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The Elephant Not in the Room: Apportionment to Nonparties in Georgia

Michael K. Newman
University of Georgia School of Law

THE ELEPHANT NOT IN THE ROOM: APPORTIONMENT TO NONPARTIES IN GEORGIA

TABLE OF CONTENTS

I. INTRODUCTION

Plaintiffs have fallen on hard times. Taking into account the Georgia legislature's abolition of joint and several liability,[1] nonparty apportionment, as it stands now, poses a significant hurdle to injured plaintiffs in collecting their full amount of damages.[2] Generally, apportionment is the process of allocating fault to the parties that have contributed to the plaintiff's injuries.[3] Currently, Georgia does not require precise party identification and does not require a finding of each element of a cause of action in order for a defendant to apportion fault to a nonparty.[4] Current Georgia trial practice, under the regime laid out by a recent appeals court opinion in *Double View Ventures, LLC v. Polite*,[5] poses a significant risk of depriving the plaintiff of a fair trial and due process.

The Georgia Supreme Court has a chance to right this problem and explicitly lay out the requirements of the Georgia apportionment statute, O.C.G.A. § 51-12-33.[6] The Georgia Supreme Court has declared that the defense needs to provide a rational basis for apportioning fault to a nonparty.[7] But this standard has been warped by the recent appeals court decision in *Double View Ventures*.[8] This Note recommends that the Georgia Supreme Court strictly adhere to the language in O.C.G.A. § 51-12-33(d)(2)[9] and require the defense to precisely identify the party to the best of their ability under the circumstances. Georgia should also require that

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[1] *See* McReynolds v. Krebs, 725 S.E.2d 584, 587 (Ga. 2012) ("And the statute reiterates this point by saying that damages 'shall not be a joint liability among the persons liable.' ").

[2] *See* Thomas A. Eaton, Special Contribution, *Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. § 51-12-33*, 64 MERCER L. REV. 15, 16 (2012) ("Innocent plaintiffs will now bear the burden of the 'uncollectible share' of damages, thereby reducing the prospect of securing a full recovery.").

[3] Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355, 409 (2003).

[4] *See generally* Double View Ventures, LLC. v. Polite, 757 S.E.2d 172, 178 (Ga. Ct. App. 2014).

[5] *Id.*

[6] *See generally* O.C.G.A. § 51-12-33 (LexisNexis Supp. 2015).

[7] Levine v. SunTrust Robinson Humphrey, 740 S.E.2d 672, 678 (Ga. Ct. App. 2013).

[8] 757 S.E.2d 172.

[9] O.C.G.A. § 51-12-33(d)(2) (requiring precise party identification "or the best identification of the nonparty which is possible under the circumstances").

defendants allege and present evidence on each element of their defense concerning a nonparty.[10] Only then will the jury have a rational basis for a finding of nonparty fault and the plaintiff's due process rights be protected.[11]

Apportionment aims to allocate the correct percentage of responsibility to each tortfeasor. If the plaintiff sues only one defendant, while several entities actually contributed to the plaintiff's injury, the one joined defendant has an incentive to allocate fault to those nonparties so that the joined defendant is not stuck paying the complete amount of the plaintiff's damages.[12] The purpose of this process is to subject the defendant only to the portion of fault that he is actually responsible for, so as to not make him bear liability in excess of his responsibility for the harm.[13] Simply put, fairness is the aim of Georgia's apportionment statute.

In Georgia, if a defendant successfully apportions fault to nonparties then the plaintiff will be unable to collect that portion of her damages during that particular trial because of the

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[10] *See Double View Ventures*, 757 S.E.2d at 181 (Barnes, J., dissenting) (stating that the defense "must at a minimum present evidence that the nonparty had a duty to the plaintiff, breached its duty, and caused damages").

[11] *See* Eaton, *supra* note 2, at 22–23 (noting that conflicting findings of liability in multiple trials can leave a blameless plaintiff without full recovery, even when he collects against each negligent tortfeasor for the same harm, and thus depriving the plaintiff of due process because the findings of the jury are not binding on the nonparty, but they are binding on the plaintiff). Inconsistent findings of fault are actually more likely to happen if the jury, in the first instance, does not know the specific identity of the nonparty and all of the elements of a cause of action. Without evidence concerning each element of a cause of action, there is more room for jury speculation and thus more room for conflicting findings of fault in separate trials where the latter trial requires a showing of liability.

[12] Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 88 (1992) ("[A]lthough the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that fault lies as well with other entities." (internal quotation marks omitted)).

[13] *See* Couch v. Red Roof Inns, Inc., 729 S.E.2d 378, 383 (Ga. Ct. App. 2012) (stating that the statute's purpose "is to have the jury consider all of the tortfeasors who may be liable to the plaintiff together, so their respective responsibilities for the harm can be determined"); *see also* Northland Ins. Co. v. Truckstops Corp. of Am., 914 F. Supp. 216, 220 (N.D. Ill. 1995) (noting that failing to include certain nonparties for apportionment purposes violates the main objective "of comparative fault by improperly subjecting the defendants to liability in excess of their proportion of fault").

elimination of joint and several liability.[14] Plaintiffs bear the cost of the uncollectible portion, which is every percentage point that the jury decides to allocate to nonparties.[15] The apportionment statute thus incentivizes plaintiffs to join all parties that may be liable to them[16] and incentivizes defendants to try to allocate fault to as many nonparties as possible in order to reduce the damages that they might have to pay.[17]

O.C.G.A. § 51-12-33, which abolished joint and several liability, mandates the current apportionment scheme in Georgia.[18] Traditionally, joint and several liability had been the rule in Georgia.[19] If liability is joint and several, that means that if two or more tortfeasors' wrongful conduct combines to produce a single, indivisible injury to the plaintiff, the plaintiff may collect from both of them or just one of them.[20] Practically, this puts the risk of an insolvent tortfeasor on the defendants rather than the plaintiff.[21] So if defendants *X* and *Y* cause an indivisible harm to Plaintiff worth $100,000 in damages in a jurisdiction that respects joint and several liability, and defendant *X* is insolvent while *Y* is rather wealthy in excess of $100,000, *Y* will have to pay every bit of the $ 100,000 (if the plaintiff is non-negligent). However, in a

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[14] *See* Eaton, *supra* note 2, at 30–31 ("The elimination of joint liability when fault is apportioned to parties and non-parties effectively places the risk of the uncollectible share to the innocent plaintiff."); *see also* Joseph W. Little, *Absent Tortfeasors*, *in* 2-13 COMPARATIVE NEGLIGENCE LAW AND PRACTICE § 13.20 (2014) ("If several liability applies and consideration of phantom negligence is permitted, considering the negligence attributable to a phantom tortfeasor may drastically reduce the plaintiff's potential recovery in a several liability jurisdiction.").

[15] *See* Eaton, *supra* note 2, at 31 ("Every percentage of fault apportioned to the unidentified criminals is a percentage of damages for which even an innocent plaintiff will not likely receive compensation.").

[16] *See* Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437, 473 (2007) (noting that nonparty apportionment encourages plaintiffs to sue all parties in one action rather than serially).

[17] Eaton, *supra* note 2, at 30.

[18] *See* McReynolds v. Krebs, 725 S.E.2d 584, 587 (Ga. 2012) ("And the statute reiterates this point by saying that damages 'shall not be a joint liability among the persons liable.'").

[19] Eaton, *supra* note 2, at 15.

[20] *Id.* at 26.

[21] *Id.*

jurisdiction without joint and several liability, the plaintiff would simply be unable to collect the portion allocated to *X*.[22]

Assuming the plaintiff is in a jurisdiction with joint and several liability, if one defendant is forced to pay the whole amount of damages, he will seek contribution against the other defendant(s) in order to force them to pay their rightful share of the damages.[23] But if the other defendants are insolvent, the solvent defendant will pay the whole amount of damages in excess of his liability.[24] In the context of nonparty apportionment, if a nonparty was found to have fault for the innocent plaintiff's injury under a regime of joint and several liability, the joined defendants would still have to pay the whole of the plaintiff's damages because the plaintiff could not collect from the nonparty.[25]

Joint and several liability was abolished by the enactment of O.C.G.A. § 51-12-33.[26] This means that if one defendant is insolvent, the plaintiff bears the weight of the uncollectible share rather than a blameworthy defendant.[27] This makes it harder for plaintiffs to collect their whole award to pay for medical expenses and other damages.[28]

On top of this statutory mandate, which creates a risk of a plaintiff being unable to collect her whole amount of damages, is the other statutory mandate allowing defendants to apportion fault to nonparties.[29] It is only fair that blameworthy nonparties who contributed to the plaintiff's harm be assigned their share of

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[22] *Id.* at 30–31 (noting that the elimination of joint and several liability places the risk of the uncollectible share on the plaintiff).

[23] *Id.*

[24] *Id.*

[25] *Id.* at 16.

[26] McReynolds v. Krebs, 725 S.E.2d 584, 587 (Ga. 2012) ("And the statute reiterates this point by saying that damages 'shall not be a joint liability among the persons liable.' ").

[27] For an insightful discussion on the point of who should bear the risk of insolvent defendants, see Bublick, *supra* note 3, at 409 ("Just because a defendant would ideally pay a particular percentage of the damages when all other defendants are known and solvent does not mean that any other allocation would be unfair when other defendants are unknown or insolvent. In this situation, the harsh reality is that either the plaintiff or the negligent defendant will bear the remaining cost of the injury.").

[28] Little, *supra* note 14 ("The pure comparative negligence policy is disadvantageous to plaintiffs, particularly because it makes recovery of damages more burdensome and uncertain.").

[29] *See generally* O.C.G.A. § 51-12-33.

fault so that the defendant is not held liable for more than his fair share of contribution to the harm.[30] However, the current interpretation of the apportionment statute makes it unreasonably easy for the defendant to allocate fault to a nonparty and slants the trial in the defendant's favor. So, compounded with the abolition of joint and several liability, the apportionment of fault to a nonparty makes it more likely that plaintiffs will not collect their entire recovery in a personal injury suit.[31] The fundamental goal of tort law is to make the victim whole after being harmed by a wrongdoer.[32] But Georgia's current interpretation of the apportionment statute makes the plaintiff battle uphill to reach that goal.

Apportioning fault in a truly rational way would be fair to defendants and plaintiffs alike, but when the process is skewed so much in favor of the defense, due process is threatened on the part of the plaintiff.[33] Right now, the "rational basis for apportioning fault" lacks a definition in case law in Georgia. The Georgia Supreme Court should clarify that the apportionment statute requires defendants to precisely identify the nonparty when reasonable, and that the defendants must allege and present evidence on every element of a cause of action in order to include a nonparty on a verdict form that allows the jury to apportion fault to said nonparty.

Part II of this Note will outline the relevant case law in Georgia concerning apportionment. Part III.A of this Note will show that case law in Georgia requires that the burden of apportioning fault

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[30] Northland Ins. Co. v. Truckstops Corp. of Am., 914 F. Supp. 216, 220 (N.D. Ill. 1995) (noting that failing to include certain nonparties for apportionment purposes violates the main objective "of comparative fault by improperly subjecting the defendants to liability in excess of their proportion of fault").

[31] *See* Marcus, *supra* note 16, at 475–76 (noting that the combination of several liability and nonparty allocation causes hardship for plaintiffs).

[32] Jonathan Cardi, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1329 (1997); J. Tayler Fox, *Can Apples Be Compared to Oranges? A Policy-Based Approach for Deciding Whether Intentional Torts Should Be Included in Comparative Fault Analysis*, 43 VAL. U. L. REV. 261, 263 (2008).

[33] *Cf.* Sisk, *supra* note 12, at 76 ("Some procedure, of course, must be adopted so that the issue of a nonparty's responsibility may be presented to the trier of fact in a manner consistent with the principles of due process.").

to a nonparty be placed on the defendant. That burden necessarily entails precise party identification and a finding of liability on the part of nonparties in order to apportion fault to them, and thus a requirement of evidence going to each element. Part III.B–C of this Note will discuss how the court of appeals wrongly decided the case of *Double View Ventures LLC v. Polite*.[34] Part III.D of this Note will discuss how if the apportionment statute is not interpreted in the recommended way, plaintiffs run a serious risk of being deprived of due process. Finally, Part III.F, offers solutions to the problem.

II. BACKGROUND

Tort reform spread throughout the United States starting in the 1980s as a response to a perceived problem of "unfair and inaccurate damage assessments."[35] Georgia's legislature made significant amendments to its apportionment statute in 2005 after a period of less comprehensive tort reform enactments.[36] The amendments to O.C.G.A. § 51-12-33,[37] addressing apportionment

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[34] 757 S.E.2d 127 (Ga. Ct. App. 2014).

[35] *See* Marcus, *supra* note 16, at 440–42 (discussing the rise of tort reform in the 1980s and positing that tort reform has "perpetuated and worsened the problem of unfair and inaccurate damage assessments that the legislation was intended to remedy").

[36] Eaton, *supra* note 2, at 18.

[37] The amendments to O.C.G.A. § 51-12-33 read as follows:

> (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 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

of liability, made sweeping changes to the traditional tort regime in Georgia.[38] The statute has since been interpreted by the Georgia courts in *McReynolds v. Krebs*,[39] *Couch v. Red Roof Inns, Inc.*,[40] *Union Carbide Corp. v. Fields*,[41] *Zaldivar v. Prickett*,[42] and *Double View Ventures, LLC. v. Polite*.[43]

A. DECISIONS INTERPRETING THE APPORTIONMENT STATUTE BEFORE *DOUBLE VIEW VENTURES*

In *McReynolds*, the plaintiff filed suit against McReynolds and General Motors (GM) after McReynolds's GM vehicle struck her.[44] McReynolds brought a cross-claim against GM for contribution[45]

> 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.

[38] Eaton, *supra* note 2, at 18.

[39] 725 S.E.2d 584 (Ga. 2012).

[40] 729 S.E.2d 378 (Ga. 2012).

[41] 726 S.E.2d 521 (Ga. Ct. App. 2012), *rev'd on other grounds*, Georgia-Pacific, LLC v. Fields 748 S.E.2d 407 (Ga. 2013), *vacated in part*, Union Carbide Corp. v. Fields 758 S.E.2d 335 (Ga. Ct. App. 2014).

[42] 767 S.E.2d 166 (Ga. Ct. App. 2014).

[43] 757 S.E.2d 172 (Ga. Ct. App. 2014).

[44] 725 S.E.2d at 586.

[45] *Black's Law Dictionary* defines contribution as "[o]ne tortfeasor's right to collect from joint tortfeasors when, and to the extent that, the tortfeasor has paid more than his or her

and set-off,[46] but after the plaintiff settled with GM, the trial court dismissed McReynolds's cross-claims because it decided that O.C.G.A. § 51-12-33 abolished joint and several liability.[47] Thus, contribution and set-off were not allowed, meaning McReynolds could not receive any help from GM in paying her portion of damages.[48] The Georgia Supreme Court affirmed the trial court's ruling.[49]

McReynolds tried to argue to the Georgia Supreme Court that the apportionment statute did not apply because the statute only comes in to play when the plaintiff is partially at fault.[50] Since the plaintiff here was not partially at fault, McReynolds argued that she should not be subject to the statutory scheme abolishing joint and several liability.[51] She wanted to find a way to still have GM help pay damages. The court found this argument unpersuasive and held that "in applying O.C.G.A. § 51-12-33, the trier of fact must 'apportion its award of damages among the persons who are liable according to the percentage of fault of each person' even if

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proportionate share to the injured party, the shares being determined as percentages of causal fault." BLACK'S LAW DICTIONARY 402 (10th ed. 2014).

[46] *Black's Law Dictionary* defines setoff as "[a] debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor." BLACK'S LAW DICTIONARY 1581 (10th ed. 2014).

[47] McReynolds v. Krebs, 725 S.E.2d 584, 586 (Ga. 2012).

[48] *Id.*

[49] *Id.* at 588.

[50] *Id.* at 586. To make this argument, McReynolds relied on the fact that subsection (a) of the apportionment statute limits its application to cases in which "the plaintiff is to some degree responsible for the injury or damages claimed." *Id.* at 587. The plaintiff in this case was not at fault. Defendant argued that subsection (a) needs to be satisfied as a prerequisite before subsection (b) (abolishing joint and several liability and requiring apportionment of fault) comes into play. *Id.* In other words, she argued that for subsection (b) to apply, the plaintiff must be, to some degree, at fault. The court rejected this argument for a couple of reasons. The court recognized that this interpretation would import subsection (a)'s language into the next six subsections, while subsection (a) contains no language implying that it need be satisfied before the other subsections apply to any given case. *Id.* Further, none of those subsections have the limiting language used in subsection (a). *Id.* Also, the court noted that subsection (b) states that it applies "after a reduction of damages pursuant to subsection (a) of this Code section, *if any*." O.C.G.A. § 51-12-33(b); 725 S.E.2d at 587. The "if any" language necessarily means that the plaintiff can be completely without fault and subsection (b) still applies. 725 S.E.2d at 587. Therefore, subsection (b) applied to this case where the plaintiff was not at fault. *Id.*

[51] 725 S.E.2d at 586–87.

the plaintiff is not at fault for the injury or damages claimed."[52] The court reasoned that apportionment of fault to parties and nonparties alike is warranted when the plaintiff is not at fault because O.C.G.A. § 51-12-33(b) states that it applies "after a reduction of damages pursuant to subsection (a) of this Code section, *if any*." Subsection (b) allows for apportionment of damages to those who are liable after the reduction of damages attributable to the plaintiff, if any, for her own injuries.[53] Hence, because of the "if any" language, there may be apportionment of fault if the plaintiff is or is not negligent, and abolition of joint and several liability in section (b) applies just as well.[54]

After denying claims for contribution and set-off, the court also denied McReynolds's claim that fault should be apportioned to GM.[55] The court so held because McReynolds offered no evidence at all "on which apportionment could be based."[56] In fact, McReynolds rested after the plaintiff presented her case without presenting any evidence at all concerning the fault of GM.[57]

The same year, the Georgia Supreme Court decided another case interpreting O.C.G.A. § 51-12-33. In *Couch v. Red Roof Inns, Inc.*, the court ruled that fault could be apportioned between a negligent premises owner and an intentional tortfeasor[58] after the District Court for the Northern District of Georgia certified two questions for the Georgia Supreme Court:

> *(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?*

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[52] *Id.* at 587.
[53] *See* O.C.G.A. § 51-12-33(b).
[54] 725 S.E.2d at 587.
[55] *Id.* at 588.
[56] *Id.*
[57] McReynolds v. Krebs, 705 S.E.2d 214, 218 (Ga. Ct. App. 2010).
[58] 729 S.E.2d 378, 379 (Ga. 2012).

> *(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 rights to a jury trial, due process or equal protection?*[59]

The court opined that the word "fault," used in O.C.G.A. § 51-12-33, encapsulated both intentional and negligent conduct and thus required apportionment to intentional, as well as negligent, tortfeasors.[60] Also, apportionment between negligent and intentional tortfeasors does not violate the plaintiff's constitutional rights.[61]

The court also gave insight into the policy underlying the apportionment statute, stating that its purpose "is to have the jury consider all of the tortfeasors who may be liable to the plaintiff together, so their respective responsibilities for the harm can be determined."[62] The word "liability" appears several more times in the court's opinion. Notably, the court asserted that "subsection (b) addresses the full universe of tortfeasors, whether parties or not" and was "designed to address 'the total amount of damages' remaining at this point and the liabilities of all persons whom the jury has determined to be liable for the plaintiff's damages."[63] Next, the court noted that "[t]he jury will be instructed to 'apportion its award of damages among the persons who are *liable* according to the percentage of *fault* of each person.' "[64] Boiled down, the jury should "take the total amount of damages to be awarded to the plaintiff, identify the persons who are liable, and apportion the damages to each liable person according to each

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[59] *Id.*
[60] *Id.* at 383.
[61] *Id.* at 379.
[62] *Id.* at 383.
[63] *Id.* at 380.
[64] *Id.* (emphasis in original).

person's percentage of fault."[65] This necessarily means that to find fault of a party or nonparty, one must find that they are liable first. The court used *Black's Law Dictionary* to define liability as being responsible or answerable in law.[66]

Earlier in the same year, the Georgia Court of Appeals decided *Union Carbide Corp. v. Fields*.[67] Plaintiff Fields, contracted mesothelioma from exposure to asbestos remaining on her father's work clothes.[68] She filed suit against several companies.[69] Each defendant "affirmatively pled the defense of nonparty fault, seeking to attribute fault to nonparties."[70] In all, there were fifty-one nonparties designated by the defendants to be at fault for Fields's injuries.[71] The court of appeals affirmed summary judgment for Fields on the issue of nonparty fault, thus precluding

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[65] *Id.*

[66] *Id.* at 383; *see also* BLACK'S LAW DICTIONARY 997 (9th ed. 2009) (defining liability as "the quality or state of being legally obligated or accountable").

[67] 726 S.E.2d 521 (Ga. Ct. App. 2012). This decision was reversed on a specific issue in a separate part of the opinion. The plaintiff originally named several parties in her original complaint, which was later amended not to include these parties (thus making them nonparties). *Id.* at 528. Additionally, the plaintiff had sworn in her information form that she had been affected by asbestos from these particular nonparties. *Id.* The Georgia Court of Appeals held that "this evidence alone was not sufficient to defeat summary judgment on Defendants' nonparty defense as it pertained to the potential fault of" these specific nonparties, and so summary judgment was proper against the Defendants. *Id.* The Georgia Supreme Court found error in this ruling and reversed because:

> Where the pleading has been stricken, the admission contained therein remains to be utilized as evidence of fact which the admitting party can explain but may be unable to conclusively refute. Thus, the Fields, having made the admissions in their original pleadings, "could not establish as a matter of law that the admission[s] w[ere] untrue, but only could raise an issue of fact for a jury to determine."

Georgia-Pacific, LLC v. Fields, 502, 748 S.E.2d 407, 411 (Ga. 2013) (alteration in original) (citation omitted). Since the Georgia Supreme Court did not address the other issues in the appellate court opinion, they are still good law and binding upon the courts. *See* Union Carbide Corp. v. Fields, 758 S.E.2d 335, 336 (Ga. Ct. App. 2014) ("Since those portions of our earlier opinion are consistent with the Supreme Court's opinion, Division 1 (a)–(c), (e) and Division 2 of our earlier opinion 'become binding upon the return of the remittitur.'" (citing Shadix v. Carroll Cnty., 554 S.E.2d 465 (Ga. 2001))). This Note does not discuss any rules or facts from the reversed portion of this opinion as support for the proposition.

[68] 726 S.E.2d 521, 523 (Ga. Ct. App. 2012).

[69] *Id.*

[70] *Id.* at 524.

[71] *Id.*

the defense from presenting the potential fault of these nonparties to the jury.[72]

The court noted that "[a]s with other affirmative defenses, Defendants have the burden at trial to prove the defense of nonparty fault."[73] The defendants failed to prove their defense of nonparty fault and carry their burden for several reasons. Defendants failed to prove whether some parties even had a duty to the plaintiff.[74] The court noted that "[i]n the absence of a legally cognizable duty, there can be no fault or negligence."[75] That the defense should present evidence of nonparty fault achieved significance in this case. The court asserted that apportionment of fault to a nonparty "cannot be considered for the purposes of apportioning damages without some competent evidence that the nonparty . . . 'contributed to the alleged injury or damages.' "[76] Without evidence, the court would be left with only speculation as to nonparty fault, and just because a guess can raise the possibility of fault, it would not be "sufficient to create even an inference of fact for consideration on summary judgment."[77] In light of these rules, and the fact that the defendants produced no evidence to prove that Fields was exposed to any other products that included asbestos residue other than defendants', the court affirmed the dismissal of the issue of nonparty fault on summary judgment.[78]

The next year, in 2013, the Georgia Court of Appeals decided *Levine v. SunTrust Robinson Humphrey*.[79] There, SunTrust was Maxim's financial advisor.[80] Maxim sued and alleged that SunTrust caused it damages by, among other things, fraud, breach

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[72] *Id.* at 523.

[73] *Id.* at 524; *see also* Polston v. Boomershine Pontiac-GMC Truck, 423 S.E.2d 659, 661 (Ga. 1992) (noting that where "one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor").

[74] *Union Carbide*, 726 S.E.2d at 524.

[75] *Id.* at 525 (quoting Ford Motor Co. v. Reese, 684 S.E.2d 279 (Ga. Ct. App. 2009)).

[76] *Id.* at 526 (citing O.C.G.A. § 51-12-33(c)).

[77] *Id.* at 527 (quoting Adamson v. Gen. Elec. Co., 694 S.E.2d 363 (Ga. Ct. App. 2010)).

[78] *See id.* at 525–29 (affirming summary judgment as to each of the named nonparties).

[79] 740 S.E.2d 672 (Ga. Ct. App. 2013).

[80] *Id.* at 675.

of contract, and professional negligence.[81] Maxim settled with the other defendants before trial.[82] SunTrust filed a notice of nonparty fault in order for the jury to apportion fault to the settling parties.[83] The court held that "it is the defendant's burden to establish a rational basis for apportioning fault to a nonparty."[84] The court noted that at the summary judgment stage, the plaintiff did not have to establish the exact percentage of fault of the defendant or any other actor because the burden is on the defendant, and apportionment of fault is best left to the jury.[85] Therefore, Maxim did not have to establish the exact percentage of the fault of nonparties or SunTrust, just that SunTrust was a proximate cause of some damages.[86]

Recently, the Georgia Court of Appeals decided the case of *Zaldivar v. Prickett*.[87] In this case, O.C.G.A. § 51-12-33(c) was not applicable because the court found that the nonparty employer did not contribute to Plaintiff's injuries by negligently supplying the car involved in the crash.[88] Prickett sued Zaldivar after Zaldivar struck Prickett's car.[89] Zaldivar attempted to have fault allocated to Prickett's employer, stating that the employer was at fault for negligently entrusting a car to Prickett, of whom they had received reports of being an erratic driver.[90] The court affirmed the trial court's ruling, holding that the employer "was not in breach of any

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[81] *Id.*

[82] *Id.* at 676.

[83] *Id.*

[84] *Id.* at 678.

[85] *Id.*

[86] *Id.*

[87] 762 S.E.2d 166 (Ga. Ct. App. 2014). Close to publication of this Note, the Georgia Supreme Court issued an opinion reversing this case. That case is *Zaldivar v. Prickett*, 744 S.E.2d 688 (Ga. 2015). While it did not specifically overrule *Double View Ventures, LLC v. Polite*, 757 S.E.2d 172 (Ga. Ct. App. 2014), it produced a much more coherent interpretation of the apportionment statute. This new opinion is evaluated in later Notes. *See* Michael David Alfano, Jr., Note, *Employer Escape Hatch Closed in Georgia: How the Interpretation of Georgia's Apportionment Statute in* Zaldivar *Prohibits Employers from Using Respondeat Superior to Eschew Direct Negligence Claims*, 50 GA. L. REV. (forthcoming 2016).

[88] *Zaldivar*, 762 S.E.2d at 167.

[89] *Id.*

[90] *Id.*

legal duty owed to Mr. Prickett, nor was it the proximate cause of his injuries."[91]

The court reasoned that O.C.G.A. § 51-12-33(c) mandates that a nonparty contribute to the plaintiff's injury or damages in order to have fault apportioned to it.[92] Unless there is a causal connection between a nonparty's act and the plaintiff's injury, there is no way for the nonparty to have contributed to that injury.[93] Georgia courts usually disallow negligent entrustment claims because the driver's own negligence supersedes the supplier's negligence.[94] Thus, there was no causation.

The majority noted that the defendant's interpretation of *Couch* as an expansion of fault to include negligent entrustment was misplaced since statutes in derogation of the common law should be read strictly.[95] Applying fault on a theory of negligent entrustment would broaden the application of the statute beyond the plain and explicit terms because the supplier of the vehicle did not contribute to the harm.[96] The court stated that fault should be read no more broadly than including only negligent and intentional conduct causing harm.[97] Therefore, the employer could not have fault apportioned to it because it did not contribute to or cause the harm, and allowing apportionment of fault to the employer broadens the statute beyond its plain and explicit terms.[98]

This opinion is also notable for its dissent by Judge Branch. The dissent contended that apportioning fault to Prickett's employer for supplying his car "has nothing to do with assigning liability to [his employer] for Prickett's injuries" because the apportionment statute does not equate fault with tort liability.[99] The dissent cited *Couch* in noting that fault is not "synonymous with negligence, but instead includes other types of

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[91] *Id.*
[92] *Id.* at 168.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 168–69.
[96] *Id.* at 169.
[97] *Id.* at 168–69.
[98] *Id.* at 169.
[99] *Id.* at 169–70 (Branch, J., dissenting).

wrongdoing."[100] Therefore, fault could be apportioned to Prickett's employer because the employer "ha[d] a duty not to negligently entrust others with its vehicles, and a violation of that duty can lead to accidents."[101] Notably, Judge Branch also found that there could in fact be causation in a negligent entrustment case.[102] Judge Branch reasoned that if the employer knew that Prickett was an incompetent driver, it cannot be said that they are without fault even if they could never be held liable.[103] The dissent bolstered its argument further by citing *Barnett v. Farmer*, which allowed apportionment of fault to an immune party when the immune party was negligent.[104]

B. BREAKING PRECEDENT: *DOUBLE VIEW VENTURES*

In the same term, the Court of Appeals of Georgia decided the case of *Double View Ventures, LLC v. Polite*.[105] Here, the court decided that a nonparty should not have been excluded from the verdict form because there was a question of fact concerning

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[100] *Id.* at 170 (Branch, J., dissenting); *see* Couch v. Red Roof Inns, Inc., 729 S.E.2d 378, 381 (Ga. 2012) ("[F]ault is not meant to be synonymous with negligence, but instead includes other types of wrongdoing.").

[101] *Zaldivar*, 762 S.E.2d at 171 (Branch, J., dissenting).

[102] *See id.* at 170 ("[N]egligent entrustment of a motor vehicle to an incompetent driver is an independent wrongful act of the vehicle's owner which is a concurrent, proximate cause of injury when it combines with the negligence of the operator." (quoting Ridgeway v. Whisman, 435 S.E.2d 624 (Ga. Ct. App. 1993))). Arguably, the dissent is correct on this point but should have reached a different conclusion on liability. If there was evidence presented that the employer knew he was a reckless driver and still provided him with a car, then there is evidence of causation. Along with the duty to not entrust vehicles to reckless drivers and breaching that duty by giving the car to that reckless driver, causation is the last element that the courts need to find the employer liable to the plaintiff. Therefore, the employer could have actually been found liable, contrary to what the majority opinion holds (provided that evidence of each element was properly presented).

[103] *Id.* at 171.

[104] *Id.*; *see generally* Barnett v. Farmer, 707 S.E.2d 570 (Ga. Ct. App. 2011) (allowing a wife's damages to be apportioned to the negligent defendant driver and her husband, who was also negligent). Until recently, with the *Double View Ventures* decision, Georgia decisions have been consistent in finding each element of a cause of action before apportioning fault to a nonparty. Notably, truly immune nonparties have a duty, breached that duty, and caused damages, all the elements necessary to find liability. They would be liable but for their status. In a sense then, immune nonparties are an exception in the universe of nonparty tortfeasors when it comes to liability.

[105] 757 S.E.2d 172 (Ga. Ct. App. 2014).

whether they were at fault for the plaintiff's harm.[106] The plaintiff, Polite, filed a premises liability suit against the owner and property manager of his apartment complex.[107] Polite walked down a commonly used dirt path and through a wooden gate to go to the Chevron station close to his apartment complex.[108] After buying a drink and some cigarettes, Polite walked back toward his apartment.[109] Upon walking through the wooden gate, two criminal attackers threw bleach in his face, and when Polite started running and yelling for his friends, one of the assailants shot him in the back, leaving him severely injured.[110] The assailants escaped without capture.[111]

A security expert testified that the apartment complex's perimeter control fell below the standard of care because the apartment had a documented history of criminal assaults and armed robberies.[112] The apartment controlled most of the perimeter with chain link fencing and wrought-iron gates, but had access to the convenience store by way of wooden fence, which blocked any view of possible assailants.[113] The security guard voiced his concerns to the defendant on numerous occasions.[114]

After trial, the jury assigned fault to Polite and the named defendants, but not to the criminal assailants.[115] The defendants tried to apportion fault to other parties by filing three notices that named three different entities as being the owners of the Chevron station.[116] The trial court excluded these entities from the verdict form so that the jury could not consider them for apportionment purposes for the reason that the defendants produced no evidence of their fault.[117] The Georgia Court of Appeals reversed, even

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[106] *Id.* at 178.
[107] *Id.* at 174.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 175.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 175, 180–81 (naming Chevron USA, Inc., AMA Investment, Inc., and Areesha Enters., LLC).
[117] *Id.* at 175–76, 180–81.

though the true legal owner of the Chevron station was never determined.[118]

There was evidence at trial of nine criminal incidents "on the Chevron property, both inside and outside of the store."[119] The wooden fence was built by owners or former owners of the station and was on their property, while the wooden gate was installed by the apartment complex's managers who were then repairing the fence.[120] The managers from the apartment complex could never reach anyone from the Chevron station to talk about the fence situation.[121]

The Georgia Court of Appeals held that "a jury question exists as to whether the Chevron station should have anticipated another criminal attack near the wooden fence and whether Chevron took reasonable precautions to protect Polite from the use of its premises."[122] This was so because a premises owner has a duty to "exercise ordinary care to keep its premises safe, which includes inspecting the premises" for dangerous conditions.[123] The court also determined that there was a factual question of whether the owners knew or should have known about the dangerous conditions on the premises because the store was in a bad area and the previous criminal acts had occurred on the property.[124] The court was unmoved by the argument that the trial court was correct in directing a verdict for the plaintiff on the apportionment issue because the identity of the owner of the Chevron station was never discovered.[125] The court cited O.C.G.A. § 51-12-33(d)(2) which states in relevant part that the apportionment 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

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[118] *Id.* at 177–78.
[119] *Id.* at 175.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 177.
[123] *Id.* at 176 (citing Benefield v. Tominich, 708 S.E.2d 563, 566 (Ga. Ct. App. 2011)).
[124] *Id.* at 177.
[125] *Id.* at 178.

> the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.[126]

The court held that "[t]he statute does not require precise party identification" and, additionally, found the notice adequate because the finding of fault will not bind the nonparty in any action.[127] Finally, the defendants have the burden of establishing "a rational basis for apportioning fault to a nonparty," and the court held that there was a factual question best left to the jury as to whether that basis was established.[128]

Judge Barnes (who wrote the majority opinion for the Georgia Court of Appeals in *Zaldivar*) disagreed and dissented, stating that "the defendants failed to introduce evidence that would provide a rational basis for the jury to apportion fault against this nonparty under a premises liability theory."[129] The dissent noticed that defendants rested immediately after Polite rested his case, and put up no evidence.[130] There was lack of evidence concerning the relationship between the store and the three parties alleged to be owners and there was no evidence presented as to whether the owners knew of the criminal attacks on the property.[131] Also, there was no evidence of custom, because convenience store owners may want free access to their store from apartments, so there could be no basis of finding a breach of any duty.[132] After defendants contended that the identity of the owners was inconsequential, they conceded that this would allow them to name infinitely many phantom nonparties on the verdict form so long as they could just articulate some reason that the party may be responsible for harm.[133] The dissent also noted that competent

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[126] *Id.* .

[127] *Id.*

[128] *Id.* This Note argues that a defendant should establish a rational basis before the nonparty ever reaches the verdict form.

[129] *Id.* at 180 (Barnes, J., dissenting).

[130] *Id.*

[131] *Id.*

[132] *See id.* ("Polite also argued that because a convenience store would not want to restrict access in the way the apartment owners wanted to restrict nonresidents' access, the defendants needed to present evidence regarding what security measures a convenience store should employ.").

[133] *Id.*

evidence is needed to establish that the nonparty contributed to the harm, lest there be no limit to the number of nonparties that a court would have to include on the verdict form.[134] Judge Barnes articulated a standard for adding a nonparty for fault apportionment purposes by stating that the defense "must at a minimum present evidence that the nonparty had a duty to the plaintiff, breached its duty, and caused damages."[135] Because there was no evidence as to what the nonparty actually knew about crimes or whether they had security measures, there was no rational basis for apportioning fault to them.[136]

Polite subsequently filed a petition requesting that the Georgia Supreme Court grant certiorari, but the Georgia Supreme Court denied the Writ of Certiorari on June 30, 2014, thus refusing to answer the question of what exactly a defendant must prove for fault to be apportioned in Georgia.[137] The court did not list any reasons for the denial of the Writ of Certiorari.[138] There are several reasons why the court could have denied the petition. The court could have believed that the case was not the proper vehicle by which to set the law.[139] The court could have also wanted to wait for the lower courts to develop and evolve more law.[140] Additionally, the court could have also believed that it was not proper to grant certiorari because the apportionment issue in the case would simply be remedied.[141] The defense, on remand, could precisely identify the nonparty and allege each element of a cause of action. The reason for denial is not clear, but what is important

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[134] *Id.* at 181 (quoting Union Carbide Corp. v. Fields, 726 S.E.2d 521, 526, 526 n.4 (Ga. Ct. App. 2012), *rev'd on other grounds*, Georgia-Pacific, LLC v. Fields, 748 S.E.2d 407 (Ga. 2013)).

[135] *Id.*

[136] *Id.* at 182.

[137] *See generally* Petition for Writ of Certiorari, Polite v. Double View Ventures, LLC, 2014 Ga. LEXIS 555 (June 30, 2014) (No. S14C1092); Polite v. Double View Ventures, LLC, No. S14C1092, 2014 Ga. LEXIS 555 (June 30, 2014).

[138] *Polite*, 2014 Ga. LEXIS 555.

[139] *Cf.* Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (granting certiorari would be improper when a case raises important questions of law but the record is opaque).

[140] *Id.* (stating that in regard to a denial of a writ of certiorari, "[i]t may be desirable to have different aspects of an issue further illumined by the lower courts").

[141] *See id.* at 917–19 (illuminating several reasons why a state court may deny a petition for writ of certiorari, but noting that it means nothing more, in the federal context, than that less than four justices granted review).

for the purpose of this Note is that the denial of certiorari is not an endorsement of the appeals court decision by the court of last resort,[142] and so Georgia can still correct the interpretation of the apportionment statute.[143] And nonetheless, the petition for certiorari is illustrative of the problems that Georgia will face if the issue is not decided.

The petition first argued that the Georgia Court of Appeals erred in allowing apportionment to the Chevron station because the defendants never properly identified the actual nonparty responsible for the station.[144] Polite noted the vague language used by the court of appeals when they opined that the " 'Chevron station' originally built the fence."[145] The petition concluded that the "Chevron station" was not a proper party identification without knowing who is actually responsible for the store and thus is not "the best identification of the nonparty which is possible under the circumstances," as required by O.C.G.A. § 51-12-33(d)(2).[146] The court of appeals decision only spoke of the Chevron station, but not any of the named parties on the actual Notices of Intent, which were AMA Investments, Chevron U.S.A., and Areesha Properties.[147] The petitioner suggested that the court hold that the precise party identification must be shown if it is possible under the circumstances, and that not precisely identifying the nonparty is only permissible when it is impossible to identify such party.[148] The petitioner also distinguished nonparty identification of a criminal tortfeasor from that of a negligent tortfeasor because a criminal tortfeasor is usually

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[142] *See* 22-403 DREW S. DAYS, III, MOORE'S FEDERAL PRACTICE - CIVIL § 403.03[2][b] (2014) ("A denial of certiorari is not a ruling on the merits and, therefore, has no precedential value."). Although this description is in the federal context, the rules have the same effect in Georgia.

[143] *See id.* ("[A] denial of certiorari . . . does not establish the law of the case or act as res judicata on the issues raised in the certiorari petition.").

[144] Petition for Writ of Certiorari, *supra* note 137, at 3–4.

[145] *Id.* at 4.

[146] *Id.* at 6.

[147] *Id.* at 13.

[148] *Id.* at 23. This Note will argue that the standard should be when it is *unreasonable* to identify the nonparty.

impossible to find, while corporate entities are easily identifiable.[149]

The petition also argued that the Georgia Court of Appeals was wrong in allowing apportionment to the Chevron station because the defense presented no competent evidence upon which to base fault.[150] The petitioner suggested that the court hold that every element of a certain theory of liability needs to be shown by the offer of evidence.[151]

The defendants in *Double View Ventures* failed to establish a duty or breach on the part of the nonparty at issue.[152] Even though the Chevron station built the fence, it is of no consequence if the same owner was not the owner of the store when Polite was shot.[153] Similarly, there was no evidence that the owner at the time of the shootings was the owner during the prior crimes at the store, therefore one cannot know whether the owner was on notice of any dangerous condition.[154]

Also important to the asserted error in the court of appeals decision was that "[i]f a defendant can trigger a right to apportionment by noticing any number of entities, without being responsible for proving a case . . . against each one, then a defendant has no reason not to apportion fault among indefinitely many nonparties."[155] Petitioner stated that "[i]f a plaintiff tried to prove a case in that slipshod fashion, a defense verdict would be directed every time."[156] If the Georgia Supreme Court fails to resolve this issue, there will be no reasonable standard for apportioning fault to a nonparty.[157]

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[149] *Id.* at 23–25.
[150] *Id.* at 7.
[151] *Id.* at 27.
[152] *Id.* at 7.
[153] *Id.* at 28–29.
[154] *Id.* at 29.
[155] *Id.* at 30.
[156] *Id.* at 8.
[157] *Id.* at 30.

III. ANALYSIS

Georgia should require defendants to allege and present evidence tending to prove each element of a cause of action in order to have a nonparty on a jury verdict form, which allows a jury to apportion fault to that nonparty.[158] Also, to adhere to the apportionment statute, the defense should be required to precisely identify the nonparty's identity when the nonparty has not fled or actively avoided identification. A defendant presenting anything less does not provide a rational basis for apportioning fault.[159]

Precedent establishes that the burden is on the defendant to present evidence of nonparty fault.[160] Case law illustrates that that burden involves the defendant affirmatively presenting evidence of the nonparty's fault going to each element of a cause of action.[161] Judged by this precedent, *Double View Ventures* was wrongly decided. There are several reasons that the Georgia Supreme Court should correct and clarify the law going forward. *Double View Ventures* ignored O.C.G.A § 51-12-33's required showing of evidence concerning each element of a cause of action in order to have fault apportioned.[162] The case also produced a dangerous interpretation of O.C.G.A § 51-12-33(d)(2).

Moreover, if the Georgia courts follow *Double View Ventures*, several problems arise involving a plaintiff's right to a fair trial. The decision leaves room for jury speculation as to the fault of a nonparty. That finding of nonparty fault is binding on the plaintiff, and therefore, it is just as consequential as a finding of

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[158] Eaton, *supra* note 2, at 30; *see* Double View Ventures, LLC v. Polite, 757 S.E.2d 172, 181 (Ga. Ct. App. 2014) (Barnes, J., dissenting) ("[A] defendant must at a minimum present evidence that the nonparty had a duty to the plaintiff, breached its duty, and caused damages.").

[159] *See* Petition for Writ of Certiorari, *supra* note 137, at 8 (commenting that "[i]f a plaintiff tried to prove a case in that slipshod fashion, a defense verdict would be directed every time" in regard to the Appeals Court's unbalanced interpretation of the apportionment statute, since the court provided no standard—much less a rational one—for defendants to apportion fault to nonparties).

[160] *See infra* note 166 (citing cases establishing this principle).

[161] *See infra* notes 176, 178–79 and accompanying text (citing cases establishing this principle and discussing the same).

[162] *See infra* notes 176, 178–79 and accompanying text (citing cases establishing this principle and discussing the same).

liability on a joined defendant.[163] The majority ignored the plaintiff's concern with a fair trial in *Double View Ventures*.[164] Also, leaving the law as it stands now makes plaintiffs fight an uphill battle in being made whole against blameworthy defendants who have almost no hurdles in apportioning fault to nonparties. Thus, the plaintiff's recovery is taken away with an ease that the plaintiff is not afforded toward any defendant in proving his fault. All of these concerns, if not remedied, pose a serious risk of denying the plaintiff due process and a fair trial.[165] The solution is for the Georgia Supreme Court to require a defendant to present evidence on each element of a cause of action concerning a nonparty and to strictly adhere to the logical sequence of language in O.C.G.A § 51-12-33(d)(2).

A. THE DEFENDANT HAS THE BURDEN OF PROVING NONPARTY FAULT

As a preliminary matter, Georgia jurisprudence places the burden on the defendant to prove the defense of nonparty fault.[166] Actually, it is a relatively elementary principle of tort law that the defense has the burden of proof when they try to have fault apportioned to nonparties.[167] Even *Double View Ventures* accepts that this burden is on the defendant.[168] But while the courts agree that the defendant has the burden, the issue gets somewhat confused when trying to determine exactly what that burden is.

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[163] *See* Marcus, *supra* note 16, at 466 ("The court's argument that apportionment does not impose liability on tortfeasors misses the point that the consequence of such apportionment is to reduce the damages awarded to plaintiffs.").

[164] *See* Double View Ventures, LLC v. Polite, 757 S.E.2d 172, 178 (Ga. Ct. App. 2014) (ignoring the consequences to the Plaintiff by stating that the defendant's precise identification was not required because the nonparty is not held liable).

[165] *See* Eaton, *supra* note 2, at 22 ("A plausible argument exists that apportioning fault to unknown tortfeasors violates the plaintiff's right to due process.").

[166] Union Carbide Corp. v. Fields, 726 S.E.2d 521, 524 (Ga. Ct. App. 2012), *rev'd on other grounds*, Georgia-Pacific, LLC v. Fields, 748 S.E.2d 407 (Ga. 2013); Polston v. Boomershine Pontiac-GMC Truck, 423 S.E.2d 659, 661 (Ga. 1992); Atlantic Coast Line R.R. Co. v. Thomas, 64 S.E.2d 301, 306 (Ga. Ct. App. 1951).

[167] RESTATEMENT (SECOND) OF TORTS § 433B (1965) ("[T]he burden of proof as to the apportionment is upon each such actor" trying to prove the issue); Sisk, *supra* note 12, at 88.

[168] 757 S.E.2d at 178.

First, what was clearly established by precedent, but ignored by the *Double View Ventures* court is that part of the defendant's burden is to affirmatively produce evidence of the nonparty's fault.[169] "Apportionment is not self-executing."[170] As to nonparties, the simple filing of notice and relying on the plaintiff's evidence to prove the negligent nonparty is at fault will not be enough.[171] The burden is on the defense to prove that the nonparty allegedly at fault actually has that fault.[172] This involves presenting evidence[173] on exactly the same factors that the plaintiff would have to present if they were suing the nonparty directly.[174] Even though this may be expensive and time-consuming for a defendant, anything less would leave a jury wanting of a rational standard for finding fault.[175]

Precedent before *Double View Ventures* shows what exactly the defendant's burden should be in offering this evidence to prove nonparty fault. Georgia requires a rational basis for apportioning fault to a nonparty,[176] and the only way to have a rational basis for fault apportionment, as precedent shows, is to require that defendants allege[177] and present evidence as to each element of a cause of action.[178] The *Union Carbide* case is clear on this point.

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[169] That the defense in *Double View Ventures* rested after Plaintiff's case without producing any evidence of nonparty fault and was still allowed to allege the fault of the nonparty flies in the face of precedent. *Double View Ventures*, 757 S.E.2d at 180 (Barnes, J., dissenting); *see also* McReynolds v. Krebs, 725 S.E.2d 584, 587 (Ga. 2012) (denying the jury the chance to apportion fault when the defendant produced no evidence of the nonparty's fault); *Union Carbide*, 726 S.E.2d at 528 (denying the jury the chance to apportion fault when the defense produced no evidence of the nonparties' fault).

[170] Eaton, *supra* note 2, at 30.

[171] *Id.*

[172] *Id.*

[173] Sisk, *supra* note 12, at 88 ("The defendant's burden of production includes the duty of bringing forward sufficient evidence to make a prima facie case. The defendant must produce concrete evidence of the nonparty's contribution to the tortious harm.").

[174] Eaton, *supra* note 2, at 30.

[175] *See id.* (explaining what a defendant would have to prove for a nonparty who is alleged to have a defective product).

[176] Levine v. SunTrust Robinson Humphrey, 740 S.E.2d 672, 678 (Ga. Ct. App. 2013).

[177] *See* O.C.G.A. § 51-12-33(d)(2) (requiring that the defendant identify the nonparty "together with a brief statement of the basis for believing the nonparty to be at fault").

[178] *See* McReynolds v. Krebs, 725 S.E.2d 584, 588 (Ga. 2012) (denying the nonparty the chance to reach the verdict form because the defendant offered no evidence concerning the nonparty on which apportionment could be based).

There, the court held that "[i]n the absence of a legally cognizable duty, there can be no fault or negligence."[179] Therefore, in order to find fault of a nonparty, the defendant must present evidence that the nonparty had a duty to the plaintiff.

The *Union Carbide* court also held that there must be evidence showing that the nonparty was a cause of the plaintiff's harm.[180] Without contribution, which equates to causation, there is no fault.[181] This requirement is explicit from O.C.G.A. § 51-12-33(c), which states that "[i]n 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."[182] The *Zaldivar* court explained that contribution requires a finding of causation.[183]

As mentioned above, Georgia has required a finding of duty and causation, but what about breach? Both *Zaldivar* and *Couch* illustrate that the burden of the defendant is also to put evidence on that there was a breach of a duty that the nonparty had. *Zaldivar* quoted and approved the trial court's ruling that the nonparty was properly excluded because they breached no applicable duty to the plaintiff.[184] *Couch* shows that one seeking apportionment to a nonparty must prove each and every element of a claim.[185] This would necessarily include breach for negligence.

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[179] Union Carbide Corp. v. Fields, 726 S.E.2d 521, 525 (Ga. Ct. App. 2012), *rev'd on other grounds*, Georgia-Pacific, LLC v. Fields, 748 S.E.2d 407 (Ga. 2013); *see also* Zaldivar v. Prickett, 762 S.E.2d 166, 167 (Ga. Ct. App. 2014) (affirming the trial court's denial of apportionment to the nonparty when the employer "was not in breach of any legal duty owed to Mr. Prickett").

[180] *Union Carbide*, 726 S.E.2d at 526.

[181] *Zaldivar*, 762 S.E.2d at 168; *see* Sisk, *supra* note 12, at 88 ("The defendant must produce concrete evidence of the nonparty's contribution to the tortious harm. The defendant may not merely *hint* at possible involvement by other entities and leave the plaintiff with the impossible task of proving a negative." (emphasis added)).

[182] O.C.G.A. § 51-12-33(c).

[183] *Zaldivar*, 762 S.E.2d at 168.

[184] *Id.* at 167.

[185] Couch v. Red Roof Inns, Inc., 729 S.E.2d 378, 380 (Ga. 2012) (noting that the jury should "take the total amount of damages to be awarded to the plaintiff, identify the persons who are liable, and apportion the damages to each liable person according to each person's percentage of fault").

Couch noted that O.C.G.A. § 51-12-33(b) applies to nonparties.[186] Subsection (b) requires a finding of liability as a prerequisite to apportioning fault.[187] In order to apportion fault then, the defendant must present evidence on every element that would be sufficient to hold a party liable, even if that party would ultimately be immune. The nonparty must have committed a tort in order to have fault apportioned to them.[188] If the defendant does not provide evidence of each element, then the jury is not left with a rational basis for finding fault because a tort has not occurred and the prerequisites for liability are not present. *Couch* and other Georgia precedent, then, necessarily require Georgia courts to find that there has been evidence presented that a nonparty had a duty, breached that duty, and caused the plaintiff's indivisible harm. This is the defendant's burden and the only rational basis for reducing the plaintiff's award by apportioning fault to nonparties and shedding the fault of the defendant.

B. JUDGED BY PRECEDENT, THE DECISION IN *DOUBLE VIEW VENTURES* IS ERRONEOUS BECAUSE NO EVIDENCE WAS PRESENTED ON THE NONPARTY'S NEGLIGENCE

Judged by these precedents, the Georgia Court of Appeals came to an erroneous conclusion in *Double View Ventures* and the case should be overruled. Evidence on the element of breach was tellingly missing in *Double View Ventures*. As the dissent noted, there was no evidence of whether the gas station had any security measures, or even if they knew about the danger in the first place; therefore, the jury could not know if the owners took reasonable care in keeping the premises safe.[189]

Also, the defense was not made to allege the exact identity of the Chevron station owners.[190] That being so, it is even unknown whether the owners started business the very day that Polite was

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[186] *Id.* ("[S]ubsection (b) addresses the full universe of tortfeasors, whether parties or not.").

[187] O.C.G.A. § 51-12-33(b).

[188] Cardi, *supra* note 32, at 1308–09. The *Couch* court did use *Black's Law Dictionary* (9th ed. 2009) to define being liable as being "responsible or answerable in law." *Couch*, 729 S.E.2d at 383.

[189] Double View Ventures, LLC v. Polite, 757 S.E.2d 172, 180 (Ga. Ct. App. 2014) (Barnes, J., dissenting).

[190] *Id.* at 178 (majority opinion).

shot. If that is the case (and theoretically, it could be), there was no reasonable way for the owners to know about the dangerous fence condition, and therefore they did not breach any duty of care to Polite and fault in no way should be apportioned to them.[191] The issue of precise party identification and breach are intertwined. Since there was absolutely no evidence presented establishing a breach of any duty on the part of the Chevron station owners, fault could not rationally be apportioned to them, but the majority held that the jury could apportion fault to them anyway.[192] Moreover, the defense did not independently present any evidence of any element of the nonparty's negligence, but the appeals court allowed the jury to apportion fault to that nonparty.[193] Lack of evidence concerning negligence, especially on the breach issue, flies in the face of Georgia precedent.[194]

A further point of error in the Polite case is the majority's disregard for *Union Carbide*. As stated earlier, *Union Carbide* is binding precedent on the Georgia Court of Appeals.[195] The majority dismissed the case in a footnote by stating that it had been reversed by *Georgia-Pacific* and that there was some evidence of contribution to Polite's injuries by the Chevron station (therefore quickly dismissing the more stringent standards required by *Union Carbide*).[196] The court dismissed binding precedent in a footnote and did not give it the proper weight that it should be afforded. Considering *Union Carbide* along with other binding precedent shows that a defendant needs to present

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[191] Walker v. Aderhold Props., 694 S.E.2d 119, 122 (Ga. Ct. App. 2010) ("[A] landowner can be liable for third-party criminal attacks if the landowner has reasonable grounds to apprehend that such a criminal act would be committed but fails to take steps to guard against injury." (quoting TGM Ashley Lakes v. Jennings, 590 S.E.2d 807, 816 (2003))). Therefore, if the owners moved in the day before then they would not know of any criminal attacks and would not breach any duty by failing to take care of the fence. Thus, there would be no breach of a duty and the Chevron station would have no fault.

[192] *Double View Ventures*, 757 S.E.2d at 181 (Barnes, J., dissenting).

[193] *Id.*

[194] *See* Eaton, *supra* note 2, at 30 (discussing the *McReynolds* and *Union Carbide* decisions and how they denied apportionment of fault to nonparties when the defense failed to affirmatively present evidence of their fault).

[195] Union Carbide Corp. v. Fields, 758 S.E.2d 335, 336 (Ga. Ct. App. 2014).

[196] *Double View Ventures*, 757 S.E.2d at 178 n.2.

evidence of duty, breach, cause and harm.[197] Without affording proper weight to this case, the court misses the point that every element of a cause of action needs evidence presented on it. Tellingly, there was no evidence that the landowners breached any duty to the plaintiff in *Double View Ventures*.[198] In fact, in certain circumstances, the "Chevron station" could have in no way breached any duty, especially if the owners set up shop the day of the shooting.

C. *DOUBLE VIEW VENTURES* DISREGARDS THE LOGICAL SEQUENCE OF LANGUAGE IN O.C.G.A. § 51-12-33(D)(2) AND SETS A DANGEROUS PRECEDENT

The ownership issue shows that the court wrongly decided *Double View Ventures* on another vital point concerning O.C.G.A. § 51-12-33(d)(2), which deals with the identification of nonparties for apportionment purposes.[199] O.C.G.A. § 51-12-33(d)(2) requires that "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 that is possible under the circumstances."[200] Exact party identification, when reasonable, is part of the defendant's burden.[201]

At trial, the defendants pleaded three nonparty corporate entities as being owners of the Chevron station.[202] These were struck, and the appellate court designated the Chevron station as

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[197] *See generally* Union Carbide Corp. v. Fields, 726 S.E.2d 521 (Ga. Ct. App. 2012), *rev'd on other grounds*, Georgia-Pacific, LLC v. Fields, 748 S.E.2d 407 (Ga. 2013); Couch v. Red Roof Inns, Inc., 729 S.E.2d 378 (Ga. 2012); Zaldivar v. Prickett, 762 S.E.2d 166 (Ga. Ct. App. 2014).

[198] 757 S.E.2d at 180 (Barnes, J., dissenting) ("Polite also argued that because a convenience store would not want to restrict access in the way the apartment owners wanted to restrict nonresidents' access, the defendants needed to present evidence regarding what security measures a convenience store would employ.").

[199] O.C.G.A. § 51-12-33(d)(2).

[200] *Id.* Elementary tort law principles also require proper identification of nonparties. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 cmt. f (2000) ("A nonparty who is not sufficiently identified to be either subject to service of process or discovery ordinarily should not be submitted to the factfinder for assignment of responsibility. . . . In some cases, fairness may require an exception to this rule.").

[201] Petition for Writ of Certiorari, *supra* note 137, at 25.

[202] *Double View Ventures*, 757 S.E.2d at 175.

the party at fault.[203] There is no way to tell if the court meant that the corporate entity is responsible, the current owners running the store as the Shreeji Food Mart are responsible, or the building as a building is responsible. It is not known which person was the actual owner of the store, and brick and mortar cannot owe a duty to any plaintiff.

The court decided that this designation of the Chevron station was good enough because prior precedent allowed an unnamed criminal defendant to have fault apportioned to him after an assault at an apartment complex.[204] But clearly the situations in *Couch* and *GFI Management Services v. Medina*, involving fleeing criminal nonparties, and *Double View Ventures*, involving a stationary convenience store, are vastly different. Actually, the easiest situation imaginable—when it comes to identifying nonparties—is identifying the owners of a particular building next door.[205] Whereas when a criminal flees, it is not reasonable to find them for identification for apportionment purposes and usually the plaintiff explains the attack in great detail as part of his case.[206] Baldly asserting that the Chevron station is at fault is in no way the best party identification possible and the court set a dangerous precedent by allowing an ethereal, inanimate nonparty to have fault apportioned to it when it is very easy to identify who owns the establishment.[207] When the bar is set this low, it virtually

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[203] *Id.*

[204] *Id.* at 178; *see* GFI Mgmt. Svcs. v. Medina, 733 S.E.2d 329, 329 (Ga. 2012) (allowing fault to be apportioned to an unknown criminal assailant); Couch v. Red Roof Inns, Inc., 729 S.E.2d 378, 379 (Ga. 2012) (allowing fault to be apportioned to an unknown criminal attacker).

[205] For the proper process of identification of a nonparty in this situation, see RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B19 cmt. f (2000) ("Before assigning responsibility to nonparties, they should be sufficiently identified that they could be joined in the suit. . . .").

[206] *See* Eaton, *supra* note 2, at 33 (noting that a plaintiff "proving there was a criminal assault" to establish negligence "will tend to provide the basis for apportioning fault to the criminal assistant").

[207] *See* Petition for Writ of Certiorari, *supra* note 137, at 23 ("By its plain terms, this language provides two alternative means of identification, but the apportioning defendant is not left to choose arbitrarily between them. Rather, the defendant must identify the nonparty by name and last known address, unless it is not possible under the circumstances to provide that information . . . ." (citation omitted)). Petitioner's statement is not exactly the argument of this Note; I would substitute the word "possible" for "practical." The statute only calls for the best identification "possible under the circumstances." O.C.G.A.

destroys the requirement mandated by the apportionment statute to precisely identify any nonparty to the best of one's ability "under the circumstances."[208]

It is necessary for the court to distinguish between nonparties who actively evade identification and stationary, easily identifiable nonparties.[209] After all, the statute requires the best identification under the circumstances,[210] and where the circumstances involve defendant's counsel simply walking into a store during discovery to find out who owns it, then it is obvious that the "Chevron station" is not the best identification possible under the circumstances. This decision by the court makes it all too easy for the defense to allege phantom nonparties and reduce the award to which injured plaintiffs are entitled.[211] That precise party identification is not required, coupled with the Georgia courts opaque guidelines concerning what evidentiary proof is adequate for a nonparty to reach the verdict form, make it excessively easy for defendants to throw the blame on nonparties and shed their liability.

D. IF GEORGIA COURTS CONTINUE BASED ON THE INTERPRETATION SET OUT IN *DOUBLE VIEW VENTURES*, A PLAINTIFF'S RIGHT TO DUE PROCESS IS THREATENED

Following the decision in *Double View Ventures* will deprive the plaintiff of a fair trial. Under circumstances such as those in *Double View Ventures*, where it would be easy to identify the nonparty at fault, the court made a dangerous precedent because vague nonparty identification allows defendants to engage in

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§ 51-12-33(d)(2). The circumstances could make it overly costly and burdensome on a defendant to precisely identify a nonparty, therefore, in that situation, precisely identifying a nonparty would not be required, even though it is not impossible to do so. Therefore, when it is reasonable and practicable to do so, a party should be required to precisely identify a nonparty.

[208] O.C.G.A § 51-12-33(d)(2).

[209] *See* Petition for Writ of Certiorari, *supra* note 137, at 25 ("[T]he nonparties . . . were not fugitives from justice, but corporate entities registered with the Secretary of State. Ordinary due diligence, and . . . discovery, could have enabled Defendants to figure out" who was actually at fault.).

[210] O.C.G.A § 51-12-33(d)(2).

[211] *Cf.* Marcus, *supra* note 16, at 473 (noting one court's decision that nonparty allocation of fault puts an unfair burden on the plaintiff to prove and introduce evidence on the culpability of nonparties).

strategic gamesmanship that makes collection more difficult for plaintiffs. Indeed, this situation has been illustrated by a landmark case. The defendants in *Union Carbide* designated a total of fifty-one different nonparties that were allegedly at fault for the plaintiff's injury.[212] Permitting defendants to allege less than precise party identification when it is fairly easy for them to precisely identify that nonparty allows them to cast the widest net possible in order to apportion fault to others where they can find any reason at all why that party might be at fault.[213] It encourages defendants to allege as many nonparties as possible because it is easy to do so (they just have to come up with some name); the burden is then on the plaintiff to fight off the possibly hundreds of vaguely named nonparties, instead of focusing on the defendant.[214] The precedent set by *Double View Ventures* also leaves room for inconsistent verdicts. These circumstances threaten due process for plaintiffs.

The ability to name infinitely many nonparties is also inevitably intertwined with the issue of proof and evidence.[215] If defendants do not have to allege the precise party identification, along with not having to allege and present evidence on the specific elements of a given cause of action, a defendant is encouraged to allege as many nonparties as possible in order to increase chances of shedding liability. As a result, plaintiffs are distracted by the nonparties and are forced to turn their attention away from the defendant.

Oddly enough though, the court focused more on these nonparties' rights rather than the plaintiff's. Another reason why the court in *Double View Ventures* decided that precise party identification was not necessary is because it does not establish liability on the part of the nonparty or bind them in a separate

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[212] Union Carbide Corp. v. Fields, 726 S.E.2d 521, 524 (Ga. Ct. App. 2012).

[213] Double View Ventures, LLC v. Polite, 757 S.E.2d 172, 180 (Ga. Ct. App. 2014).

[214] *See* Sisk, *supra* note 12, at 88 ("The defendant may not merely hint at possible involvement by other entities and leave the plaintiff with the impossible task of proving a negative . . . . [T]he plaintiff's affirmative case [should] not involve shadow boxing with an imaginary opponent.").

[215] *See Union Carbide*, 726 S.E.2d at 524 n.4 (requiring proof of contribution because if it were otherwise, there would be no limit to the number of nonparties that "a trial court would be required to include on the verdict form").

tribunal.[216] In deciding this, the court only thought of the nonparty's interests[217] and disregarded the plaintiff's interest in a fair trial. At that, the court did not even give proper weight to the finding of fault of a nonparty. A finding of fault of a nonparty, even though it does not establish their liability or bind them in a separate proceeding, still harms their reputation.[218] This could be devastating for professionals. Say a doctor was a nonparty to be found at fault. It will no doubt hurt a doctor's practice if a jury apportions a certain amount of fault for a plaintiff's harm.[219]

Though, the real reason that this language in *Double View Ventures* is troubling is because it threatens the right of the plaintiff to a fair trial and due process by paving the way for inconsistent verdicts.[220] Denying a strict and proper interpretation[221] of O.C.G.A. § 51-12-33(d)(2) for the reason that it does not bind the nonparty or subject them to liability sets a dangerous precedent. The court overlooked that the plaintiff is necessarily bound by the decision of the court to allow vaguely identified nonparties, with vague bases for fault, to reach the verdict form.[222] The jury needs a rational basis to apportion fault to a nonparty because the plaintiff's due process rights are implicated when there is not enough evidence to find the nonparty liable.[223] This inconsistent verdict scenario can be properly illustrated through a hypothetical similar to the facts of *Double View Ventures*:

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[216] *Double View Ventures*, 757 S.E.2d at 178.

[217] *Id.* at 180 (Barnes, J., dissenting) (noting the defendant's nonparty-centric argument).

[218] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, § B19 cmt. c (2000) ("[F]requently a judgment, although not binding on a nonparty, may cause collateral harm to that nonparty.").

[219] *Id.*

[220] *See* Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 CREIGHTON L. REV. 683, 713 (1995) ("[T]he Due Process Clause may . . . constrain judicial acceptance of such patently irrational results.").

[221] Arguably, a strict interpretation of this provision is required already by precedent. *See* Monitronics Int'l, Inc. v. Veasley, 746 S.E.2d 793, 804 (Ga. Ct. App. 2013) (noting that O.C.G.A. 51-12-33(d)(1) demands "*strict* compliance," not "substantial compliance").

[222] *See* Eaton, *supra* note 2, at 23 ("The percentage of fault apportioned to the unknown person is not binding on that individual, but it is binding on the plaintiff.").

[223] *Id.* at 22–23 (noting that due process rights are implicated because of possible inconsistent verdicts when the jury is allowed to apportion fault to certain nonparties).

Plaintiff sues Defendant premises owner and the corporation who owns the chain of apartments for negligence. Plaintiff was attacked by a criminal on the premises' property line with a gas station. The defendants try to have fault apportioned to the gas station, but present no evidence of breach on the part of the gas station's owners. Specifically, there was no evidence of the gas station owner's security measures or whether the gas station owners regularly patrol the boundaries close to the apartment buildings. In addition, the jury is allowed to apportion fault to the nonparty gas station without knowing who specifically owns the station. The jury returns a verdict that apportions 50% of the fault to the two apartment defendants, and 50% to the gas station. No fault is allocated to Plaintiff and none is apportioned to the criminal.

At a later date, Plaintiff sues the gas station, which is owned by a young entrepreneur. Facts that were not investigated at the first trial come out at the second. The entrepreneur opened the store just a day before Plaintiff was injured. The entrepreneur also had a security guard who was patrolling that day but was on the other side of the store. The jury finds that the owner breached no duty to Plaintiff and was therefore not negligent, not at fault, and not liable to Plaintiff.

Plaintiff collects nothing. Plaintiff is left without full recovery because the first jury was allowed to speculate as to the fault of the gas station in the first trial. Plaintiff has thus been denied due process and a fair trial because Plaintiff is bound by the finding of the first jury.[224] Plaintiff can never recover more than 50% of the damages rightfully owed to her.

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[224] For a similar hypothetical, see *id.* at 21–22.

As this illustrates, without the precise identification of parties and evidence going to each element of a cause of action, juries are left to guess at the fault of a nonparty. The jury is left with no rational basis to find fault of a nonparty without evidence of liability. When the jury is allowed to speculate, there is a risk that they will apportion fault to a faultless party and the plaintiff will receive inconsistent verdicts.[225] The purpose of the apportionment statute is to allocate to each party the proportion of fault for which they are responsible.[226] This requirement comports with due process.

Due process requires that plaintiffs be afforded the same protections as defendants in trial. The apportionment of fault to nonparties is just as serious as finding them liable because the result is that the plaintiff has potentially collectible money taken away from her.[227] If a defendant is found liable then they are deprived of money by the state. If the jury apportions fault to a nonparty, the plaintiff is deprived an amount of recovery by the state. Both situations are just as serious and require the same protections since courts are dealing with money being taken from each party. Even though in Georgia, it is not binding upon the nonparty, the situation is still just as serious because there are money damages that the plaintiff runs a high risk of never collecting.[228] Finding a nonparty at fault takes money from plaintiffs. Georgia should be just as certain when depriving a plaintiff recovery as when it takes the defendant's money away.

As the law stands now, it is too easy for defendants to apportion fault to nonparties and thus the Georgia Supreme Court should correct this fault to give an even playing field to both plaintiffs and

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[225] *Id.* at 22–23 (noting that inconsistent verdicts of this sort "would offend traditional notions of fairness that underlie the constitutional right of due process").

[226] Couch v. Red Roof Inns, Inc., 729 S.E.2d 378, 383 (Ga. 2012) (stating that the statute's "purpose . . . is to have the jury consider all of the tortfeasors who may be liable to the plaintiff together, so their respective responsibilities for the harm can be determined"); Cardi, *supra* note 32, at 1329.

[227] Union Carbide Corp. v. Fields, 726 S.E.2d 521, 524 (Ga. Ct. App. 2012) ("Thus, under this State's statutory scheme, the effect of a successful nonparty defense is the reduction of the plaintiff's potential award and the defendant's possible liability.").

[228] *See* Eaton, *supra* note 2, at 31 ("Every percentage of fault apportioned to the unidentified criminals is a percentage of damages for which even an innocent plaintiff will not likely receive compensation.").

defendants. Defendants should have to present evidence on each element of a cause of action.[229] Right now that is not the explicit holding in Georgia, and so it is easier to apportion fault to nonparties because defendants do not have to particularly show the nonparties' liability.[230] Compounding this problem, though, is the fact that the nonparty is not there to fight the allegation against it.[231] The defendant has no opposition from these nonparties (when regularly they would be joined at trial and oppose any finding of their fault), and so the burden is put on the plaintiff to prove that a nonparty was not at fault, when possibly the defendant has named many nonparties with vague identifications and only alleged facially that they are at fault to the plaintiff.[232] This puts an undue burden on injured plaintiffs. Plaintiffs need more protection during trial to ensure a fair process because the odds are stacked against them when it comes to the ease of apportioning fault and reducing their recovery.

E. A BRIEF COMMENT ON POLICY

Further, as a policy issue, the incentive for premises owners to keep their premises safe was reduced when Georgia allowed juries to compare the fault of intentional wrongdoers with negligent wrongdoers.[233] The jury could apportion the lion's share of the fault to the intentional tortfeasor and possibly ignore the negligent

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[229] *See* Double View Ventures, LLC, v. Polite, 757 S.E.2d 172, 181 (Ga. Ct. App. 2014) (Barnes, J., dissenting) (requiring evidence going to duty, breach, cause, and harm to apportion fault to a nonparty).

[230] *See supra* notes 166–79 and accompanying text (detailing what Georgia requires so that a defendant may apportion fault to a nonparty).

[231] *See* Marcus, *supra* note 16, at 475 ("[M]erely identifying a nonparty, and even subjecting the nonparty to discovery, is not equivalent to providing the full protections of the adversary system.").

[232] *See* Justin C. Roberts & Randell C. Roberts, *Can Immune Parties Really be Responsible?: An Analysis of the Current Interpretation of the Texas Responsible Third Party Statute and its Vulnerability to Constitutional Challenge*, 43 ST. MARY'S L.J. 559, 569 (2012) (finding the plaintiff's right to substantive due process was violated in apportionment because "[w]ithout the opportunity to appear and defend themselves, non-parties are likely to be assigned a disproportionate share of liability, and the plaintiffs' recovery is likely to be reduced beyond the degree to which" a jury would find the third party at fault had they been present at trial).

[233] Eaton, *supra* note 2, at 31.

wrongdoer's fault.[234] The incentive to keep real property safe is further reduced because premises owners are not required to precisely identify nonparties that are easily identifiable, and they do not have to prove their liability. The ease of apportioning fault to nonparties at this time in Georgia provides no great incentive for premises owners to keep their premises safe because apportionment to nonparties is almost effortless. The new rule should set the balance straight and require that the premises owner allege precise party identification and each element of a cause of action so that only parties that are truly at fault are assigned that fault by the jury.

F. SOLUTIONS

What is fair is to have each party receive the amount of fault for which they are responsible. When a party receives fault without actually having any because of slipshod proof and allegations, the plaintiff suffers and is denied due process.[235] In order to effect this purpose of fairness, it is necessary for the courts to require precise identification whenever practical[236] and evidence on each element of a cause of action. Precedent already requires evidence as to each element of a cause of action.[237] This reduces the risk of the plaintiff receiving inconsistent verdicts because the jury has a concrete basis for finding in the first trial what another jury will be asked to find in a second trial—which is liability—if the plaintiff sues the nonparty. Room for speculation is cut drastically

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[234] *Id.* at 32 ("While one might debate just how much potential tort liability shapes premises owners' conduct, it is beyond debate that the extent of that incentive has been reduced.").

[235] *See* Truman v. Mont. Eleventh Jud. Dist. Ct., 68 P.3d 654, 658 (Mont. 2003) (noting that the plaintiff's substantive due process rights were violated when the jury was likely to assign a disproportionate amount of fault to a nonparty and the plaintiff was forced to defend the nonparty in order to stop the jury from apportioning a disproportionate amount of fault to them).

[236] Sisk, *supra* note 12, at 71 (noting that even when there is no reasonable way to identify a nonparty, to protect due process "it may be appropriate to require that a defendant at least be able to provide some additional evidence of the existence of an unidentified entity").

[237] *See supra* notes 178–88 and accompanying text (showing that precedent requires evidence going to each element of a cause of action before fault may be apportioned to a nonparty).

with strict rules for nonparties to reach the verdict form.[238] The courts should read the apportionment statute strictly in order to afford fairness to all parties and avoid due process problems for the plaintiff.[239]

Inhibiting gamesmanship on the part of the defendant will also help protect the plaintiff's due process right. The solution is to require the defendant to allege precise party identification, along with precise elements of a cause of action that need evidence.[240] This stops defendants from alleging possibly hundreds of nonparties because they need to be reasonably specific with which entity is at fault and they will also have to prove the specific elements of a cause of action against them. Only nonparties that are truly responsible will be alleged when reasonable identification and evidence is required. That is not the case right now. After defendants have successfully alleged a rational basis for nonparty fault, the burden is rightfully put on the plaintiff to combat the nonparty's fault.[241] But otherwise, defendants are given free rein to engage in gamesmanship and dishonest trial practice by freely alleging multiple nonparties at fault that have no basis to be on the verdict form because they have not been properly identified and do not have a sufficient foundation for apportionment of fault.

IV. CONCLUSION

Double View Ventures was wrongly decided for several reasons. Georgia acknowledges that the burden of proving nonparty fault is properly on the defendant. That burden includes affirmatively putting forth evidence. Georgia precedent prior to *Double View Ventures* illustrates that every element of a cause of action need be shown in order for the jury to be able to apportion fault to a

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[238] *See* Redden v. SCI Colo. Funeral Servs., 38 P.3d 75, 80 (Colo. 2001) ("Courts should construe designation requirements strictly to avoid a defendant attributing liability to a non-party from whom the plaintiff cannot recover.").

[239] *Id.*

[240] Petition for Writ of Certiorari, *supra* note 137, at 23, 26–27.

[241] *See* Sisk, *supra* note 12, at 88 (noting that even though the ultimate burden to prove defendant's fault always lies with the plaintiff, the plaintiff still needs a concrete "evidentiary basis in which to respond," which is only possible when the defendant offers evidence of contribution to harm by the nonparty).

nonparty. The element of breach was missing for the Chevron station and moreover, the defendant offered no evidence at all of the responsibility of the Chevron station. *Double View Ventures* also set a dangerous precedent because the court did not properly interpret the language in O.C.G.A. § 51-12-33(d)(2) and allowed the defendant to give a vague party identification in a situation where it would be quite easy during discovery to precisely identify the party.

Following this case will result in plaintiffs being deprived of due process. The decision allows the defendants wide latitude to engage in gamesmanship. It is in the defendant's best interest to allege as many nonparties as possible so that the plaintiff has to focus on nonparty fault rather than the defendant's fault at trial. Because of *Double View Ventures*, it is increasingly easy to do this because the defendant does not need to precisely identify any nonparty and does not need to affirmatively present evidence on each element of a claim. Shedding their liability is already easy enough on defendants as the law stands; the nonparty is not in the action to refute any of the claims against it. In large part, the court allows lax standards because the nonparty is not bound by the decision of the tribunal, but the court overlooked the fact that the plaintiff is bound by the decision. These lax standards leave the jury without a rational basis to apportion fault. When the jury is left wanting and plaintiffs are bound by their decision, deprived of full recovery, they run a serious risk of being denied due process.

The nonparties should have fault apportioned to them in a manner that is consistent with their percentage of actual responsibility for the harm to the plaintiff to ensure that the fairness goal of the apportionment statute is reached in each trial. To ensure a fair trial, defendants should be required to present evidence on each element of a cause of action. The Georgia courts should also adhere strictly to the logical sequence of language in O.C.G.A. § 51-12-33(d)(2) and require precise party identification whenever it is reasonable to discover that information. The Georgia Supreme Court still has the opportunity to clarify and fix the law on apportionment to nonparties and should do so

whenever it is presented with the opportunity again so that plaintiffs' due process rights are protected.

Michael Koty Newman

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