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DAILY REPORT

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Assigning fault heard on appeal

CASE TESTS whether statute requires juries to allocate liability among property owners, managers—and criminal assailants

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JOHN DISNEY/DAILY REPORT

Matthew Moffett, defending a property management company, told a Court of Appeals panel the Legislature wanted juries to divide fault among everyone responsible for a wrongful death.

DEFENSE LAWYERS encountered skepticism on Wednesday from judges considering whether changes made in 2005 to the state's apportionment statute require juries to apportion liability in premises liability cases sparked by a criminal assault.

"I don't see how it makes sense, logically and also from a statutory construction perspective, to apportion damages in a situation where what we're talking about is damages arising from the failure to address a foreseeable risk as a property owner," said Judge Stephen Dillard, the most active questioner on the three-judge panel that heard 30 minutes of arguments at the state Court of Appeals.

The case is one of a series that tests the applicability of the 2005 apportionment rules to premises liability suits. Landowners and property managers sued in these matters have pointed to the new apportionment rule as a basis to ask juries to assign a percentage of responsibility for the plaintiff's damages to a criminal assailant—even if the assailant isn't named as a defendant in the case. But some trial judges have balked, leading to several pre-trial appeals pending at the Court of Appeals.

The state Supreme Court has before it other cases about the constitutionality and applicability of the apportionment statute in the premises liability context that have leapfrogged the Court of Appeals for jurisdictional reasons. Although Dillard mentioned one of those cases, no one suggested Wednesday that the panel should wait for the Supreme Court's decision before ruling on its own cases.

Wednesday's case was brought by Ana Julia Maya Salinas, the wife of Ismael Cervantes Orta, as well as Orta's estate. Orta was shot and killed at an apartment complex in Roswell in December 2009.

A lawyer for the property management company being sued, Matthew Moffett of Gray, Rust, St. Amand, Moffett & Brieske, has said the shooting across the parking lot of the complex appeared to be a targeted crime; he added that no prior similar crime put the complex on notice of a security problem.

A lawyer for the plaintiffs, Joel Williams of Law & Moran in Atlanta, has disputed both contentions.

Orta's estate didn't sue the shooter, who apparently hasn't been identified, but instead named as defendants the apartment complex

owners and their management company. Last year, Fulton County State Court Judge John Mather rejected the defendants' request that the shooter be put on the verdict form so that jurors had the option of laying some or all of the responsibility on him.


Stephen Dillard

"Notwithstanding the fact that the criminal, rather than the landowner, may be the more immediate cause of harm," Mather wrote, "the landowner's breach is still the proximate cause and it is he who bears responsibility for full consequences of the criminal act if the criminal act was the foreseeable result of the landowner's breach."

Mather likened the situation to a 2010 Court of Appeals ruling, *PN Express v. Zegel*, 304 Ga. App. 672, upholding a trial court's refusal to instruct the jury to apportion fault in a case in which the defendant's liability was vicarious based on an alleged employment relationship.

In the Salinas case, the Court of Appeals agreed to hear the defense's appeal before trial, leading to Wednesday's argument before Dillard, Chief Judge John Ellington and Presiding Judge Herbert Phipps.

At the top of Moffett's argument, Dillard asked whether last month's state Supreme Court decision in another case about apportionment, *McReynolds v. Krebs*, could provide any basis for reversing Mather's order.

Moffett indicated the case was relevant—in that it is "yet another decision that upholds apportionment"—but not directly on point. He said the decision addressed a defendant's burden of proof in seeking apportionment, something not directly at issue in his case.

Moffett argued that his client and the other defendants simply were asking that the jury be allowed to consider everyone who might be at fault, which he said was required by the 2005 statute.

But, asked Phipps, "this is a non-delegable duty, so how can you satisfy that duty if all you have to do is point to someone else?"

The defendants couldn't point to the negligence of a security company, Moffett responded, but that's not what they are doing: "We're not attempting to delegate any duty here."

"I'm still having trouble following," interjected Dillard, who was appointed to the bench by the governor who signed the 2005 statute into law, Sonny Perdue. The allegation against the defendants is that the apartment complex wasn't maintained in a safe manner, creating the conditions that led to the shooting, Dillard noted.

"How does the shooter have anything to do with creating the risk of harm?" Dillard asked. "The shooter is the harm. You know this stuff a lot better than I do, but help me understand—what am I missing?"

Moffett responded by describing a hypothetical lawsuit arising from an assault by a rich celebrity on property owned by someone with no assets. In that case, he said, the plaintiff would sue the assailant and claim he was at fault. Mather's reasoning gives plaintiffs the ability to decide whose fault a jury should consider, Moffett said.

"That's just not what our Legislature intended in 2005 when they passed the apportionment statute," said Moffett. "It just doesn't make sense, and it's against public policy."

Dillard wondered whether that meant how a plaintiff brings a claim is meaningless.

"Well, I don't know if it is meaningless," said Moffett. But, he said, the statute "doesn't say 'negligence,' it doesn't say 'intentional,' it doesn't say 'except intentional.'"

"We just want the jury to do what the Legislature said they should do: consider the fault of any and all as to the proximate cause of the contended wrongful death," Moffett continued. Policy arguments are "misplaced," he said, and should be directed to the governor or the Legislature.

Williams, the plaintiffs' attorney, countered that the plain language of the apportionment statute forbid the unknown shooter who's not a party to the case from being placed on the verdict form.

Dillard directed Williams to one of the plaintiffs' other arguments, that the state's premises liability statute giving landowners a non-delegable duty to keep their premises safe is a more specific statute than the apportionment statute, making premises liability cases not subject to apportionment.

That's right, Williams replied, saying that the Legislature is presumed to have known of the premises liability statute and case law interpreting it when it drafted the apportionment law.

A property owner can be negligent "all day long," said Williams, but it can't be liable until the criminal comes onto the property and shoots, rapes or robs someone. "The criminal shooting is the cause, it is the proximate cause, but it's a necessary element for the damages to be there," said Williams. "Otherwise, the defendants would be entitled to a directed verdict."

"There's no question that the shooter is 100 percent at fault," Williams continued. But, he said, that's a separate question from the landowner's negligence.

Ellington asked Williams to address Moffett's hypothetical about a celebrity assailant and a bankrupt property owner.

"The law in this state is the plaintiff gets to elect who to sue and under what theories of liability to sue them," Williams responded, adding the defense was making "political arguments."

Jacob Daly of Atlanta's Freeman Mathis & Gary, which represents the owners of the apartment complex, had only about 30 seconds left to make the defense's rebuttal. He contended that the law in a sense no longer gives plaintiffs carte blanche in electing whom to sue.

"This is what the General Assembly is trying to avoid, is this kind of manipulation of the system, solvent defendants, insolvent defendants," Daly said. "Plaintiffs clearly don't like it, but the law is what it is now."

The case is *Coro Realty Advisors v. Salinas*, No. A12A0796. DR