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# PLAINTIFFS PURSUE JUDICIAL NULLIFICATION OF GEORGIA PREMISES LIABILITY LAW

by  
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Georgia's 2005 Tort Reform Act (the "Act") essentially abolished joint and several liability in the state. Notably, under the Act, joint-tortfeasors are liable only for their individual portion of damages as determined by the trier-of-fact, fault may be assessed against nonparties, and the persons liable do not share joint liability. A controversial section of the Act states that "*negligence or fault of a nonparty can also be considered* if the plaintiff entered into a settlement agreement with the nonparty or if a defendant gives the plaintiff notice that a nonparty is wholly or partially at fault within 120 days prior to the date of trial." O.C.G.A. § 51-12-33(d)(1) (emphasis added).

Georgia trial courts have permitted apportionment of liability among multiple tortfeasors in several premises liability cases involving criminal attacks.<sup>1</sup> Furthermore, the Georgia Court of Appeals recently upheld the application of the O.C.G.A. § 51-12-33 in *Pacheco, et al. v. Regal Cinemas, Inc., et al.*, 2011 WL 3716556 (Ga. App. July 14, 2011), where the decedent was beaten and fatally shot by criminal assailants in the parking lot of a movie theatre. The plaintiffs brought a wrongful death action against the operator of the movie theatre and the security company that was hired by the movie theater. *Id.* at \*1.

The trial court instructed the jury pursuant to O.C.G.A. § 51-12-33's provisions regarding assessment of fault and apportionment of damages, and the jury found in favor of the defendants. The plaintiffs appealed, claiming that the court erred in permitting application of O.C.G.A. § 51-12-33. *Id.* at \*9. The plaintiffs "contend that the trial court erred in instructing the jury pursuant to O.C.G.A. § 51-12-33 because 'it was not rationally possible to apportion fault between a premises owner and the criminal perpetrator that the owner was supposed to protect against.'" *Id.* at \*11. The Court of Appeals, relying on subsections (b) and (c) of the O.C.G.A. § 51-12-33, held that the "jury was required to determine percentage of fault of fatal shooting between individuals involved in shooting and the defendant, based on the defendant's 'alleged negligent failure to protect a theater patron from intentional, criminal conduct of individuals.'" *Id.* The Court of Appeals reviewed the plaintiffs' arguments that "the

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<sup>1</sup> See *Herrera v. Miles Properties, Inc.*, DeKalb County State Court, Civil Action No. 08A83964-0, and *Raines v. Maughan*, Fulton County State Court, Civil Action No. 07EV001852A.

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trial court should not have covered the O.C.G.A. § 51-12-33's principles of assessing fault and apportioning damages, given the particular allegations underlying their case," where the facts allegedly reflected that defendants were *negligent* in failing to keep their premises safe from foreseeable *intentional* conduct. *Id.* \*13-14. The Court of Appeals held that the cases from other jurisdictions relied upon by the plaintiffs in *Pacheco* were "not persuasive authority" and upheld the trial court's submission of apportionment to the jury pursuant to Georgia law. *Id.* at \*14.

The reasoning in *Pacheco* was recently challenged in *Salinas, et al. v. Coro Realty Advisors., et al.*, Fulton County State Court, Civil Action No. 10-EV-009982, where the court ordered that O.C.G.A. § 51-12-33 does not allow for apportionment of fault in premises liability actions.

In *Salinas*, the trial court declined to apply O.C.G.A. § 51-12-33 and refused to charge the jury as to its application. Order at 6. Specifically, the court stated that though the criminal act of a nonparty is typically considered to be a supervening intervening cause, breaking the chain of causation, in a premises liability case, the criminal act does not relieve the landowner from liability where the criminal act was a reasonably foreseeable consequence of the landowner's breach. *Id.* at 3-4. The court further stated that "notwithstanding the fact that the criminal, rather than the landowner, may be the more immediate cause of the harm, the landowner's breach is still the proximate cause of the injury, and [the landowner] bears the responsibility for the full consequences of the criminal act if the criminal act was a foreseeable consequence of the landowner's breach." *Id.* at \*5. Subsequently, the court executed a certificate of immediate review to the Georgia Court of Appeals on this issue, which is yet to be decided.

Several states, including, Florida, Tennessee, Kansas, Nebraska, Arizona, Oregon, and Michigan have adopted the view espoused by the plaintiffs in *Salinas*, and similar to the Restatement of Torts § 449, that "it would be irrational to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there was an intervening intentional tort, where the intervening intentional tort is exactly what the security measures are supposed to protect against."<sup>2</sup> Some states' analogous statutes specifically prevent a negligent tortfeasor from shifting liability to an intentional tortfeasor whose conduct was a foreseeable result of the negligent tortfeasor's acts or omissions. However, as noted in *Pacheco*, O.C.G.A. § 51-12-33 does not contain a similar public policy exception for intentional acts. Therefore, the proper forum in which to challenge O.C.G.A. § 51-12-33 is in the legislature, and not through the courts. It is the duty of the court to interpret and apply statutes, not to create public policy. In fact, the Georgia Court of Appeals, in evaluating a slightly different argument against apportionment to intentional tortfeasors, has acknowledged "we have no authority to adopt a construction that is contrary to the General Assembly's intent as plainly codified." *Cavalier Convenience v. Sarvis*, 305 Ga. App. 141 (2010).

Perhaps Georgia will follow the lead of other states and eventually abolish comparative fault in premises liability cases where a plaintiff alleges injuries caused by the acts of both a negligent and intentional tortfeasor; however, in the meantime, it remains appropriate for jurors in Georgia to consider allocation of fault between negligent and intentional tortfeasors.

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<sup>2</sup> See *Merrill Crossings Assoc. v. McDonald*, 705 So. 2d 560 (Fla. 1997); *Kansas State Bank & Trust Co. v. Specialized Trans. Serv., Inc.*, 819 P.2d 587 (Kan. 1991); *Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001); *Turner v. Jordan*, 957 S.W.2d 815 (Tenn. 1997); *Stevens v. Des Moines Indep. Community Sch. Dist.*, 528 N.W.2d 117 (Iowa 1995); *Johnston v. Harris*, 198 N.W.2d 409 (Mich. 1972); *Egurrola v. Szychowski*, 288 P.2d 242 (Ariz. 1964); *Arneil v. Schnitzer*, 144 P.2d (Or. 1944).