Georgia Legislature to make policy decisions regarding whether a plaintiff has a right to sue and recover damages in the case of Teasley v. Mathis, 243 Ga. 561, 255 S.E.2d 57 (1979). In Teasley, the plaintiff argued that he had been deprived of "access to the courts" in violation of the Georgia Constitution when the Legislature eliminated any right to recover punitive damages under the Georgia Motor Vehicle Accident Reparations Act (commonly referred to as the "no-fault" automobile insurance law). Id. at 58, 255 S.E.2d at 563. In rejecting the plaintiff's claim, the Supreme Court acknowledged that the Legislature "may modify or abrogate common law rights of action ... as well as statutorily created rights," and it held that the decision to eliminate the plaintiff's right to sue for punitive damages was a policy decision "well within the province of the legislature...." Id. at 58-59, 255 S.E.2d at 563. Plaintiff in the present action similarly argues that she will be deprived a "right of access" to the courts if Senate Bill 3 is upheld, citing Art. I, § 1, ¶ XII. (Omnibus Brief, p. 11). However, the Georgia appellate courts have consistently ruled that this paragraph of the Georgia Constitution was only intended to give litigants a choice between self-representation and representation by counsel, and it was not intended to create an expansive right of access to Georgia courts, much less a constitutional right to a fully collectable judgment. State v. Mosely, 263 Ga. 680, 436 S.E.2d 632 (1993); Crane v. Poteat, 282 Ga. App. 182, 638 S.E.2d 335 (2006). Therefore, as in Teasley, this Court should hold that the decision to modify Georgia law from a system of joint and several liability to one of apportionment of fault was a decision well within the sound discretion of the Georgia Legislature, and that decision

should not be disturbed or second-guessed by the courts. Plaintiff's attempt to seek refuge under Art. I, § 1, ¶ XII of the Constitution should be rejected.

Likewise, Plaintiff incorrectly invokes two provisions in the Georgia code that define well-established principles of equity, O.C.G.A. § 23-1-14 and O.C.G.A. § 23-1-15. (Omnibus Breif, pp. 13-14). Neither provision speaks to the imposition of liability on tortfeasors at law, and therefore neither provision is applicable in an action for money damages. E.g., Holmes v. Henderson, 274 Ga. 8, 8-9, 549 S.E.2d 81, 81-82 (2001); Zappa v. Automotive Precision Machinery, Inc., 205 Ga. App. 584, 585, 423 S.E.2d 286, 288 (1992). Moreover, neither provision applies to the facts of this case as alleged. Under O.C.G.A. § 23-1-14, as between "two innocent persons," the "loss" is placed on the innocent who "put it in the power of the third person to inflict the injury...." Even if it were applicable to an action at law, this provision makes no sense here, for the Plaintiff's allegations do not describe "two innocent persons," much less identify which of them enabled yet another person to cause the collision at issue. Nor does the "unclean hands" doctrine set forth in O.C.G.A. § 23-1-15 fit the facts of this case as alleged, for it speaks only to an action between two parties where, if both are equally at fault, equity will not interfere. These equitable provisions simply do not define a "fundamental" concept that a "wrongdoer who is proven even partially at fault should bear the [whole] burden of loss in preference to a plaintiff who [allegedly] is completely innocent." (Omnibus Brief, p. 13).

In sum, the Plaintiff's due process claim is that she has a "property right" protected by Article I, § 1, ¶ I of the Georgia Constitution to sue for personal injuries and collect an award for 100% of those injuries only from the Defendants she perceives to have the deepest pockets. The Wal-Mart Defendants respectfully submit that the Georgia Constitution does not recognize a due process right guaranteeing the collectability of 100% of damages incurred in a motor vehicle accident. Senate Bill 3 requires the apportionment of damages based on the relative percentages

of fault assigned to those individuals and entities whose conduct is determined to have contributed to the alleged injuries. This statute is reasonable and it does not abolish any cause of action or limit the amount of any award for any cause of action that the Plaintiff has alleged in this lawsuit. She is therefore not deprived of a property right, much less a "vested" property right, and her due process challenge to Senate Bill 3 should be rejected.

II. THE AMENDMENTS TO O.C.G.A. § 51-12-33 ARE NOT UNCONSTITUTIONALLY VAGUE SO AS TO VIOLATE THE DUE PROCESS CLAUSE FOUND IN ARTICLE I, § 1, ¶ I OF THE GEORGIA CONSTITUTION.

The standard for determining whether a duly enacted statute is unconstitutionally vague is not in dispute. The statute must provide "fair notice" to those affected, and "its provisions must enable them to determine the legislative intent." Jekyll Island - State Park Authority v. Jekyll Island Citizens Association, 266 Ga. 152, 153, 464 S.E.2d 808, 810 (1996). Only if "men of common intelligence must necessarily guess at its meaning and differ as to its application," will a statute be determined unconstitutionally vague and therefore in violation of the due process clause found in Article I, § 1, ¶ I of the Georgia Constitution. Id. (emphasis added) (quoting Hartrampf v. Georgia Real Estate Commission, 256 Ga. 45, 46, 343 S.E.2d 25 (1986)).

The Wal-Mart Defendants submit that the legislative intent in Senate Bill 3 is very clear, and the Bill provides fair notice, that liability for personal injuries of the type alleged in this lawsuit shall be apportioned according to jury assessments of relative fault, such that each defendant shall only be liable for that portion of the award of damages calculated based on the defendant's assigned percentage of fault. The statutory language in O.C.G.A. § 51-12-33 is specific on this point, as is the legislative intent if the statute is given a common sense of meaning. Thus, vagueness under the due process clause of the Georgia Constitution is not a genuine issue.

Instead, Plaintiff's arguments focus on perceived inconsistencies between O.C.G.A. § 51-12-33 as amended, and the two preceding sections of Title 51, Chapter 12, of the Georgia Code, O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-32. These provisions, however, are not inconsistent, but instead are designed to cover the broad range of possible claims that may be alleged. Moreover, any inconsistencies between 51-12-31 or 51-12-32 and 51-12-33 are ameliorated by the express language in both 51-12-31 and 51-12-32 that these two sections have effect "[e]xcept as provided in Code Section 51-12-33...." See O.C.G.A. § 51-12-33; O.C.G.A. § 51-12-32(a). So in the event of possible conflict, 51-22-33 should prevail. The claim that Plaintiff can conceive of no factual scenario where 51-12-31 or 51-12-32 may have application outside of the scope of 51-12-33 does not render these two sections redundant or cause such confusion that Senate Bill 3 must be held unconstitutionally vague. Those circumstances can and will exist given the many possible factual scenarios and types of tort claims that can be alleged.

For an example of such a scenario in which O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33 are both applicable and operate consistently, consider a plaintiff who falls on a slippery floor and alleges that the cause was a defective or poorly maintained floor surface as well as a defective pair of boots. If this plaintiff suffered a head injury in the fall, he could also allege that he was wearing a defective "hard hat," and if the fall also caused his leg to become entangled in an unguarded machine, he could allege that the machine was defective or improperly designed or maintained. The plaintiff could sue several defendants in a single action (i.e., those responsible for the floor, boots, hard hat and unguarded machine), and different groupings of the defendants could be charged with liability for the specific injuries. The defendants allegedly responsible for the floor, boots and hard hat, could be held liable for the head injury. The defendants responsible for the floor, boots and unguarded machine, would be held liable for the leg injury.

Within these two subgroups, percentages of fault would be assessed on those defendants whose conduct contributed to these specific injuries, as required under O.C.G.A. § 51-12-33, and this would be entirely consistent with O.C.G.A. § 51-12-31, as only these defendants, respectively, may be held liable for each injury.[7] Then the jury in its verdict could specify the particular damages to be recovered of each defendant, depending upon the damages proven for each injury and the relative percentages of fault assigned to each defendant. Depending upon the form of the special verdict (developed by the court under O.C.G.A. § 9-11-41), the jury could specify the particular damages to be recovered of each defendant so as to reflect the percentage assessments for each injury and the total amount to be recovered of each defendant. The judgment stating these totals would be entered severally, in accordance with O.C.G.A. § 51-12-31.

III. THE AMENDMENTS TO O.C.G.A. § 51-12-33 DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE FOUND IN ARTICLE I, § 1, ¶ II OF THE GEORGIA CONSTITUTION.

As an initial matter, the Plaintiff has failed to show that O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33 create two different classes of plaintiffs who are subjected to different treatment, which she must do in order to articulate her argument that Senate Bill 3 violates the

[7] Plaintiff argues elsewhere in her Omnibus Brief that O.C.G.A. § 51-12-31 "does not abolish joint and several liability, but instead reaffirms it." (Omnibus Brief, p. 17). However, the changes enacted by Senate Bill 3 to O.C.G.A. § 51-12-31 when construed in conjunction with O.C.G.A. § 51-12-33 make it very clear that the intent of the Georgia Legislature was to abolish the joint and several liability doctrine. The old version of 51-12-31 provided that "the plaintiff may recover damages for the greatest injury done by any of the defendants against all of them." O.C.G.A. § 51-12-31 (1987) (emphasis added). The amended statute now provides that "the plaintiff may recover damages for an injury caused by any of the defendants against **only** the defendant or defendants liable for the injury." O.C.G.A. § 51-12-31 (2005) (emphasis added). This "only" qualifier in 51-12-31 is entirely consistent with the allocation provisions in 51-12-33. As explained above, if several defendants are named in a particular lawsuit, only the defendant or defendants (proportionally) found liable for a specific injury alleged by the plaintiff must pay damages for that injury. If a separate defendant or group of defendants is found liable for some other injury also alleged in that lawsuit, only the separate defendant or defendants (proportionally) must pay damages for that other injury. The jury may delineate in its verdict each specific injury so as to specify the particular damages to be recovered of each defendant, and, depending on the facts, this process may (and in some instances will) require the allocations of fault provided for under O.C.G.A. § 51-12-33.

equal protection clause contained in Article 1, § 1, ¶ II of the Georgia Constitution. Plaintiff candidly acknowledges this weakness in her argument by describing "[t]he only differentiating factor," between two classes (as she attempts to define them) as "undefined, vague and uncertain." (Omnibus Brief, p. 16.) Thus, Plaintiff's conclusion that 51-12-31 and 51-12-33 create "classifications [that] disadvantage a suspect class" and "interfere with the exercise of a fundamental right" is unsupported at the outset. Id.

What is certain under the statutes is that plaintiffs affected by 51-12-31 and 51-12-33 are not part of a "suspect class" that has historically been subjected to discrimination, and, as common law tort claimants, they have not historically had a "fundamental right" to recover 100% of their damages from a defendant who is not 100% at fault.[8] Moreover, it is indeed difficult to articulate disparate classes under these statues for all plaintiffs affected by 51-12-31 and 51-12-33 will be treated identically, as they all have the same rights and limitations placed upon them—including the right to decide which parties to sue and the limitation that they can only recover from a particular party according to that party's proportionate fault.

The only arguable classification that exists among plaintiffs affected by O.C.G.A. §§ 51-12-31 and 51-12-33 is a classification separating those plaintiffs who can recover from solvent

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[8] A "suspect class" in equal protection jurisprudence is a group of claimants identified, for example, by race or gender, see, e.g. Parks v. State, 254 Ga. 403, 330 S.E.2d 686 (1985), while "fundamental rights" include rights such as the defendant's right to appointed counsel in a criminal proceeding. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963). There simply is no fundamental right under Georgia's equal protection clause to recover 100% damages in a tort cause of action. See, e.g. Williams v. Byrd, 242 Ga. 80, 247 S.E.2d 874 (1978).

Plaintiff has not cited Denton v. Con-Way Southern Express, Inc., 261 Ga. 41, 402 S.E.2d 269 (1991), in her equal protection argument although she has relied upon it elsewhere. (Omnibus Brief, pp. 19-21). Denton has been interpreted to suggest that the phrase "impartial and complete" in Art. I, § 1, ¶ II of the Georgia Constitution provides for additional equal protection rights beyond those traditionally recognized to protect a "suspect class" or enforce "fundamental rights." However, this analysis in Denton was later expressly rejected by the Georgia Supreme Court in Grissom v. Gleason, 262 Ga. 374, 418 S.E.2d 27 (1992), which leaves Plaintiff with no textual basis in the Georgia Constitution for arguing that her recovery must be "complete" in the sense that she must be made 100% whole even from a defendant found less that 100% at fault.

defendants and those who cannot recover from an insolvent defendant. It is an unavoidable fact that some plaintiffs will be injured by defendants who are solvent or well-insured and some plaintiffs will be injured by defendants who are not solvent or are under-insured. As previously discussed, however, the solvency or insured status of a particular defendant is a matter of fortuity and does not (and should not) impact the validity of the apportionment statute under equal protection analysis. The statute does not create any disparate classification since all citizens (and all members of the motoring public here) are equally subjected to the same risk of injury caused by an insolvent or under-insured defendant. However, even if the Legislature did define certain defendants as "insolvent" in advance of the injury -- by way of statutory immunity, for example -- still no disparate classification would be created by the statute, but rather all citizens would be treated the same in terms of possibly being injured by the immune defendant. Not surprisingly, such statutes have been upheld when challenged on equal protection grounds. E.g., Barrett v. Carter, 248 Ga. 389, 283 S.E.2d 609 (1981) (rejecting equal protection challenge to statute that creates tort immunity for children under the age of thirteen).

Since all potential plaintiffs are similarly affected by the proportional fault assessments now required by Senate Bill 3, it remains difficult to define any classifications to which equal protection analysis can be applied. But it is at least certain that because those affected by 51-12-31 and 51-12-33 are not members 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 (instead of strict scrutiny) to pass constitutional muster in the face of an equal protection challenge. Bickford v. Nolen, 240 Ga. 255, 256, 240 S.E.2d 24, 26 (1977).[9] The rational basis test "requires that classifications created

[9] Contrary to Plaintiff's representation on page 7 of her Omnibus Motion that Shessel v. Stroup, 253 Ga. 56, 316 S.E2d 155 (1984), recognizes a due process right for plaintiffs to recover for their injuries under the Georgia Constitution as found in other states, in fact, Shessel only held that a medical malpractice statute of limitations that began to accrue when the defendant's negligent act occurred was unconstitutional on equal protection grounds. The statute of limitations created two classes of plaintiffs in that it: (1) allowed plaintiffs to pursue their claims when their injury occurred

by a state must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Smith v. Cobb County-Kennestone Hospital Authority, 262 Ga. 566, 570, 423 S.E.2d 235, 238 (1992). When the legislative purpose of a statute is legitimate and when the classification drawn by the statute has a reasonable relation to furthering the legislative purpose, the classification is acceptable. Id. In discussing the application of an equal protection analysis to a statute, the Georgia Supreme Court observed in Department of Transportation v. Georgia Mining Associates, 252 Ga. 128, 311 S.E.2d 443 (1984):

> Laws enacted by our legislature are presumed to be constitutional and the burden is on the party challenging the law to prove its invalidity. When classifications are challenged under the equal protection guarantees they will be upheld if there is any set of facts upon which they could be sustained.

Id. at 129, 311 S.E.2d at 445-446 (emphasis added).

O.C.G.A. § 51-12-33 is reasonable in light of the legislative purpose of Senate Bill 3 to "provide substantive and comprehensive revision of provisions regarding civil practice, evidentiary matters, and liability in tort actions in general and actions related to health care in particular...." Session Laws 2005, (Tab 1, p.1). Courts and commentators have recognized for

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within two years of the negligent act, but (2) barred plaintiffs from pursuing their claims when their injury occurred more than two years after the negligent act. This classification was irrational since a personal injury claim cannot be brought until there is an injury. The holding in Shessel was predicated on the prior case of Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484 (1983), which reached the same conclusion in the context of the medical malpractice statute of limitations as applied to wrongful death claims. Both Shessel and Clark were later expressly limited when the Supreme Court held in Craven v. Lowndes County Hospital Authority, 263 Ga. 657, 437 S.E.2d 308 (1993), that an ultimate statute of repose for causes of action based upon alleged medical malpractice did not violate equal protection and was constitutional.

Although Plaintiff cites both Shessel and Clark as support for her proposition that her right to recover for her injuries is a "fundamental right" (Omnibus Brief, p. 7), neither case actually supports that proposition. Neither Shessel nor Clark contains that holding either explicitly or implicitly, as evidenced by the fact that the Georgia Supreme Court in those cases only applied a rational relationship test in evaluating the plaintiffs' equal protection challenges.

years the inequities of holding a defendant liable for 100% of the damages when he was not 100% at fault for the tort. See, e.g., Hudson v. Union Carbide Corporation, 620 F. Supp. 558 (N.D. Ga. 1985). In enacting Senate Bill 3, the Georgia Legislature specifically found that these reforms were needed, so as a matter of fairness, and with the desire to decrease litigation and insurance costs, Georgia law has now been changed to impose only proportionate liability. That change in opinion has been expressed through the enactment of Senate Bill 3. Changes in the collective opinion of Georgia's citizens as to what is fair are not unusual. As recognized by Justice Weltner in Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135, 296 S.E.2d 697 (1982), "[a]t heart, the whole body of tort law is but an expression of what the community perceives to be the civil, as opposed to moral or ethical, responsibility of its members to each other. That concept changes with the cumulative experiences and assessments of succeeding generations, through constitutional, legislative, and judicial pronouncement." Id. at 148, 296 S.E.2d at 707 (Weltner, J., concurring specially).

The Georgia Legislature has reasoned that enacting the reforms provided for under Senate Bill 3, and particularly O.C.G.A. § 51-12-33, is in the best public interest. As noted, its primary policy reason for enacting these and other reforms related to rising insurance costs and a desire to keep those costs down, particularly in the health care arena. That policy decision was rational and, as such, O.C.G.A. § 51-12-33 should be upheld as constitutional. This has been the result in other instances where the Georgia Legislature has actually created identifiable classifications and limited personal injury recoveries. For example, as discussed previously in response to Plaintiff's due process challenge, the Georgia Supreme Court in Teasly v. Mathis, 243 Ga. 561, 255 S.E.2d 57 (1979), analyzed an equal protection challenge to the Georgia "no-fault" automobile insurance statute, which eliminated an injured motorist's recovery for punitive damages. In upholding that statute in the face of an equal protection challenge, the Supreme

Court recognized a rational relationship between the elimination of that element of damages and the classes established by the statute, which distinguished between those who had suffered "serious" injuries and those who had "moderate to small claims." Id. Thus, although the statute limited the recoveries of certain plaintiffs, the Supreme Court held it did not violate equal protection.[10]

Courts in other states have also concluded that the abolishment of joint and several liability does not violate equal protection. In Evangelatos v. The Superior Court of Los Angeles County, 44 Cal.3d 1188, 753 P.2d 585) (1988) (copy attached at Tab 4), the voters of California approved an initiative known as Proposition 51, which modified the common law rule of joint and several liability so as to limit a defendant's liability for non-economic damages to an amount that was proportional to the defendant's percentage of fault for the tort. The new law specifically provided that in determining each defendant's proportional share of liability, the trier of fact "may consider the conduct of all persons whose fault contributed to plaintiff's injury, not just the conduct of plaintiff and defendants who are parties to the action." Id. at 1195, 753 P.2d at 588. The plaintiff in Evangelatos argued that this new law improperly discriminated among those tort victims who suffered non-economic damages because of the risk that some of those victims might only receive a partial recovery from an insolvent defendant. Id. at 1203, 594. Nevertheless, after applying a rational basis test to evaluate this challenge, the California

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In Bickford v. Nolen, 240 Ga. 255, 240 S.E.2d 24 (1977), the Georgia Supreme Court similarly held that the judicially recognized guest-passenger rule passed the reasonableness test although it prohibited non-paying guest passengers from recovering damages for personal injuries sustained as a result of the ordinary negligence of the owner or operator of the vehicle in which the guest was a passenger. The court recognized that this rule created a distinction between paying and non-paying passengers in an effort to foster hospitality among vehicle owners, and this was sufficient to prevail on an equal protection challenge because the classification of guest passengers bore a "fair and substantial relation to a valid purpose of the rule." Id. at 257, 240 S.E.2d at 27. The court also recognized that the long-standing rule, while created judicially, involved an issue of public policy that should stand until the legislature chose to change it. Id. at 258, 27.

Supreme Court found no constitutional defect. Id. at 1204, 753 P.2d at 595. The court held there was no evidence of any intent to discriminate among injured victims on the basis of defendant solvency, but that instead the new law was simply intended to limit the potential liability of an individual defendant for non-economic damages in proportion with that defendant's share of fault. Id. The court analyzed the distinctions among the two alleged classes of plaintiffs as follows:

> Under any tort liability scheme, a plaintiff who is injured by a single tortfeasor who proves to be insolvent is, of course, worse off than a plaintiff who is injured by a single tortfeasor who can pay an adverse judgment. Such differential treatment flowing from the relative solvency of the tortfeasor who causes an injury, however, has never been thought to render all tort statutes unconstitutional or to require the state to compensate plaintiffs for uncollectible judgments obtained against insolvent defendants. And while the common law joint and several liability doctrine has in the past provided plaintiffs a measure of protection from the insolvency of a tortfeasor when there are additional tortfeasors who are financially able to bear the total damages, plaintiff has cited no case which suggests that the joint and several liability doctrine is a constitutionally mandated rule of law, immune from legislative modification or revision.

Id. This same rationale is directly applicable to the constitutional analysis of O.C.G.A. § 51-12-33 that this Court should undertake in response to the Plaintiff's equal protection challenge to O.C.G.A. § 51-12-33.

IV. SUBSECTION (c) OF O.C.G.A. § 51-12-33 DOES NOT PROVIDE A BASIS FOR DECLARING SENATE BILL 3 UNCONSTITUTIONAL "IN PART."

In the final section of her Omnibus Brief, Plaintiff argues that Subsection (c) of O.C.G.A. § 51-12-33 is constitutionally defective such that the Court should hold Senate Bill 3 unconstitutional "in part." Two arguments are presented: (1) the statute's requirement that the trier of fact "consider" the fault of other persons or entities who contributed to the alleged injury or damages, even if they are not named parties in the lawsuit, is "unconstitutionally vague" because it "does not set a standard as to what use the jury should make of any negligence they find on the part of a third-party except to 'consider' the fault of such persons" (Omnibus Brief, pp. 19, 20), and (2) this consideration of the fault of non-parties "puts an unfortunate plaintiff in

the position of having to take on the defense of various and sundry other parties...." (Omnibus Brief, p. 22).

First, the "vagueness" argument: Citing Denton v. Con-Way Southern Express, Inc., 261 Ga. 41, 401 S.E.2d 269 (1991), Plaintiff claims that Subsection (c) is unconstitutionally vague because there is no "standard" as to what "use" the jury should make of any finding of fault on the part of a third-party. (Omnibus Brief, p. 20). In Denton, however, the uncertainty was the use to which a jury was to consider evidence of a plaintiff's collateral source benefits such as insurance, indemnity or other similar benefits. The Georgia Supreme Court in Denton considered such information "irrelevant" and "highly prejudicial" and therefore "readily subject to misuse by a jury" without specific standards or other guidance, thereby creating the possibility that juries might reach "arbitrary, disparate and unfair decisions." Id. at 42, 43, 46, fn 4, 402 S.E.2d at 270, 272 fn 4. However, that is not the case with respect to O.C.G.A. § 51-12-33(c), as this statute provides that the trier of fact "shall consider the fault of all persons or entities who contributed to the alleged injury or damages," even if they are not named as defendants in the lawsuit, and it requires the jury to access percentages of fault so that damages can be apportioned among the defendants who are liable according to those percentages. O.C.G.A. §§ 51-12-33(b) and (c) (emphasis added). The common law standards for accessing fault under Georgia Law are well-established, and they are succinctly set forth in the uniform jury instructions given to juries on a daily basis in the State and Superior Courts throughout the State of Georgia – a jury must find that (1) a duty is owed to the plaintiff, (2) the duty has been breached, and (3) the breach proximately caused injury. Under O.C.G.A. § 51-12-33(c), this inquiry must be applied to each defendant named in the lawsuit as well as to other persons or entities who have entered into a settlement agreement with the plaintiff and other non-parties whose conduct allegedly contributed to the plaintiff's injuries or damages if a defendant has given notice identifying these

non-parties at least 120 days before trial. O.C.G.A. § 51-12-33(d). By requiring that the trier of fact access "percentages of fault," Subsection (c) necessarily requires determinations of fault that, when totaled, will add up to 100% for all of the parties and non-parties considered. This is a simple mathematical requirement, and no other "standard" is needed for a court and jury to implement the rules of apportioning fault contained in Senate Bill 3. There is simply no consideration of information that is "irrelevant" or "highly prejudicial," as in Denton. So long as the established rules governing the admissibility of evidence are followed correctly, and so long as the jury instructions are properly given, then the determinations of fault and the allocation of percentages should not result in outcomes that are arbitrary, disparate or unfair. Thus, Denton is easily distinguished, and O.C.G.A. § 51-12-33(c) is not unconstitutionally vague.

As a second ground for arguing that 51-12-33(c) is unconstitutional, the Plaintiff focuses on the fact that "non-parties are not present to defend their own action." (Omnibus Brief, p. 22). Apart from the unfounded inference that these non-parties are somehow deprived of due process rights (for which this Plaintiff has no standing to complain), this argument rests on an assertion that it is unfair for the Plaintiff to have to "take on the defense" of such persons or entities. (Omnibus Brief, p. 22). Two Law Review articles are cited, but otherwise the Plaintiff has found nothing in Georgia law to support this assertion.

The text of Senate Bill 3 addresses the first concern expressly. A non-party against whom the trier of fact assesses a percentage of fault will not be affected by that determination. Under O.C.G.A. § 51-12-33, such an assessment "shall only be used in the determination of the percentage of fault of named parties" and "shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action." O.C.G.A. § 51-12-33(f)(1) and (f)(2). Given this provision, it is difficult to conceive of any prejudice to a non-party in the circumstances.

Nor is it unfair to a plaintiff for a named defendant to blame a non-party for the plaintiff's injuries. As noted at the outset of this Response, the "empty chair" defense has long been recognized in court cases litigated in the State of Georgia. Contrary to the Plaintiff's argument, the burden of proof of the non-party's contributing conduct rests upon the defendant who pursues this defensive strategy. Of course, the Plaintiff may (and often as a practical matter, must) respond, but the rules of discovery allow all parties a fair opportunity to investigate and develop the evidentiary basis and arguments for and against that factual contention. Absent a surprise argument by the defendant that some undisclosed non-party caused the plaintiff's injuries, no constitutional issue of fairness should arise. And to prevent such surprise, the Georgia Legislature included a provision in O.C.G.A. § 51-12-33 that identifies those non-parties in advance. Under O.C.G.A. § 51-12-33(d), in assessing such fault the trier of fact is to consider non-parties who have "entered into a settlement agreement" with the plaintiff (and are thus known to the plaintiff) as well as nonparties who have been identified by the defending party at least 120 days prior to trial.

The Law Review articles attached to the Plaintiff's Omnibus Brief are equally unpersuasive. One author suggests that, because of the non-party's lack of participation, a jury is likely to assign that non-party "a disproportionate share of liability...." (See Costello, "Allocating Fault to the Empty Chair: Tort Reform or Deform?" 76 U. Det. Mercy L. Rev. 571, 585 (1999)).[11] However, this is not necessarily the case, unless one instinctively doubts the

[11] The author of this Law Review article observes that the non-party will not be active in the discovery process or in presenting evidence, and then goes on to conclude that the "defendant, therefore, has an unfair advantage over a non-party in determining the allocation of fault." Id. at 597. No evidence or authority was cited to support this assertion, and (as will be shown) it is of no consequence to the nonparty who is in no way bound or otherwise affected by the allocation. Nor is there any basis for suggesting that the defendant -- as opposed to the plaintiff -- has an unfair advantage on the issue of proving or disproving a nonparty's fault. The author suggests that the plaintiff "has no knowledge, possession or control of evidence that a nonparty could use to protect themself from a finger-pointing defendant," id. at 598, but that is simply not true, for the plaintiff has the opportunity to obtain all non-privileged information available from that nonparty through

reliability of jury verdicts. It is simply not correct to assume that the plaintiff will have a diminished incentive or diminished capacity to prove that the non-party is not at fault or was less at fault than would the non-party himself if he were named in the lawsuit. The plaintiff would have an opportunity to conduct full discovery and call any witness in order to prove that the non-party was not at fault, and the plaintiff would have a direct incentive to do this in order to enhance her own potential recovery against the named defendant More importantly, in most instances, as in the present case, the Plaintiff could avoid this purported burden simply by naming the non-party as a defendant in the action. In other words, it is as much the Plaintiff's choice as it is the choice of the Wal-Mart Defendants not to name Moniquea Stanley as an additional party defendant in this action. In light of that fact, the Court should not credit the Plaintiff's due process argument that the jury's allocations of fault in this case under O.C.G.A. § 51-12-33(c) will not be reliable.

CONCLUSION

For these reasons, the Wal-Mart Defendants respectfully submit that Plaintiff's Omnibus Motion should be denied in its entirety.

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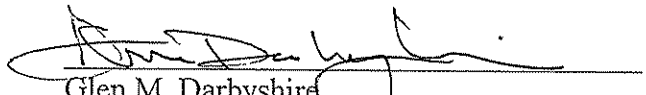
the discovery process. The defendant has this opportunity to conduct discovery as well, and it is simply incorrect to suggest that the plaintiff faces "an impossible burden" of responding to this defense as well as proving the defendant's liability, or that the defendant has a "great advantage in diminishing" his own liability by allowing the jury to allocate fault to non-parties. Id. The only sources cited for these arguments by the author of this Law Review article is a Plaintiff's Motion to Strike the allocation of fault defense raised by a defendant in a Michigan lawsuit which settled without a published opinion. Id. at fns. 224-232.

This 11th day of June, 2007.



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IN THE STATE COURT OF BULLOCH COUNTY
STATE OF GEORGIA

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

ORDER

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

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

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

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

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

At the heart of the motion is O.C.G.A. section 51-12-33, which provides: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." In a broader sense, the arteries feeding the dispute here flow from three statutes as reworded (or not, as the case may be)in 2005 revisions by the Georgia Legislature, to wit: O.C.G.A. sections 51-12-31, 51-12-32, 51-12-33.

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

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

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

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

This 5th day of July, 2007.

Judge Gary L. Mikell,
State Court of Bulloch County

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