

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

RICHARD MERLE REASONER, as  
surviving spouse of ELIZABETH  
DIANNE REASONER, deceased,

Plaintiff,

v.

ANN C. STIEN SCHWARTZ, as the  
Administrator of the Estate of TODD  
KIRK STIEN, deceased,

Defendant .

CIVIL ACTION FILE

No. 08A92811-3

ORDER

**Introduction**

This wrongful death action is specially set for trial on August 18, 2009. On May 6, 2009, Defendant GuideOne/Stien<sup>1</sup> filed a Notice and Designation of a Negligent or At Fault Nonparty pursuant to O.C.G.A. §51-12-33, along with a First Amended Answer and Defenses to Plaintiff's First Amended Complaint. Plaintiff moves to strike this defense and designation.

O.C.G.A. §51-12-33 (d) provides that a defending party shall give notice not later than 120 days before trial "that a non-party was wholly or partially at fault." The number of days between May 6, 2009, and August 18, 2009, is 104. However, in footnote 3 on page 8 of the Motion to Strike, Plaintiff states that "[i]n order to meet the Court's trial schedule, Plaintiff agreed to waive the 120 day notice requirement." Assuming this concession forecloses the simple

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<sup>1</sup>GuideOne Elite Insurance Company is the uninsured/underinsured motorist carrier for Ms. Reasoner's employer, which provided the vehicle that was involved in the subject accident. It was served with a copy of the complaint under O.C.G.A. § 33-7-11 and filed a special appearance/answer in this case.

resolution of this matter, the Court will address the statutory interpretation issues asserted by the parties.

### **Factual and Procedural Background**

This case stems from an April 1, 2007 vehicular collision that resulted in two fatalities and caused other serious injuries on Interstate 985 in Gwinnett County. Plaintiff alleges that Todd Kirk Stien was negligently, recklessly and wantonly operating a 2004 Jeep Liberty in the southbound lanes of I-985 and as a result struck the rear of another vehicle, a 1996 Chrysler Town & Country van. Plaintiff contends this caused the Liberty and the van to travel through the median of I-985 and into the northbound lanes, where the Liberty struck the 2006 Jeep Grand Cherokee Laredo. Elizabeth Dianne Reasoner, a front seat passenger in the Laredo, was killed, as was Stien.

The Consolidated Pretrial Order, filed on April 24, 2009, stated upon information and belief that Stien's actions were the result of his being attacked by his dog, which caused him to contact the van with his vehicle and caused them to cross the median. As such, the defense contended Stien was confronted with a sudden emergency.

On May 6, 2009, "Defendant GuideOne Elite/Stien" filed a First Amended Proposed Pretrial Order, along with the aforementioned Notice and Designation of a Negligent or At Fault Nonparty and the First Amended Answer and Defenses to Plaintiff's First Amended Complaint. After these amendments, Defendant's outline of the case asserts that the proximate cause of the Plaintiff's injuries was the negligent design of the highway by the Georgia Department of Transportation in failing to erect a barrier in the median that would have prevented the Liberty

and the van from crossing into oncoming traffic in the northbound lanes.

Plaintiff's motion to strike, filed June 5, 2009, asserts that under the plain language of O.C.G.A. §51-12-33 fault cannot be apportioned to a nonparty in this case because the Plaintiff was not negligent and because multiple tortfeasors were not named in this action. Indeed, Plaintiff urges that *both* contributory negligence by plaintiff and multiple defendants remain requirements under the new statutes as under the earlier version. Alternatively, Plaintiff asserts that application of the statute in the manner suggested by Defendant in this case would be unconstitutional and would conflict with the Georgia Tort Claims Act and impede the state's sovereign immunity.

Defendant's response asserts that O.C.G.A. §51-12-33 applies in the absence of any fault on the part of the Plaintiff and in an action where the plaintiff has sued only one defendant - in other words, the new version of the statute requires apportionment of several liability in all cases in single defendant cases. Defendant asserts that to read the statute otherwise would lead to absurd results. Furthermore, Defendant argues that the statutory language is sufficiently definite to withstand Plaintiff's vagueness and due process challenges and that this statute neither impedes the state's sovereign immunity nor conflicts with the Georgia Tort Claims Act.

#### Legal Analysis

The statutory language at issue in this case was enacted as a part of the Georgia Tort Reform Act of 2005. The *old* version of O.C.G.A. §51-12-33 (a), prior to its 2005 amendment, provided:

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.

Subsections (b) and (c) of the former code section addressed venue and effective date issues.

In *Schriever v. Maddox*, 259 Ga. App. 558, 561, 578 S.E.2d 210, 213-14 (2003), the Georgia Court of Appeals rejected the assertion of defendants that there should have been an instruction under the former O.C.G.A. §51-12-33 (a) on apportionment of damages with a co-defendant who had been dismissed from the case. In *Schriever*, the court found that the law did not apply apportionment to non-parties, even former parties to the action; thus, "an instruction on apportionment with him would have been inappropriate." 259 Ga. App. at 561, 578 S.E.2d at 214.

In 2005, the General Assembly amended O.C.G.A. §51-12-33, creating a new subsection (c) to allow defendants to shift blame to a nonparty for its percentage of the harm suffered by the plaintiff. It is this provision that Defendant seeks to invoke in this case to fault highway design, instead of the defendant driver. But the amendment of subsection (c) was not the only alteration the General Assembly made in O.C.G.A. §51-12-33, and thus it must be viewed in conjunction with other changes made in the statute.<sup>2</sup>

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<sup>2</sup> The current O.C.G.A. §51-12-33 provides in pertinent part:

(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

Analysis of the language of O.C.G.A. § 51-12-33

The former subsection (a) of O.C.G.A. § 51-12-33 provided that it applied "[w]here 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." (Emphasis supplied.) As a result of the conjunctive wording, the old law required both the presence of more than one defendant in the case at the time of trial, as the Court of Appeals held in *Schriever*, and that the plaintiff also be culpable to some degree for the injuries suffered.

When the General Assembly rewrote subsection (a) in 2005, the revised subsection dealt only with the reduction of damages due to comparative negligence. The new language makes clear what has always been the case - that comparative negligence principles apply even when there is only one defendant: "[w]here 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." (Emphasis supplied.)

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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.

But the General Assembly did not stop there in its redrafting of the statute in 2005. It also created a new subsection (b) to separately deal with the apportionment of damages. The new subsection (b) states in its introductory clause that it applies "[w]here an action is brought against *more than one person* for injury to person or property." (Emphasis supplied.) Thus, the plain language of this subsection makes it apply only where there are multiple defendants. It is also noteworthy that the introductory clause in the new subsection (b) is the same wording as the former subsection (a), which also applied to an action "brought against more than one person for injury to person or property." Although the General Assembly altered the language of subsection (a) in the 2005 redraft to apply to cases with a single defendant, it consciously chose to *retain* the requirement of multiple defendants when it expanded the applicability of apportionment.

In the new subsection (b), apportionment of damages is now undertaken "after a reduction of damages pursuant to subsection (a) of this Code section, *if any*." By emplacing apportionment in a separate paragraph from comparative negligence and incorporating the above cited language, the language of this code section, *read in isolation*, appears to show an intent to apportion damages irrespective of whether the plaintiff was at fault.<sup>3</sup>

Next, after re-crafting in subsection (b) the circumstances in which fault can be apportioned, the General Assembly included an introductory clause in its re-write of subsection (c). That clause states: "In assessing percentages of fault . . ." and then goes on to allow for the inclusion of a nonparty among those against whom blame can be assessed. For purposes of apportionment, the introductory clause referring to the assessment of fault percentages appears to

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<sup>3</sup> This opinion will discuss below the effect of reading this section in pari materia with other parts of the Act and unamended portions of Georgia law.

refer back to the prior subsection in which the General Assembly has set out the circumstances in which fault can be apportioned: where there is "more than one" defendant as set out in subsection (b). Had the General Assembly wanted subsection (c) to apply to any type of case in which a nonparty could be faulted, it would not have used the introductory clause. And, indeed, subsection (c) contains no language authorizing apportionment or reduction of damages by either the judge or jury. Because this is not a case "[w]here an action is brought against *more than one person* for injury to person or property," the provision in subsection (c) for shifting blame to a nonparty does not apply.<sup>4</sup>

Defendant's sole argument against the plain language of the introductory clause of subsection (b) is that it is an absurd result, because if, for instance, a plaintiff who is injured by three tortfeasors sues two of them, the fault of the absent tortfeasor is considered, but not if the plaintiff only sues one of them. Such a result is not absurd; instead it retains, in limited form, a privilege plaintiffs have had from time immemorial - to pursue their rights against an individual guilty party without tracking down every remotely responsible party.<sup>3</sup> Defendant's broad reading

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<sup>4</sup> GuideOne Elite Insurance Company has not alleged that it is a "party" to this action. A special appearance and participation in litigation by an uninsured motorist carrier would not create multiple parties for purposes of the statute in any event. Although prior pleadings were ambiguous, the Pretrial Order states that it "shall be defending this case exclusively in the name of Todd Kirk Stien." Even where an uninsured motorist carrier defends in its own name, it would not be an action "brought against more than one person for injury to person," and GuideOne is not a tortfeasor.

<sup>3</sup> Assuming arguendo that O.C.G.A. § 51-12-33 applies to all cases of multiple tortfeasors, irrespective of fault of the plaintiff, giving effect to the introductory phrase of O.C.G.A. § 51-12-33(b), limiting apportionment and reduction of damages to cases involving multiple parties, operates in a fair fashion to allow the plaintiff a remedy for the wrong done him. It mitigates conflict with the longstanding principle that every right should have a remedy, while addressing the evil of trolling for deep pockets among those peripherally and very remotely responsible. A plaintiff is not likely to sue a remotely involved defendant by himself - it would be

of the statute, however, would violate an important principle of statutory construction.

Statutes in derogation of the common law "must be strictly construed and never extended beyond their plain and explicit terms." *Stanfield v. Glynn County*, 280 Ga. 785, 787, 631 S.E.2d 374 (2006); accord, *Killearn Partners, Inc. v. Southeast Props.*, 279 Ga. 144, 146, 611 S.E.2d 26 (2005) (statutory language must be read literally), *Baylis v. Daryani*, 294 Ga. App. 729, 731-32, 669 S.E.2d 674, 677 (2008); *Stoker v. Severin*, 292 Ga. App. 870, 874 (n. 10), 665 S.E.2d 913 (2008) ("cannot be extended to cases not enumerated in the statutes, and the courts have no power to enlarge the remedy").

The legislature is presumed to act with knowledge of this rule of construction, and with that body only lies the right and privilege to grant rights not given under the common law and to extend and broaden any rights so granted. Such is not the function of the courts.

*Delta Airlines, Inc. v. Townsend*, 279 Ga. 511, 512, 614 S.E.2d 745 (2005). Here, the legislature, while extending defendants' rights to apportion the responsibility for damages, chose to retain the existing limitation to suits "brought against more than one person." Accordingly, an interpretation that preserves the common law right of a plaintiff to severally sue a single responsible party for all of his or her damages is to be favored.

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very hard to establish proximate cause considering the predominant fault of those whose are not present (and even a shadow of contributory fault would be compared to that small amount of fault of the named defendant). But the wronged plaintiff would still have the right to a complete recovery by selecting a substantially liable defendant, and that defendant in turn would have the right to contribution against the other responsible parties, a remedy that has been deemed sufficient for more than a century. Or the plaintiff could elect, instead, to proceed against multiple responsible parties and have each defendant pay only the share that accords with its own degree of fault. Arguably, such an interpretation would mitigate much of the perceived problems of searching for a deep pocket while mitigating some of the ill effects on the injured plaintiff of the solution.

### Interpretation in pari material with other provisions

In the same section of the same Act with the revisions of O.C.G.A. § 51-12-33, the General Assembly also revised O.C.G.A. § 51-12-31. The changes are shown below (new language in *italics*, old language struck through):

Except as provided in Code Section 51-12-33, where an action is brought jointly against ~~several trespassers persons~~, the plaintiff may recover damages for the greatest injury done by any of the defendants ~~against all of them~~ *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 first item which leaps out is that this Code Section is only to apply when O.C.G.A. § 51-12-33 does not. And Section 15 of the Act makes the new provisions of both Section 31 and Section 33 "apply only with respect to causes of action arising on or after the effective date of this Act, and any prior causes of action shall continue to be governed by prior law." Accordingly, the Defendant's independent interpretation of O.C.G.A. § 51-12-33 would make the revised language, and indeed the entirety, of O.C.G.A. § 51-12-31 meaningless.<sup>6</sup> There would be literally no cases "where an action is brought jointly against several persons" which would be outside the scope of O.C.G.A. § 51-12-33 under Defendant's interpretation. "The two statutes are 'in pari materia' since they relate to the same subject matter, and it is an elementary rule of statutory construction that statutes in pari materia be construed together." *Synder v. State*, 283 Ga. 211, 214, 657 S.E.2d 834, 837 (2008). "It is a basic rule of construction that a statute or constitutional provision should be construed to make all its parts harmonize and to give a

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<sup>6</sup> In this case, there is a single injury, death, and the new language of O.C.G.A. § 51-12-31 would not suggest a severance of damages if the Georgia DOT was a party. Rather, the Plaintiff could recover damages against "the defendant or defendants liable for the" death.

sensible and intelligent effect to each part, as it is not presumed that the legislature intended that any part would be without meaning,' *Houston v. Lowes of Savannah*, 235 Ga. 201, 203 (219 S.E.2d 115) (1975).'<sup>7</sup> *Gilbert v. Richardson*, 264 Ga. 744, 747-748(3), 452 S.E.2d 476 (1994).'<sup>7</sup>

### Conclusion

It does less violence to the rules of statutory construction to lay no weight on the reorganization of former subsection (a) into two subsections in the 2005 revision than to render meaningless an entire Code Section. The revision of O.C.G.A. § 51-12-31 lends no support to an intent to eliminate joint liability in all cases. Therefore Plaintiff's reading of O.C.G.A. § 51-12-33, limited to cases involving contributory negligence by the Plaintiff in accordance with its previous meaning, is superior to an interpretation which extends the reach of O.C.G.A. § 51-12-33 to all cases involving multiple tortfeasors, excluding *any* cases from the reach of Section 31. Such an interpretation is also consistent with the decision to leave O.C.G.A. § 51-12-32 unamended - that "[e]xcept 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."<sup>8</sup> And, most importantly, such a limiting construction is also in accordance with the principle that statutes in derogation of the common

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<sup>7</sup> The precise meaning of "damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury" is not relevant to this decision. Suffice it to say that, construed in the light of the limited construction of changes from the common law, it would not suggest an intent to abolish joint and several liability. And given that this language is only intended to apply in cases where Section 33 does not, the language concerning apportionment in Section 33 cannot be used to read such an intent in Section 31.

<sup>8</sup> This Code section gives a remedy for a defendant sued singly and required to pay all of the damages; under Defendant's interpretation, the Code section would only be applicable when a Defendant slept on its rights in failing to proceed under O.C.G.A. § 51-12-33(d).

law "must be strictly construed and never extended beyond their plain and explicit terms."

*Stanfield v. Glynn County*, 280 Ga. 785, 787, 631 S.E.2d 374 (2006).

Finally, it cannot be the case that reduction of damages is available where there is an empty chair to point to, but no possibility of obtaining relief from that absent party, but is not available when the other person allegedly at fault is a party present and defending itself and subject to being assessed with responsibility for the damages. Such a result would not only be absurd, but also a violation of equal protection.

Accordingly, the Court finds that Defendant cannot seek to apportion blame with a nonparty because there is, and at all times has been, only one Defendant in this case and there is no assertion of contributory negligence on the part of the Plaintiff. Therefore, Plaintiff's Motion to Strike Defendant's Fifth Defense and Notice and Designation of a Negligent or At Fault Party, filed on June 5, 2009, is GRANTED.

SO ORDERED, this 30 day of July, 2009.

*Wayne M Purdom*  
WAYNE PURDOM, JUDGE  
STATE COURT OF DEKALB COUNTY

Copy to:  
All parties (kw)

FILED IN THIS OFFICE  
THIS 27<sup>th</sup> DAY OF July 2009  
*C. W. Merck*  
Clerk, State Court, DeKalb County