

# **THE JOINT TORTFEASOR MAZE**

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Georgia's statutes and case law regarding joint tortfeasors, apportionment of liability and contribution have always been challenging. When the Georgia General Assembly amended O.C.G.A. §§ 51-12-31 and 51-12-33 in 2005, new rules created a whole new playing field for tort lawsuits involving multiple parties. It may appear that the amendments and non-amendments to these code sections are inconsistent. An understanding of the history of the numerous legal concepts encompassed by these statutes and the seemingly endless scenarios they cover allows the practitioner to understand that these provisions attempt to provide a framework that eliminates joint and several liability, and maintain other important rights. Joint tortfeasors still exist, but the allocation of fault and payment responsibilities have changed. This article attempts to analyze several common joint tortfeasor issues and how the new amendments apply to them.

### **THE PAST**

#### **A. History**

##### ***Joint Tortfeasors***

Defendants are joint tortfeasors if their separate and distinct acts of negligence concur to proximately cause an injury.<sup>1</sup> Concert of action among defendants is not required to be considered joint tortfeasors.<sup>2</sup> The fact that a plaintiff's injuries would not have been sustained had only one defendant's act of negligence occurred, did not make

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<sup>1</sup> *St. Paul Fire Ins Co. v. MAG Mutual Ins. Co.*, 209 Ga. App. 184, 185, 433 S.E.2d 112 (1993).

<sup>2</sup> See *Gilson v. Mitchell*, 131 Ga. App 321, 327, 205 S.E.2d 421 (1974).

another's act of negligence the sole proximate cause.<sup>3</sup> Plaintiffs could sue whoever was liable for damages, together or separately. However, where one defendant is the sole proximate cause of an injury, there are no joint tortfeasors.<sup>4</sup> The doctrine of joint tortfeasor liability has not been changed by the Tort Reform Act of 2005 or the amendments to O.C.G.A. §§ 51-12-31 and 51-12-33.<sup>5</sup>

### ***Joint and Several Liability***

Before 2005, joint and several liability was the law in Georgia for more than 100 years.<sup>6</sup> If the negligence of two persons combined to produce an injury, either could be sued for the entire amount of damages. There was no accounting of comparative negligence between the two negligent parties causing the injury and either of them could be held liable for all the damages even though one was more negligent than the other.<sup>7</sup> Leaving policy arguments aside, it was well-established that joint and several liability benefited Plaintiffs. Moreover, even if the injury would have happened regardless of the defendant's negligence, the Plaintiff could still recover.<sup>8</sup> Joint and several liability was allowed despite different duties being owed to a plaintiff by different defendants.<sup>9</sup>

The percentage of culpability did not matter, “[w]here one is injured by the concurring negligence of two tortfeasors, each is liable for the whole injury although the

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<sup>3</sup> See *Central Truckaway System v. Harrigan*, 79 Ga. App. 117(3), 53 S.E.2d 186 (1949); *Stern v. Wyatt*, 140 Ga. App. 704, 705, 231 S.E.2d 519 (1976).

<sup>4</sup> See *State Auto Mutual Ins. Co v. Relocation & Corporate Housing Services, Inc.*, 287 Ga. App. 575, 651 S.E.2d 829 (2008)

<sup>5</sup> In fact, O.C.G.A. §9-10-31(c), enacted as part of the Tort Reform Act of 2005 expressly referred to joint tortfeasors in this venue statute. (Declared unconstitutional on other grounds in *EHCA Cartersville, LLC v. Turner*, 280 Ga. 333, 626 S.E.2d 482 (2007).

<sup>6</sup> See *Central Railway Company v. Brown*, 113 Ga. 414, 38 S. E. 989 (1901).

<sup>7</sup> *Fields v. Jackson*, 102 Ga. App. 117, 131(7), 115 S.E.2d 877 (1960); *City of Atlanta v. Harris*, 52 Ga. App. 56, 182 S.E.2d 202 (1935).

<sup>8</sup> See generally, *Hicks v. Talbott Marsh et. al.* 196 F.3d 1226, 1242-1243 (11<sup>th</sup> Cir. 1999), (affirmed trial court's decision not to charge jury on proximate cause or intervening cause with respect to non-defendant's concurrent cause of injury).

<sup>9</sup> *McBerry et al. v. Ivie*, 116 Ga. App 808. , 159 S.E.2d 108 (1967).

other defendant may have contributed thereto in greater degree.”<sup>10</sup> Even where the negligence of one tortfeasor was only 3% and the other was 97%, both were jointly and severally liable for the entire verdict.<sup>11</sup> The effect of these principles was to allow recovery of an entire verdict against any defendant. Except in limited cases, that defendant would be required to pay an entire verdict regardless of the percentage of fault. Defendants with minimal responsibility for an injury could be held liable for entire verdicts. The most dramatic examples of this took place in product liability lawsuits and third-party criminal act lawsuits against property owners.

### ***Apportionment***

In causes of action for personal injuries arising prior to February 16, 2005, unless a jury under O.C.G.A. § 51-12-33 (as amended July 1, 1987) chose to apportion fault in a case where the Plaintiff was found to be at fault to some degree, a verdict was split evenly among defendants included in the verdict who were joint-tortfeasors. This apportionment did not apply to defendants who were vicariously liable for the acts of another defendant.<sup>12</sup>

### ***Contribution***

Often confused with rights of indemnification, contribution has undergone a tortured history in the Georgia appellate courts and progressive expansion by the General Assembly prior to 2005. Generally, the right of contribution exists between parties who are jointly liable where one party has paid more than their share.<sup>13</sup> The right of contribution is often cited in support of joint and several liability because it allows a party

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<sup>10</sup> *Isom v. Schettino*, 129 Ga. App. 73, 75(1), 199 S.E.2d 89 (1973) (physical precedent only).

<sup>11</sup> *Gates v. L. G. DeWitt, Inc.*, 528 F.2d 405, 413 (5th Cir.1976).

<sup>12</sup> See *Travelers Indem. Co. v. Liberty Loan Corp.*, 140 Ga. App. 458, 231 S.E.2d 399 (1976); *St. Paul Fire & Marine Ins. Co. v. MAG Mut. Ins. Co.*, 209 Ga. App. 184, 433 S.E.2d 112, (1993).

<sup>13</sup> See *Weller v. Brown*, 266 Ga. 130, 464 S.E.2d 805 (1996).

who pays an entire verdict, or more than its share, to pursue other parties who have not paid their share. Proponents of joint and several liability believe that the right of contribution eliminates the inequities of joint and several fault. Contribution allows the tortfeasors to sort out any disproportionate payments among themselves. However, the risk of an insolvent or under-insured party was on the defendant, not the plaintiff. The amendments have shifted this risk from solvent defendants to the plaintiff, so that no defendant will pay more than its share, as determined by the jury.

### **THE PRESENT**

#### **B. The Current Statutes (As amended effective February 16, 2005)**

##### **O.C.G.A. § 51-12-31**

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 caused 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. § 51-12-32**

(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 trespasser 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 trespassers 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.

**O.C.G.A. § 51-12-33**

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

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

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section 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.

## **PURPOSE OF TORT REFORM ACT OF 2005**

There was no specific purpose given for the amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 except the general language of the purpose of the Act as a whole:

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.***

As a result, litigants and courts considering these amendments do not have a specifically stated purpose for these amendments which are not limited to medical liability actions and would be considered “general reforms”. Another interesting aspect of these amendments is that there is no expression that the General Assembly was abolishing joint and several liability. The absence of such a declaration is not dispositive of the intent of the amendments; we only need to look at the language of subsection 33 to recognize that joint and several liability has been eliminated.

## **THE FUTURE**

Following these amendments several questions remain about the state of the law in joint tortfeasor cases. Here are a few of the questions we will have to confront.

### **C. Is the Plaintiff's contributory negligence still a complete defense?**

Yes. Under O.C.G.A. § 51-12-33(g) “notwithstanding the provisions of this Code section and any other provisions of law...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.”

Although this is a codification of the common-law contributory negligence rule in Georgia, its inclusion appears to clarify that the changes in apportioning fault under O.C.G.A. § 51-12-33 were not intended to eliminate this defense. Without the inclusion of subsection (g) then subsection (a) could be read to allow a recovery by the plaintiff regardless of the percentage of the plaintiff's fault.

### **D. Does the jury have to find the Plaintiff to be at fault to apportion damages among multiple Defendants?**

No. Prior to the 2005 amendment, a jury could only apportion fault among multiple defendants when it determined a plaintiff was also at fault.<sup>14</sup> The 2005 amendment to O.C.G.A. § 51-12-33 (b) provides:

Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, *shall* after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. [Emphasis added]

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<sup>14</sup> O.C.G.A. § 51-12-33 (a) (As enacted, 1987)

The use of *shall* mandates that the jury apportion its award of damages. This language requires that trial courts provide an appropriate verdict form for the jury to assign percentages of fault and charge the jury on its obligation to apportion an award of damages.

Although subsection 33(a) provides that the jury shall determine the percentage of fault for the plaintiff and the judge shall reduce the damages accordingly, it in no way mandates apportionment *only* when the plaintiff is at fault. Subsection 33(b) clearly and unambiguously allows apportionment if there are multiple defendants, regardless of the plaintiff's fault.

There has also been some discussion about whether the amendment to O.C.G.A. § 51-12-33 conflicts with the language of O.C.G.A. § 51-12-31 which provides that:

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 caused 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. [Emphasis added].

Some commentators have suggested that the permissive language of subsection 31 conflicts with the mandatory language of subsection 33, making it unclear whether a jury can or must apportion fault among multiple defendants. This argument ignores the history and purpose of both statutes.<sup>15</sup>

Subsection 31 has been in the Georgia Code since 1863. It was a codification of the common law, and the permissive apportionment language contained in this subsection has been repeatedly held to apply to actions for trespass to property, not personal

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<sup>15</sup> See Adams, Georgia Law of Torts, 2008 Update, § 15-5 Concurrent Proximate Cause (The General Assembly's abolishment or limiting of joint liability appears to be limited to cases in which the Plaintiff is to some degree at fault).

injuries.<sup>16</sup> Subsection 33 was enacted in 1987, and when it was enacted subsection 31 was amended to limit its application to situations “except as provided in Code Section 51-12-33. . .” Ever since its enactment, subsection 33 has superseded subsection 31.

Moreover, subsection 31, in addition to providing apportionment in trespass cases, defines joint tortfeasors. It sets forth the general common law principle that where separate and independent acts of negligence produce one indivisible injury, the actors are joint tortfeasors. The significance of this common law principle is that individual defendants that cause one injury may be sued separately or together and the concurrent negligence of one defendant is not a defense to the other.<sup>17</sup> Subsection 31 preserves joint tortfeasors and the various options for personal injury plaintiffs, but it is subject to the newly created apportionment under subsection 33. For example a Plaintiff may elect to sue one of two defendants whose acts caused the plaintiff’s injuries. The named defendant will not be able to assert as a defense that the injury would have happened anyway based on the non-party’s negligence. However, subsection 33 will allow the jury to apportion fault among the parties who caused the injuries, even if not named in the suit.

It has also been argued that the retention of the right of contribution in subsection 32, also supports the concept that an entire verdict for an injury can be recovered from one defendant.<sup>18</sup> This is a misreading of subsection 32 that ignores the plain language of subsection 32 which expressly states that is subject to the provisions of subsection 33.

Commentators argue that if subsection 33 is to be read literally, then subsection 32 would

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<sup>16</sup> See *Gazaway v. Nicholson*, 190 Ga. 345, 9 S.E.2d 154 (1940) (citing prior cases).

<sup>17</sup> See *Coweta County v. Adams*, 221 Ga. App. 868, 473 S.E.2d 558 (1996).

<sup>18</sup> See Wells, *Joint Liability Rules*, Georgia’s New Battleground, Five Georgia Law Professors examine the state’s new tort legislation. (2005) (Presented at the 2005 Joseph Henry Lumpkin Society Educational Seminar; and Mason, *Are Joint Liability and the Right to Contribution Dead ?*, Georgia Defense Lawyers Journal (2005).

be surplusage, a statutory construction our appellate courts would avoid. This argument is incorrect because subsection 32 is not a nullity and is intended to preserve the right of contribution, subject to section 33. (particularly subsection 33(b) and 33(f)(2), which are explained in detail in subparts J & K of this article).

**E. Under what circumstances can the jury assign fault to a non-party at trial?**

The most revolutionary amendment to O.C.G.A. § 51-12-33 is the procedure for the jury to assign fault to non-parties. There are two categories of non-parties discussed in the amended statute and the procedure for seeking an assignment of fault differs significantly. The pertinent subsections of the code section are:

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

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

As a preliminary matter, there is a threshold question of whether a single defendant sued by a plaintiff can utilize the non-party notice and apportionment provisions of O.C.G.A. § 51-12-33. Interestingly, the language of subsection (b) states that the action must be against more than one person for non-party liability apportionment to occur. However, if we assume that eliminating joint and several

liability was the purpose of these amendments, then they would not apply to a single party case. If the purpose of the amendments was to ensure that defendants pay no more than their percentage share of damages, then limiting subsection 33 (c) and (d) to multi-defendant cases would be inconsistent with this purpose. Moreover, nothing in subsection (c) or (d) limits the application of these provisions to multi-defendant cases. In fact, it could pose a constitutional equal protection challenge if defendants in multi-defendant cases could seek non-party apportionment, but a sole defendant could not.

#### ***Settled or Dismissed Parties***

Based on the language of subsection (d)(1), the negligence or fault of a non-party who entered into a settlement agreement with the Plaintiff shall be considered by the jury automatically. No requirement of notice is required for apportionment to a settled party. Strictly speaking, a party that was named in an action and dismissed without a settlement agreement would not appear to be a non-party that would automatically be considered by the jury. It is easy to envision abuse of this subsection under this strict construction. A named defendant who was dismissed without a settlement agreement shortly before trial could evade inclusion on a verdict form because there was no settlement agreement and notice could not be given within 120 Days of trial. There is no requirement that any defendant identify another defendant as a potential non-party in order to avoid this odd circumstance and this would appear to be contrary to subsection (c).

#### ***Nonparties***

Notice must be given at least 120 days prior to trial that a defendant contends that a non-party is wholly or partially at fault. The notice must be given in a pleading, with

the identity and last known address of the party along with a brief statement of the basis for why the non-party is believed to be at fault.

Of particular interest in professional malpractice actions is the issue of whether the notice of a non-party at fault must be accompanied by an expert affidavit if the non-party is one of the professionals listed in O.C.G.A. § 9-11-9.1. Since non-party notice is not an action and under subsection 33(f), and any apportionment of fault to a non-party does not create any liability for the non-party, an expert affidavit would not need to accompany the notice. Nevertheless, the appellate courts of Georgia will have to determine whether expert testimony will be needed for the issue of a non-party professional's fault to be considered by the jury. In order for a non-party to be "at fault", all the elements of a *prima facie* case would appear to be necessary.

Certainly, expert testimony will be needed to explain a professional duty and how it was breached so the jury would be able to determine whether a professional was at fault. For example if a defendant gave notice that a non-party physician was negligent and caused or contributed to the Plaintiff's injuries, could evidence of the physician's care and treatment be submitted to the jury without expert testimony that the physician violated the standard of care and without evidence of how such a violation caused the plaintiff's injuries ? Does "fault" under this subsection also require proof of causation in fact and proximate causation?

Certainly under all other circumstances regarding the fault of a professional, expert testimony would be required. The case law on this topic is from cases where a physician was being sued directly or was being sued in a third-party action. Nothing in O.C.G.A. § 51-12-33 equates the jury's consideration of a non-party's fault with the

burden of proof in a professional negligence case. Liberal identification of non-parties, unusual verdicts and uncertainty will result from a relaxation of proof necessary to establish fault against non-party professionals and other non-parties. There would be nothing to deter a car-wreck defendant from identifying all the plaintiff's medical providers in the hopes that the jury will assign some fault to them without the necessity of proving they were at fault.

### ***The California Experience***

In considering these issues, California law provides some meaningful guidance. In 1986, the voters of California adopted Proposition 51, which modified the doctrine of joint and several liability for non-economic damages in California. Cal.Civ.Code § 1431.2 was created by the passage of Proposition 51 and it provides:

#### **Several liability for non-economic damages**

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

Since 1986, numerous California cases have addressed many of the arguments that Georgia courts will soon begin to face. In considering the fault of non-parties, California allows defendants to reduce their share of liability for non-economic damages by showing the fault of non-parties. However, unless there is “substantial evidence that an individual is at fault, there can be no apportionment of damages to that individual.”<sup>19</sup>

In *Wilson v. Ritto*, the California Court of Appeals, Fourth District, upheld the trial court's refusal to add a subsequent treating physician on the verdict form in a

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<sup>19</sup> *Wilson v. Ritto*, 105 Cal.App.4th 361, 129 Cal.Rptr.2d 336 (2003).

medical malpractice case for purposes of apportioning liability. During the trial, the Defendant, a podiatrist, presented expert testimony that the Plaintiff's subsequent treating orthopaedist's actions were responsible for some of the Plaintiff's subsequent surgeries, being claimed as damages. At the close of the evidence, the Defendant moved to have the orthopaedist's name added to the verdict form. The trial court denied the motion and the Plaintiff obtained a verdict. On appeal, the Defendant argued that all that was required to add the orthopaedist to the verdict form was evidence that he contributed to the Plaintiff's injury.<sup>20</sup> The California Court of Appeals disagreed and held that the Defendant needed to show that the non-party was *at fault*. The Court evaluated California case law and the Dictionary definitions of fault and held that:

Fault, although not the equivalent of liability, connotes wrongdoing or culpability. And wrongdoing or culpability in the context of medical treatment is measured by the standard of care within the medical community. "Mere error of judgment, in the absence of a want of reasonable care and skill in the application of his medical learning to the case presented, will not render a doctor responsible for untoward consequences in the treatment of his patient."

Apportionment among doctors under Civil Code section 1431.2 requires evidence of medical malpractice, not only as to named defendants, but also as to nonparty doctors. The burden of proof in apportioning noneconomic damages among joint tortfeasors should not be contingent upon whether a joint tortfeasor is a named defendant. The same burden of proving fault applies regardless of whether a joint tortfeasor is a defendant or nonparty.<sup>21</sup>

This holding seems consistent with Georgia case law which requires proof of malpractice through expert testimony to find a physician at fault. Georgia uses a similar definition to California, "fault" is not a term of art, but is a word of general use, it is to be

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<sup>20</sup> *Id.* at 366-367.

<sup>21</sup> *Id.* at 369.

given its “ordinary and everyday meaning.”<sup>22</sup> Webster's Third New World Dictionary defines “fault” 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.”<sup>23</sup> There is very persuasive authority and legitimate policy reasons for requiring proof of fault against a non-party to include them on the verdict form. With respect to professional non-parties that proof would require expert testimony.

**F. Are there categories of non-parties that a jury cannot assign fault to as a matter of law?**

Georgia law provides numerous defenses and immunities that limit or eliminate a defendant’s liability. These same defenses do not appear to apply prevent a defendant from asking the jury to assign fault to a non-party. O.C.G.A. § 51-12-33(c) provides the answer to this question:

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.

Would Georgia allow proof of the fault of a non-party who has a legal defense or bar to being sued directly as a party ? The apparent language of subsection (c) would be to allow the trier of fact to consider the fault of others, regardless of whether a suit could be legally brought against that party or not. Subsection (d)(1) supports this interpretation because the trier of fact can consider the fault of a settled party despite the settling party’s defense of settlement and release. Likewise, subsection (f)(2) which eliminates the

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<sup>22</sup> *Risser v. City of Thomasville*, 248 Ga. 866, 286 S.E.2d 727 (1982). See also OCGA § 1-3-1(b) (“In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter.”).

<sup>23</sup> *A.A. Professional Bail v. State*, 265 Ga. App. 42, 592 S.E.2d 866 (2004).

consequences of any finding of fault against a non-party would be consistent with this interpretation. Allowing the trier of fact to assign fault to a non-party that would be immune from suit or barred by the statute of limitations would not create new liabilities because the assignment of fault would have no consequences to the non-parties. Included in the list of potential non-parties would be the plaintiff's employer, governmental entities, parties barred by the statute of limitations or statute of repose, parties who would be entitled to pre-emption, parties where the court has no jurisdiction and other immune parties.

Examples are endless. A commercial property owner in a third party criminal attack premises liability case would certainly ask the trier of fact to assign liability to the criminal attacker. If the criminal had a prior criminal history, the defendant could seek to have the trier of fact assign fault to the police who failed to arrest and prosecute the criminal who committed the crime or generally failed to protect the plaintiff from harm.

Defendants in car accident cases could seek to assign fault to governmental non-parties for the design of intersections and roadways.

All parties where an injury was on the job will seek to add the plaintiff's employer to have the trier of fact assign fault to the employer, a party that has never been in the "fault" arena.

Another provision of O.C.G.A. § 51-12-33 is also potentially relevant to this discussion:

(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.

The interpretative question regarding this subsection is whether it refers to defendants' defenses and immunities or non-party defenses or immunities. There is considerable evidence that subsection (e) applies to defendants and not non-parties. First, the fault of non-parties is set forth in subsection (f) and nothing in that subsection addresses the immunities and defenses of non-parties. That subsection specifically states that the fault of non-parties is only pertinent to the determination of a defendant's fault. Second, an interpretation of (e) that allows defense and immunities to non-parties would be inconsistent with subsection (c) and would make the statute internally inconsistent. Third, the language of subsection (e) is commonly used by the legislature to clarify the scope of a particular statute that has changed the law.

California's Proposition 51, codified at Cal Civ. Code § 1431.2 is silent with respect to the fault of non-parties. Nevertheless, the California appellate courts have allowed apportionment of fault to non-parties who could not have been sued as defendants.<sup>24</sup>

Assignment of fault to a plaintiff's employer will implicate numerous legal issues in Georgia. Although California allowed the assignment of fault to an employer, immune from suit under workers compensation laws,<sup>25</sup> California's joint and several statute applies only to non-economic damages. O.C.G.A. § 51-12-33 applies to economic and non-economic damages. Georgia allows an employer to seek recovery of amounts it paid

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<sup>24</sup> *DaFonte v. Up-right, Inc.*, 2 Cal. 4th 593, 8282 P.2d 140 (1992) (fault can be allocated to a entity that is immune from paying for its tortious acts, and plaintiff's employer could receive an allocation); *Richards v. Owens-Illinois, Inc.*, 14 Cal.4th 985, 928 P.2d 1181 (1997) (asbestos manufacturer could not assign fault to non-party cigarette manufacturer for lung injuries because California statute provided that tobacco suppliers commit "no tort" against smokers); *Munoz v. City of Union City*, 148 Cal.App.4th 173, 55 Cal. Rptr.3d 393 (2007) (city was entitled to sovereign immunity and no portion of fault could be assigned to it).

<sup>25</sup> *DaFonte, supra*

in workers compensation from a third-party tortfeasor.<sup>26</sup> Countless issues will arise in the allocation of fault to employers of Plaintiffs and arguments about allocation, particularly with respect to economic damages will be challenging.

A different perspective on non-party fault can be found in the case of *Billings v. Aeropres Corp.*<sup>27</sup> Arkansas enacted a Civil Justice Reform Act in 2003 and enacted A.C.A. § 16-55-202 which is identical to subsections (c) through (f) of O.C.G.A. § 51-12-33. In *Billings*, an injured worker brought a product liability suit against a supplier of odorless propane gas that allegedly caused the explosion and fire that injured the Plaintiff. The Defendant gave notice that the Plaintiff's employer, a co-worker and the manufacturer of other equipment should have fault apportioned to them. The Plaintiff objected, arguing that his employer and co-employee were immune from suit under workers compensation laws. The Plaintiff also challenged the CJRA's apportionment statute as being unconstitutional to the extent it allowed apportionment to an immune employer. The District Court upheld the statute but held that it could not constitutionally allow apportionment of fault to an immune non-party.<sup>28</sup>

The *Billings* analysis of the Procedural Due Process shortcomings of apportioning fault to non-parties is instructive. There are practical difficulties with assigning non-party liability with respect to immune parties. Compulsory process and the right to a fair trial were important factors in denying apportionment to these non-parties. Ensuring jurisdiction and compulsory process over a non-party was critical to the *Billings* court. Without the application of the Federal Rules to the non-parties, allowing apportionment denied the Plaintiff Procedural Due Process. Although the fault of these non-parties

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<sup>26</sup> O.C.G.A. § 34-9-11.1.

<sup>27</sup> 522 F.Supp. 1121 (E.D. Ark. 2007).

<sup>28</sup> *Id.* at 1126-1127.

could be considered as a superseding proximate cause, apportionment could only be obtained if a third-party complaint in accordance with the Federal Rules was filed.

Finally, the language of subsection 33(c) leaves open the argument that an unidentified person or entity could be included on the verdict form. The language “regardless of whether the person was, or could have been named as a party to the suit” could indicate that even unidentified persons or entities, so unknown not to be named, could be included on the verdict form. This would include hit and run vehicles, unknown product manufacturers and other describable, but not nameable non-parties.

**G. What is the procedure at trial for apportionment?**

Trial courts and trial counsel will need to prepare very detailed instructions and complex verdict forms to comply with the amended laws. It would appear to be a two step process that begins with a determination of whether the plaintiff has proven their case against the defendant(s). If the jury determines the Plaintiff has proven their case then they must determine if the plaintiff was at fault and in what percentage. Of course, if the Plaintiff is at least 50% at fault the case is over. If the Plaintiff is 0-50% at fault then the jury assigns percentages of fault against the defendants and non-parties. Based on the language of O.C.G.A. § 51-12-33(a) & (b), the trial court will be actively involved:

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount

of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. ...

The trial court will need to utilize a verdict form that will allow for the correct calculation of damages following a Plaintiff's verdict so that the proper allocation and ensuing judgments can be entered.

**H. Do non-settling defendants still receive a set-off of amounts paid by settled defendants?**

No. Because these amendments were enacted to eliminate joint and several liability, the concept of a set off would appear to be eliminated.<sup>29</sup> In its place is the actual apportionment of fault by the trier of fact pursuant to O.C.G.A. § 51-12-33 which contains the mandatory shall language in subsection (b). Accordingly, a defendant does not appear to have the option of choosing apportionment of fault from a settling party or a set off. This is consistent with the language of subsection 33(d)(1) which states that “[n]egligence of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty . . .”<sup>30</sup>

**I. How does the jury's apportioned verdict relate to liability and payment?**

A defendant's apportioned share of liability as determined by the jury, and applied to the amount of the verdict is the amount that a defendant pays to the plaintiff. If an individual defendant is found 10% at fault for a \$ 100,000 verdict, judgment should be entered against that defendant in the amount of \$ 10,000 regardless of the other parties or non-parties ability to pay their portion of the verdict. This is directly stated in

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<sup>29</sup> See *Allison v. Patel*, 211 Ga. App. 376, 438 S.E.2d 920 (1993); *King Cotton, Ltd v. Powers*, 190 Ga. App. 845, 380 S.E.2d 481 (1989).

<sup>30</sup> The California appellate courts have rejected a set-off of non-economic damages paid by settling parties under Cal Civ. Code § 1431.2. See *Espinoza v. Machonga*, 9 Cal.App4th 268 268 (1992); *Markel Ins. Co v Kaiser Foundation Health Plan*, 2008 WL 188051 (2008); *In re Piper Aircraft*, 792 F. Supp. 1189 (1992).

O.C.G.A. § 51-12-33(b): “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.”

**J. Can a single Defendant who settles a case or receives a Plaintiff’s verdict seek contribution from a third party?**

Yes. In my view this was the reasoning behind the retention of the language of O.C.G.A. § 51-12-32 despite the amendment to subsection 33. Of course, § 51-12-32 is subject to the provisions of § 51-12-33, but that section only applies to cases of apportionment. A single defendant who settles a case or receives a plaintiff’s verdict may still pursue an action for contribution against a third party. Preserving this right of contribution is not mere surplusage.

**K. Can any defendant in an apportioned verdict seek contribution from another party in the verdict?**

No. O.C.G.A. § 51-12-33(b): “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.” Under this provision of subsection (b), the apportionment of fault by a jury shall not be subject to a right of contribution. It appears that once a jury apportions fault against a defendant, the defendant has paid its “fair share” and has no further liability to the plaintiff or any other party.

**L. Can a settled defendant seek contribution from a defendant who was assigned fault in a verdict?**

No. O.C.G.A. § 51-12-33(b): “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.” Under this provision of subsection (b), the apportionment of fault by a jury shall not be subject to a right of contribution. It appears that once a jury apportions fault against a defendant, the defendant has paid its “fair share” and has no further liability to the plaintiff or any other party.

**M. Trial Court Decisions Regarding O.C.G.A. § 51-12-33**

In *Bennett v. Wal-Mart*, Case # 2B06CV406, State Court of Bullock County, Judge Mikell upheld the amendment to O.C.G.A. § 51-12-33 as constitutional in response to several arguments by the Plaintiff that the amendments were unconstitutional. A copy of Judge Mikell’s Order is attached as Exhibit “A”.

In *Taylor v Dekalb County*, Case # 06A50694-7, State Court of Dekalb County, Judge Gordon also found that the amendment to O.C.G.A. § 51-12-33 was constitutional and consistent with the opinions expressed in this paper, held that allocation of fault to a non-party is not limited to cases where the Plaintiff is some degree at fault. Judge Gordon’s Order is attached as Exhibit “B”.

In *Peters v Waddell*, Case # 07A77984-6, State Court of Dekalb County, Judge Carriere granted a Third-Party Defendant’s motion to dismiss the Defendant/Third Party Plaintiff’s contribution claim as no longer being a valid third party claim after the amendment to O.C.G.A. § 51-12-33.

### **CONCLUSION**

Eliminating the perceived inequities of joint and several liability was the goal of the amendments to O.C.G.A. §§ 51-12-31 & 51-12-33. Without question the goal of these amendments was to hold defendants financially liable for their share of fault, not the shares of other joint or concurrent tortfeasors. This understanding is made clear in subsection 33, and as the language at the beginning of subsections 31 and 32 makes clear, subsection 33 governs. Proponents of the jury system should be in favor of placing further responsibility in the hands of the jury to allocate fault among responsible parties and non-parties.

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 5<sup>th</sup> day of July, 2007.

  
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Judge Gary L. Mikell,  
State Court of Bulloch County

P.O. Box 1688  
Statesboro, GA 30459



collision, Plaintiff sustained injury and is claiming medical expenses in the amount of \$923,839.56.

### Legal Framework

O.C.G.A. § 51-12-33, which addresses the "reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties," provides the following:

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

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

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

A statute is presumed to be constitutional unless it is established that it "manifestly infringes upon a constitutional right or violates the rights of the people. . . ." Georgia Department of Human Resources v. Sweat, 276 Ga. 627, 580 S.E.2d 206 (2003). Where a statute does not infringe upon a fundamental right and the complaining party is not a member of a suspect class, substantive due process analysis of governmental action is performed under the "rational basis test." Id. at 628, 580 S.E.2d at 210. The rational basis test is the least rigorous level of constitutional scrutiny. Id. at 628, 580 S.E.2d at 210. Under this test, a statute will be upheld in the face of a due process attack so long as it is reasonably related to the public health, safety or general welfare. Id. at 628, 580 S.E.2d at 210.

Similarly, when neither a suspect class nor a fundamental right is affected by the challenged statute, an equal protection challenge is assessed under the rational relationship test. Roberts v. Burgess, 279 Ga. 486, 614 S.E.2d 25 (2005). The rational basis test requires that the classification drawn by the

legislation be reasonable and not arbitrary, and rest upon some ground of difference having a fair and rational relationship to the legislation's objective, so that all similarly situated persons are treated alike. Old South Duck Tours, Inc. v. Mayor & Aldermen of the City of Savannah, 272 Ga. 869, 535 S.E.2d 751 (2000). A classification will be upheld in the face of an equal protection challenge so long as under any conceivable set of facts, it bears a rational relationship to a legitimate end of government not prohibited by the United States Constitution. Id. at 873, 535 S.E.2d at 755. In this regard, the party who challenges legislation on equal protection grounds bears the burden of establishing that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decision maker. Id. at 873, 535 S.E.2d at 755.

#### Plaintiff's Contentions

Plaintiff contends that Defendant's purported Notice of Fault of Non-Party is not applicable to the facts of this case and, further, application of O.C.G.A. § 51-12-33 in this case would be unconstitutional. Plaintiff argues that Defendant's Notice should be disregarded by the Court and stricken from the record because O.C.G.A. § 51-12-33 applies only to causes of action where the Plaintiff is to some degree responsible for his injury. In the instant case, Plaintiff argues that there is no evidence that Plaintiff was responsible for his injuries.

Additionally, Plaintiff contends that applying O.C.G.A. § 51-12-33 to reduce Plaintiff's recovery due to the alleged fault of a nonparty would be unconstitutional. Plaintiff argues that O.C.G.A. § 51-12-33 is vague, overbroad,

uncertain and unclear; and it violates due process by denying a fair trial to litigants and nonparties. O.C.G.A. § 51-12-33 requires the jury to allocate fault or liability to unrepresented parties. However, the accused nonparty and the Plaintiff have no reasonable opportunity to defend against the naming of a nonparty who is allegedly at fault. There is no provision for discovery, and the nonparty cannot request a hearing. Further, although a Plaintiff's award may be reduced by the percentage of the nonparty's fault, the nonparty has no financial or pecuniary obligation to the Plaintiff.

Plaintiff also argues that O.C.G.A. § 51-12-33 denies equal protection because it allows the Defendant to blame a nonparty who will not be held liable to the Plaintiff. Plaintiff argues that procedural benefits cannot be granted to some litigants and capriciously denied to others without violating the Equal Protection Clause. Plaintiff argues that the statute classifies Plaintiffs and nonparties in ways not rationally related to any legitimate state interest; thus, the statute is invalid based upon equal protection grounds.

#### Defendant's Contentions

Defendant argues that Plaintiff's Motion to Strike must be denied because (1) there is at least some evidence that Plaintiff assumed the risk of injury and, therefore, is to some degree at fault; (2) O.C.G.A. § 51-12-33 provides for consideration of fault of all persons, including nonparties, regardless of whether Plaintiff is to some degree at fault; and (3) Plaintiff has failed to show that O.C.G.A. § 51-12-33 is unconstitutional.<sup>1</sup> O.C.G.A. § 51-12-33 is reasonably

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<sup>1</sup> On July 5, 2007, in the State Court of Bulloch County, Judge Gary L. Mikell denied Plaintiff's Motion Regarding the Unconstitutionality and Inapplicability of All or Part of O.C.G.A. § 51-12-33

related to a permissible legislative purpose, and Plaintiff has failed to show how it violates substantive due process or equal protection.

Defendant argues that there is some evidence that Robert Lamar was impaired and that Plaintiff assumed the risk of injury by voluntarily riding in Mr. Lamar's vehicle. On Friday, October 28, 2005, the day before the accident, Plaintiff left work at 2:30 p.m. and at some point that evening, he went out to have "some beers" with Mr. Lamar. Mr. Lamar testified that he drank two or three drinks with vodka and orange juice and probably a margarita.<sup>2</sup> Defendant argues that to the extent O.C.G.A. § 51-12-33 requires Plaintiff to be to some degree at fault before the jury may consider the fault of a nonparty, which Defendant disputes, there is sufficient evidence here that Plaintiff is to some degree responsible for his injuries.<sup>3</sup> Therefore, O.C.G.A. § 51-12-33 applies.

Additionally, Defendant argues that O.C.G.A. § 51-12-33(d)(1) provides that the negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that "a nonparty was wholly or partially at fault." Plaintiff entered into a settlement agreement with Mr.

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in Sandra Bennett, Individually and as Mother and Duly Appointed Administratrix of the Estate of Toni S. Bennett, Deceased v. Wal-Mart Transportation, LLC, and Chester Skelton, Jr. (Exhibit D-A).

<sup>2</sup> Following the automobile accident, the record reflects that Robert Lamar was arrested and charged with DUI. Mr. Lamar subsequently pled guilty to making an improper turn.

<sup>3</sup> Defendant relies on DeLoach v. DeLoach, 258 Ga. App. 187; 573 S.E.2d 444 (2002), where the Court held that "[w]hen there is any evidence, however slight, upon a particular issue, it is not error for the court to charge the law in relation to the issue. A charge on assumption of the risk is appropriate where there is evidence that the plaintiff had subjective knowledge of the specific, particular risk of harm associated with the activity or condition that proximately causes injury, yet proceeded anyway."

Lamar. In Response to Defendant's Interrogatory No. 9, Plaintiff stated, "[a] policy limit in the amount of \$25,000 was received from Progressive Insurance Company." Further, Defendant argues that based upon the clear language of O.C.G.A. § 51-12-33(d)(1), Plaintiff need not be found at fault before the jury can apportion its award according to the degree of fault of the parties and nonparties. Defendant argues that the statute applies to cases in which Plaintiff is not to any degree at fault.

Additionally, Defendant argues that Plaintiff has failed carry his burden to show that O.C.G.A. § 51-12-33 is unconstitutional. Applying the rational basis test to Plaintiff's constitutional challenge to the statute, Defendant argues that Plaintiff has not shown that the statute violates due process, i.e., that it is not reasonably related to the public health, safety or general welfare. Further, Plaintiff has not shown that the statute violates equal protection, i.e., that it classifies Plaintiffs and nonparties in ways not rationally related to any legitimate state interest. Defendant argues that O.C.G.A. § 51-12-33 in no way diminishes Plaintiff's meaningful access to courts; it does not abolish Plaintiff's right to recover from any individual or entity in any civil action; it does not limit the amount of recovery; it does not preclude Plaintiff from filing suit against any party; it does not eliminate any substantive claim Plaintiff might assert; and it does not reduce the total amount of damages Plaintiff might prove and be awarded as compensation for his injuries.<sup>4</sup>

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<sup>4</sup> Defendant also emphasizes that the single nonparty, whose fault Defendant seeks to have assessed by the jury, entered into a settlement agreement with Plaintiff.

Defendant argues that the Georgia Legislature provided a reasonable statutory scheme by which Defendants would be held legally responsible for the damages caused only by their conduct based on the jury's apportionment of fault. O.C.G.A. § 51-12-33 provides for the apportionment of damages based on the fault of all responsible parties and, thereby, achieves the rational goal of ensuring that each person or entity responsible for Plaintiff's injury will be liable for only that portion of the total damages caused by that person's percentage of fault. Defendant argues that the statute clearly distinguishes between liability and fault because only party defendants can be liable for damages. Nonparties cannot be liable for damages, but their fault is considered for apportionment of damages.

#### Conclusions of the Court

The Court finds that Plaintiff's Motion to Strike Defendant's Notice of Fault of Non-Party must be denied. Plaintiff has failed to carry his burden to show that O.C.G.A. § 51-12-33 applies only where Plaintiff is to some extent responsible for his injury or damages claimed; or that O.C.G.A. § 51-12-33 violates due process or equal protection under the facts of this case. O.C.G.A. § 51-12-33 addresses the "reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties." O.C.G.A. § 51-12-33(c) provides that "[i]n assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages regardless of whether the person or entity was, or could have been, named as a party to the suit." O.C.G.A. § 51-12-33(d)(1) provides in part that the "[n]egligence or fault of a nonparty shall be considered if the plaintiff entered into

a settlement agreement with the nonparty. . . ." There is no dispute that Plaintiff in the instant case entered into a settlement agreement with nonparty Robert Lamar, the driver of the vehicle in which Plaintiff was a passenger at the time of the collision.

Contrary to Plaintiff's contention that O.C.G.A. § 51-12-33 addresses reduction and apportionment of award only when Plaintiff is responsible for his injury or damages claimed, the statute also addresses apportionment of award when Plaintiff is not responsible for his injury or damages claimed. O.C.G.A. § 51-12-33(a) specifically addresses reduction and apportionment of an award where Plaintiff brings an action against one or more persons for injury to person or property, and Plaintiff is to some degree responsible for the injury or damages claimed. Under O.C.G.A. § 51-12-33(a), the trier of fact must determine the percentage of fault of the Plaintiff, and the judge must reduce the amount of damages in proportion to Plaintiff's percentage of fault. However, O.C.G.A. § 51-12-33(b) specifically addresses reduction and apportionment of an award where Plaintiff brings an action against more than one person for injury to person or property, and it does not require that Plaintiff is to some degree responsible. Under O.C.G.A. § 51-12-33(b), the trier of fact must determine the percentage of fault in its determination of the amount of damages to be awarded and "shall after a reduction of damages pursuant to subsection (a) of this Code section, *if any*, apportion its award of damages among the persons who are liable according to the percentage of fault of each person." Thus, even if the trier of fact does not find that Plaintiff is to some degree at fault, under subsection (b), the trier of fact

must apportion its award of damages among the persons who are liable according to the percentage of fault of each person.

Alternatively, since Plaintiff in the instant case has filed an action against only one Defendant, O.C.G.A. § 51-12-33(a) applies if Plaintiff is found to be to some degree responsible for his injury or damages claimed. Contrary to Plaintiff's contention that there is no evidence that Plaintiff was responsible for his injuries, the Court finds that there is at least some evidence from which a jury could find that Plaintiff assumed the risk of injury and is, therefore, to some degree at fault. Mr. Robert Lamar, the driver of the vehicle in which Plaintiff was a passenger at the time of the collision, testified that he had been drinking alcohol prior to the collision. If the trier of fact finds that Plaintiff is to some degree responsible for his injuries by knowingly getting into a vehicle driven by an intoxicated driver, the trier of fact must determine the percentage of fault of the Plaintiff, and the amount of damages must be reduced in proportion to Plaintiff's percentage of fault. Accordingly, Plaintiff's Motion to Strike Defendant's Notice of Fault of Non-Party based upon Plaintiff's contention that O.C.G.A. § 51-12-33 does not apply to the facts in the instant case must be denied.

Further, the Court has carefully considered Plaintiff's challenges to the constitutionality of O.C.G.A. § 51-12-33. A statute is presumed to be constitutional unless it is established that it "manifestly infringes upon a constitutional right or violates the rights of the people. . . ." Georgia Department of Human Resources v. Sweat, 276 Ga. 627, 580 S.E.2d 206 (2003). Plaintiff has failed to establish that O.C.G.A. § 51-12-33 manifestly infringes upon a

constitutional right, and Plaintiff is not a member of a suspect class. Where a statute does not infringe upon a fundamental right and the complaining party is not a member of a suspect class, substantive due process analysis of governmental action is performed under the "rational basis test." Georgia Department of Human Resources v. Sweat, 276 Ga. at 628, 580 S.E.2d at 210. Under this test, a statute will be upheld in the face of a due process attack so long as it is reasonably related to the public health, safety or general welfare. Id. at 628, 580 S.E.2d at 210.

The Court finds that Plaintiff has failed to show that O.C.G.A. § 51-12-33 is not reasonably related to the public general welfare such that it violates due process. Contrary to Plaintiff's argument that the statute violates due process by denying a fair trial to litigants and nonparties, O.C.G.A. § 51-12-33 does not diminish Plaintiff's meaningful access to courts; it does not eliminate any substantive claim Plaintiff might assert; and it does not reduce the total amount of damages Plaintiff might prove and be awarded as compensation for his injuries. With respect to nonparties, O.C.G.A. § 51-12-33(f)(2) provides that where fault is assessed against nonparties, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action. Further, notwithstanding Plaintiff's argument that he has no reasonable opportunity to defend against the naming of a nonparty who is allegedly at fault,

Plaintiff consummated a settlement agreement with the named nonparty Robert Lamar.<sup>5</sup>

Additionally, Plaintiff has failed to satisfy his burden with respect to his claim that O.C.G.A. § 51-12-33 violates equal protection. When neither a suspect class nor a fundamental right is affected by the challenged statute, an equal protection challenge is assessed under the rational relationship test. Roberts v. Burgess, 279 Ga. 486, 614 S.E.2d 25 (2005). The rational basis test requires that the classification drawn by the legislation be reasonable and not arbitrary, and rest upon some ground of difference having a fair and rational relationship to the legislation's objective, so that all similarly situated persons are treated alike. Old South Duck Tours, Inc. v. Mayor & Aldermen of the City of Savannah, 272 Ga. 869, 535 S.E.2d 751 (2000). A classification will be upheld in the face of an equal protection challenge so long as under any conceivable set of facts, it bears a rational relationship to a legitimate end of government not prohibited by the United States Constitution. Id. at 873, 535 S.E.2d at 755.

Plaintiff has failed to show how O.C.G.A. § 51-12-33 classifies Plaintiffs and nonparties in ways not rationally related to any legitimate state interest. O.C.G.A. § 51-12-33(c) provides that "[i]n assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages regardless of whether the person or entity was, or could have been, named as a party to the suit." The statute provides for the

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<sup>5</sup> Based upon Plaintiff's settlement agreement with nonparty Robert Lamar, the Court finds Plaintiff's constitutional challenge to the statute somewhat disingenuous. If there is a case that presents a constitutional challenge to O.C.G.A. § 51-12-33, this is not that case.

apportionment of damages based on the fault of all responsible parties, whether named as a defendant or identified through timely notice, and thereby achieves the rational goal of ensuring that each person or entity responsible for Plaintiff's injury will be liable for only that portion of the total damages caused by that person's percentage of fault. Nonparties cannot be liable for damages, but their fault is considered for apportionment of damages. The Court finds that Defendant has failed to carry his burden to establish that O.C.G.A. § 51-12-33 violates equal protection. Accordingly, Plaintiff's Motion to Strike Defendant's Notice of Fault of Non-Party based upon Plaintiff's claim that application of O.C.G.A. § 51-12-33 would be unconstitutional must be denied.

**WHEREFORE**, Plaintiff's Motion to Strike Defendant's Notice of Fault of Non-Party is **DENIED**.

SO ORDERED this 22 day of January, 2009

  
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JANIS C. GORDON, JUDGE  
State Court of DeKalb County

cc: Michael M. Calabro, Esq.  
Susan J. Levy, Esq.  
✓ H. Lee Pruett, Esq.

FILED IN THE CLERK'S OFFICE  
JAN 22 2009  
JAN 22 2009  
CLERK, STATE COURT, DEKALB COUNTY  
TRB

IN THE STATE COURT OF DEKALB COUNTY  
STATE OF GEORGIA

RICHARD C. PETERS,

Plaintiff,

v.

DEBORAH LEE WADDELL and STATE  
FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendants,

and

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Third-Party Plaintiff,

v.

MICHAEL PETERS,

Third-Party Defendant.

Case No. 07A77984-6

ORDER

This case came before the Court on Third-Party Defendant Michael Edward Peters's Motion to Dismiss State Farm Mutual Automobile Insurance Company's Third-Party Complaint. By his Motion, Peters contends that State Farm's Third-Party Complaint is not based upon secondary or derivative liability as required by O.C.G.A. § 9-11-14. State Farm responds that because it answered the complaint in its own name, it can raise any defense or issue of the named party. Therefore, it asserts that because the named defendant could have a derivative claim against Michael Edward



Peters, its claim is properly raised in its third-party complaint.

O.C.G.A. § 9-11-14 provides that a defendant may bring in a third party who is or may be liable to him for all or part of the plaintiff's claim against that defendant. In the present case, Plaintiff asserts in his complaint that as a direct result of Defendant Deborah Lee Waddell's negligence, Plaintiff sustained serious bodily injury and other damages when the car in which he was a passenger was struck by Waddell's car. In its third-party complaint, State Farm asserts that the collision between Waddell's car and Third-Party Defendant Michael Peters's car was caused by the negligence of Michael Peters.

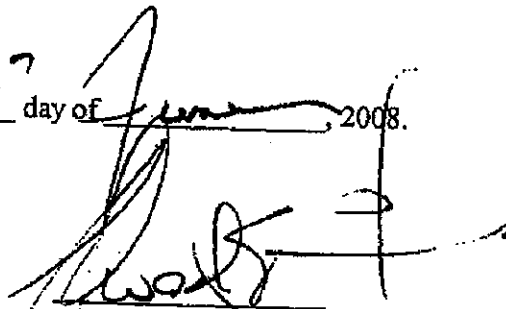
Under Georgia law pre-tort reform, State Farm's claim properly sounds in contribution between Waddell and Peters *e.g.*, if any negligence is proven against Third-Party Defendant Peters, he would be liable to Defendant Waddell for contribution on any judgment obtained by Plaintiff Peters against Waddell. See Moss v. Cincinnati Ins. Co., 154 Ga. App. 165, 168, 268 S.E.2d 676 (1980) (insurance company allowed to file any pleading that could be filed by the owner or operator of the offending vehicle). See also Travelers Indemnity Co. v. Liberty Loan Corp., 140 Ga. App. 458, 460, 231 S.E.2d 399 (1976) ("where there are co-defendants one of whom would be entitled to contribution from the others on paying off the judgment, such contribution may be sought, as to an uninsured co-defendant, from the uninsured motorist carrier") citing Wages v. State Farm Mutual Automobile Ins. Co., 132 Ga. App. 79, 208 S.E.2d 1 (1974). However, in 2005 the legislature amended O.C.G.A. § 51-12-33 to eliminate joint and several liability.

The elimination of joint and several liability results in substantial changes to Georgia's traditional third-party practice. O.C.G.A. § 51-12-33 (c) requires the apportionment of damages among parties and non-parties. This mandate takes away State Farm's right to contribution in the present case. The jury is required to assess the percentages of fault as to all parties and nonparties.

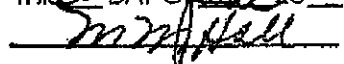
The assessment as to nonparties is used to determine the percentage of fault of the named parties. See O.C.G.A. § 51-12-33 (f) (1). Therefore, under the present statutory scheme Third-Party Defendant Peters cannot be liable for any portion of a judgment rendered against Defendant Waddell because any fault of Third-Party Defendant Peters will be factored out of the judgment regardless of whether he is a party. Because there can be no secondary or derivative liability between Waddell and Michael Peters, O.C.G.A. § 9-11-14 does not provide a mechanism to bring Michael Peters into the present case.

Based on the foregoing, Third-Party Defendant Peters' Motion to Dismiss is hereby **GRANTED.**

SO ORDERED, this 27<sup>th</sup> day of June, 2008.

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

cc: A. Jack Hinton, Esq.  
F. C. Schenck, Esq.  
J. Natalie Wilkes, Esq.  
Charles E. Johnson, III, Esq.

FILED IN THIS OFFICE  
THIS 30 DAY OF June 2008  
  
Clerk, State Court, DeKalb County