APPORTIONMENT OF FAULT TO A NON-PARTY – POINTING FINGERS TO VICTORY

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In 2010, David and Christian tried the case of *Herrera v. Miles Properties, Inc.* in the State Court of DeKalb County – one of the first cases in Georgia where a jury apportioned a large amount of fault to non-party criminals in a negligent security action.

Apportioning fault to a non-party is one of the most effective weapons in a defense attorney's arsenal. Its full impact was exhibited in Herrera (Hagan) v. Miles Properties, Inc, which involved the murder of a 26 year old man at an apartment complex. Two people were convicted of charges related to their involvement in the murder. Over plaintiff's objection, the Court permitted the two non-party criminals to be listed on the verdict form. The jury allocated 95% of fault to the non-party criminals and 5% to the defendant property management company.

Out of fear of similar outcomes, the plaintiff's bar has been working tirelessly in an attempt to limit defense counsel's ability to point the finger at non-parties that are at fault. Specifically, they are attempting to limit the application of O.C.G.A. § 51-12-33 to scenarios where a plaintiff is partly at fault, as opposed to scenarios where the plaintiff is "innocent." Plaintiff's parsed interpretation is contrary to the plain language and intent of the statute. Had it been accepted by the trial court, it most certainly would have significantly altered the outcome of Herrera (Hagan) v. Miles Properties, Inc.

The recent Georgia Court of Appeals decision in Cavalier Convenience, Inc. v. Sarvis,[1] correctly rejected the plaintiff's bar interpretation. This ruling has defined the parameters of Georgia's apportionment statute in future cases.

This article will examine the history of joint and several liability, the birth of apportionment of liability to non-parties, how it was used in a negligent security case, the advantages and challenges of using apportionment, and how the plaintiff's bar is attempting to chip away at the defense's ability to use it.

I. History:

A. Joint and Several Liability:

Georgia law on joint and several liability traces its roots back to the mid 1800s. In 1851 the Georgia Supreme Court held that the rule is that where there is "an action for a *joint tort* against several defendants, that the Jury are (sic.) to assess damages against all the defendants *jointly*, according to the amount which in their judgment, the most culpable of the defendants ought to pay."[2]

In 1884 the Georgia Supreme Court again addressed the issue of joint and several liability in the context of the first Georgia Code. In a case in which Plaintiff alleged false imprisonment at the hands of two defendants, the Georgia Supreme Court rejected the application of Georgia Code § 3075 which provided that "when several trespassers are sued jointly, the plaintiff may recover against all, the greatest injury done by either. But the jury may, in their verdict, specify the particular damage to be recovered of each."[3]

The Georgia Supreme Court held that section 3075 referred to trespasses committed to property and not to the commission of a personal tort such as false imprisonment. [4] The court instead held that Code Section 2992 which stated that, "If the imprisonment be the act of several persons, the party may sue them jointly or separately; and if jointly, all shall be responsible for the entire recovery" should apply.[5]

Under Georgia law there also existed a right of contribution between joint tortfeasors set forth by Georgia Code § 3008. This law, enacted in 1863, provided that, "If the judgment is entered jointly against several trespassers, and is paid off by one, the others shall be liable to him for contribution."

The Georgia Supreme Court maintained the distinction between damage to property and personal torts in 1903, when it held that where a plaintiff sought theories of recovery for trespass and malicious abuse of legal process, it was error for the court to charge the jury that they may find a verdict for the plaintiff for different amounts against the different defendants without charging also that such a verdict could only be found in the event they find for the plaintiff solely on the count in trespass.[6]

In 1975 the Georgia Supreme Court went further in defining joint liability in holding that there need not be a concert in action between joint tortfeasors in finding that defendants are joint tortfeasors, and that each defendant should be liable for the full amount of a plaintiff's damages.[7]

B. Negligence of the Plaintiff:

The Georgia Supreme Court set forth an excellent summary of the state of contributory and comparative negligence as it existed prior to the enact-

ment of OCGA § 51-12-33 in Union Camp Corp. v. Helmy,[8]. The Court held that:

> Under Georgia law, there is found what can be described as a hybrid form of the doctrines of both contributory negligence and comparative negligence.
>
> As a matter of contributory negligence, it is the rule in this state that, if the plaintiff, in the exercise of ordinary care, could have avoided the accident, he is denied recovery. O.C.G.A. § 51-11-7; see, e.g.; *Clark v. Carla Gay Dress Co.*, 178 Ga. App. 157, 160 (342 S.E.2d 468) (1986). However, in all other cases, Georgia law's comparative-negligence rule is that if the plaintiff's negligence was less than the defendant's, the plaintiff is not denied recovery although his damages shall be diminished by the jury in proportion to the degree of fault attributable to him. See, e.g., *Ga. Power Co. v. Maxwell*, 52 Ga. App. 430 (2) (183 SE 654) (1936). Thus, a tort plaintiff cannot recover if his negligence is greater than or equal to the negligence of the defendant. O.C.G.A. § 51-11-7, supra. *Walton v. United States*, 484 F.Supp. 568 (S.D. Ga. 1980).[9]

The specific question posed in Union Camp was whether defendants would be jointly and severally liable where a plaintiff's negligence was greater than one defendant but not the aggregate negligence of all defendants. The Court answered the question in the affirmative and held that "unless the plaintiff's negligence is equal to or greater than the aggregate negligence of all defendants, plaintiff may recover. Therefore, a plaintiff whose comparative fault exceeds that of one defendant but does not exceed that of another defendant is entitled to a judgment against both defendants ..."[10]

By way of example, under the law prior to the enactment of O.C.G.A. § 51-12-33, if defendant A was 50% negligent, defendant B was 5% negligent and plaintiff was 45% negligent, plaintiff could still recover 55% of an award jointly against both defendants. Defendant B, despite being much less negligent than Plaintiff, would be jointly liable and would have to resort to a contribution claim against defendant A.

C. Tort Reform Act of 1987:

Code Section 3075 cited above eventually became O.C.G.A. § 51-12-31. The 1987 version of 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 damages 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 case must be entered severally.

As noted above, this statute only applied to property damage claims.

O.C.G.A. § 51-12-32 was born of Code Section 3008 and continued to provide for the right of contribution between joint tortfeasors 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.

Finally O.C.G.A. § 51-12-33 which was first enacted in 1987 read as follows:

(a) 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.

This statute provided a better remedy for a party in Defendant B's position in the earlier illustration, as he is only liable for 5% of Plaintiff's award.

In interpreting this statute the Georgia Court of Appeals specifically noted that O.C.G.A. § 51-12-33(a) only applied to apportion fault to parties to an action, and could not be used to apportion fault to parties who had been dismissed from an action[11]. In other words, prior to 2005, O.G.C.A. § 51-12-33 did not allow for apportionment of fault to a non-party. Further, the statute is clear that apportionment was only available in cases where plaintiff was to some degree responsible for her injury. Joint liability continued to exist for an innocent plaintiff filing suit against multiple defendants.

II. Senate Bill 3 – The Birth of Apportionment of Fault to a Non-Party:

A. O.C.G.A. § 51-12-31:

The latest version of tort reform was passed in 2005 through Senate Bill 3. It made several changes to both O.C.G.A. §§ 51-12-31 and 51-12-33. O.C.G.A. § 51-12-31 was amended to 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.

The primary change is that this statute now states that a plaintiff may recover damages for an injury "only against the defendant or defendants liable for the injury." Further this statute replaces the word "trespassers" which connotes damage to property with "persons."

B. O.C.G.A. § 51-12-32:

This section was left unchanged and allows for a scenario where one "joint trespasser" may assert a contribution claim against another.

C. O.C.G.A. § 51-12-33:

The most noteworthy change was to O.C.G.A. § 51-12-33 which reads:

> (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.

The latest version of O.C.G.A. § 51-12-33 revolutionizes how liability of multiple "at fault" parties is viewed in Georgia. It also provides the defense a brand new weapon to use in defending cases – the ability to apportion fault to a non-party that contributed to the injury alleged.

The legislative intent in enacting O.C.G.A. § 51-12-33 is to hold persons accountable for their own actions and not for the actions of others, which arguably is fundamentally fair to all persons. In that context, the legislature set forth three scenarios:

Section (a) establishes guidelines pertaining to comparative negligence. In so doing, this Section provides for the scenario where a plaintiff is to some degree at fault for the alleged injury to person or property. It is equally applicable to actions where there are one or more defendants. This Section simply reduces a plaintiff's recovery by his proportion of fault; however, plaintiff is not entitled to any recovery if he is 50% or more at fault.

Section (b) establishes apportionment where multiple persons are at fault for an alleged injury to person or property. This Section apportions fault to each responsible person, both plaintiff and defendants, but does not require plaintiff to be any degree at fault. Instead, the plain language of the statute instructs the trier of fact to first reduce the total amount of damages by plaintiff's degree of fault **if any** and then to apportion damages amongst the defendants according to the percentage of fault of each defendant.

Sections (c) through (f) are entirely new sections and were added to allow for the apportionment of fault to non-parties. Section (c) states that 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**. Section (d) states that "Negligence or fault of a nonparty **shall** be considered" where Plaintiff has entered into a settlement agreement with a nonparty or where the Defendant provides **notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.** (emphasis added).

Section (e) was added to reserve defenses or immunities to defendants unless expressly stated in this section. Section (f) provides that "assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties." This section cannot be used to subject a non-party to liability and cannot be used as evidence of liability in another suit. Finally section (g) re-asserts that a Plaintiff cannot recover where he is found more than 50% liable.

III. Using Apportionment of Fault to a Non-Party:

Apportionment of fault to a non-party can be used by the defense in many different factual scenarios. The most basic is the motor vehicle accident where the phantom vehicle causes an accident, before disappearing into the night. Fault can then be apportioned against "John Doe" offering little more than a description of the mystery vehicle. This statute can also be used to apportion fault to the driver of a vehicle in which plaintiff is a passenger, where he or she is potentially liable but is not a party to the suit.

Further O.C.G.A. § 51-12-33(d) provides that fault may be apportioned against a non-party "regardless of whether the person or entity was, or could have been, named as a party to the suit." This opens the door for a party to apportion fault against parties otherwise immune or protected from suit such as a plaintiff's employer, governmental entities, or insolvent parties.

As referenced in the introduction of this article, one of the more effective uses for the apportionment statute is to apportion fault to a non-party criminal wrongdoer in a premises liability or negligent security case. These types of cases typically involve a person that is in some way harmed by a criminal who then sues an apartment complex or property management company because of their solvency rather than the person directly responsible for the harm – the likely judgment-proof (or unknown) criminal actor(s).

Traditionally, the criminal party frequently was not named and the case would be focused entirely on the acts or omissions of the apartment complex or the property management company. The apartment complex, property management company or security company would be the only names on the verdict form. Now, the apportionment statute allows a jury to properly consider the fault of the non-party criminal wrongdoer. Despite the protest by the plaintiff's bar, the plain language and intention of the apportionment statute is to hold persons accountable for their individual actions and not for the actions of others. After all, this is the very essence of individual responsibility.

The apportionment statute was used effectively in Herrera (Hagan) v. Miles Properties, Inc. In that case, Wesley Hagan was shot and killed by two individuals who conspired to rob him earlier that day. At approximately 11:00 p.m., while Mr. Hagan was walking on the grounds of the apartment complex, towards his mother's apartment, he was shot several times and died approximately one month later. The jury was informed of the names of the two individuals who were involved in the shooting, that one of those individuals pled guilty to conspiracy to commit robbery and that the other was convicted of felony murder. One of the non-party criminals even testified at trial. The jury considered the facts of the shooting and apportioned 95% of fault amongst the two people involved in the shooting and only 5% against the management company, resulting in a $9,000 verdict against the management company.

It is likely that the use of the non-party apportionment statute is more effective in a case like Herrera where the criminal wrongdoer's identity is known and the jury can identify a specific person to blame. The application of the ap-

portionment statute becomes a bit more abstract where the criminal wrongdoer escapes capture or is otherwise unknown and appears on the jury verdict only as "John Doe." Without a specific person to identify, it is easier for a plaintiff to re-direct the focus of the case away from the criminal wrongdoer and back toward the apartment complex, property management company or security company.

IV. The Future of the Apportionment Statute:

Undoubtedly, the plaintiff's bar understands the value of the addition of the non-party apportionment statute to the defense's arsenal and has made a concerted effort to limit its use. Although contrary to the clear and unambiguous language of the apportionment statute, the primary argument set forth by the plaintiff's bar is that joint and several liability is not dead and that apportionment of fault is improper in the case of an innocent (non-negligent) plaintiff. In effect, the plaintiff's bar is attempting to turn back the hands of time to the law as it existed prior to 2005.

A. Cavalier Convenience v. Sarvis

The Court of Appeals took up the issue of the apportionment statute in Cavalier Convenience, Inc. v. Sarvis.[12] Sarvis arose out of an auto accident between Sarvis and Bath, who Sarvis alleged was intoxicated at the time of the accident. Sarvis also named Cavalier Convenience, Inc. and Ken's Supermarkets as Defendants alleging that they unlawfully sold intoxicating beverages to Bath.

Prior to trial Sarvis filed a motion seeking to preclude the issue of apportionment from being argued or submitted to the jury. Essentially, Sarvis was seeking a ruling that the defendants should be jointly and severally liable for any verdict awarded to Sarvis. Defendants countered by arguing that O.C.G.A. § 51-12-33 **mandated** apportionment where multiple defendants are found liable[13]. Sarvis responded that O.C.G.A. § 51-12-33 mandated apportionment among defendants **only** in cases where the plaintiff was alleged to have been responsible for some degree for the injury and damages claimed[14]. There was no such contention that Sarvis was responsible for his injuries.

The State Court of Evans County agreed with Sarvis' position and entered an Order prohibiting any mention to the jury of apportionment of damages.[15] Essentially, liability against Bath, Cavalier, and Ken's would have been joint and several. Cavalier and Ken's applied for and were granted interlocutory appeal of this order.

The Court of Appeals reviewed the history of apportionment and tort reform in Georgia and noted that prior to 2005, O.C.G.A. § 51-12-33 only provided for apportionment where plaintiff was partially at fault. O.C.G.A. § 51-12-33(b), enacted post tort reform, provides that the trier of fact in its determination of the total amount of damages "shall **after** a reduction of damages pursuant to subsection(a), **if any,** apportion its award of damages among the persons who are liable according to the percentage of fault of each person."[16] (emphasis added).

In granting Sarvis' motion, the trial court held that:

> The 'after' language contemplates that comparative negligence must at a minimum be an issue considered by the jury before proceeding to apportionment under subsection (b). In a case such as this one, where there is no allegation or factual threshold as to plaintiff's fault, the jury never even considers subsection (a) and the threshold for the apportionment stage of subsection (b) is never reached.[17]

The Court of Appeals disagreed focusing on the "if any" clause following the "after". The Court held that with the insertion of this language, the legislature clearly did not intend to make plaintiff's liability a threshold issue, or to limit apportionment to cases where the plaintiff is partly at fault[18]. The Court concluded that both Sarvis and the trial court's interpretation overlooked the use of the phrase "if any".

The Court of Appeals ultimate holding was that

> where damages are to be awarded in an action brought against more than one person for injury to person or property – whether or not such damages must be reduced pursuant to O.C.G.A. § 51-12-33 (a) – the trier of fact 'shall' apportion its award of damages among the persons who are liable according to the percentage of fault of each person.[19]

The Court of Appeals noted that had the legislature wanted to limit apportionment to situations where there was a reduction of damages pursuant to subsection (a) (where Plaintiff was partly at fault) it could have specifically done so.[20]

Additionally, Sarvis argued that O.C.G.A. § 51-12-31 authorized the trial court to find that apportionment is not mandated where the plaintiff bears no fault. The Court of Appeals rejected this argument noting that the language of O.C.G.A. § 51-12-31 clearly limits its use to situations where O.C.G.A. § 51-12-33 does not apply.[21]

The Court of Appeals also rejected Sarvis' argument that such an interpretation of O.C.G.A. § 51-12-33 renders OCGA §§ 51-12-31 and 51-12-32 meaningless as there are no cases that would fall under those statutes[22]. Sarvis argued that these three statutes must be read "in pari materia" to ascertain legislative intent[23]. The Court of Appeals disagreed and held that reading statutes in pari materia may not be resorted to where the language of the statue under consideration is clear, and that this was one of those cases where the language was clear[24].

The important thing about this portion of the opinion is that O.C.G.A. § 51-12-33 does arguably render O.C.G.A. § 51-12-31 obsolete, as it is hard to envision a factual situation where this statute would apply to possibly allow for joint and several liability. However, the Court's holding was simply that this possibility need not even be addressed as the language of O.C.G.A. § 51-12-33 was clear.

Finally the Court of Appeals rejected Sarvis' public policy arguments noting that its only job was to interpret

the statute as written and that it had no authority to adopt a construction contrary to that of the legislature.[25] As noted below, several groups chimed in with their opinion as to why the Court of Appeals interpretation of the statute is bad policy.

The Georgia Supreme Court granted plaintiff's Petition for Writ of Certiorari[26], and this case was to be argued before the Georgia Supreme Court on April 20, 2011. However, the parties consented to a withdrawal of this petition on February 24, 2011, likely as the result of a settlement.

B. Sarvis and Apportionment of Fault to Non-Parties

The situation in Sarvis involved the apportionment of fault to a fellow defendant rather than a non-party; however, the decision is relevant in that the plaintiff's bar has raised identical arguments in opposition to defendants' attempts to Apportion Fault to Non-Parties. In fact there are two amicus curiae briefs referenced in the Sarvis opinion that raise arguments that you can expect the next time you attempt to apportion fault as was done in Herrera.

First, the GTLA argues that if apportionment were allowed in a case like Sarvis, a jury would likely apportion fault almost completely on the driver absolving the other defendants of any fault. This would relieve the other defendants from liability and "effectively remove any independent duty on the part of the initial tortfeasor".[27]

Second, the DeKalb Rape Crisis Center argues even more directly that:

> In a rape victim's civil action against landlord, liability of the property owner is based on its negligent conduct which exposed the victim to the intentional tort, and but for that conduct, the victim would not have been harmed. It is neither unfair nor irrational for an innocent victim to collect full damages from a negligent defendant who knew or should have known that an injury would be intentionally inflicted and failed in its duty to take reasonable steps to prevent it.[28]

Also, one should expect plaintiffs to argue that joint and several liability has existed in Georgia for over 150 years and that with the passage of the 2005 version of O.C.G.A. § 51-12-33, the legislature did not intend to change 150 years of law. Plaintiffs will reference the interplay between O.C.G.A. §§ 51-12-31, 51-12-32 and 51-12-33 in support of this argument.

With the withdrawal of the petition for certiorari, Sarvis provides a green light for defendants to properly point the finger to the responsible persons, regardless of whether the plaintiff is at fault or if those at fault are parties to the action. However, this is an issue that the plaintiff's bar will not cease contesting, meaning the Sarvis decision is likely not the end of this story.

[1] 305 Ga. App. 141 (2010).

[2] Simpson v. Perry, 9 Ga. 508 (1851).

[3] McCalla v. Shaw, 72 Ga. 458 (1884).

[4] Id. at 460.

[5] Id. at 459.

[6] Hay v. Collins, 118 Ga. App. 243 (1903).

[7] Mitchell v. Gilson, 233 Ga. 453 (1975).

[8] 258 Ga. 263 (1988) Despite being passed in 1987 O.C.G.A. § 51-12-33 did not apply to this section as it applied to actions arising after July 1, 1987 – a fact noted by the Court.

[9] Id. at 267.

[10] Id.

[11] Schriever v. Maddox, 259 Ga. App. 558 (2003).

[12] 305 Ga. App. 141 (2010).

[13] Id. at 142.

[14] Id.

[15] Id.

[16] Id. at 143.

[17] Id. at 144.

[18] Id.

[19] Id. at 145.

[20] Id.

[21] Id.

[22] In fact, the Court of Appeals recently rejected the argument that the right of contribution no longer exists in Georgia in Murray v. Patel, 304 Ga. App. 253 (2010).

[23] Id. at 146.

[24] Id.

[25] Id. at 147.

[26] 2011 Ga. LEXIS 34.

[27] Sarvis, at 147.

[28] Id.