CURRENT STATUS OF APPORTIONMENT IN GEORGIA: AS MANY QUESTIONS AS ANSWERS

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I. INTRODUCTION

The passage of Senate Bill 3 in 2005 ushered in significant changes to the tort system in Georgia.[1] Notably, the amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 created a new scheme of apportionment of fault and abolished joint and several liability among co-defendants.[2] They also established a new concept of apportioning fault to nonparties.[3] Prior to the 2005 amendments, O.C.G.A § 51-12-31 read as follows:

> Except as provided in Code Section 51-12-33, where an action is brought jointly against several trespassers, the plaintiff may recover damage for the greatest injury done by any of the defendants against all of them. 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.[4]

In addition, the relevant portions of the pre-2005 version of O.C.G.A. § 51-12-33 read as follows:

> Where an action is brought against more than one person for injury to person or property and the plaintiff is himself 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, may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if apportioned by the trier of fact as provided in this Code section, shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons

liable, and shall not be subject to any right of contribution.[5]

After the 2005 amendments, those statutes now read as follows:

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.[6]

. . .

(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 designated 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.[7]

O.C.G.A. § 51-12-32, which remained unchanged by the 2005 amendments, continues to read as follows:

> (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.[8]

As predicted by scholars, these changes raised significant questions as to the intent of the Legislature and the practical effect of the statutes, as amended.[9] Beginning in 2010, the Georgia Court of Appeals answered some of these questions in deciding several notable cases, and the Georgia Supreme Court very recently has

weighed in on some issues and likely will do so again in the near future. However, despite the questions that have been answered thus far, additional questions exist that will need to be addressed as well. This article examines the recent decisions of Georgia's appellate and trial courts construing O.C.G.A. § 51-12-33, and it identifies several issues that remain unanswered and which have sparked intense debate among scholars and practitioners.

II. QUESTIONS ANSWERED

A. Apportionment Among Co-Defendants Irrespective of the Plaintiff's Fault Under O.C.G.A. § 51-12-33(b)

Until very recently, the only appellate cases addressing the issue of whether O.C.G.A. § 51-12-33(b) applies in a situation where the plaintiff is not at fault were the 2010 Georgia Court of Appeals decisions in *Cavalier Convenience v. Sarvis*[10] and *McReynolds v. Krebs*.[11] Although the petition for certioari to the Georgia Supreme Court in *Cavalier Convenience* was withdrawn by the parties,[12] a similar petition was granted in *McReynolds*, and a decision was issued on March 23, 2012, affirming the court of appeals' ruling on apportionment.[13] This question has now been answered definitively: Apportionment of fault among co-defendants is required, *regardless of the whether the plaintiff is at fault*.[14]

1. Background: *Cavalier Convenience v. Sarvis*

On July 9, 2010, after much debate among scholars and practitioners regarding the status of joint and several liability among co-defendants in the wake of the 2005 amendments, the court of appeals finally addressed the issue of whether O.C.G.A. § 51-12-33(b) applies in a situation where the plaintiff is not at fault. Christopher Sarvis filed

suit against 17-year-old Jeremi Bath, alleging that Mr. Bath caused the subject motor vehicle collision and that he was intoxicated at the time.[15] The complaint also named two businesses that allegedly sold alcoholic beverages to the underage Mr. Bath.[16] Prior to trial, Mr. Sarvis argued that because there was no evidence of his own fault in causing the accident, the defendants should be prohibited from utilizing O.C.G.A. § 51-12-33(b) to apportion fault among themselves, but rather should be held jointly and severally liable.[17]

The trial court agreed with Mr. Sarvis and prohibited the defendants from arguing apportionment of damages, but it also granted the defendants' request for an interlocutory appeal.[18] In an opinion lauded by the defense bar, the court of appeals rejected the trial court's interpretation of O.C.G.A. § 51-12-33(b) and held that when multiple defendants are involved, apportionment of damages among them is mandatory, regardless of the plaintiff's fault.[19] Essentially, the trial court had ignored the crucial second use of the phrase "if any" in O.C.G.A. § 51-12-33(b), which refers to the assessment of the plaintiff's fault by a percentage pursuant to O.C.G.A. § 51-12-33(a) prior to apportioning damages among the defendants.[20] In other words, by inserting the phrase "if any" in referring to whether the plaintiff's damages would be reduced to account for his own fault, the Georgia General Assembly specifically contemplated the very circumstance presented by *Cavalier Convenience* (i.e., multiple defendants sued by a non-negligent plaintiff). The court reasoned that if the General Assembly had intended for apportionment to be limited to situations where the plaintiff was to some degree responsible, it would not have used the latter "if any" clause in O.C.G.A. § 51-12-33(b).[21]

2. *McReynolds v. Krebs*: The Georgia Supreme Court Has Spoken

When *McReynolds v. Krebs* reached the Georgia Court of Appeals several months after *Cavalier Convenience*, it appeared to be a logical extension of the O.C.G.A. § 51-12-33(b) debate. In *McReynolds*, Lisa Krebs was injured in a motor vehicle collision when a vehicle driven by Carmen McReynolds collided with a vehicle in which she was a passenger.[22] Ms. Krebs sued both Ms. McReynolds and General Motors Company ("GM"), the manufacturer of the vehicle in which she was riding.[23] Ms. McReynolds filed a cross-claim against GM for set-off and contribution.[24] After GM's pre-trial settlement with the plaintiff, Ms. McReynolds continued to assert that she had a viable cross-claim against GM for set-off or contribution in the amount of the settlement.[25] Over McReynolds' objection, the trial court granted GM's motion to dismiss and held that the 2005 amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 abolished joint and several liability and eliminated any right of set-off or contribution for nonsettling parties.[26] The case proceeded to trial, and after Ms. McReynolds admitted that she had no evidence of GM's potential fault, she was prohibited by the court from arguing that the jury should apportion fault to GM.[27] The jury found Ms. McReynolds liable for the plaintiff's damages, and the court entered judgment against her for the full amount of the damages.[28]

Interestingly, Ms. McReynolds' first argument to the court of appeals was that O.C.G.A. § 51-12-33 was not applicable to cases in which the plaintiff was not at fault, similar to what the plaintiff had argued unsuccessfully on appeal in *Cavalier Convenience*.[29] The court of appeals quickly rejected this by citing its recent decision to the contrary.[30] On certiorari to the Georgia Supreme Court, McReynolds' attorneys

clearly argued that the court of appeals' analysis on this issue in *Cavalier Convenience* should be revisited.[31]

However, in its March 23, 2012 decision, Justice David E. Nahmias, writing for a nearly unanimous Georgia Supreme Court,[32] affirmed the court of appeals' holding that apportionment under O.C.G.A. § 51-12-33(b) is required regardless of the plaintiff's fault.[33] The court reasoned, "the statute nowhere states that the remaining subsections are dependent on satisfying subsection (a)'s limitation to cases involving plaintiff fault."[34] It also added, "subsection (b) expressly states that it applies 'after a reduction of damages pursuant to subsection (a) of this Code section, *if any*.'"[35] Accordingly, the court held that O.C.G.A. § 51-12-33(b) "is plainly meant to apply even if there is no plaintiff fault."[36]

B. More Answers from *McReynolds*: No Contribution or Set-off for Nonsettling Defendant; Nonparty Apportionment Does Not Depend on the Plaintiff's Fault

Another principal issue presented by *McReynolds* on appeal was the right of a nonsettling defendant to obtain a set-off or contribution to account for any settling defendant. In *McReynolds*, the Georgia Court of Appeals had looked to the plain language of the statute, focusing on the last sentence of O.C.G.A. § 51-12-33(b), which provides, "[d]amages 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*."[37] According to the court of appeals, its interpretation of O.C.G.A. § 51-12-33(b) led to the inescapable conclusion that GM was entitled to be dismissed from the suit after it had

settled, and the remaining defendant, Ms. McReynolds, had no claim of contribution or set-off.[38] The court reasoned that the statute requires each liable party to pay its own percentage share of fault, and significantly, Ms. McReynolds presented no evidence regarding GM's alleged fault.[39]

In her brief to the Georgia Supreme Court, McReynolds' attorneys argued that she should have been entitled to either a set-off or apportionment, but could not be denied both.[40] The argument went as follows:

> If the Court of Appeals is wrong in its interpretation of § 51-12-33 [that joint and several liability has been abolished regardless of the plaintiff's fault], then McReynolds was entitled to contribution and/or set-off. If the Court of Appeals is correct, then McReynolds was entitled to apportionment. McReynolds, however, was denied all three, and the net effect of these rulings was to permit that which is prohibited under any interpretation: a double recovery by the plaintiff.[41]

Essentially, McReynolds' attorneys argued to the Georgia Supreme Court that their client was first denied contribution or set-off by virtue of the *Cavalier Convenience* holding, but at the same time not allowed to reap the rewards of the 2005 amendments through apportionment, all the while with the plaintiff gaining a windfall in the form of a double recovery.[42]

The supreme court reiterated the court of appeals' reliance on the plain language of the anti-contribution provision of O.C.G.A. § 51-12-33(b), noting that it "flatly states that apportioned damages 'shall not be subject to any right of contribution'" and "'shall not be a joint liability among the persons liable.'"[43] The court also rejected McReynolds' argument that she could obtain contribution through O.C.G.A. § 51-12-32, noting that it "obviously cannot trump the rules set forth in § 51-12-33 because it begins with the phrase, '[e]xcept as provided in Code Section 51-12-33.'"[44] Moreover, the court held

that because the applicability of a set-off is predicated on the settling party being liable, at least in part, to the plaintiff, McReynolds was not entitled to a set-off, given that she admitted she had no evidence of GM's potential liability.[45]

The rulings in *McReynolds* and *Cavalier Convenience* obviously hold that joint and several liability and the right of contribution have been abolished among multiple defendants. However, do these holdings affect cases involving apportionment of fault to nonparties, given that much of the analysis was limited to subsection (b) of O.C.G.A. § 51-12-33? Some language in the supreme court opinion in *McReynolds* appears to suggest that its holding indeed reaches these issues as well.

Although *Cavalier Convenience* initially answered the question of whether apportionment is required *among co-defendants* regardless of the plaintiff's fault, that case did not involve any attempts to apportion fault *to nonparties* pursuant to O.C.G.A. § 51-12-33(c) and (d). *McReynolds* presented a slightly different situation in that one of the original defendants reached a settlement with the plaintiff and had requested that it be dismissed as a party. Certainly a reasonable implication of the courts' holdings is that apportionment, in a general sense,[46] is the applicable rule in all cases in the wake of the 2005 amendments. However, a careful reading of both opinions reveals no such sweeping rule. In fact, the opening sentence of the court of appeals' opinion in *Cavalier Convenience* clearly frames the narrow issue presented as "whether . . . a trier of fact is required to apportion its award of damages *among multiple liable defendants* when the plaintiff bears no fault."[47] Similarly, the Georgia Supreme Court in *McReynolds* opened its opinion with the question presented on certiorari: "Did the Court of Appeals correctly construe O.C.G.A. § 51-12-33 to require a trier of fact to apportion an award of

damages *among multiple defendants* when the plaintiff is not at fault?"[48]

In *Raines v. Maughan*,[49] the appellant argued to the court of appeals that *Cavalier Convenience* does not apply where a defendant attempts to apportion fault to a nonparty.[50] The argument posits that if the plaintiff bears no responsibility, the defendants may not utilize O.C.G.A. § 51-12-33(c) or (d) to apportion fault to a nonparty.[51] Notably, O.C.G.A. § 51-12-33(c) and (d) are silent as to whether the plaintiff is required to be at fault. Thus, proponents of this argument contend that the holding of *Cavalier Convenience* is limited to O.C.G.A. § 51-12-33(b), while the remaining portions of the statute retain the requirement that the plaintiff be to some degree responsible.

Unfortunately, the court of appeals in *Raines* did not reach this specific issue in its ruling. In *Raines*, it was undisputed that the plaintiff was not negligent, given that he was the victim of an attack by a third party at an apartment complex.[52] However, because the jury returned a defense verdict at trial, the court found that there was no occasion to apportion damages at all.[53] The court reasoned that any error in charging the jury on apportionment had no effect on the outcome of the trial and necessarily would have been harmless, citing its recent decision in *Pacheco v. Regal Cinemas*[54] as authority.[55] The court concluded, "we need not consider, therefore, whether instructing the jury on apportionment in this case actually was error."[56]

In *Barnett v. Farmer*,[57] this question may have been resolved by the court of appeals, albeit in the context of a set of somewhat peculiar facts. The plaintiffs, Willie and Shirley Farmer, were both injured in a motor vehicle collision with the defendant, Madison Barnett.[58] Shirley Farmer was Willie Farmer's wife and was riding as a

passenger in their vehicle at the time.[59] Both Mr. and Mrs. Farmer asserted claims for personal injury against Ms. Barnett, as well as loss of consortium on each other's claims.[60] There was evidence that Ms. Barnett and Mr. Farmer were negligent in causing the collision, and the trial court gave a jury instruction on comparative negligence on Mr. Farmer's claims.[61] However, with regard to Mrs. Farmer's claims, the trial court refused to instruct the jury that it should consider the negligence of Mr. Farmer.[62] The jury returned verdicts for the plaintiffs, but awarded Mr. Farmer less than the full amount of his damages, presumably because it found that he was comparatively negligent and reduced his award by his proportion of fault.[63] Ms. Barnett appealed the denial of her jury instruction on apportionment on Mrs. Farmer's claims.[64]

In reversing the trial court's decision on this issue, the court of appeals reasoned that it would be contrary to the "clear intent of the legislature" to require Ms. Barnett to pay the full amount of Mrs. Farmer's damages simply because she was a passenger in a vehicle driven by her (presumably) negligent husband.[65] In other words, given that the jury already found Mr. Farmer partially at fault, it would be inequitable to require Ms. Barnett to pay *all* of Mrs. Farmer's damages, without regard to the fault of another person (i.e., Mr. Farmer) who caused or contributed to the collision. In essence, Mr. Farmer's negligence had the same effect of that of a nonparty on Mrs. Farmer's claim, and his negligence should have been considered by the jury, regardless of the fact that Mrs. Farmer may not have been negligent.[66] Given that the court cited its holding in *Cavalier Convenience* that apportionment of damages under O.C.G.A. § 51-12-33[67] is required *regardless of the plaintiff's fault*, it may have answered in the affirmative the question of whether *nonparty* apportionment is allowed where the plaintiff is not at fault.

Although this interpretation of the court's holding may be slightly strained given the unique facts of the case and the assumptions made by the court of appeals regarding the verdict,[68] it has been cited subsequently by the court of appeals as standing for this very rule.[69]

Additionally, the significance of the Georgia Supreme Court's recent holding in *McReynolds* cannot go unnoticed and likely answers this question as well, given that GM became a nonparty after it settled with the plaintiff. Again, although the court framed the issue presented as being one of apportionment among multiple defendants, it briefly addressed arguments regarding O.C.G.A. § 51-12-33(c) and (d) as well, given that alternative arguments were made that GM's fault as a nonparty should have been considered. In its rejection of McReynolds' argument that "§ 51-12-33 imports subsection (a)'s limiting language [regarding plaintiff fault] into the six following subsections," the court noted that "the statute nowhere states that *the remaining subsections* are dependent on satisfying subsection (a)'s limitation to cases involving plaintiff fault."[70] Additionally, the fact that the court addressed McReynolds' alternative argument for apportionment of fault to GM as a nonparty under subsections (c) and (d) suggests that the appellate courts of this state will now reject any argument that a plaintiff's lack of fault has some bearing on nonparty apportionment.[71] Therefore, the language used by the supreme court in *McReynolds* should be cited by defense attorneys as standing for the rule that apportionment to nonparties is allowed regardless of the plaintiff's fault.

C. *Union Carbide Corporation v. Fields*: Proving Nonparty Fault is an Affirmative Defense; Inferences Alone are Insufficient

The question of the standard of proof on claims of nonparty fault was arguably up for debate in the wake of the court of appeals' decision in *McReynolds*. However, in *Union Carbide Corporation v. Fields*,[72] the court offered additional guidance as to the amount of proof required on a defense of nonparty negligence. In *Fields*, the plaintiffs had sued multiple manufacturers, suppliers, and sellers of asbestos-containing products for damages allegedly resulting from the plaintiffs' mesothelioma.[73] The defendants filed notices of nonparty fault pursuant to O.C.G.A. § 51-12-33(d), seeking to apportion fault to some 51 other entities that were allegedly responsible for exposing the plaintiffs to asbestos-containing products.[74] The plaintiffs moved for partial summary judgment as to many of these claims, asserting that the defendants should be precluded from apportioning fault to nonparties because they failed to present evidence creating a jury question on the issue.[75]

The court of appeals affirmed the trial court's grant of partial summary judgment, holding that the defendants' allegations of nonparty fault rested entirely on inferences.[76] The court reasoned that "[w]hen a party is relying on inferences to prove a point, not only must those inferences tend in some proximate degree to establish the conclusion sought, but must also render less probable all inconsistent conclusions."[77] The court also rejected the defendants' argument that O.C.G.A. § 51-12-33(d) provides for "automatic" consideration of fault for settling entities, noting that when read with subsection (c), a defending party still must show that a settled entity "contributed to the alleged injury or damages" before fault can be assessed by the jury.[78] The court also held that nonparty fault is an affirmative defense for which the defendant bears the burden of proof, and a plaintiff has the initial burden of piercing the defense at the

summary judgment stage.[79]

D. *Murray v. Patel*: The Filing of a Third-Party Complaint for Contribution or Indemnity Triggers Apportionment

In *Murray v. Patel*,[80] the plaintiffs were injured in a motor vehicle collision while they were passengers in a vehicle driven by their son.[81] They sued the driver of the other vehicle, Brittany Murray, and the vehicle owner, Anthony Hill, who then filed a third-party complaint for indemnification against the plaintiffs' son for his alleged negligence in causing the accident.[82] The third-party defendant filed a motion to dismiss, asserting that because joint and several liability had been abolished by the 2005 amendments, there was no longer a right of contribution under Georgia law.[83] The trial court granted the motion, apparently without making any findings of fact or conclusions of law, and the defendants/third-party plaintiffs filed an interlocutory appeal.[84]

The court of appeals recited the entire text of O.C.G.A. § 51-12-33(b) and framed the third-party defendant's argument as follows: "because joint and several liability has been abolished, Murray and Hill cannot assert their third-party complaint."[85] The court succinctly responded by pointing out that there was no legal authority for such a proposition.[86] The court also noted that the purposes of the statutes[87] are not incompatible, but rather the filing of the third-party complaint required apportionment between the defendants and third-party defendant, and neither has a right of contribution against the other.[88] In other words, when a defendant files a third-party complaint for contribution or indemnification, O.C.G.A. § 51-12-33(b) is immediately triggered, thus requiring apportionment among those parties just as if they were all

named as defendants in the original complaint. Furthermore, by virtue of the plain language of O.C.G.A. § 51-12-33(b), as construed by the supreme court in *McReynolds v. Krebs*, there is no right of contribution among those parties.

As discussed more in Part III.B., *infra*, the court's terse analysis in *Murray* has left open an interesting debate on the current status of the right of contribution.

E. *PN Express, Inc. v. Zegel*: No Apportionment of Fault to a Nonparty Where the Only Basis for Apportionment is an Agency Relationship

In 2010, the court of appeals also addressed apportionment to nonparties in the context of agency relationships in *PN Express, Inc. v. Zegel*.[89] In that case, the plaintiffs were injured when a tractor trailer owned by Mile Surlina and leased by PN Express, Inc. collided with their vehicle.[90] Although most of the court's opinion was devoted to the trial court's jury instructions regarding statutory employment and respondeat superior, it concluded by addressing whether it was proper for the trial court to deny the defendant the opportunity to apportion fault to a nonparty with whom the defendant had an agency relationship.[91]

At trial, the defendant argued that the jury should consider the fault of another company, Patterson Freight Company and "certain other entities."[92] The trial court rejected this argument and the court of appeals affirmed, reasoning that the nonparty to which the defendant was attempting to assign fault would have been responsible only on notions of derivative liability (i.e., respondeat superior and/or statutory employment).[93] In other words, a defendant may not apportion fault to a nonparty with whom it has an agency relationship *and that relationship is the only basis for assigning fault to the nonparty*.

At first blush, this appears to be a logical holding, with which few would disagree. However, as discussed in Part III.A.3., the court's holding may have affected some existing arguments that have been made regarding whether apportionment to nonparties is proper when there is only one defendant. The holding also has added weight to some arguments regarding derivative liability in the context of third-party attack cases.

F. *Clark v. Rush*: Pattern Jury Charge § 60.141 is Invalid

On November 1, 2011, the Georgia Court of Appeals decided *Clark v. Rush*,[94] which held that the pattern jury charge on comparative negligence[95] is no longer an accurate statement of the law in light of the amendments to O.C.G.A. § 51-12-33(a). The facts of *Clark* arose out of a two-vehicle crash involving Zanta'vious Rush and Courtny Clark. Ms. Clark's defense was that the plaintiff was partly at fault for causing the collision because he was speeding at the time.[96] Over the defendant's objection, the trial court gave the following pattern charge on comparative negligence:

> If you find that the defendant was negligent so as to be liable to the plaintiff and that the plaintiff [also] was negligent, thereby contributing to the plaintiff's injury and damage, but that the plaintiff's negligence was less than the defendant's negligence, then the negligence of the plaintiff would not prevent the plaintiff's recovery of damages, but would require that you reduce the amount of damages otherwise awarded to [the] plaintiff in proportion to the negligence . . . of the plaintiff compared with that of the defendant.[97]

The court began by noting that this charge was based upon prior case law that predated the 2005 amendments to O.C.G.A. § 51-12-33.[98] Under the new apportionment scheme, the court held that if the jury concludes that the plaintiff was negligent and that his negligence was less than that of the defendant, the jury "must identify the percentage of fault attributable to the plaintiff and specifically report that

percentage to the judge, who then must reduce the award of damages by the same percentage."[99] Under the court's interpretation of O.C.G.A. § 51-12-33(a), it is implicit that a special verdict form be used so that the parties' respective percentages of fault be specified by the jury.[100]

Turning to pattern charge § 60.141, the court pointed out that it was inconsistent with O.C.G.A. § 51-12-33(a) in two important respects. First, § 60.141 does not require the jury to quantify the fault of the plaintiff but rather that it determine the "proportion" of the plaintiff's negligence. According to the court, such a "mere rough proportionality of fault" is not consistent with the concept of specific percentages of fault embodied in O.C.G.A. § 51-12-33(a).[101] Second, the pattern charge ambiguously leaves open the possibility that the jury may not have found comparative negligence at all, or that it made an error in reducing the plaintiff's damages in proportion to the degree of his negligence.[102]

According to the court, the plain language of the statute makes clear that the judge, rather than the jury, is required to reduce the plaintiff's damages, and that this procedure occurs only after the jury has specifically reported the parties' respective percentages of fault on a special jury verdict form.[103] The court concluded by holding that both pattern charge § 60.141 and the prior case law on which it was based have been superseded by O.C.G.A. § 51-12-33(a), as amended.[104]

III. QUESTIONS REMAINING

A. Is Apportionment Applicable in Single-Defendant Scenarios?

Some plaintiffs have made the argument that apportionment of fault to nonparties is not allowed where there is only a single defendant, which has led to mixed results

from trial courts.[105] Again, this argument is based on a reading of O.C.G.A. § 51-12-33 that examines the interplay between subsections (a) and (b) thereof and their relationship with the remaining portions of the statute. The argument is presented as follows: O.C.G.A. § 51-12-33(a) simply describes the process for reducing a plaintiff's damages award by his or her own negligence, while subsection (b) is the true "apportionment" provision in the statute that abolishes joint and several liability, and the remaining subsections of the statute, which are silent as to the number of defendants that are required, should be read as falling under subsection (b). Therefore, because subsection (b) limits its application to actions "against more than one person," apportionment of fault to nonparties pursuant to subsections (c) and (d) is not allowed in single-defendant cases.[106]

The logical response to this argument is that subsections (c) and (d) of O.C.G.A. § 51-12-33 appear in the statute as separate subsections, not as sub-subsections of subsection (b). If the General Assembly intended for subsection (b) to apply to the remaining portions of the statute, presumably it would have drafted the statute to reflect this structure.[107] The use of the phrase "[i]n assessing percentages of fault" in subsection (c) does not require an interpretation that the Legislature was intending to refer only to subsection (b). After all, the jury assesses percentages of fault under *both* subsections (a) and (b), so this phrase logically could be referring to either subsection.[108]

The recent Georgia Supreme Court opinion in *McReynolds* should also be used by defense attorneys to argue that subsections (c) and (d) of O.C.G.A. § 51-12-33 are standalone provisions of the statute, and just as the court declined to import the limiting

language of subsection (a) into the remaining subsections, the multiple defendant limitation of subsection (b) similarly should not be imported into the nonparty fault subsections.

1. Single Defendant Sued by Plaintiff

The simplest example is a case where the plaintiff sues only one defendant. Such a scenario certainly could not qualify as an action "brought against more than one person" within the meaning of O.C.G.A. § 51-12-33(b). The typical argument described above is then made that because O.C.G.A. § 51-12-33(c) and (d) are limited by subsection (b), the single defendant is precluded from apportioning fault to a nonparty.[109] However, some trial courts have allowed apportionment under these circumstances.[110] Again, it would be reasonable to expect trial judges to become more receptive to single defendants' arguments for nonparty apportionment, given the reasoning used by the Georgia Supreme Court in *McReynolds* that O.C.G.A. § 51-12-33(c) and (d) are not limited by the preceding subsections of the statute.[111]

2. Single, Nonsettling Defendant

A slightly different situation than that presented by *McReynolds v. Krebs* occurs when multiple parties are originally sued, but the remaining nonsettling defendant attempts to apportion fault not only to the settling parties,[112] but *also to other nonparties*. This issue was not addressed in *McReynolds*, and an analogous argument to that made in *Raines v. Maughan* could be made in such a scenario: the single remaining defendant is not allowed to apportion fault to nonparties.

However, this argument is less persuasive than in a situation where a single defendant is originally sued by the plaintiff. One need look no further than the language

of O.C.G.A. § 51-12-33(b) itself to see the flaw in this argument. Subsection (b) applies to all actions "*brought* against more than one person . . ."[113] If the plaintiff originally sued multiple defendants and settled with all but one of them, subsection (b) would still be implicated by this language because it was "brought" against more than one person, thus allowing a defendant to utilize subsections (c) and (d), even under the plaintiff's structural interpretation of the statute.[114]

3. Multiple Defendants and Respondeat Superior

Another argument that can be made by plaintiffs who wish to foreclose a single defendant's attempt to apportion fault to nonparties is that where a second defendant is named only for purposes of respondeat superior liability, the multiple-defendant requirement is lacking because the two defendants are not truly separate parties or joint tortfeasors. There is some established authority that supports the rule that a claim based upon respondeat superior technically is not one against joint tortfeasors because the claim against the principal is purely derivative of the claim against the agent.[115] Thus, where there are no named defendants other than the principal and agent, and the claim against the principal rests entirely on respondeat superior, it can be expected that a court would find that only a single defendant has been sued for purposes of O.C.G.A. § 51-12-33(b), and the plaintiffs' arguments discussed above likely will ensue.[116]

The recent holding in *PN Express, Inc. v. Zegel*, discussed in Part II.E., *supra*, obviously stands for the rule that there can be no apportionment *between* a principal and an agent, even where one of them is a nonparty.[117] This case clearly supports the traditional rule that the two defendants are treated as a single party rather than joint tortfeasors, which likely will result in more arguments by plaintiffs that apportionment to

nonparties is not allowed in such cases, despite the fact that the action was "brought against more than one person."[118]

Another interesting effect of the *PN Express* holding can be seen in premises liability cases involving an intentional third-party attacker, discussed more in Part III.C., *infra*. Some plaintiffs are now arguing that because a premises owner's liability is essentially derivative of the third-party attacker, apportionment between the two should not be allowed under the reasoning used by the court of appeals in *PN Express*.[119] In other words, there would be no attack and injury, but for the owner's negligent failure to discharge its duty to prevent that very attack.[120]

However, is an owner's liability truly "derivative" of the attacker? In respondeat superior cases such as *PN Express*, the principal's liability is triggered by virtue of the relationship with its agent, and a plaintiff may recover under a separate cause of action against the principal for negligent hiring and retention, assuming there is sufficient evidence for this separate claim. By analogy, a premises owner is not automatically liable by virtue of the attacker's conduct, but may be liable under a separate cause of action for a failure to protect its guest. In other words, there can be an attack and injury to a guest even if the owner or occupier is not negligent.

B. Contribution and Implied Indemnity: What is Left After *McReynolds v. Krebs* and *Murray v. Patel*?

Has the right of contribution been eliminated totally by the 2005 amendments? At first blush, the *McReynolds* opinion would suggest so. Many scholars and practitioners have agreed with this proposition or had made suggestions predating *Cavalier Convenience* that if joint and several liability were truly abolished in all

situations, regardless of the plaintiff's fault, then the right of contribution would also be eliminated.[121]

However, *Murray v. Patel* may have specifically rejected the argument that the right of contribution no longer exists under Georgia law, implying that it may have been retained in a limited form. However, did the third-party defendant in *Murray* lose because the court expressly found that the right to contribution still exists, or did it hold simply that the third-party defendant could not be liable for contribution *by virtue of it being added pursuant to the provisions of O.C.G.A. § 9-11-14*? The court's terse analysis in *Murray* obviously has led to an interesting debate on what exactly was said in its holding.[122] It can hardly be disputed that *McReynolds* stands for the rule that when apportionment is utilized, there is no contribution among the defendants, regardless of whether a defendant has settled prior to trial. At the very least, *Murray* says that when a third-party complaint for contribution or indemnity is filed, both the defendants and third-party defendants are treated as co-defendants for purposes of apportionment, and there is no contribution between them (i.e., their respective liability "shall be the liability of each person against whom they are awarded . . .").[123]

This appears to leave open the possibility that the right of contribution or implied indemnity in a separate, subsequent action lives on, so long as the nonparty is not made a party to the original suit, a position that has considerable support and would appear to be a logical way to harmonize O.C.G.A. §§ 51-12-33(b) and 51-12-32, without concluding that the latter is mere surplusage.[124] In other words, nothing in the text of O.C.G.A. § 51-12-33(b) says anything that would preclude a single defendant from defending his case through trial or settlement, and then choosing to institute a

subsequent contribution action against a third party at a later date. So long as that third party was not made a party to the initial litigation, there is no need to consider the anti-contribution language of O.C.G.A. § 51-12-33(b) because that third party would not qualify as one of the "persons who are liable" within the meaning of that Code section. Similarly, it would appear that if a nonparty is assigned a percentage of fault pursuant to O.C.G.A. § 51-12-33(c) and (d), the named defendants would be precluded from seeking contribution or implied indemnity from the nonparty. However, even if the nonparty is considered by the jury and given a percentage of fault, it is still not a person who is "liable" within the meaning of O.C.G.A. § 51-12-33(b). Nevertheless, the logical conclusion is that once a jury has apportioned fault to a nonparty, the defendants are thereafter precluded from litigating the issue of that nonparty's responsibility.

The foregoing suggests that the rights of contribution and implied indemnity have survived in a limited form, and a defendant generally has three choices when it believes an unnamed person is wholly or partly responsible: (1) file a third-party complaint and bring the person into the action; (2) serve a O.C.G.A. § 51-12-33(d)(2) notice of nonparty fault; or (3) defend the case and institute a separate action for contribution or implied indemnity at a later date against the other person(s) believed to be responsible. Only in scenario (1) above is the right of contribution clearly eliminated by O.C.G.A. § 51-12-33(b) under the holding of *Murray*.[125] Logically, it would appear that there can be no contribution or indemnity in scenario (2) either. In scenario (3), it can be reasonably argued that contribution or implied indemnity still exist, a theory that does not appear to have been affected by the recent Georgia Supreme Court decision in *McReynolds*.

C. Negligent Security: O.C.G.A. § 51-12-33 Under Attack in Third-Party

Criminal Attack Cases

Perhaps the most vigorous debate regarding O.C.G.A. § 51-12-33 is occurring in the context of premises liability cases where the injured person asserts that the defendant was negligent in failing to protect him from a third-party criminal attacker. In fact, several trial courts of this state have already held O.C.G.A. § 51-12-33 inapplicable to negligent security cases or have declared portions of it unconstitutional,[126] which is contrary to the recent nonbinding decision of the court of appeals in *Pacheco v. Regal Cinemas, Inc*.[127] The reasoning of these trial court decisions is that by allowing a premises owner to apportion fault to a nonparty criminal assailant, the owner effectively escapes or significantly diminishes its liability by shifting responsibility to the very actors whose conduct it had a duty to prevent, essentially nullifying its non-delegable duty to keep its premises safe.[128] This position has support from the Restatement (Third) of the Law of Torts:

> A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.[129]

These arguments also raise concerns regarding whether the language used in the statute is broad enough to include the consideration of intentional conduct. O.C.G.A. § 51-12-33(c) and (d) both speak in terms of "fault"[130] and "negligence," while subsection (a) uses the broader term "responsible."[131] Although the definition of "fault" from Black's Law Dictionary arguably contains a theme of negligence, rather than intentional conduct, at least one trial judge has disagreed and held that "fault,"as defined by Black's, is broad enough to include intentional acts.[132] Regardless of the

ambiguity in the definition of "fault," if the General Assembly intended subsections (c) and (d) to encompass *all* conduct, including intentional acts, why would it choose to use the terms "fault" and "negligence" instead of the broader term "responsible" that was used in a previous subsection of the same statute? It could hardly be argued that the term "responsible" is not broad enough to include intentional conduct.

Furthermore, even assuming that the General Assembly intended for intentional conduct to be considered pursuant to O.C.G.A. §§ 51-12-33(c) and (d), as a practical matter, will a jury actually be able to make such a comparison and arrive at a result that appropriately separates each person's respective fault? This is precisely what was argued before the Georgia Supreme Court in *Couch v. Red Roof Inns, Inc.* by the appellant on certified questions from the United States District Court for the Northern District of Georgia.[133] In *Couch*, the appellant has argued that it is unfair, irrational and impossible for a jury to weigh the two types of conduct in negligent security cases.[134] In response, Justice Nahmias suggested that such a comparison is not impossible, despite theories to the contrary by legal "commentators."[135] He also hinted that he may look to other jurisdictions for guidance on the issue, pointing out that several other states have addressed this very issue or have carved out an exception by statute.[136] Counsel for the appellee also pointed out in response to this argument that juries decide difficult questions on a regular basis,[137] and that courts and litigants should have faith in the "enlightened conscience" of the jury to do its job. As of the time of publication of this article, no ruling has been issued by the Georgia Supreme Court resolving this issue.

D. "Proving" a Nonparty's Negligence: What Proof is Required?

As discussed in Part II.A., *supra*, the trial court in *McReynolds v. Krebs* prohibited the nonsettling defendant from arguing apportionment or even mentioning the settling defendant to the jury.[138] This was because at the beginning of the trial, the nonsettling defendant, Ms. McReynolds, admitted that she had no evidence of the settling defendant's potential fault for the accident.[139] The court of appeals and supreme court affirmed this ruling, pointing out the particular importance of the fact that there was no evidence of GM's potential liability.[140] As the courts noted, McReynolds' attorneys had been given extra time in discovery to pursue her allegations against GM, which they chose not to do.[141] Simply stated, McReynolds "presented *no evidence* on which apportionment of liability could be based."[142] This statement raises interesting questions regarding the amount of evidence needed in order to argue the fault of a nonparty.

The statute is conspicuously silent as to the amount of evidence required to apportion and whether there is a threshold evidentiary inquiry by the court before the jury decides apportionment. The trial court in *McReynolds* essentially found that there was such a threshold evidentiary requirement and that because Ms. McReynolds failed to meet this burden, she was not allowed to argue apportionment or obtain such a jury instruction.[143] The court of appeals' statement that McReynolds presented "no evidence on which apportionment of liability could be based" echoed this conclusion, implying that there is a threshold evidentiary standard that a party must meet prior to arguing the negligence of a nonparty.[144] This unavoidably leads to the next question: how high is that standard?

It seems reasonably clear that a party must ultimately make his or her case of

nonparty negligence in the same way as if the nonparty were a party to the action (i.e., proof of a duty, breach, cause and harm, by a preponderance of the evidence). The apportioning party will argue his or her case to the jury, and the jury will presumably decide whether the preponderance standard has been met (just as it would do for the primary claim by the plaintiff). The existence of a distinct threshold evidentiary test for the court, as implied by the *McReynolds* decision, raises interesting questions regarding the procedure for apportionment.[145] Most often, the issue arises in the context of a pre-trial motion in limine by the plaintiff to preclude any reference to nonparty fault or a motion to strike the defendant's O.C.G.A. § 51-12-33(d) notice. Should a trial court deny such a motion if there is *any* evidence of nonparty fault? Does the apportioning party have to meet the preponderance standard at this initial stage, effectively being required to prove by a preponderance of the evidence to both the judge and jury?

The language of the statute clearly illustrates the legislative intent that the consideration of nonparty negligence is mandatory. O.C.G.A. § 51-12-33(c) provides in part that "the trier of fact *shall* consider the fault of all persons or entities . . ., regardless of whether the person or entity was, or could have been, named as a party to the suit."[146] Similarly, subsection (d) provides that "[n]egligence 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 . . ."[147] This strong language hardly suggests that the trial court maintains discretion on whether to allow apportionment based on a party's meeting some unknown evidentiary burden of proof.[148] However, a counter-argument could be made that if the evidence of nonparty negligence is zero (as it was in *McReynolds*), then there is no fault to be considered or

apportioned, and O.C.G.A. § 51-12-33 is not even implicated.[149] This is essentially what the court held in *McReynolds*, suggesting that a party seeking apportionment of fault to a nonparty must make a prima facie case beyond mere conclusory allegations.[150] In addition, given that the general standard of proof on affirmative defenses involving negligence is a preponderance of the evidence and the fact that *Union Carbide Corporation v. Fields* clearly holds that an attempt to apportion fault to a nonparty indeed is an affirmative defense, it is likely that the ultimate burden on the defendant to prove nonparty negligence is by a preponderance of the evidence.[151] As discussed in Part II.C., *supra*, *Fields* also makes clear that the defendant may not rely on inferences alone to carry this burden, subjecting such inferential allegations of nonparty negligence to summary adjudication in favor of the plaintiff.[152]

E. Constitutional Issues

There are a host of arguments being made that O.C.G.A. §51-12-33 is unconstitutional, most notably that it is vague when read in conjunction with O.C.G.A. §§ 51-12-31 and 51-12-32.[153] Judge Alvin T. Wong recently held both O.C.G.A. §§ 51-12-31 and 51-12-33 unconstitutionally vague in his January 11, 2012 order in *Medina v. GFI Management Services, Inc*.[154] The court noted that prior to the 2005 amendments, O.C.G.A. § 51-12-33 applied where the plaintiff was at fault and O.C.G.A. § 51-12-31 applied where the plaintiff was not at fault, and in either situation, apportionment was discretionary (i.e., by use of the word “may”).[155] However, with the 2005 amendments, apportionment under section 51-12-33 is now mandatory (i.e., by use of the word “shall”), but the Legislature left apportionment discretionary under section 51-12-31 by retaining the word “may.”[156] The court reasoned that if apportionment is mandatory

regardless of whether the plaintiff is at fault, as held in *Cavalier Convenience v. Sarvis*, then section 51-12-31 is rendered meaningless.[157]

However, it cannot be ignored that section 51-12-31 clearly defers to section 51-12-33 by use of the phrase "[e]xcept as otherwise provided in Code section 51-12-33."[158] The court of appeals placed significance importance on this language in deciding *Cavalier Convenience* as it side-stepped the plaintiff's argument that its holding would render § 51-12-31 meaningless.[159] Similarly, the Georgia Supreme Court noted in *McReynolds* that O.C.G.A. § 51-12-32 "obviously cannot trump the rules set forth in § 51-12-33" due to the opening phrase "[e]xcept as provided in Code Section 51-12-33."[160] Nevertheless, given that the constitutionality of the 2005 amendments was not raised in *McReynolds* on certiorari to the Georgia Supreme Court, opponents of these holdings will continue to rely upon Georgia's fundamental rules of statutory construction[161] to argue that the opening sentences of sections 51-12-31 and 51-12-32 essentially now read: "except for [always], the following rules will apply."[162]

IV. CONCLUSION

It cannot be disputed that the 2005 amendments have dramatically altered the landscape of tort litigation in Georgia. The significance of these changes began to be fully realized in 2010 with the court of appeals' decisions in *Cavalier Convenience v. Sarvis* and *McReynolds v. Krebs*. Given that the Supreme Court of Georgia has agreed with the court of appeals' analysis in *McReynolds* and *Cavalier Convenience*, it appears that joint and several liability has been totally eliminated in Georgia, but there is a colorable argument that the rights of contribution and implied indemnity may still exist in a separate action against a person or entity who was not previously made a party to the

original suit. Many questions still remain regarding who may take advantage of apportionment of fault to nonparties or whether it applies at all in certain types of cases. Additionally, there are possible constitutional problems with the 2005 amendments that cannot be ignored in light of some recent trial court decisions from around the state. Judges, attorneys, litigants, insurance companies and many others are anxiously awaiting the appellate courts of this state to offer some additional guidance on these issues. It is quite possible that the appellate courts will once again defer to the Legislature as in *Cavalier Convenience*, which in all likelihood will prompt yet another rewrite by the General Assembly of the statutes at issue. Until then, it appears that there may be as many questions raised by the 2005 amendments as there are answers.

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[1] Hereinafter referred to as "the 2005 amendments."

[2] For purposes of this article, it is assumed that the reader has a general understanding of these amendments. This article is intended neither as a survey of the history of joint and several liability and contribution in Georgia, nor of the amendments themselves or the legislative history of these statutes. For a detailed analysis of the background of the 2005 amendments and the law as it existed prior thereto, which is beyond the scope of this article, see David C. Marshall, Christian J. Lang & Marcus W. Wisehart, *Apportionment of Fault to a Non-Party: Pointing Fingers to Victory*, 2011 Ga. Def. Lawyers Ass'n L.J. 33, 34-39; Kirby G. Mason, *Are Joint Liability and the Right to Contribution Dead?*, 2008 Ga. Def. Lawyers Ass'n L.J. 61, 61-63; Emily Ruth Boness, Note, *The Effect (or Noneffect) of the 2005 Amendments to O.C.G.A. Sections 51-12-31 and 51-12-33 on Joint Liability in Georgia*, 44 Ga. L. Rev. 215, 216-233 (2009).

[3] *See* O.C.G.A. § 51-12-33(c) and (d).

[4] O.C.G.A. § 51-12-31 (1987), *amended by* S.B. 3 (2005).

[5] O.C.G.A. § 51-12-33 (1987), *amended by* S.B. 3 (2005).

[6] O.C.G.A. § 51-12-31 (2011).

[7] O.C.G.A. § 51-12-33 (2011).

[8] O.C.G.A. § 51-12-32 (2011).

[9] Michael L. Wells, *Joint Liability Rules*, 39 Ga. Law Advocate 18, Spring/Summer 2005.

[10] 305 Ga. App. 141, 699 S.E.2d 104 (2010).

[11] 307 Ga. App. 330, 705 S.E.2d 214 (2010).

[12] 2011 Ga. LEXIS 198.

[13] *See* McReynolds v. Krebs, S11G0638 (Mar. 23, 2012).

[14] *See id.*

[15] 305 Ga. App. at 141.

[16] *Id.*

[17] *Id*. at 142.

[18] *Id.*

[19] *Id.* at 145.

[20] *Id.* at 144.

[21] *Id*. at 144-145.

[22] 307 Ga. App. at 330-331.

[23] *Id.* at 331.

[24] *Id*.

[25] *Id.* The terms of GM's settlement included a confidentiality agreement. Thus, Ms. McReynolds had no knowledge of the amount of the settlement.

[26] *Id.* at 332.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 333, *citing Cavalier Convenience*, 305 Ga. App. 141.

[31] Brief of Appellant at 20, McReynolds v. Krebs, 2011 Ga. LEXIS 400 (2011) (S11G0638).

[32] All of the justices concurred on this particular issue, except Justice Hunstein, who concurred only in the judgment.

[33] *See* McReynolds v. Krebs, S11G0638 (Mar. 23, 2012).

[34] *Id.* at 5.

[35] *Id.*, *quoting* O.C.G.A. § 51-12-33(b) (emphasis added in opinion).

[36] S11G0638 at 5.

[37] 307 Ga. App. at 334, *quoting* O.C.G.A. § 51-12-33(b) (emphasis added).

[38] 307 Ga. App. at 334.

[39] *Id.*

[40] Brief of Appellant at 20, McReynolds v. Krebs, 2011 Ga. LEXIS 400 (2011) (S11G0638).

[41] *Id.*

[42] In layperson's parlance, Ms. McReynolds was left between the proverbial "rock and a hard place."

[43] S11G0638 at 6, *quoting* O.C.G.A. § 51-12-33(b).

[44] S11G0638 at 6, *quoting* O.C.G.A. § 51-12-32(a).

[45] S11G0638 at 6, *citing* Broda v. Dziwura, 286 Ga. 507, 509, 689 S.E.2d 319 (2010).

[46] That is, whether under any subsection of O.C.G.A. § 51-12-33.

[47] 305 Ga. App. at 141 (emphasis added).

[48] S11G0638 at 2 (emphasis added).

[49] 312 Ga. App. 303, 718 S.E.2d 135 (2011) (physical precedent only).

[50] Amended Brief of Appellants at 16-17, Raines v. Maughan, 312 Ga. App. 303

(2011) (A11A0793).

[51] *Id*.

[52] *Id.* at 17.

[53] 312 Ga. App. at 308.

[54] 311 Ga. App. 224, 228, 715 S.E.2d 728 (2011) (physical precedent only for division (2)(b)).

[55] 312 Ga. App. at 308.

[56] *Id.*

[57] 308 Ga. App. 358, 362, 707 S.E.2d 570 (2011).

[58] *Id.* at 358.

[59] *Id.* at 362.

[60] *Id.* at 358.

[61] *Id.* at 360, n.8.

[62] *Id.* at 360. Additionally, it did not appear that any instruction on comparative negligence was given on Mrs. Farmer's claims, given that she was riding as a passenger in the vehicle, and in all likelihood, was not negligent.

[63] *Id.* at 362, n.14. Apparently, a special verdict form was not used at trial, and it appears that the court of appeals assumed that the jury found Mr. Farmer partially at fault by not awarding him the full amount of damages sought on his claim. This is precisely what gave the court of appeals such concern in *Clark v. Rush*, 312 Ga. App. 333, 718 S.E.2d 555 (2011), discussed in Part II.F., *infra*, because there is no way to discern the exact percentage of negligence, if any, was assessed against the plaintiff or whether the jury had already reduced its award based on that negligence. *See Clark*, 312 Ga. App. at 337.

[64] 308 Ga. App. at 358.

[65] *Id.* at 362.

[66] The court also rejected the Farmers' argument that apportionment in this case would violate the interspousal tort immunity doctrine, reasoning that Mrs. Farmer was in no way required to file suit against her husband. Rather, she was precluded from recovering from Ms. Barnett that portion of her damages, if any, that the jury concluded resulted from the negligence of her husband.

[67] Interestingly, the court of appeals recited the text of O.C.G.A. § 51-12-33(a), (b) and (c), with emphasis on portions from each subsection, implying that each subsection has independent significance. This is contrary to some of the arguments espoused by the plaintiffs' bar, namely that subsection (c) is limited by subsection (b).

[68] *See* note 63, *supra*.

[69] *See* Union Carbide Corp. v. Fields, 2012 Ga. App. LEXIS 308 (Mar. 20, 2012), discussed in Part II.C., *infra* (noting that *Barnett* held that the negligence of a nonparty was properly considered where there was evidence of negligence on the part of both the defendant and the nonparty, despite the fact that the nonparty was immune from suit or could not be named as a party). At the time of this article's publication, the *Fields* opinion was uncorrected and subject to revision by the court.

[70] S11G0638 at 4 (emphasis added).

[71] *Id.* at 7.

[72] 2012 Ga. App. LEXIS 308 (Mar. 20, 2012).

[73] *Id.*

[74] *Id.* at 4-6.

[75] *Id.* at 6.

[76] *Id.* at 15-16.

[77] *Id.* at 16, *quoting* Adamson v. Gen. Elec. Co., 303 Ga. App. 741, 744, 694 S.E.2d 363 (2010).

[78] *Fields* at 10-11, *quoting* O.C.G.A. § 51-12-33(c).

[79] *Fields* at 7.

[80] 304 Ga. App. 253, 696 S.E.2d 97 (2010).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 255.

[86] *Id.*

[87] Referring to O.C.G.A. §§ 9-11-14 and 51-12-33(b).

[88] 304 Ga. App. at 255.

[89] 304 Ga. App. 672, 697 S.E.2d 226 (2010).

[90] *Id.* at 673.

[91] *Id.* at 673-680.

[92] *Id.* at 680.

[93] *Id. See also* Travelers Indem. Co. v. Liberty Loan Corp., 140 Ga. App. 458, 461, 231 S.E.2d 399 (1976) (recognizing the rule that where liability against an employer rests only on the doctrine of respondeat superior, the employer is not a joint tortfeasor in the ordinary sense of the term, and law of joint and several liability does not apply).

[94] 312 Ga. App. 333, 718 S.E.2d 555 (2011).

[95] Council of Superior Court Judges of Georgia, *Suggested Pattern Jury Instructions*, Vol. I: Civil Cases (4th ed.) § 60.141 (2006).

[96] 312 Ga. App. at 333.

[97] *Id.* at 334-335, *quoting Suggested Pattern Jury Instructions*, § 60.141.

[98] *See* Underwood v. Atlanta & West Point R.R. Co., 105 Ga. App. 340, 358-362, 124 S.E.2d 758 (1962).

[99] 312 Ga. App. at 336.

[100] *Id*.

[101] *Id.* at 336-337.

[102] *Id*. at 337.

[103] *Id*.

[104] *Id.*

[105] *Compare* Order granting Plaintiff's motion to strike, Reasoner v. Schwartz, State Court of DeKalb County, Civil Action No. 08A92811-3 (July 30, 2009), attached hereto as Exhibit "A" (not allowing jury to consider fault of nonparty where only a single defendant was sued), *with* Order denying Plaintiff's motion to strike, Taylor v. DeKalb County, Georgia, State Court of DeKalb County, Civil Action No. 06A50694-7 (Jan. 22, 2009), attached hereto as Exhibit "B" (allowing the jury to consider apportionment to

nonparty even where only a single defendant was sued). *See also* Susan J. Levy, *Sometimes, It Makes Sense To Waive Apportionment*, Georgia Insurance Defense Lawyer Blog, Jan. 4, 2010, http://www.georgiainsurancedefenselawyer.com/2010/01/sometimes_it_makes_sense_to_wa.html#more (recognizing the significance of this intra-county split on nonparty apportionment). This apparent split within the State Court of DeKalb County represents a fundamental problem with the structure of the statute and the ambiguity it presents.

[106] This is precisely the interpretation used by Judge Wayne Purdom in *Reasoner v. Schwartz*, note 105, *supra*. Additionally, Judge Alvin T. Wong of the State Court of DeKalb County noted in a recent order declaring O.C.G.A. §§ 51-12-31 and 51-12-33 unconstitutional that the court of appeals in *McReynolds v. Krebs* "specifically held" that O.C.G.A. § 51-12-33(c) and (d) are "enabling provisions" that foreclose the concept of apportionment where a single defendant is involved. *See* Medina v. GFI Management Svcs., Inc., DeKalb County State Court, Civil Action No. 09A13159-1 (Jan. 11, 2012), attached hereto as Exhibit "C." This conclusion is presumably based upon the following sentence from the court of appeals' opinion in *McReynolds*: "[t]he remainder of the Code section [subsections (c) through (g)] explains the procedure to be followed for apportionment." 307 Ga. App. at 333. In its use of this sentence in *McReynolds*, did the court of appeals actually announce that subsections (c) and (d) were to be limited by the multiple defendant provision in subsection (b)? Such a conclusion seems contrary to the Georgia Supreme Court's recent analysis in *McReynolds* on certiorari, where it seemed to hold that subsections (c) and (d) are standalone provisions that are not limited by the preceding subsections.

[107] For example, the statute could have been structured with subsections (a) and (b) as they appear currently, with a (b)(1) instead of (c), and (b)(2)(A) and (B) instead of (d)(1) and (2). Alternatively, the Legislature could have inserted additional language in subsection (c) to read instead: "In assessing percentages of fault *pursuant to subsection (b) of this Code section*, . . ." (emphasis added). Defense attorneys can reasonably argue that the Legislature's failure to use this language, which it presumably knows how to do, results in a logical interpretation that subsections (c) and (d) are not limited by subsection (b).

[108] *See also* Order, Herrera v. Miles Properties, Inc., State Court of DeKalb County, Civil Action No. 08A83964-6 (Aug. 16, 2010), attached hereto as Exhibit "D" (allowing apportionment to nonparty and noting that the legislature neither stated nor indicated that subsection (c) applies only after application of subsections (a) and (b)).

[109] Amended Brief of Appellants at 18, Raines v. Maughan, 312 Ga. App. 303 (2011) (A11A0793).

[110] *See* Taylor v. DeKalb County, Georgia, State Court of DeKalb County, Civil Action No. 06A50694-7.

[111] *See* McReynolds v. Krebs, S11G0638 at 4-5 (Mar. 23, 2012). However, it

should be noted that the supreme court's opinion contains an apparent error in referring to what it describes as the same opening "broad statement of applicability" of subsections (a) and (b): "Where an action is brought against *more than one* person for injury to person or property . . ." (emphasis added). Clearly, subsection (a) opens with "[w]here an action is brought against *one or more* persons . . ." (emphasis added). Therefore, given that the two subsections indeed do differ as to the number of defendants required, it remains unclear whether apportionment to nonparties is allowed where only a single defendant is sued.

[112] As the defendant attempted to do in *McReynolds*, assuming some actual evidence of the settling parties' negligence exists, as was *not* the case in *McReynolds*.

[113] O.C.G.A. § 51-12-33(b) (emphasis added).

[114] *See* Order, Herrera v. Miles Properties, Inc., State Court of DeKalb County, Civil Action No. 08A83964-6 (Aug. 16, 2010) (finding apportionment to nonparty appropriate, even after dismissal of all but one defendant, because the action was originally *brought* against more than one defendant).

[115] *See* Travelers Indem. Co. v. Liberty Loan Corp., 140 Ga. App. 458, 461, 231 S.E.2d 399 (1976); Giles v. Smith, 80 Ga. App. 540, 543, 56 S.E.2d 860 (1949).

[116] Interestingly, in *Bennett v. Wal-Mart Transportation, LLC, et al.*, State Court of Bulloch County, Case No. 2B06CV406, this factual situation presented itself, but the plaintiff apparently chose not to argue the single-defendant issue, even though the only two named defendants were in a respondeat superior relationship. Instead, the plaintiff challenged the 2005 amendments on constitutional grounds. On July 5, 2007, Judge Gary L. Mikell denied the plaintiff's motion and allowed the defendants to argue that a nonparty was at fault for causing the accident forming the basis of the suit. A copy of Judge Mikell's Order is attached hereto as Exhibit "E."

[117] 304 Ga. App. at 680.

[118] O.C.G.A. § 51-12-33(b). It is not clear why the trial court or court of appeals declined to allow the defendant in *PN Express* to apportion fault to the "certain other entities" in addition to Patterson Freight Company, the company with whom PN Express, Inc. had an agency relationship. Additionally, the single-defendant argument was not raised on appeal or otherwise discussed by the court in the opinion, despite the fact that PN Express, Inc. apparently was the only defendant sued by the plaintiffs.

[119] *See* Order denying apportionment at 4-6, Salinas v. Coro Realty Advisors, State Court of Fulton County, Civil Action No. 10EV009982 (Sept. 20, 2011), attached hereto as Exhibit "F"; Order granting Plaintiff's motion for partial summary judgment, Todd v. Accor North America, Inc., State Court of Fulton County, Civil Action No. 09EV006935 (Nov. 10, 2011), attached hereto as Exhibit "G"; Plaintiff/Appellant's Brief Regarding Certified Questions at 7-9, Couch v. Red Roof Inns, Inc., Supreme Court of

Georgia, Case No. S12Q0625.

[120] *See* Plaintiff/Appellant's Brief Regarding Certified Questions at 8, *Couch*, note 119, *supra*.

[121] *See* Michael L. Wells, *Joint Liability Rules*, 39 Ga. Law Advocate 18, Spring/Summer 2005 (pre-*Cavalier Convenience*, positing that O.C.G.A. § 51-12-33 merely clarifies the law as it existed prior to the enactment of S.B. 3, namely, that joint and several liability is abolished only when the plaintiff is at fault because if joint liability has indeed been abolished, even where the plaintiff is not at fault, O.C.G.A. § 51-12-32 would be a nullity); Emily Ruth Boness, Note, *The Effect (or Noneffect) of the 2005 Amendments to O.C.G.A. Sections 51-12-31 and 51-12-33 on Joint Liability in Georgia*, 44 Ga. L. Rev. 215, 235-236, 244 (2009); Adam Hoipkemier, *Georgia's Apportionment Scheme: Reevaluating Accepted Litigation Tactics*, Feb. 15, 2012, http://www.carltonfields.com/georgiaapportionmentscheme/.

[122] Reply Brief of Cross Appellants at 12-13, K&V Meter Automation, LLC and Khafra Operations, LLC v. City of Atlanta, 2011 Ga. App. Ct. Briefs 10769 (2011) (A11A0769); Brief of Cross Appellee at 26, K&V Meter Automation, LLC and Khafra Operations, LLC v. City of Atlanta, 2011 Ga. App. Ct. Briefs 10769 (2011) (A11A0769).

[123] O.C.G.A. § 51-12-33(b).

[124] *See Cavalier Convenience*, 305 Ga. App. at 146, n.21 (citing *Murray v. Patel*, and noting that the appellants in the instant case each argued that the right of a tortfeasor to contribution would continue to be applicable in instances where one party resolves the plaintiff's entire claim by way of settlement and then pursues an action for contribution against others claimed to be responsible). *See also* Daniel J. Huff, *The Joint Tortfeasor Maze*, 24 Medical Malpractice Inst. 1, 21 (2008).

[125] 304 Ga. App. at 255 (requiring apportionment between the defendant and third-party defendant).

[126] *See* Order granting Plaintiff's motion in limine, Martin v. Six Flags Over Georgia II, L.P., et al, Cobb County State Court, Civil Action No. 09-A-55-4 (Sept. 12, 2011), attached hereto as Exhibit "H" (finding apportionment inapplicable in premises cases where there is an allegation of an intentional tort); Order denying apportionment, Salinas v. Coro Realty Advisors, et al., Fulton County State Court, Civil Action No. 10EV009982 (Sept. 20, 2011) (holding that to allow a landowner to apportion fault to a third-party criminal assailant would be an "incompatible result" under Georgia law); Order granting Plaintiff's motion in limine, Medina v. GFI Management Svcs., Inc., DeKalb County State Court, Civil Action No. 09A13159-1 (Jan. 11, 2012) (holding O.C.G.A. §§ 51-12-31 and 51-12-33 unconstitutionally vague and violative of due process and equal protection, although noting that nothing in O.C.G.A. § 51-12-33 precludes its application to negligent security cases). In his Order denying apportionment in *Medina*, Judge Alvin T. Wong described the current state of

apportionment in premises liability litigation involving third party criminal actors as a "quagmire." Additionally, in *Couch v. Red Roof Inns, Inc.*, Certified Questions from Northern District of Georgia, 1:10-CV-00045-SCJ, the Georgia Supreme Court heard oral arguments on March 6, 2012 on these very issues.

[127] 311 Ga. App. 224, 715 S.E.2d 728 (2011) (physical precedent only for Division (2)(b)).

[128] *See* Plaintiff/Appellant's Brief Regarding Certified Questions at 10, Couch v. Red Roof Inns, Inc., Supreme Court of Georgia, Case No. S12Q0625. Interestingly, these very same arguments were made in *Cavalier Convenience* by the Georgia Trial Lawyers Association and the DeKalb Rape Crises Center in their amicus curiae briefs to the Georgia Court of Appeals, effectively predicting the coming of the current "quagmire" in negligent security cases described by Judge Wong in *Medina*. Nevertheless, the court rejected these "policy arguments" in *Cavalier Convenience*, deferring to the Legislature and the doctrine of separation of powers. 305 Ga. App. at 146-147.

[129] Restatement (Third) of the Law of Torts, Apportionment of Liability, § 14.

[130] Black's Law Dictionary defines "fault" as "*[n]egligence*; an error or defect of judgment or of conduct; any *deviation from prudence*, duty, or rectitude; any shortcoming, or *neglect of care* or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course or act; bad faith or mismanagement; *neglect of duty*." Black's Law Dictionary 608 (6th ed. 1990) (emphasis added).

[131] O.C.G.A. § 51-12-33(a).

[132] *See* Order granting Plaintiff's motion in limine at 3, Medina v. GFI Management Services, Inc., DeKalb County State Court, Civil Action No. 09A13159-1 (Jan. 11, 2012). *Cf.* Order granting Plaintiff's motion in limine at 3, Martin v. Six Flags Over Georgia II, L.P., et al., Cobb County State Court, Civil Action No. 09-A-55-4 (Sept. 12, 2011) (finding that the terms "negligence" and "fault" in O.C.G.A. § 51-12-33(d) clearly evidences the Legislature's intent that the subsection be limited to cases involving negligence, rather than intentional torts).

[133] Oral arguments held on March 6, 2012, Supreme Court of Georgia, Case No. S12Q0625.

[134] Plaintiff/Appellant's Brief Regarding Certified Questions at 10-11, Couch v. Red Roof Inns, Inc., Supreme Court of Georgia, Case No. S12Q0625. Counsel for the Plaintiff/Appellant pointed out examples of multiple cases with similar facts in which juries returned verdicts that reflected disparate percentages of apportionment to the nonparty attackers. For instance, some cases have reflected heavy apportionment for the nonparty, while in others only nominal fault was found by the nonparty attacker. Counsel reasoned that such disparities show a lack of rational basis for apportionment

in these instances.

[135] Oral arguments held on March 6, 2012, Supreme Court of Georgia, Case No. S12Q0625.

[136] *Id. See also* Barth v. Coleman, 878 P.2d 319 (N.M. 1994) (allowing apportionment between defendants and third party attacker); Weidenfeller v. Star & Garter, 2 Cal. Rptr.2d 14 (Cal. App. 4 Dist. 1991) (holding that apportionment between defendant and third-party attacker was proper under Cal. Civ. Proc. Code § 1431.2, rejecting plaintiff's public policy arguments); Natseway v. City of Tempe, 909 P.2d 441 (Ariz. App. 1995). *But see* Turner v. Jordan, 957 S.W.2d 815, 823 (Tenn. 1997) (declining to allow apportionment between negligent defendant and intentional actor where the intentional conduct is the foreseeable risk created by the negligent tortfeasor); Wal-Mart Stores, Inc. v. McDonald, 676 So.2d 12, 22 (Fla. App. 1 Dist. 1996) (reasoning that if a negligent tortfeasor were to be allowed to blame an intentional wrongdoer, it would create a disincentive for the negligent tortfeasor to prevent the intentional harm from occurring); Kansas State Bank & Trust Co. v. Specialized Transp. Services, Inc., 819 P.2d 587 (Kan. 1991) (holding that negligent defendants should not be allowed to reduce their liability by intentional acts they had a duty to prevent); Brandon v. County of Richardson, 624 N.W.2d 604 (Ned. 2001) (finding it irrational to allow a negligent party to reduce its liability due to an intentional tort when the intentional tort is exactly what the negligent party had a duty to protect against); Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991) (allowing apportionment between negligent property owner and intentional attacker but only because the attack was not foreseeable, thus there was no duty on the part of the owner to prevent the attack).

[137] One example given by the appellee's counsel during oral argument was the calculation of the value of a human life in wrongful death cases, the amount of which can often vary from one case to another. However, this difficulty does not warrant a conclusion that such a calculation is unfair, irrational or impossible, as suggested by the appellant's counsel.

[138] 307 Ga. App. at 332.

[139] *Id.*

[140] *Id.* at 335; S11G0638 at 7.

[141] 307 Ga. App. at 335; S11G0638 at 7.

[142] 307 Ga. App. at 335 (emphasis added)

[143] 307 Ga. App. at 332.

[144] *Id*. at 335.

[145] An interesting point was raised by the plaintiff in *McReynolds* in her brief to the

Georgia Supreme Court: "[w]ithout evidence of GM's fault or liability, McReynolds' argument that she should have been allowed to 'mention' GM is meritless. Although every plaintiff's lawyer in Georgia wishes it were so, the mere use of unproven allegations . . . cannot form the basis of fault or liability . . ." Appellee's Response to Brief of Appellant at 4, McReynolds v. Krebs, 2011 Ga. LEXIS 400 (2011) (S11G0638).

[146] O.C.G.A. § 51-12-33(c) (emphasis added).

[147] O.C.G.A. § 51-12-33(d)(1) (emphasis added).

[148] *But see Fields*, 2012 Ga. App. LEXIS 308 (holding that despite the mandatory language found in O.C.G.A. § 51-12-33(d) as to consideration of fault of settling parties, there must be some competent evidence that the nonparty "contributed to the alleged injury or damages" before its fault can be assessed by the jury), *quoting* O.C.G.A. § 51-12-33(c). As such, it is unlikely that defendants will be able to argue successfully that juries must *automatically* consider the fault of nonparties pursuant to O.C.G.A. § 51-12-33(d).

[149] Perhaps another way of justifying the harsh outcome for Ms. McReynolds is that she was essentially arguing for a set-off, even in her "alternative" argument for apportionment. Ultimately, she sought to reduce her liability for the plaintiff's damages by the amount of GM's settlement payment or its "fault," but by arguing the latter in the alternative (i.e., that she should be allowed to apportion), she may have appeared to be seeking the identical relief as in her argument for set-off. Perhaps the court believed this was a clever attempt to obtain a set-off, disguised as apportionment.

[150] *See also* Deloach v. Deloach, 258 Ga. App. 187, 573 S.E.2d 444 (2002) (noting that where there is any evidence, however slight, upon a particular issue, it is not error for the court to charge the law in relation to that issue).

[151] 2012 Ga. App. LEXIS 308 (Mar. 20, 2012). Prior to *Fields*, it would appear that some confusion existed on whether an allegation of nonparty fault is an affirmative defense or merely an alternative theory of causation. *See* Order granting Plaintiff's motion for clarification, Johnson v. Gibson, State Court of Fulton County, Civil Action No. 10EV009486 (Feb. 17, 2011), attached hereto as Exhibit "I." In light of the *Fields* analysis, it seems reasonably clear that proving nonparty fault is in fact an affirmative defense.

[152] *See id.* (holding that defendants' claims of nonparty negligence were precluded as a matter of law because they failed to render less probable all inconsistent conclusions).

[153] Plaintiff/Appellant's Brief Regarding Certified Questions at 20-30, Couch v. Red Roof Inns, Inc., et al., Supreme Court of Georgia (S12Q0625).

[154] Order granting Plaintiff's motion in limine, DeKalb County State Court, Civil

Action No. 09A13159-1 (Jan. 11, 2012).

[155] *Id.* at 7-8.

[156] *Id.* at 8.

[157] *Id.* at 9.

[158] O.C.G.A. § 51-12-31. Additionally, O.C.G.A. § 51-12-32 contains an identical opening phrase.

[159] 305 Ga. App. at 145-146.

[160] S11G0638 at 6.

[161] *See* Slakman v. Continental Cas. Co., 277 Ga. 189, 191, 587 S.E.2d 24 (2003) (noting the rule that courts avoid a construction that makes some language mere surplusage).

[162] *See* Michael L. Wells, *Joint Liability Rules*, 39 Ga. Law Advocate 18, Spring/Summer 2005.