IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

ANN J. HERRERA, as Personal Representative of WESLEY N. HAGAN, Deceased and as Administratrix of the Estate of WESLEY N. HAGAN, Deceased,	*	**Case No. 08A83964-6**
Plaintiff,	*	
v.	*	
MILES PROPERTIES, INC.	*	
Defendant.	*	

ORDER

This case came before the Court on Defendant's Motion to seek apportionment against non-parties pursuant to O.C.G.A. § 51-12-33. During a previous hearing on December 17, 2009, the Court ruled that apportionment would not be allowed in this case. The Court reasoned that apportionment is inappropriate in premises liability actions because therein a plaintiff can seek to hold the defendant solely responsible for the damages caused by a third party. Liability, therefore, is predicated on the foreseeable, at fault acts of the property owner or other people. The property owner's or occupier's negligence is the basis for its responsibility for any damages caused by the foreseeable acts of a third party. Recently, however, the Georgia Court of Appeals

issued its opinion in Cavalier Convenience v. Sarvis, Ga. App. (Case No. A10A0538, decided July 9, 2010).

Therein, the Court of Appeals addressed the issue of whether O.C.G.A. § 51-12-33 requires apportionment among multiple liable defendants when the plaintiff bears no fault. The Court found the language of O.C.G.A. § 51-12-33 unambiguous and held "that where damages are to be awarded in an action brought against more than one person for injury to person or property - - whether or not such damages must be reduced pursuant to O.C.G.A. § 51-12-33 (a) - - the trier of fact 'shall . . . apportion its award of damages among the persons who are liable according to the percentage of fault of each person.' Had the legislature intended for subsection (b) of O.C.G.A. § 51-12-33 to be triggered *only* upon a reduction of damages pursuant to subsection (a) of that Code section, it could have so stated; but it did not impose any such prerequisite." Id.

Although the specific holding of Cavalier, is not directly applicable to this case, the Court's discussion of the policy arguments against apportionment support a finding that apportionment is appropriate herein. One of the policy arguments presented to the Court of Appeals dealt with a premises liability hypothetical using the same rationale for not apportioning in premise liability cases that this Court used at the hearing in December, 2009. However, the Court of Appeals determined that it had "no authority to adopt a construction that is contrary to the General Assembly's intent as plainly codified." Implicitly applying the apportionment statute to premise liability cases.

Subsection (c) of O.C.G.A. § 51-12-33 provides that "[i]n assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." Plaintiff's assertion that subsection (c) applies only after application of subsections (a) and (b) is without merit. The legislature neither stated nor indicated that such a construction was necessary. Additionally, Plaintiff brought the present action against more than one defendant and Defendant's Notice of Apportionment was filed prior to the dismissal of any defendants. Therefore, subsection (b) of O.C.G.A. § 51-12-33 also clearly applies as it requires only that an action be "**brought** against more than one defendant." (Emphasis supplied.)

Plaintiff contends that O.C.G.A. § 51-12-33 is unconstitutionally vague in that its application conflicts with that of O.C.G.A. §§ 51-12-31 and 51-12-32 and that O.C.G.A. § 51-12-33 is internally inconsistent and unclear. However, as set out in Defendant's responsive brief, the three statutes codify the Legislature's unambiguous intent to place tort litigants on notice that joint and several liability has been replaced with an equitable apportionment statute. "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." Jekyll Island State Park Auth. v. Jekyll Island Citizens Assoc., 266 Ga. 152, 153, 464 S.E.2d 808 (1996). The Legislature's intent is clear from codification of the three statutes which are applicable in

different circumstances. Additionally, the Court finds that the application of O.C.G.A. § 51-12-33 is not inconsistent. Nothing in O.C.G.A. § 51-12-33 prevents plaintiffs from bringing actions against all parties they contend were at-fault.

Plaintiff argues that O.C.G.A. § 51-12-33 denies substantive and procedural due process. "Duly enacted statues enjoy a presumption of constitutionality. A trial court must uphold a statue unless the party seeking to nullify it shows that it 'manifestly infringes upon a constitutional provision or violates the rights of the people.'" Rhodes v. State, 283 Ga. 361, 361, 659 S.E.2d 370 (2008). This the Plaintiff has failed to do. Under the rational basis test applied to this substantive due process claim, "a statute will be upheld in the face of a due process attack so long as it is reasonably related to the public health safety or general welfare." Ga. Dep't of Human Res. v. Sweat, 276 Ga. 627, 629, 580 S.E.2d 206 (2003). "In the arena of social welfare and economics . . . only if the means adopted, or the resultant classifications, are irrelevant to the [state's] reasonable objective, or altogether arbitrary, does the [statute] offend due process." (Citation and punctuation omitted.) Id. In the present case, the state has a legitimate interest in apportioning damages to defendants according to their respective degree of fault. The statute does not limit an injured party's ability to bring an action against a tortfeasor nor does it limit the application of the Civil Practice Act with regard to discovery from non-parties.

Plaintiff contends that O.C.G.A. § 51-12-33 denies equal protection among

classes of both plaintiffs and defendants. The rational basis test also applies to Plaintiff's equal protection arguments. See Rhodes, supra at 363. "It is fundamental that no equal protection violation exists unless legislation treats similarly-situated individuals differently." Sweat, supra at 630. The Plaintiff has not satisfied her burden that the apportionment statute creates a disparate classification. Additionally, the Court finds that the revisions to O.C.G.A. § 51-12-33 are legitimate in light of the specific purpose of the tort reform initiatives embodied in the legislative bill proposing the changes.

The Court finds that Plaintiff's arguments as to the constitutionality of O.C.G.A. § 51-12-33 are without merit. The issue of apportionment of fault among the Defendant herein and the named non-parties shall be presented to the jury upon proper evidence during the trial of this case.

SO ORDERED, this 16 day of Aug, 2010, nunc pro tunc 22 day of July, 2010.

Edward E. Carriere, Jr., Judge
State Court of DeKalb County

cc: Gilbert H. Deitch, Esq.
Edwin M. Saginar, Esq.
Christian J. Lang, Esq.

FILED IN THIS OFFICE
THIS 16th DAY OF Aug 2010
Clerk, State Court, DeKalb County