

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

TERENCE L.D. MEDINA,)

Plaintiff,)

vs.)

CIVIL ACTION

GFI MANAGEMENT SERVICES, INC.,)

FILE NO.: 09A13159-1

Defendant.)

ORDER

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

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

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

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 See, .e.g, Veazey v. Elmwood Plantation Assocs., 650 So. 2d 712, 719 (La. 1994), superseded by statute as stated in Thomas v. Sheridan, 977 So. 2d 303 (La.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

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

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by the percentage of fault attributable to a third party.'"); Bhinder v. Sun Co., 717 A.2d 202, 212 (Conn. 1998), superseded by statute as stated in Allard v. Liberty Oil Equip.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

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

Under Georgia law, Code Section 51-12-33(b) requires apportionment of damages among "the persons who are liable according to the percentage of fault of each person"; Code Section 33 (c) requires "In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit"; and, Code Section 33 (d) sets forth the requirements necessary for consideration of the "[n]egligence or fault of a nonparty."

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

As the statute requires apportionment "according to the percentage of fault of each person," it allows apportionment between persons who are liable due to negligence and those who are liable due to an intentional tort. And because it requires consideration of "the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit," that comparison can be made even where the criminal actor is a non-party.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

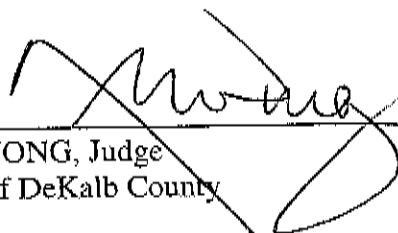
While policy decisions regarding whether a defendant's liability should be joint and several or proportionate to his degree of fault are reserved for the Legislature, the present statutory scheme leaves trial courts and litigants unable to determine the legislative intent as evidenced by the flood of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

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

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

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

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


ALVIN T. WONG, Judge
State Court of DeKalb County

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