

Insights

GEORGIA SUPREME COURT TAKES AIM AT PREMISES LIABILITY & APPORTIONMENT

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The Georgia Supreme Court recently decided important premises liability questions and found landowners liable for injuries to persons on their property caused by third-party criminal assailants.

The Court's decision, *Georgia CVS Pharmacy, LLC v. Carmichael*, No. S22G0527++, __ Ga. __, __ S.E.2d __, 2023 WL 4247591 (June 29, 2023), which was one of three consolidated appeals, arose from a shooting incident in the parking lot of an Atlanta area CVS. In its consolidated opinion, the Supreme Court provided two notable conclusions that will profoundly affect future cases involving landowner liability for criminal activity.

First, the Court rejected prior case law that had imposed a requirement on plaintiffs to show the landowner could have reasonably foreseen such criminal activity through prior similar events. The Court held instead that reasonable foreseeability can be shown based on the "totality of the circumstances" and noted that, while prior similar incidents at the property are important, they are not required. This expansion of the reasonable-foreseeability standard will no doubt lead to more of these cases going to trial in Georgia.

Second, the Court found that, while Georgia's "Apportionment Statute"—O.C.G.A. § 51-12-33—does not require the jury to apportion fault to each party and non-party alleged to be at fault in every case, the statute does not authorize the jury to decline apportionment to a non-party where the evidence compels a finding that the non-party shares some degree of fault for the harm alleged. Further, the Court expressed doubt that a jury could logically determine (1) that a criminal assailant is not at fault for their intentional conduct; and (2) that a landowner is at fault for failing to protect against that assailant's intentional conduct.

This latter conclusion—although not the focus of the opinion—is merely dicta because the Georgia Supreme Court still affirmed the underlying decision to apportion 0% fault to the assailant, 5% fault to the victim, and 95% fault to the property owner—CVS—based upon the phrasing of the apportionment jury instruction used at trial.

GEORGIA'S APPORTIONMENT STATUTE

Georgia's legislature enacted the Apportionment Statute as part of the Tort Reform Act of 2005 and more recently passed a significant amendment to the Statute in 2022 to cure the impacts of a 2021 Georgia Supreme Court's decision. The *Carmichael* appeal was decided under the pre-2022 version of the Statute.

The Apportionment Statute governs the reduction of damages awarded by a jury based upon the proportion of fault attributed to those other than the defendant(s), including the plaintiff. Subsection (a) of the statute focuses on the proportion of fault attributed to plaintiffs. Subsections (b) and (c) concern the fault of defendants and non-party entities and individuals.

O.C.G.A. § 51-12-33(a) provides:

- Where the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, 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.

O.C.G.A. § 51-12-33(b) provides:

- The trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages in proportion to the percentage of fault attributable to the plaintiff, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person.

O.C.G.A. § 51-12-33(c) provides:

- The trier of fact, in assessing percentages of fault, considers the fault of all persons or entities contributing to the alleged injury, regardless of whether the person or entity was, or could have been, named as a party in the litigation.

THE GEORGIA SUPREME COURT'S *CARMICHAEL* DECISION

BACKGROUND

The plaintiff, James Carmichael, brought suit against Georgia CVS Pharmacy after he was shot during an armed robbery in a CVS parking lot by an unknown assailant. Carmichael had traveled to the Georgia CVS from Alabama to deliver electronic goods he had agreed to sell online to a buyer he would meet outside the CVS.

Carmichael claimed CVS failed to implement adequate security measures at this store to safeguard the CVS property, such as hiring a security guard or installing improved lighting in the parking lot, and these alleged failures caused the injuries he suffered from the assailant. Carmichael did not name the assailant in the action against CVS.

LOWER COURT DECISIONS

Prior to trial, CVS submitted a notice of non-party fault under the Apportionment Statute to indicate its intent to ask the jury to assign some portion of any fault for Carmichael's injuries to the non-party assailant.

At trial, the jury found CVS to be 95% at fault, Carmichael 5% at fault, and the assailant to have no fault whatsoever. CVS objected in a post-trial motion to the jury's failure to allocate any fault to the assailant on the basis that this conclusion conflicted with the requirements of the Apportionment Statute. The trial court rejected this argument, and, on appeal, the Court of Appeals affirmed. CVS's appeal to the Georgia Supreme Court followed.

SUPREME COURT DECISION

CVS argued that the jury's apportionment of zero fault to the assailant was inconsistent with the balance of the verdict, and thus void, because the jury found that CVS was liable (and therefore at fault) for failing to keep Carmichael safe from the assailant. In other words, CVS argued, if a third party bears no blame for the incident, then it makes no sense to impose a duty on the property owner to protect an invitee from that third-party.

The Court of Appeals disagreed with CVS's argument and concluded that the jury could have found the assailant blameless because it could have found that Carmichael initiated or escalated the confrontation, thereby causing the assailant to act in self-defense. Thus, per the Court of Appeals, the verdict was not necessarily inconsistent nor void.

The Georgia Supreme Court agreed with the Court of Appeals that the verdict was not inconsistent nor void. Nonetheless, the Supreme Court disagreed with the Court of Appeals' analysis in reaching this conclusion. The Supreme Court found that **if** the non-party indeed bore no blame for the incident, then it was improper to impose a duty on the property owner to protect an invitee from that non-party. The Court essentially agreed that, in most premises-liability cases involving third-party criminal conduct, there should be at least some apportionment of fault to the criminal.

Despite this guidance from the Supreme Court on the issue of apportionment, the Court nonetheless affirmed the zero-percent fault allocation to the assailant in the *Carmichael* case because of the specific language used in the jury instructions. CVS agreed to a jury instruction asking the jury to consider the fault of all people whose "negligence" contributed to the injury. In light of this language choice, the Supreme Court held that apportionment could be made only among those actors who were "negligent." Thus, the Court upheld the zero-fault allocation because the jury could have found this particular assailant's acts to have been "intentional" as opposed to merely "negligent."

POTENTIAL IMPACTS

On the issue of apportionment, the Georgia Supreme Court's opinion offers notable guidance for property owners facing similar litigation. Georgia litigants should be mindful that jury instructions give the jury the opportunity to consider the fault—negligent, intentional, or otherwise—of all persons or entities who could have contributed to an injury or damage in any way. The jury should not be limited to only negligent actors. Indeed, fault, as described previously by the Court, “includes all wrongdoing” (*Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 365 (2012)) and instructions should cover the same for apportionment. When instructions include only “negligent” actors for apportionment—as was the case in *Carmichael*—a jury may ignore an otherwise at-fault non-party because the jury could have found this non-party's acts to have been “intentional” instead of “negligent.”

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