

THE BATTLE REGARDING GEORGIA'S APPORTIONMENT STATUTES HEATS UP IN NEGLIGENT SECURITY PREMISES LIABILITY CASES

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Feb. 22, 2012

Clarity may be on the horizon with respect to application of Georgia's apportionment statute - O.C.G.A. § 51-12-33 - in negligent security premises liability cases. Seven years after the enactment of the statute, and with continued disagreement within the State Bar and inconsistent rulings from the courts, the Georgia Supreme Court will get its first opportunity to provide clarity on this topic. *Couch v. Red Roof Inns, Inc. et al.* is a premises liability case where the plaintiff was attacked by unknown assailants while staying at the hotel. Couch sued, contending that the hotel was negligent in failing to protect him from being the victim of foreseeable criminal activity. The hotel, pursuant to the provisions of the apportionment statute, seeks to have the jury apportion liability between it and the unknown nonparty assailants. The plaintiff is attempting to prevent this from occurring.

Historically, defense attorneys have championed the revised statute as doing away with the pesky and long-thought unfair concept of joint and several liability. Defense attorneys have further heralded the statute as allowing the jury to consider the fault of nonparties, thus reducing the verdict by the nonparty's percentage of fault. At last, it seemed that defendants would only be responsible for the damage they caused a plaintiff. On the contrary, plaintiffs have fought hard to have the statute invalidated as unconstitutional and inconsistent with the joint and several liability statute set forth at O.C.G.A. §51-12-31, which the Legislature failed to remove when it amended the apportionment statute.

Following enactment of the statute, some trial judges have allowed defense attorneys to argue apportionment and have the jury divvy up responsibilities among both parties and nonparties, while other judges have refused.

In July of 2011, the Court of Appeals had its first opportunity to weigh in on the hotly contested application of apportionment in the negligent security premises liability case of *Pacheco v. Regal Cinemas, Inc.*, 311 Ga. App. 224 (2011). In its opinion, the Court of Appeals found that it was proper to allow a jury to apportion damages among a property owner, its security company, and the unknown criminal assailants who shot and killed a man in a movie theater parking lot. Unfortunately, the opinion was not unanimous and, thus, "physical precedent only." Though one step closer to understanding the mystery of apportionment, since then, at least three trial courts have disregarded the interpretation given by the *Pacheco* court, refusing to allow the issue of apportionment to be decided by the jury, the most recent one finding that the apportionment statute is unconstitutional.

Two of these cases, *Martin v. Six Flags Over Georgia*, being defended by W. Dan McGrew, Charles M. McDaniel, Jr. and Kim M. Ruder of Carlock, Copeland & Stair, and *Salinas v. Coro Realty Advisors* are now pending before the Georgia Court of Appeals, and it is likely that the third, *Medina v. GFI Management Services, Inc.* will be directly appealed to the Georgia Supreme Court shortly.

Despite the flurry of these publicly followed appeals, all eyes are on the *Couch* matter. On December 8, 2011, the Federal District Court for the Northern District of Georgia certified two questions to the Georgia Supreme Court in *Couch*:

1. In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, is the jury allowed to consider the "fault" of the criminal assailant and apportion its award of damages among the property owner and the criminal assailant, pursuant to O.C.G.A. § 51-12-33?
2. In a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, would jury instructions or a special verdict form requiring the jury to apportion its award of damages among the property owner and the criminal assailant, pursuant to O.C.G.A. § 51-12-33, result in a violation of the plaintiff's constitutional right to a jury trial, due process or equal protection?

The answer to these questions will finally define the boundaries of responsibility in the typical negligent security premises liability case involving the criminal conduct of known or unknown assailants. Its outcome will have far reaching implications for a broad spectrum of businesses in Georgia including apartment complexes, gas stations, convenience stores/grocery stores, and all other types of retail businesses, especially those which may be located in "rough" areas of town beset with criminal activity.

According to the Supreme Court of Georgia, the *Couch* case was docketed on December 21, 2011. The briefing schedule is set, with the Plaintiff's brief due in late January. Oral argument is expected to take place in March.

As this critical issue moves toward clarity, one thing remains clear. Until told otherwise, landowners and businesses should continue to timely invoke the apportionment statute and seek to reduce liability by placing as much blame as possible on the criminal assailants responsible for a plaintiff's injuries.