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APPORTIONMENT FOR NEGLIGENT SECURITY CASES FROM THE DEFENSE PERSPECTIVE

Introduction

The case law interpreting the "apportionment" statute is dynamic and shifting. Since this Seminar was held last year, the Georgia Supreme Court issued opinions reversing (in part or in whole) two 2015 apportionment decisions of the Georgia Court of Appeals: Six Flags Over Georgia II, L.P. v. Martin[1] and Goldstein, Garber & Salama, LLC v. J.B.[2]. In addition, the Georgia Court of Appeals issued decisions in Camelot Club Condo. Ass'n, Inc. v. Afari-Opoku, 340 Ga. App. 618, 621, 798 S.E.2d 241, 245 (2017) (addressing apportionment in the negligent security premises liability context) and Hosp. Auth. of Valdosta/Lowndes Cty. v. Fender, 342 Ga. App. 13, 802 S.E.2d 346 (2017) (addressing the question of when apportionment is permitted).

This area of the law remains in flux and rewards creative legal thinking. In short, to defend a negligent security case, you should try to apportion fault to as many culpable nonparties as possible, but be ready to prove the specific tort that each nonparty committed and be able to prove the elements of each tort by a preponderance of the evidence. Finally, if your jury apportions one hundred percent of the fault to your client and none to the criminal assailant, be sure to challenge the verdict before the jury is released.

The "Apportionment" Statute

The text of the apportionment statute follows:

§ 51-12-33. Apportionment of damages in actions against more than one person according to the percentage of fault of each person[3]

> (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

[1] 335 Ga. App. 350, 780 S.E.2d 796 (2015) (Judgment Affirmed in Part, Reversed in Part by Martin v. Six Flags Over Georgia II, L.P., 301 Ga. 323, 801 S.E.2d 24. See discussion infra in Section 5.
[2] 335 Ga. App. 416, 779 S.E.2d 484 (2015) (Judgment Reversed by Goldstein, Garber & Salama, LLC v. J.B., 300 Ga. 840, 797 S.E.2d 87 (decided Feb. 27, 2017, reconsideration denied Mar. 30, 2017))
[3] Ga. Code. Ann., § 51-12-33 (2005), enacted via Laws 2005, Act 1, ¶ 12, eff. Feb. 16, 2005.

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 Law Governing Negligent Security Claims

The purpose of the apportionment statute is to ensure that each tortfeasor responsible for the plaintiff's harm, including the plaintiff himself, be held responsible only for his or her respective share of the harm. Wade v. Allstate Fire and Cas. Co., 324 Ga. App. 491, 494, 751 S.E.2d 153 (2013). Apportionment is required even if the plaintiff bears no fault. McReynolds v. Krebs, 307 Ga. App. 330, 333, 705 S.E.2d 214 (2010)[4]. The apportionment statute does not limit its scope to cases in which plaintiffs and defendants are negligent, but instead looks to the parties' "percentages of fault." See O.C.G.A. § 51-12-33(b). A nonparty against whom fault is assessed is not subject to actual liability nor can evidence of such assessment be introduced as evidence of liability in any action. See O.C.G.A. § 51-12-33(f)(2).

A landowner has a duty to exercise ordinary care to keep its premises safe, but it is not an insurer of an invitee's safety. Generally, an intervening criminal act by a third party insulates a landowner from liability unless such criminal act was *reasonably foreseeable*. Agnes Scott College v. Clark, 273 Ga. App. 619, 621(1), 616 S.E.2d 468 (2005); accord Walker v. Aderhold Props., Inc., 303 Ga.App. 710, 712(1), 694 S.E.2d 119 (2010).

In the Georgia Court of Appeals' pre-Martin decision in Agnes Scott College (and in the Georgia Supreme Court's seminal Sturbridge Partners decision), the rule on foreseeability of crime was stated in the imperative: in order for the crime to be reasonably foreseeable, "it must be substantially similar to previous criminal activities occurring on or near the premises such that a reasonable person would take ordinary precautions to protect invitees from the risk posed by the criminal activity." Agnes Scott College, supra, at 621(1), 616 S.E.2d 468 (emphasis supplied) (citing Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339 (1997).

The Georgia Supreme Court in Martin stated that "the foreseeability of future criminal acts may be established by evidence of prior criminal acts of a "substantially similar" nature to those at issue, such that 'a reasonable person would take ordinary precautions to protect his or her customers ... against the risk posed by that type of activity.'" 301 Ga. 323, 801 S.E.2d at 32 (2017) (citing Sturbridge Partners, Inc., supra, at 786, 482 S.E.2d 339 and Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 492 (1), 405 S.E.2d 474 (1991)). "[T]he word 'may' must be read in context to determine if it means an act is

[4] Judgment of the Court of Appeals affirmed by McReynolds v. Krebs, 290 Ga. 850, 725 S.E.2d 584 (2012).

optional or mandatory, for it may be an imperative."[5] The context of the Supreme Court's emphasis on the word "may" in Martin signals that Georgia courts have the option to consider substantially similar criminal activities on or near the premises *as well as* other evidentiary bases, in analyzing foreseeability:

> An establishment's location in a high crime area may also support the finding of a duty on the part of the landowner to guard against criminal attacks. And evidence that the landowner had knowledge of a volatile situation brewing on the premises can establish foreseeability as well. See, e.g., Good Ol' Days Downtown, Inc. v. Yancey, 209 Ga.App. 696, 697 (2), 434 S.E.2d 740 (1993) (summary judgment improper where bar owner's employees witnessed escalation of hostile behavior for more than five minutes prior to assault on patron).

Martin, 301 Ga. 323, 801 S.E.2d at 32 (internal citations omitted).[6]

The phrase "must be substantially similar" originates in Sturbridge Partners, 267 Ga. at 786 and is repeated in at least one post-Martin decision[7] and in at least thirty cases decided prior to Martin.[8] The emphasis on this modification of this seminal standard

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[5] Law.com, Legal Definition of 'May,' www.dictionary.law.com, http://dictionary.law.com/Default.aspx?selected=1229 (last visited August 28, 2017). And see MAY, Black's Law Dictionary (10th ed. 2014) ("may vb. (bef. 12c) 1. To be permitted to <the plaintiff may close>. 2. To be a possibility <we may win on appeal>. Cf. can. 3. Loosely, is required to; shall; must <if two or more defendants are jointly indicted, any defendant who so requests may be tried separately>. • In dozens of cases, courts have held may to be synonymous with shall or must, usu. in an effort to effectuate what is said to be legislative intent.")

[6] Martin's discussion about an "establishment's location in a high crime area" as potentially supporting the finding of a duty on the part of the landowner to guard against criminal attacks is prefigured by McNeal v. Days Inn of Am., Inc., 230 Ga. App. 786, 788, 498 S.E.2d 294, 297 (1998) ("The jury is the best judge of whether the hotel is located in an area which was such that a criminal assault on a hotel guest in the parking lot at night before the security guard arrived at 11:00 p.m. was reasonably foreseeable to defendants[.]")

[7] Camelot Club, supra, 340 Ga. App. at 621, 798 S.E.2d 241, 245. .

[8] E.g., Six Flags Over Georgia II, L.P. v. Martin, 335 Ga. App. 350, 360, 780 S.E.2d 796, 806 (2015), aff'd in part, rev'd in part, 301 Ga. 323, 801 S.E.2d 24 (2017); Little-Thomas v. Select Specialty Hosp.-Augusta, Inc., 333 Ga. App. 362, 367, 773 S.E.2d 480, 484 (2015); Med. Ctr. Hosp. Auth. v. Cavender, 331 Ga. App. 469, 474, 771 S.E.2d 153, 158 (2015); Ratliff v. McDonald, 326 Ga. App. 306, 312, 756 S.E.2d 569, 576 (2014); Whitfield v. Tequila Mexican Rest. No. 1, 323 Ga. App. 801, 804, 748 S.E.2d 281, 285 (2013) disapproved of by Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596 (2015); Tomsic v. Marriott Int'l, Inc., 321 Ga. App. 374, 384, 739 S.E.2d 521, 531 (2013); Doe I v. Young Women's Christian Ass'n of Greater Atlanta, Inc., 321 Ga. App. 403, 408, 740 S.E.2d 453, 457 (2013); Bethany Grp., LLC v. Grobman, 315 Ga. App. 298, 301, 727 S.E.2d 147, 150 (2012); Walker v. Aderhold Properties, Inc., 303 Ga. App. 710, 712, 694 S.E.2d 119, 121 (2010); Johns v. Hous. Auth. for City of Douglas, 297 Ga. App. 869, 871, 678 S.E.2d 571, 573 (2009); Drayton v. Kroger Co., 297 Ga. App. 484, 485, 677 S.E.2d 316, 317 (2009); Vega v. La Movida, Inc., 294 Ga. App. 311, 312, 670 S.E.2d 116, 119 (2008); Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 547, 659 S.E.2d 905, 910 (2008); Love v. Morehouse Coll., Inc., 287 Ga. App. 743, 745, 652 S.E.2d 624, 626 (2007); Norby v. Heritage Bank, 284 Ga. App. 360, 365, 644 S.E.2d 185, 190 (2007); Wojcik v.

in Martin is a result of the "hybrid" nature of the underlying events in that case, where the ultimate criminal act resulting in the injury giving rise to the suit occurred away from the defendant's premises, but was found to be a continuation of criminal activity that commenced on the premises.

To determine whether the prior criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, Georgia courts examine the location, nature, and extent of the prior criminal activities and their likeness, proximity, or other relationship to the crime in question. Sturbridge Partners, supra, at 786, 482 S.E.2d 389. "Substantially similar" does not mean "identical." Id. "What is required is that the prior incident be sufficient to attract the landowner's attention to the dangerous condition which resulted in the litigated incident." Id. Questions about the "reasonable foreseeability" of a criminal attack are generally for the jury's determination rather than summary adjudication by the courts. Camelot Club, supra, at 621, 798 S.E.2d 241.

1. To whom may the jury apportion liability or nonparty fault?[9]

Windmill Lake Apartments, Inc., 284 Ga. App. 766, 768, 645 S.E.2d 1, 3 (2007); McAfee v. ETS Payphones, Inc., 283 Ga. App. 756, 758, 642 S.E.2d 422, 425 (2007); Mason v. Chateau Communities, Inc., 280 Ga. App. 106, 112, 633 S.E.2d 426, 431 (2006); Agnes Scott Coll., Inc. v. Clark, 273 Ga. App. 619, 621, 616 S.E.2d 468, 470 (2005); Baker v. Simon Prop. Grp., 273 Ga. App. 406, 408, 614 S.E.2d 793, 795 (2005); Rice v. Six Flags Over Georgia, LLC, 257 Ga. App. 864, 867, 572 S.E.2d 322, 326 (2002); Wade v. Findlay Mgmt., Inc., 253 Ga. App. 688, 689, 560 S.E.2d 283, 285 (2002); McDaniel v. Lawless, 257 Ga. App. 187, 189, 570 S.E.2d 631, 633 (2002) (citing Aldridge v. Tillman, 237 Ga.App. 600, 603(2), 516 S.E.2d 303 (1999), not Sturbridge Partners); FPI Atlanta, L.P. v. Seaton, 240 Ga. App. 880, 882, 524 S.E.2d 524, 528 (1999); Woodall v. Rivermont Apartments Ltd. P'ship, 239 Ga. App. 36, 37, 520 S.E.2d 741, 743 (1999); McNeal v. Days Inn of Am., Inc., 230 Ga. App. 786, 788, 498 S.E.2d 294, 296 (1998); Doe v. Prudential-Bache/A.G. Spanos Realty Partners, L.P., 268 Ga. 604, 605, 492 S.E.2d 865, 867 (1997); Doe v. Briargate Apartments, Inc., 227 Ga. App. 408, 409, 489 S.E.2d 170, 173 (1997); and Walker v. St. Paul Apartments, Inc., 227 Ga. App. 298, 300, 489 S.E.2d 317, 319 (1997).

[9] An important corollary: To whom may the jury NOT apportion fault? As applied to negligent security claims, the Georgia Court of Appeals recently explained that where there are additional and independent acts of negligence alleged against a security company, the jury is authorized to apportion liability to it. See generally, Camelot Club, 340 Ga.App. at 626-629; and see id. at 628:

> [T]he jury could have imposed liability on Alliance [the security company hired by the landlord, Camelot] independently for common law negligence arising out of its assumption of the duty to provide security. See Kelley, 230 Ga.App. at 509 (1), 496 S.E.2d 732 (even though the independent contractor may have no liability under OCGA § 51-3-1, it could breach an independent duty of failing to perform its work properly); FPI Atlanta, LP v. Seaton, 240 Ga.App. 880, 890, 524 S.E.2d 524 (1999) (physical precedent only) (Pope, J., concurring specially) (same). Thus, based on the jury instructions provided, the jury could have found liability because of Camelot's negligence (premises liability and common law negligence), Camelot's maintenance of a nuisance, Alliance's negligence in providing security, or some combination of these based on vicarious liability principles.

In the even more recent decision in Hosp. Auth. of Valdosta/Lowndes Cty. v. Fender, 342 Ga.App. 13, 802 S.E.2d 346, 355 (2017), the plaintiffs argued that the Respondeat Superior Rule [the rule that theories of recovery such as negligent supervision are subject to dismissal where respondeat superior liability has been admitted, and the plaintiff has no valid claim for punitive damages against the employer for its own,

In 2012, the Georgia Supreme Court answered two certified questions from the Northern District of Georgia regarding apportionment. See Couch v. Red Roof Inns, Inc., 291 Ga. 359, 729 S.E.2d 378 (2012). There, the Georgia Supreme Court held that (1) a jury is allowed to apportion damages among the property owner and a criminal assailant, and that (2) instructions or a special verdict form requiring such apportionment would not violate the plaintiff's constitutional rights. See id. at 379. The Court rejected the argument that allowing a jury to apportion fault to a nonparty criminal assailant nullifies a property owner's duty to keep its premises safe.

In 2015, the Georgia Supreme Court decided the case of Zaldivar v. Prickett, 297 Ga. 589, 774 S.E.2d 688 (2015).[10] In Zaldivar, the defendant had given notice under the apportionment statute of her intent to ask the trier of fact to assign some responsibility to the plaintiff's nonparty employer for negligently entrusting the employer's company vehicle to the plaintiff. In response, the plaintiff filed a motion for partial summary judgment, asserting that the apportionment statute did not require any assignment of responsibility to the nonparty employer because Georgia case law held that negligent entrustment of an instrumentality could not be a proximate cause of injury to the person to whom the instrumentality was entrusted. The Court applied the statute, holding that it:

> [R]equires the trier of fact in cases to which the statute applies to "consider the fault of all persons or entities who contributed to the alleged injury or damages," meaning all persons or entities who have breached a legal duty in tort that is owed with respect to the plaintiff, the breach of which is a proximate cause of the injury sustained by the plaintiff. That includes not only the plaintiff himself and defendants with liability to the plaintiff, but also every other tortfeasor whose commission of a tort as against the plaintiff was a proximate cause of his injury, **regardless of whether such tortfeasor would have actual liability in tort to the plaintiff**.

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independent negligence] has been superseded by Georgia's apportionment statute, OCGA § 51–12–33 (b). The Court of Appeals commented:

> Our courts have not directly addressed this argument, but in a different context, we have held that the apportionment statute does **not** apply where a defendant employer faces only vicarious liability under the doctrine of respondeat superior because the employer and employee "are regarded as a single tortfeasor." PN Express v. Zegel, 304 Ga. App. 672, 680 (5), 697 S.E.2d 226 (2010). See also Camelot Club Condo. Assoc. v. Afari–Opoku, 340 Ga. App. 618, 626 (2) (b), 798 S.E.2d 241 (2017)."

(internal footnotes omitted, emphasis supplied).

[10] The Georgia Supreme Court granted certiorari on Zaldivar v. Prickett, 328 Ga. App. 359, 762 S.E.2d 166 (2014), and reversed the Court of Appeals decision (297 Ga. 589, 774 S.E.2d 688 (2015). The Court of Appeals decision from 2014 was ultimately vacated and the Court of Appeals adopted the opinion of the Supreme Court, 337 Ga. App. 173, 786 S.E.2d 560 (2016).

Zaldivar, 297 Ga. at 600 (emphasis supplied); accord Martin, 301 Ga. 323, 801 S.E.2d at 36. The Supreme Court in Zaldivar held that the apportionment statute permitted the attribution of "fault" to a nonparty only to the extent that the nonparty committed a tort that was a proximate cause of the injury to the plaintiff. See id. The Court noted that it "is axiomatic that liability in tort requires proof that the defendant owed a legal duty, that she breached that duty, and that her breach was a proximate cause of the injury sustained by the plaintiff." Id. at 595.[11] In rejecting the plaintiff's argument (and countering Judge Branch's similar concern, see id. at 364 (Branch, J., dissenting)), the Court observed:

> Proof of these essential elements is a necessary condition for tort liability, but it does not lead inevitably to liability. Not every tortfeasor can be held liable for his torts. A tortfeasor may have an affirmative defense or immunity that admits the commission of a tort that is the proximate cause of the injury in question. Although such a defense or immunity may cut off liability, a tortfeasor is still is a tortfeasor, and nothing about his defense or immunity means that he cannot be said to have committed a tort that was a proximate cause of the injury to the plaintiff. See, e.g., Shekhawat v. Jones, 293 Ga. 468, 470–471(1), 746 S.E.2d 89 (2013) (state employee may have statutory immunity under the Georgia Tort Claims Act when the employee "commits a tort while acting within the scope of his employment with the State"). What happened, happened, and affirmative defenses and immunities do not change what happened, only what the consequences will be. As such, the apportionment statute permits consideration, generally speaking, of the "fault" of a tortfeasor, notwithstanding that he may have a meritorious affirmative defense or claim of immunity against any liability to the plaintiff. We note that this understanding of "fault" is consistent with OCGA § 51–12–33(e), which makes clear that "[n]othing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section."

Zaldivar, 297 Ga. at 597–98, 774 S.E.2d 688 (internal footnote omitted). See also Walker v. Tensor Machinery, 298 Ga. 297, 304, 779 S.E.2d 651 (2015) (allowing apportionment to nonparty employer who is immune from liability pursuant to the exclusive remedy provisions of the Worker's Compensation Act). Zaldivar also reversed prior Georgia case law to the extent that it held that negligent entrustment of an instrumentality could not be a proximate cause of an injury to the person to whom the instrumentality was entrusted.

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[11] As discussed, *infra*, the Georgia Supreme Court affirmed this holding in Walker v. Tensor Machinery Ltd., 298 Ga. 297, 779 S.E.2d 651 (2015).

In order to apportion fault to a nonparty, Zaldivar requires the defendant to prove the elements of the tort that the nonparty committed against the plaintiff. In a negligent security case, proving fault as to the third-party criminal would typically be a straightforward affair.

Camelot Club, supra, at 628, 798 S.E.2d 241, appears to have answered the question of whether a landowner can apportion fault to a security company that it hires to provide security services on its premises in the affirmative. In Camelot Club, the landlord argued on appeal that the evidence did not support a finding that it had the requisite control under O.C.G.A. 51-2-5(5) to impose liability for the actions of its security company, and "significantly, Camelot asserted that the evidence supported **a separate and independent claim of negligence** against the [the security company] as a party to the case." Id. at 625 (emphasis supplied). The trial court entered judgment against Camelot based on the fault the jury assigned to the security company.[12] On appeal, the Georgia Court of Appeals first considered the language of the apportionment statute, O.C.G.A. 51-12-33(b), observing that this "provision addresses liability, not merely fault, and by defining the liability of each person against whom damages are awarded and prohibiting joint liability, it seems generally to preclude any post-verdict reassignment of damages based on the jury's apportionment of fault." Id. at 626. Ultimately, the Court of Appeals decision was based on the principle that the evidence supported the jury's assignment of 25% of the fault to the security company because the jury could have imposed liability on the company "independently for common law negligence arising out of its assumption of the duty to provide security." 340 Ga.App. 628.[13]

Any party defendant or nonparty which has breached an independently-owed duty to a plaintiff is fair game for apportionment.

Arguably, Zaldivar left some important questions unanswered. For instance:

- In seeking to apportion fault to a nonparty, what is the defendant's burden of proof?
- In seeking to apportion fault to a nonparty, can the plaintiff's evidence be used to prove the tort of the nonparty?

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[12] The jury apportioned 25% of fault to Camelot, 25% to Alliance, and the remaining 50% against three non-party assailants. Following a hearing, the trial court issued judgment against Camelot for 50% of the total damages, "which constitute[d] the 25% fault the jury assigned to Camelot plus the 25% fault the jury assigned to Alliance," and 25% of the total damages against Alliance. 340 Ga.App. at 618. The decision does not illuminate how the trial court reduced the 50% fault assigned to the nonparties to 25%, but held that the trial court erred in imposing liability on Camelot for Alliance's share of fault.

[13] "[T]he consolidated pretrial order listed Alliance as a party with a right to participate in the trial and described the claims against the defendants collectively as failing to provide adequate security, failing to keep the premises safe, and maintaining a private nuisance. At trial, the jury was charged on the principles of common law negligence and undertaking a duty without specifying the theories of liability against the defendants, as well as nuisance. The jury was also generally charged on vicarious liability principles[.]" 340 Ga.App. at 627.

- If a defendant proves the tort of a nonparty, but the jury does not apportion any fault to the nonparty, what should the defense do?

2. In seeking to apportion fault to a nonparty, what is the defendant's burden of proof?

In Brown v. Tucker, 337 Ga.App. 704, 788 S.E.2d 810 (2016), the Georgia Court of Appeals established that a defendant must prove the negligence of a nonparty by a "preponderance of the evidence" in order for the nonparty to appear on the verdict form for the jury's consideration. In Brown, the plaintiff rode shotgun in the defendant's car when it struck a parked tractor-trailer rig. The defendant sought to apportion fault to the non-party rig. The defendant argued that it only had to show a "rational basis" for apportioning fault to the non-party rig, but the plaintiff argued that the defendant had to prove by a preponderance of the evidence that the negligence of the nonparty rig was the proximate cause of the injuries to the plaintiff.[14] The trial court adopted the plaintiff's proposed jury instruction and instructed the jury on apportionment as follows: "Now, for you to consider the negligence of the nonparty [rig], the Defendant must prove by a preponderance of the evidence that the negligence of [the rig], if any, was a proximate cause of the injuries to the Plaintiff."[15]

The Georgia Court of Appeals reviewed the jury charge for "substantial error" and held that the trial court did not commit substantial error by giving the requested jury instruction.

Interestingly, the Brown opinion did not cite or analyze the Zaldivar opinion. Instead, the Court observed that a defendant's claim that a nonparty is liable for all or some of the plaintiff's damages is an assertion of fact, the existence of which would be essential to the defense. As an affirmative defense, the defendant bears the burden of proving her assertion of fact.

The Court of Appeals in Brown deemed that apportionment urged by the defense was an affirmative defense, analytically the same as the defense of contributory negligence:

> The burden of proof generally lies upon the party who is asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. O.C.G.A. § 24–14–1. A defendant's claim that a nonparty is liable for all or some of the plaintiff's damages is an assertion

[14] The defendant did not provide a written request to charge, so the appellate court reviewed the final jury charge for "substantial error." The appellate court held that it was not substantial error to give the apportionment charge as requested by the plaintiff.
[15] The jury apportioned 40 percent fault to the nonparty rig and 60 percent fault to the defendant driver.

of fact, the existence of which is essential to the defense. As an affirmative defense, the defendant bears the burden of proving her assertion of fact.

Generally, a defendant raising an affirmative defense admits the essential facts of a plaintiff's complaint, but then sets up other facts in justification or avoidance, or other special matters not merely elaborating or explaining a general denial, the burden of proving which by a preponderance of the evidence will rest on the defendants.

A defendant need not necessarily concede the essential facts of the plaintiff's claim to raise a burden-shifting affirmative defense, however. A defendant may deny the essential facts asserted and also claim in the alternative that, if the plaintiff had been injured, the injury was due to causes other than the defendant's actions. For example, when a plaintiff sued the driver of a car for her son's wrongful death, the defendants denied liability but also contended that the child's death was proximately caused by him dashing into the street. This defense was more than a simple denial of negligence, causation, and damages, and once the plaintiff had made out her prima facie case, the burden rested upon the defendants to show by a preponderance of the evidence, in order to sustain their plea, that the plaintiff's injuries were caused by her own negligence.

The trial court properly charged the jury that when the defendants deny an allegation made by the plaintiff, the burden rests upon the plaintiff to establish the truth of such allegations as may be denied by the defendant; but where the defendants set up an affirmative defense, the burden rests upon the defendants to establish the truth of such affirmative defense by a preponderance of evidence.

The affirmative defense that the jury should apportion fault against someone other than the defendant is no different analytically from the defense of contributory negligence. Once the plaintiff establishes her prima facie case, the defendant seeking to establish that someone else bears responsibility for the damages has the burden of proving that defense.

In sum, Brown's apportionment claim was an affirmative defense. She therefore had the burden of showing by a preponderance of the evidence that the nonparty tractor-trailer driver was negligent and that his negligence proximately caused all or some portion of damages to the plaintiff. Accordingly, the trial court committed no error in charging the jury to that effect."

Brown, supra, at 717, 788 S.E.2d 810, 821–22 (internal citations and punctuation omitted).

3. In seeking to apportion fault to a nonparty, can the plaintiff's evidence be used to prove the tort of a nonparty?

In Double View Ventures, LLC v. Polite, 326 Ga. App. 555, 757 S.E.2d 172 (2014)[16], the plaintiff walked along a dirt path leading from the parking lot in front of his apartment to the Chevron gas station located adjacent to the apartment complex. It was well documented that residents of the apartment complex and their guests would use that path to go to the Chevron store. The path went up a small hill to a wooden fence, which served as a boundary between the two properties, and the wooden fence had an opening that allowed for access back and forth across the properties. Id. at 555. On the night of the incident, two assailants attacked the plaintiff after he walked through a wooden fence.[17]

A security expert and former security guard for the apartment complex testified about how the wooden fence was a security violation. Id. at 556. Further, about two weeks before the plaintiff's attack, another resident was attacked shortly after he passed through the fence on his way to back to the apartment complex. Id. In addition, there were many prior violent crimes on both the property of the apartment complex and the property of the Chevron gas station. Id. at 557. It was unknown whether the attackers came from the Chevron station or the apartment complex. Following the close of evidence, the trial court considered the plaintiff's motion for a directed verdict on the issue of putting the Chevron station on the verdict form for an apportionment of fault. Id. The trial court ruled in favor of the plaintiff and determined that the gas station would not appear on the verdict form because the defendant failed to produce "any evidence" creating a jury question as to whether the gas station was responsible for any of the repairs or had knowledge of the existing fence. Id.

The Georgia Court of Appeals reversed, holding that it could not say that there was "no evidence" supporting the defense claim that the gas station may have been liable for the plaintiff's injuries. Id. at 560. Because there was "some evidence" that the Chevron station may have contributed to the plaintiff's injuries, the jury should have been given the opportunity to consider apportioning fault to the Chevron station. Id. at 559. The Court of Appeals noted that the defendants had a "burden to establish a

[16] Overruled on other grounds by Martin v. Six Flags Over Georgia II, L.P., 301 Ga. 323, 801 S.E.2d 24 (2017): "To the extent that Double View Ventures can be construed as adopting a categorical rule requiring a full retrial as the result of any apportionment error—a reading we do not necessarily adopt, given the absence of any analysis of the issue in the opinion—it is overruled as to this issue." Martin, 301 Ga. 323, 801 S.E.2d 24, 38 (2017) (footnote 12).

[17] The jury determined that the apartment complex and the apartment complex manager were 87 percent at fault and the plaintiff was 13 percent at fault. Id. at 557.

rational basis" for apportioning fault to a nonparty. Id. at 562.[18] The court further observed that, even though the defendants did not did not call any witnesses, the plaintiff's own evidence created a question of fact that precluded a directed verdict. Id. at 561. The principle that the plaintiff's own evidence may support apportionment to a nonparty, established in Double View, is consistent with Camelot Club and Brown v. Tucker; so long as there has been a properly articulated assertion of nonparty fault, and so long as the evidence supports the verdict, a jury's apportionment to the nonparty should withstand scrutiny as any jury verdict otherwise would. The preponderance of evidence of nonparty fault should be a determination reserved for the jury.

The Double View plaintiff was attacked while on a strip of land that was located on the border between the Chevron gas station and the plaintiff's apartment complex; the Chevron gas station experienced substantially similar crime on its property before the plaintiff's attack; and Chevron owned the wooden fence where the plaintiff was attacked. Under a preponderance of the evidence standard, the defendant there could probably have established that the Chevron gas station proximately caused the plaintiff's injuries by not protecting the plaintiff against reasonably foreseeable crime. See Murray v. State, 269 Ga. 871, 873(2), 505 S.E.2d 746 (1998) ("The [preponderance of the evidence] standard requires only that the finder of fact be inclined by the evidence toward one side or the other.").

Notwithstanding its negative treatment by the Georgia Supreme Court in Martin, the key lesson of Double View is that the defense should look for opportunities to use the plaintiff's evidence against the plaintiff to apportion fault to any nonparty, including adjoining landowners.[19]

4. If a defendant proves the tort of a nonparty, but the jury does not apportion fault to the nonparty, what should the defense do?

In Goldstein Garber & Salama, LLC v. J.B., the Georgia Supreme Court granted certiorari on the Court of Appeals decision[20] and reversed on other grounds, holding in Division 3 of its decision that "[i]n light of the foregoing [holdings in Divisions 1 and 2], we need not address whether [the defendant] waived any objection to the jury's apportionment of fault." In that case, the plaintiff sued a dental practice because an

[18] Double View's "rational basis" standard was rejected by Brown v. Tucker, and Double View was itself overruled by Martin.

[19] See also Georgia-Pacific, LLC v. Fields, 293 Ga. 499, 748 S.E.2d 407 (2013) (holding that plaintiff's allegations of fact and admissions in original pleading identifying nonparty entities responsible for producing or distributing asbestos-containing products to which plaintiff was exposed were "admissions in judicio" that named defendants could rely on to establish potential fault of nonparty entities for purposes of apportioning damages); but see McReynolds v. Krebs, 290 Ga. 850, 853 725 S.E.2d 584 (2012) (holding that defendant was not entitled to set-off against nonparty car manufacturer when the only evidence of the nonparty's potential liability came from the plaintiff's complaint).

[20] Goldstein, Garber & Salama, LLC v. J.B., 335 Ga.App. 416, 779 S.E.2d 484 (2015)

employee of the practice molested the plaintiff while the plaintiff was under anesthesia. The employee subsequently pled guilty to numerous criminal charges and received a life a sentence in prison. 335 Ga.App. 416, 779 S.E.2d at 488. The employee/criminal was a named party to the action, but the plaintiff dismissed him before trial. At trial, the jury awarded the plaintiff $3.7 million in damages and apportioned one hundred percent of the fault to the dental practice and none to the employee/criminal. The defense argued that it was entitled to a new trial because the jury's verdict allocated no fault to the employee/criminal, and they argued that such apportionment was required by the language of O.C.G.A. 51-12-33(c).[21]

The Court of Appeals noted that one possibility for the jury's decision to not assign fault to the employee/criminal may have been its determination that the dental practice's liability would not be offset on the basis of the employee/criminal's fault. And if it were clear that the jury had made that determination, the Court observed that it would have "been faced with the difficult question whether, under O.C.G.A. § 51-12-33(c), the jury was required not only to 'consider the fault' of 'persons or entities' not party to the action 'who contributed to the alleged injury and damages' but also . . . to reduce the liability of the named defendant by some amount." Id.

The Court of Appeals avoided the potentially difficult question because it determined that the defendant waived appellate review by failing to challenge the jury's verdict before the jury was dispersed. In this regard, the Court of Appeals in Goldstein noted that, had the defendant objected to the verdict before the court dismissed the jury, the trial court "could have given the jury additional instruction and permitted them to consider the matter again." Id. at 493. In Camelot Club, the Court of Appeals held that the plaintiff had waived any appeal from the denial of her motion at trial to disallow apportionment by the jury between the landlord and the security company the landlord hired because her counsel ultimately agreed to the verdict form allowing apportionment. Camelot Club, 340 Ga.App. at 625-626.

In short, the appellate courts continue to vigorously apply the principle of waiver of appealable issues where said issues were not preserved during the trial phase. E.g., Camelot Club, 340 Ga.App. at 625 (plaintiff held to have waived objection to apportionment because she eventually agreed to a verdict form submitting the issue of apportionment to the jury). For the defense, the lesson from Goldstein is clear: if the jury does not apportion fault to the underlying criminal assailant in your negligent security case, then you should object to the verdict and seek relief before the court dismisses the jury. Camelot Club reinforces the same principle whether it is the defendant or the plaintiff who has an issue it wishes to preserve for appeal.

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[22] "In fact, where the issue of apportionment is distinct from the issues of liability and damages sustained, our 'law of the case' doctrine will in most instances preclude the re-litigation of these issues once the jury's verdict on them has been affirmed." Martin, 301 Ga. 323, 801 S.E.2d at 38.

5. Apportionment after Martin

On June 5, 2017, the Georgia Supreme Court issued its ruling in Martin v. Six Flags Over Georgia II, L.P., 301 Ga. 323, 801 S.E.2d 24 (2017), holding inter alia that the issues of Six Flags' liability and the calculation of damages sustained by Martin were distinct from the issues of apportionment of fault among park and gang members, and thus, trial court's error in declining to allow apportionment among non-party gang members required retrial only as to apportionment. In this holding, the Georgia Supreme Court overruled Double View Ventures, LLC v. Polite, supra, 326 Ga.App. 555, 757 S.E.2d 172. After affirming Six Flags' liability (in Divisions 1 and 2, on grounds different than in the Court of Appeals' affirmation of same), the Martin Court addressed apportionment. By way of background, the Supreme Court explained:

> The jury assessed its verdict 92% to Six Flags and 2% to each of the four named defendants, all of whom had criminal convictions in connection with the attack on Martin. Six Flags has argued throughout the proceedings that the jury should be entitled to apportion damages not just among the named defendants but also among other individuals who, though not named as defendants, were alleged to have been involved in the attack on Martin. The trial court rejected Six Flags' request to allow apportionment among the non-parties, finding that, given the absence of a criminal conviction against any of these individuals, the evidence was insufficient to permit apportionment against them.
>
> On appeal, the Court of Appeals concluded that the trial court had imposed too high an evidentiary burden for the inclusion of non-parties in the apportionment determination. Six Flags, 335 Ga.App. at 365, 780 S.E.2d 796. It then considered Martin's argument that Six Flags had failed to preserve this alleged error on appeal and held that Six Flags had preserved the issue, but only as to two individuals, both of whom (a) were the subject of trial testimony supporting their involvement in the attack and (b) were specifically named by Six Flags in its appellate filings as having been improperly excluded from consideration for apportionment. Id. at 364-365, 780 S.E.2d 796. After identifying this apportionment error, the Court of Appeals concluded that the jury's verdict was infirm in its entirety and ordered the judgment reversed and the case remanded for a new trial. Id. at 365, 780 S.E.2d 796. In granting certiorari, we asked the parties to address whether the Court of Appeals had erred in determining that the trial court's apportionment error would require a full retrial. Implicit in the framing of this question were the understandings (1) that the trial court did in fact commit error in declining Six Flags' request to submit to the jury the question of apportionment to non-parties and (2) that Six Flags had properly preserved the apportionment issue for appellate review, at least as to the two non-parties identified by the Court of Appeals. Having declined to grant

> certiorari on these preliminary issues, we do not belabor them here, and instead proceed to determine whether, given that the two non-parties—Ander Cowart and "Mr. Black"—must be added to the verdict form, a complete retrial is necessary, as opposed to a partial trial limited to apportionment.

Martin, 301 Ga. 323, 801 S.E.2d at 35. The Supreme Court first noted that the "text of the apportionment statute does not prescribe a means of correcting a trial court's apportionment error," but found that Georgia "common law ... adheres to certain general principles in the correction of trial errors that affect less than the whole of a judgment":

> [W]here a judgment is entire and indivisible, it cannot be affirmed in part and reversed in part, but the whole must be set aside if there is reversible error therein. But where a judgment appealed from can be segregated, so that the correct portions can be separated from the erroneous, the court will not set aside the entire judgment, but only that portion which is erroneous.

Martin, 301 Ga. 323, 801 S.E.2d at 36 (internal citation omitted). The Court noted the general principle established by prior Georgia decisions that "[l]imiting the scope of retrial to only those distinct portions of the judgment that are infirm serves the dual objectives of judicial economy and respect for the jury's verdict," further observing

> This general principle is readily adaptable to the apportionment context. The apportionment statute requires that, once liability has been established and the damages sustained by the plaintiff have been calculated, the trier of fact must then assess the relative fault of all those who contributed to the plaintiff's injury—including the plaintiff himself—and apportion the damages based on this assessment of relative fault.... [T]he jury must take the total amount of damages sustained by the plaintiff, identify the persons who are at fault, and award damages according to each person's percentage of fault.... Thus, once liability has been established, the calculation of total damages sustained by the plaintiff is the first step, and the allocation of relative fault and award of damages according to that allocation is a distinct second step. There is no reason these two steps cannot be segregated for purposes of retrial.

Id. at 36–37 (internal citations omitted). The Supreme Court rejected Six Flags' contention that "the text of the statute requires a single trier of fact to make the determination of liability, damages sustained, and apportionment" and held that "relative fault among tortfeasors will not in all cases be 'inextricably joined' with the issues of liability and damages so as to preclude a retrial on apportionment only." Id. at 37-38. The Martin Court concluded that where "correction of an

apportionment error involves only the identification of tortfeasors and assessment of relative shares of fault among them, there is no sound reason to disturb the jury's findings on liability or its calculation of damages sustained by the plaintiff." Id. at 38. The Court noted that

> Though there may be instances in which the particular circumstances of the case or the nature of the apportionment error militate otherwise, in the ordinary case, the issue of apportionment among tortfeasors will be sufficiently distinct from the issue of liability and calculation of damages that the correction of an error in apportionment will not require a full retrial."[22]

Id. at 37-38. Furthermore,

> The existence and degree of responsibility of alleged tortfeasors not appearing on the verdict form are issues that are entirely separate from the questions of whether Six Flags and the other defendants breached their respective duties to Martin and whether those breaches proximately caused Martin's injuries. The relative fault of those individuals likewise would have no effect on the total amount of damages Martin has sustained as a result of the injuries he suffered in the attack. We thus conclude that the apportionment error here requires a retrial only as to apportionment, and we reverse the judgment of the Court of Appeals to the extent it ordered this case be retried in its entirety.

Id. at 38. The Supreme Court thus remanded the case with direction for retrial on the limited issues noted above.

Martin espouses the general principle that a jury verdict should not be disturbed on appeal, unless circumstances of the underlying case demand it. It remains to be seen to what extent this holding is bound to the facts and posture of the underlying case against Six Flags, as alluded to by the Court in footnote 13:

> We acknowledge that a retrial on apportionment may require the presentation of much (if not all) of the same evidence as was presented at the first trial on the question of liability. That the issues of liability and apportionment are distinct does not mean that the proof relevant to those issues is substantially different. The scope of evidence to be presented on retrial is, of course, an issue to be addressed in the trial court.

[22] "In fact, where the issue of apportionment is distinct from the issues of liability and damages sustained, our 'law of the case' doctrine will in most instances preclude the re-litigation of these issues once the jury's verdict on them has been affirmed." Martin, 301 Ga. 323, 801 S.E.2d at 38.

How this holding will be applied by the trial court following remand remains to be seen.

Conclusion

If the defendant wants to apportion fault to a nonparty, the Zaldivar opinion requires that the defendant prove that the nonparty committed a tort against the plaintiff.[23] Brown v. Tucker established that the defendant urging apportionment must prove the fault of a nonparty by a preponderance of the evidence. Defendants should seek to apportion fault to any nonparty that could be responsible for the plaintiff's injuries and be prepared to prove by a preponderance of the evidence that any nonparty committed a tort against the plaintiff that proximately caused the plaintiff's injuries. Any party that seeks to challenge apportionment must be sure to preserve the issue for appeal. And remember to think creatively about apportioning fault and consider using the plaintiff's evidence against the plaintiff to establish the fault of nonparties. However, given the Martin holding discussed supra, parties should not expect a full retrial of all issues to follow a successful appeal of an apportionment error made by the trial court.

[23] The Georgia Supreme Court reaffirmed this holding in Walker v. Tensor Machinery, Ltd., 298 Ga. 297, 779 S.E.2d 651 (2015).