

IN THE STATE COURT OF HENRY COUNTY

STATE OF GEORGIA

FILED IN OFFICE  
STATE COURT  
HENRY COUNTY, GA

OCT 21 2009

FOR  
MICHELE B. GARDNER  
CLERK OF STATE COURT, HENRY COUNTY, GA

MICHAEL D. SPINA, Individually and as )  
Administrator of the Estate of )  
HEATHER JEANNE SPINA, and )  
KAREN L. SPINA, Individually, )

Plaintiffs, )

vs. )

HENRY COUNTY, GEORGIA; )  
TERRY MCMICKLE; )  
TONY O'NIELL; )  
ERNEST DUFFBY; and )  
STEVE MCKIBBEN; )

Defendants. )

CIVIL ACTION FILE NO.: 08SV02639

**ORDER GRANTING IN PART PLAINTIFFS' MOTION TO STRIKE DEFENDANTS'  
NOTICE REGARDING JOINT AND SEVERAL LIABILITY**

The above-styled case comes before the Court on Plaintiffs' Motion to Strike Defendants' Notice Regarding Joint and Several Liability. Defendants filed the aforementioned Notice Pursuant to O.C.G.A. § 51-12-33(d) on May 18, 2009, giving notice that Richard L. Thelwell, a former party to this action, was "wholly or partially at fault for the injuries and damages alleged by Plaintiffs in this action." Defendants contend that, having filed such a notice, "they will be entitled to an apportionment of damages pursuant to O.C.G.A. § 51-12-33, and that their liability and damages, if any, shall be limited to the percentage of fault the trier of fact may assign to these Defendants and these Defendants only." Plaintiffs have moved the Court to strike Defendants' notice, arguing that O.C.G.A. § 51-12-33 is inapplicable to the instant action, and so Defendants are not entitled to the apportionment and allocation of damages provided for therein. For the reasons discussed below, Plaintiffs' motion is hereby **GRANTED IN PART**.

The issue raised by Plaintiffs' motion is the applicability of O.C.G.A. § 51-12-33 in an action

where it is undisputed that the plaintiff was not responsible to any degree for the injury or damages claimed. The facts pertinent to this determination are not contested. On July 28, 2006, Richard L. Thelwell [hereinafter "Thelwell"] was operating a motor vehicle on a road maintained by Henry County. The road had recently been repaved by Henry County, and the county employees now named as Defendants [hereinafter "the individual Defendants"] were responsible for the repaving of the road in various capacities. Thelwell's vehicle drove off the side of the road, and as Thelwell attempted to reenter the roadway, he crossed into the opposite lane of travel, and fatally struck Heather Jeanne Spina [hereinafter "Ms. Spina"], who was traveling in the opposite direction on a motorcycle.

Plaintiffs brought this action on July 28, 2008, being Ms. Spina's parents, with Michael D. Spina also having been appointed administrator of Ms. Spina's estate. Initially, this action was filed against Henry County, the individual Defendants, and Thelwell. None of the Defendants alleged that Ms. Spina was at all responsible for the collision that took her life. By consent of all parties, Plaintiffs' action against Thelwell was dismissed on April 7, 2009. Correspondence between Thelwell's attorney and the Court reflect that this dismissal was pursuant to a settlement agreement. Plaintiffs' action against the remaining Defendants has not yet been scheduled for jury trial, but the Scheduling Order entered by the Court reflects that the period for discovery will extend into November. Defendants filed the notice at issue on May 18, 2009, and Plaintiffs moved the Court to strike the notice on June 15, 2009.

#### **The Laws that May Apply**

Article 2 of Chapter 12, Title 51 [hereinafter "Article 2"], addresses the award of damages against joint tort-feasors 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.

O.C.G.A. § 51-12-31.

(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.

...

O.C.G.A. § 51-12-33

Both parties place strong emphasis on Ga. L. 2005, 1, §12 (Senate Bill 3 of the 2005-2006 Legislative Session, commonly referred to as "tort reform" legislation; hereinafter "SB3") and the changes made therein to both O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33. The Court will therefore outline these changes to fully address the parties' arguments. O.C.G.A. § 51-12-31 was modified as follows:

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~~ an injury caused by any of the defendants against ~~all of them~~ 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.

Prior to SB3, the ability to apportion damages under O.C.G.A. § 51-12-31 was limited to cases involving property damage. *McCalla v. Shaw*, 72 Ga. 458, 458 (1884) (“We think that this section refers to trespasses committed on property, and not to such a tort as is set forth in the declaration of defendant in error”).

Via SB3, O.C.G.A. § 51-12-33 was also substantially revised, and added to. The previous version reads as follows, in pertinent part:

(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.

Therefore, in an action for personal injuries or wrongful death, “[u]nder Georgia law [before SB3], liability may [have been] apportioned among joint tortfeasors only if the plaintiff was negligent and was therefore partly responsible for the injury. O.C.G.A. § 51-12-33. If the plaintiff [was] not partly responsible for the injury, joint tortfeasors [were] equally liable for the judgment, regardless of their relative degree of responsibility.” *Rust Intern. Corp. v. Greystone Power Corp.*, 133 F.3d 1376, 1382 (11th Cir. 1998).

### **Principles of Statutory Construction**

The dispute at hand centers on the meaning of the language in Article 2. The parties reach different conclusions as to both the meaning of the words in the present statute and the intent of the legislature, as expressed through the changes made in SB3. In determining the meaning of the law, the Court’s primary task is always to determine the intent of the legislature. “The cardinal rule in

construing a legislative act is 'to ascertain the legislative intent and purpose in enacting the law, and then to give it that construction which will effectuate the legislative intent and purpose.'" *Carringer v. Rodgers*, 276 Ga. 359, 363 (2003), quoting *City of Jesup v. Bennett*, 226 Ga. 606, 608 (1970). "When construing statutory phrases, of course, we look diligently for the General Assembly's intention, bearing in mind relevant old laws, evils sought to addressed and remedies interposed." *TermNet Merchant Services, Inc. v. Phillips*, 277 Ga. 342, 344 (2003). "The best indicator of the General Assembly's intent is the statutory text it actually adopted." *Chase v. State*, 285 Ga. 693(2) (June 15, 2009).

The search for legislative intent in SB3 is complicated by the existence of arguably contradictory provisions within the bill itself. As the Court determines how Article 2 requires damages to be awarded by the jury in the instant case, it is mindful that the "construction [of statutes] must square with common sense and sound reasoning." *Smith v. State*, 297 Ga.App. 300, 304 (2009), quoting *Tuten v. Brunswick*, 262 Ga. 399, 404 (1992). In addition to such broad guidance, there are specific rules of statutory construction applicable in the circumstances of this case.

The Court is interpreting two separate subsections of Article 2, with one party asserting that each applies to the instant case to the exclusion of the other. "Under the principles of statutory construction, 'in construing language in any one part of a statute, a court should consider the entire scheme of the statute and attempt to gather the legislative intent from the statute as a whole.' (Citation omitted.) *Footstar v. Liberty Mut. Ins. Co.*, 281 Ga. 448, 450 (2006). Different parts of a statutory scheme should be read in a manner that renders them consistent and harmonious. *Id.*" *Walker County v. Tri-State Crematory*, 292 Ga.App. 411, 414-415 (2008). Accordingly, the Court cannot focus on the language of any single subsection, as it is urged to by the parties' primary arguments.

The parties' arguments also tend to violate other rules of statutory construction. The

language of the statute is subject to varying interpretations, and both parties have argued constructions that render certain words meaningless. Furthermore, if the language of the differing subsections is found to be contradictory, one interpretation would render entire subsections meaningless. "A statute must be construed 'to give sensible and intelligent effect to all [its] provisions and to refrain from any interpretation which renders any part of the statute meaningless.' (Citation and punctuation omitted.)" *Handel v. Powell*, 284 Ga. 550, 554-555 (2008), citing *R.D. Brown Contractors v. Bd. of Ed. of Columbia County*, 280 Ga. 210, 212 (2006). "One aid in fulfilling our duty to construe statutes as intended by the legislature is to give meaning to each part of the statute and to avoid constructions which render a portion of the statute mere surplusage." *Moritz v. Orkin Exterminating Co., Inc.*, 215 Ga.App. 255, 256 (1994). In interpreting Article 2, the Court must therefore give effect to all of the words used, and preserve the meaning of the various subsections, seeking to harmonize conflicting provisions, rather than discarding one in favor of another.

Finally, the current language of the statute is the result of the wide-ranging reform of civil practice in SB3, which included, arguably, changes to common law rules. However, "[t]he common-law rules are still of force and effect in this State, except where they have 'been changed by express statutory enactment or by necessary implication.'" *Fortner v. Town of Register*, 278 Ga. 625, 626 (2004), citing *Robeson v. International Indem. Co.*, 248 Ga. 306, 307 (1981). Therefore, the Court will not construe SB3's changes to Article 2 as preempting common law rules unless there is clear evidence of legislative intent to do so.

Among the possible bases in SB3 for any change to the common law are the addition, modification, and omission of certain provisions. "[A] legislative body should always be presumed to mean something by the passage of an act." *Transportation Ins. Co. v. El Chico Restaurants, Inc.*, 271 Ga. 774, 776 (1999). With respect to the language that was not changed, "[i]f there is nothing in

the legislation that indicates that the phrases used were to have a new and different meaning, they are construed as having the same meaning that was attached to them before the amendment.” *Retention Alternatives, Ltd. v. Hayward*, 285 Ga. 437, 440 (2009).

**Plaintiffs’ Argument: O.C.G.A. § 51-12-31 Applies Exclusively**

Plaintiffs contend that O.C.G.A. § 51-12-31 offers the sole direction to the jury for apportionment of damages where the plaintiff was not at fault. In support of this argument, Plaintiffs note that, before SB3, “Georgia follow[ed] the common law rule against apportionment of damages among joint and several tortfeasors’ . . . It [was often] held that a verdict which seeks to apportion damages among joint tortfeasors in violation of this rule is ‘illegal.’” *Walker v. Bishop*, 169 Ga.App. 236, 240 (1983), quoting *Craven v. Allen*, 118 Ga.App. 462 (1968). Changing a common law rule can only be accomplished “by express statutory enactment or by necessary implication.” *Robeson*, 248 Ga. at 307. Plaintiffs argue that SB3 fails to abrogate the common law in cases where the plaintiff was not at fault because: (1) O.C.G.A. § 51-12-31 still permits the joint liability of all responsible defendants; (2) O.C.G.A. § 51-12-32 was untouched by SB3, and expressly provides for joint and several liability;<sup>1</sup> and (3) O.C.G.A. § 51-12-33 is limited, in its entirety, to cases where the plaintiff is at fault to some degree.

The survival of joint and several liability in O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-32 is addressed in the discussion on Defendants’ argument, below. Plaintiffs’ third argument asserts that all subsections of O.C.G.A. § 51-12-33 apply only in cases where the plaintiff was at fault to some

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<sup>1</sup> O.C.G.A. § 51-12-32 provides 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.

extent. The Court first notes that the Code Section 51-12-33 is entitled "Apportionment of damages in actions against more than one person where plaintiff is to some degree responsible for injury or damages claimed." However, "[t]he descriptive heading . . . of a Code section does not constitute a part of such statute and is not controlling regarding the construction or interpretation thereof." *Legum v. Crouch*, 208 Ga.App. 185, 189 (1993).

More instructive is the distinction between the opening sentences in first two subsections. O.C.G.A. § 51-12-33(a) begins: "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..." Plaintiffs argue that the limitation "and the plaintiff is to some degree responsible for the injury or damages claimed" therefore applies to the entire Code section. However, O.C.G.A. § 51-12-33(b) begins with the same language, "Where an action is brought against more than one person for injury to person or property..." but omits the limitation "and the plaintiff is to some degree responsible for the injury or damages claimed." If the introductory language of (a) was intended to be understood as applying to the entire code section, why repeat part of it in (b)? The legislature having declined to limit O.C.G.A. § 51-12-33(b) to cases where "the plaintiff is to some degree responsible for the injury or damages claimed," the Court will not now do so.

The Court must, rather, give meaning to the legislature's decision to create differing opening sentences to the subsections.

The rules of statutory interpretation demand that we attach significance to the Legislature's action in removing the emphasized, limiting language. ... We must presume that the Legislature's failure to include the limiting language was a matter of considered choice. ... Further, under the rules of statutory construction, the omitted language cannot be deemed a redundancy or meaningless surplusage.

*Transportation Ins. Co.*, 271 Ga. at 776. Before SB3, O.C.G.A. § 51-12-33 was limited to cases where the plaintiff was at fault. SB3 divided the statute into multiple subsections, and the Legislature removed the limitation from subsection (b). The Court must attach significance to this

omission, and therefore will not impute the limiting language in subsection (a) to subsection (b). The Court therefore finds that O.C.G.A. § 51-12-33(b) applies to cases where the plaintiff was not at fault to any degree.

Plaintiff does not explicitly argue that the following limitation survives, but the parties note that O.C.G.A. § 51-12-31, before SB3, was limited in application by *McCalla*, 72 Ga. at 458. In *McCalla*, the Supreme Court stated as follows:

[T]he defendant in error insisted that section 3075 of the Code controls this case, in which it is 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." We think that this section refers to trespasses committed on property, and not to such a tort as is set forth in the declaration of defendant in error. We think that the court should have refused to receive the verdict rendered in this case, and he should have instructed the jury that, if they found damages of three hundred dollars against *McCalla*, then they should find the same amount against *Stewart*, as they were jointly liable and responsible for the entire recovery.

*Id.* As a result, the Supreme Court and Court of Appeals have held that the ability to apportion damages in O.C.G.A. § 51-12-31 "applies only to trespasses to property and not to actions for personal torts." *Union Camp Corp. v. Helmy*, 258 Ga. 263, 268 (1988).

The source of this limitation is not apparent from the opinion in *McCalla*. However, the effect was clear—apportionment was not permitted, except in cases involving property damage. *See, e.g. McCarthy v. Combs*, 78 Ga.App. 426, 427 (1948) ("This being a case for personal injuries a several verdict against the joint defendants is illegal"). All cases reviewed by the Court that apply this limitation either cite directly or indirectly to the Supreme Court's opinion in *McCalla*. The Court's interpretation of O.C.G.A. § 51-12-33(b) would therefore broaden the scope of joint and several liability beyond the common law rule prior to SB3, to the derogation of the limitation expressed by *McCalla*. The Court finds that the language in O.C.G.A. § 51-12-33(b) is a sufficiently express removal of the *McCalla* limitation—O.C.G.A. § 51-12-33(b) applies in cases "[w]here an

action is brought against more than one person for injury to *person or property*." (Emphasis added). Furthermore, the Court finds that the change of the word "trespassers" in O.C.G.A. § 51-12-31 to "persons" is an indication "that the phrases used [are] to have a new and different meaning." *Retention Alternatives, Ltd.*, 285 Ga. at 440.

The Court also notes that the plain language of O.C.G.A. § 51-12-31 does not limit its application to cases involving property damage. The *McCalla* opinion does not state that the use of the word "trespassers" was the reason for the limitation, but, absent that word, the Court does not find any basis for such a restriction in the language of the statute.

We recognize the well-established rule of construction that absent a clear indication to the contrary, this Court should accord to virtually identical language in successor provisions the same construction given the original language. See, e.g., *Bibb County v. Hancock*, 211 Ga. 429, 432 (1955); *Thompson v. Talmadge*, 201 Ga. 867, 885 (1947). This rule reflects the value of consistency in the interpretation of legal language. But this rule cannot be allowed to take precedence over the cardinal rule of construction, which is to ascertain the true intention of the drafters and interpret the language to effectuate that intent. *Price v. City of Snellville*, 253 Ga. 166, 167 (1984); *Laurens County v. Keen*, 214 Ga. 32, 33 (1958); *Wellborn v. Estes*, 70 Ga. 390, 397 (1883).

*City of Thomaston v. Bridges*, 264 Ga. 4, 6 (1994). The Court having found legislative intent that O.C.G.A. § 51-12-33(b) applies in tort cases where the plaintiff was not at fault, the common law rule against apportionment in such cases was accordingly abrogated by SB3.

Plaintiffs further argue that O.C.G.A. § 51-12-33(b) only applies, by its language, "after a reduction of damages pursuant to subsection (a) of this Code section," that is, where the jury has assessed some fault on the part of plaintiff. Plaintiffs' reading, however, ignores or mistakes the effect of the words "if any," following the above-quoted phrase. Without the words "if any," Plaintiffs could make a persuasive argument that the subsection applies *only* "after a reduction of damages pursuant to subsection (a) of this Code section." However, with the addition of "if any," it is clear that the action contemplated by subsection (b) is not contingent upon a reduction pursuant to

subsection (a), but rather will simply happen "after" such a reduction, if there is one. Plaintiffs' interpretation would render the words "if any" mere surplusage, a violation of the rules of statutory construction. Subsection (b), therefore, applies "[w]here an action is brought against one or more persons for injury to person or property." But what does it do?

**Defendants' Argument: O.C.G.A. § 51-12-33 Applies Exclusively**

Defendants argue that O.C.G.A. § 51-12-33(b) reflects the legislature's intent in all cases where an action is brought against more than one defendant, regardless of the plaintiff's fault. The Court has come to the same conclusion, but Defendants further contend that the apportionment of damages described therein is mandatory in all such cases. Defendants' argument relies primarily on the changes made to Article 2 by SB3. Before SB3, Defendants note, the jury was permitted to apportion damages under O.C.G.A. § 51-12-33, but was not required to do so. Therefore, before SB3, both O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33 permitted, without mandating, apportionment of damages, in cases to which they applied (that is, as to O.C.G.A. § 51-12-31, claims for property damage, *see McCalla*, 72 Ga. at 458; and as to O.C.G.A. § 51-12-33, claims where the Plaintiff was partly at fault). Defendants argue that the changes made to O.C.G.A. § 51-12-33 make mandatory the apportionment that was permissive, and reveals legislative intent that joint and several liability be abolished in Georgia. Defendants contend that this intent is so strong that it overcomes any permissive language in O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-32.

Defendants thus concede Plaintiff's arguments, enumerated above, that O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-32 would be rendered meaningless by interpreting O.C.G.A. § 51-12-33 as offering the exclusive direction to the jury in awarding damages against multiple defendants. Both O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-32 begin with the phrase "[e]xcept as provided in Code Section 51-12-33." Both code sections provide for the ability of the jury to award damages jointly against multiple defendants. If O.C.G.A. § 51-12-33 applied exclusively to *all* cases against multiple

defendants, then the "exceptions" contained in O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-32 would not apply to any cases at all. Consequently, a reading of O.C.G.A. § 51-12-33 as mandating apportionment of damages, regardless of the fault of the plaintiff, would render O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-32 meaningless.

To interpret O.C.G.A. § 51-12-33 as abolishing the common law rule of joint and several liability would violate the rule against rendering sections of the law "mere surplusage," as cited above. "In addition, when we are interpreting a statute, we must presume that the General Assembly had full knowledge of the existing state of the law and enacted the statute with reference to it." *Chase v. State*, 285 Ga. 693(2) (June 15, 2009). Making this presumption, the Court cannot conclude that the legislature intended to eliminate joint and several liability in all cases, but, having "full knowledge of the existing state of law" in O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-32, left those two sections extant purposefully.

As to Defendant's broad argument that joint and several liability was abolished in Georgia by SB3, the Court does agree that there was express legislative intent to substantially reform actions based in tort. "However, it is "presumed that the legislature did not intend to effect a greater change than is clearly apparent either by express declaration or by necessary implication." [Cit.] *SRM Realty Services Group v. Capital Flooring Enterprises*, 274 Ga.App. 595, 599 (2005)." *Etrod v. Cowart*, 284 Ga. 869, 872 (2009). The legislature made no express declaration in SB3, or otherwise, that joint and several liability has been abolished in Georgia. As discussed above, there is no necessary implication that joint and several liability has been abolished by the amendments to O.C.G.A. § 51-12-33; in fact, it is necessary to find the opposite to give any meaning to O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-32. Accordingly, the Court finds that joint and several liability survives, although it is no longer the sole means of awarding damages in cases against joint tortfeasors.

**The Court's Interpretation: O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33 Both Apply**

The Court chooses neither path offered by the parties, but determines that the two code provisions must be read together as providing the jury with discretion, in whether to apportion damages, and direction, should the jury choose to do so, regardless of the fault of the plaintiff. In doing so, the Court faces the apparent discrepancy between the permissiveness of the two code sections. O.C.G.A. § 51-12-31 provides that, "[I]n its verdict, the jury *may* specify the particular damages to be recovered of each defendant." (Emphasis added). O.C.G.A. § 51-12-33 states that "the trier of fact, in its determination of the total amount of damages to be awarded, if any, *shall* after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person." (Emphasis added).

Defendants rely on the use of the word "shall" in arguing that O.C.G.A. § 51-12-33 mandates the apportionment of damages in all cases against multiple defendants. "The general rule is that 'shall' is recognized as a command, and is mandatory." *Baylis v. Daryani*, 294 Ga.App. 729, 730 (2008). This general rule sometimes bends, however, to the need to harmonize code sections or otherwise make logical sense of the law. "[A] court's duty is 'to reconcile, if possible, any potential conflicts between different sections of the same statute, so as to make them consistent and harmonious.'" *Sikes v. State*, 268 Ga. 19, 21 (1997), quoting *Ellis v. Johnson*, 263 Ga. 514, 515 (1993). In this case, the two code sections can be reconciled by recognizing that "shall" need not always be construed to be mandatory. The mandatory nature of the word "shall" is "general," and "the word . . . need not always be construed in that fashion." *Lewis v. State*, 283 Ga. 191, 195 (2008); see also *State v. Parlor*, 281 Ga. 820, 821 (2007) (defendant "contend[ed] that the wording of O.C.G.A. § 15-12-40(a)(1) that the jury list 'shall' be updated at least biennially makes that task mandatory for the board of jury commissioners, rather than directory. However, the word 'shall' was

present in the statutes involved in [the Supreme] Court's prior decisions . . . and we remain convinced that the provision is directory"). The Court therefore interprets the "shall" in O.C.G.A. § 51-12-33 to mean that it is mandatory that any apportionment be according to the percentage of fault, while continuing to vest the jury with discretion to apportion damages or not, under O.C.G.A. § 51-12-31.

As Defendants note, O.C.G.A. § 51-12-33, in its previous form, contained the word "may," and the current statute includes the word "shall." However, this change does not so strongly express legislative intent to abolish joint and several liability when taking into account that, not only was O.C.G.A. § 51-12-31 left extant by SB3, but the use of the word "may" remains therein. To the extent that the word "shall" pertains to the apportionment of damages by the jury pursuant to O.C.G.A. § 51-12-33, it is in conflict with O.C.G.A. § 51-12-31, so long as the Court interprets the use of the word "shall" as removing all discretion. Therefore, the Court will not construe it in such a manner.

"[T]he context ought to be very strongly persuasive before [the word 'shall'] is softened into a mere permission." (Citations and punctuation omitted.) *Rickett v. State*, 276 Ga. 609, 610 (2003), *Meagher v. Quick*, 264 Ga.App. 639, 643 (2003). The Court finds that the context of the word "shall" in O.C.G.A. § 51-12-33(b) is sufficiently strong to justify this interpretation; indeed, it appears to be the only means available to the Court to apply the legislature's intent here and give meaning to the entirety of all applicable statutes without reducing any of them, or any part of them, to meaninglessness. To interpret the jury's apportionment of damages as permissive, rather than mandatory, in both Code sections would "reconcile ... any potential conflicts between different sections of the same statute, so as to make them consistent and harmonious." *Sikes v. State*, 268 Ga. at 21.

The language of the opening clause of O.C.G.A. § 51-12-31 does not preclude this

interpretation. "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." O.C.G.A. § 51-12-31 (emphasis added). To interpret the statute without rendering this language mere surplusage, there must be some distinction between O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33. Before SB3, this distinction lay in the applicability of O.C.G.A. § 51-12-33 only when the plaintiff was at fault to any degree, as both statutes permitted allocation of damages. Having remained unchanged, the Court finds that this language continues to refer to cases where plaintiff is at fault to some degree, although it exists only in subsection (a). In those cases, the contributory negligence is taken into account first, before proceeding to the discretionary apportionment.

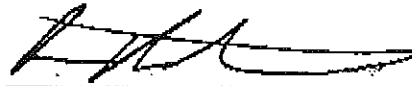
The Court believes that this interpretation of Article 2 best reflects the intention of the General Assembly — to provide for apportionment of damages when the plaintiff was not at fault, reflected by the omission of limiting language in the scope of O.C.G.A. § 51-12-33(b), but to leave the option of joint and several liability available to the jury, reflected by the failure to substantially amend O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-32.

#### **Whether Defendants' Notice Pursuant to O.C.G.A. § 51-12-33(d) Should be Stricken**

The Court has determined that O.C.G.A. § 51-12-33 is not inapplicable in its entirety on the basis that Plaintiffs were not at fault, as Plaintiffs argued. Rather, the Court finds that only O.C.G.A. § 51-12-33(a) is limited to cases where the plaintiff is at fault to some degree. Therefore, the Court finds that Defendants' Notice Pursuant to O.C.G.A. § 51-12-33(d) shall remain a part of the record, to the extent that it permits the jury to consider the negligence of Thelwell. However, the language in the Notice contending that the jury *must* apportion damages pursuant to O.C.G.A. § 51-12-33 is inconsistent with the permissive language in O.C.G.A. § 51-12-31, and is hereby stricken. Plaintiff's

Motion to Strike Defendants' Notice Regarding Joint and Several Liability is accordingly  
**GRANTED IN PART.**

**SO ORDERED** this 21 day of October, 2009.



**BEN W. STUDDARD III**, Chief Judge  
State Court of Henry County