Special Contribution

Premises Liability and Apportionment Following *Martin v. Six Flags Over Georgia II, L.P.*

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A nineteen-year-old boy's innocent trip to an amusement park ended in a brutal beating and permanent brain damage. The boy's efforts to hold accountable those responsible for the tragedy ultimately resulted in much-needed clarification of Georgia's law regarding negligent security and apportionment of fault. It is now clear that a landlord can be held responsible for damages caused by criminal activity even when the damages occur beyond the four corners of the landlord's property. Likewise, *Martin* elucidates that errors in a jury's apportionment verdict can be retried without disturbing the verdict as to liability and damages.

I. FACTUAL BACKGROUND OF *MARTIN*

Joshua Martin went to Six Flags Over Georgia on July 3, 2007 with his brother and a friend[1] to celebrate the friend's admission to college.[2]

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1. Martin v. Six Flags Over Ga. II, L.P., 301 Ga. 323, 324, 801 S.E.2d 24, 28 (2017).

2. Six Flags Over Ga. II, L.P. v. Martin, 335 Ga. App. 350, 351, 780 S.E.2d 796, 800 (2015) (en banc), *aff'd in part, rev'd in part*, *Martin*, 301 Ga. at 323, 801 S.E.2d at 24.

Shortly before 9:00 p.m., as the amusement park's closing time approached, the trio left the park, went to use a nearby restroom, and returned to wait in front of the park for a Cobb County Transit (CCT) bus. They sat on a guardrail near the park's main entrance.[3] The bus stop was around the corner at the intersection of Six Flags Parkway and South Service Road, about 200 feet from the park's property line and within the teens' sight.[4]

Earlier in the day, a large group of fifteen to forty young men gathered in the park. They had been running around, "yelling obscenities, and otherwise causing a commotion."[5] Several of them, including some off-duty Six Flags employees, "accosted and threatened" two families, the Queens and the Tapps.[6] When park security approached, the young men made finger-gun gestures and told Mr. Tapp and Mr. Queen to "watch your back" and "we'll get you in the parking lot."[7] The security officers reprimanded some of the assailants but allowed them to go back into the park despite company policy stating that they should have been ejected. Shortly before closing time, the group of now approximately forty young men ran to the main exit in what was described as a "frenzy;" security guards followed them out, stood outside watching for a period, and then reentered the park. The group of young men remained on Six Flags property, gathering on the sidewalk outside the gates. When the Tapp and Queen families exited shortly thereafter, the group followed them and yelled at them. The families reached their cars and left, but the group was still actively planning to get into a fight.[8]

The group made their way back toward the area outside the main gate of the park, planning to fight someone at the bus stop. Within five minutes of abandoning the Tapp and Queen families, the group encountered Martin, his brother, and their friend at the guardrail. The boys went to the bus stop to try to escape, but one member of the group approached Martin and began beating him with brass knuckles. About eight other members of the group joined in—hitting Martin's brother and friend as well—beating and stomping Martin so badly that he was rendered comatose. Martin was in a coma for seven days and suffered severe injuries, including permanent brain damage.[9]

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3. *Six Flags*, 335 Ga. App. at 351, 780 S.E.2d at 800.
4. *Martin*, 301 Ga. at 324–25, 801 S.E.2d at 28.
5. *Id.* at 325, 801 S.E.2d at 28.
6. *Six Flags*, 335 Ga. App. at 351, 780 S.E.2d at 800.
7. *Martin*, 301 Ga. at 325, 801 S.E.2d at 28.
8. *Id.* at 325–26, 801 S.E.2d at 28.
9. *Id.* at 326, 801 S.E.2d at 28–29.

Martin sued Six Flags[10] on a negligent-security theory, as well as suing several individual assailants.[11] Before the case was given to the jury, Six Flags sought to add additional nonparty assailants to the verdict form for purposes of apportionment of fault. The trial court denied this request, ruling "that it would only consider including individuals who had a criminal conviction related to the attack or who personally testified to their involvement."[12]

Based on the events of that night and evidence of a pattern of gang activity Six Flags failed to address or tried to conceal,[13] the jury rendered a $35 million verdict in Martin's favor against Six Flags and four individual defendants.[14] The jury apportioned the award 92% to Six Flags and 2% against each of the four liable individuals.[15] Six Flags appealed the finding that it was liable to Martin and the trial judge's denial of its request to allow the jury to apportion fault to three nonparty assailants.[16]

II. LANDOWNER LIABILITY FOR CRIMINAL ACTIVITY

A landowner "is liable in damages to [invitees] for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe."[17] "The general rule is that a landlord is not an insurer of his tenant's safety; however, the landlord does have a duty to exercise ordinary care to prevent foreseeable third-party criminal attack upon" business invitees.[18] "[I]f the proprietor has reason to anticipate a criminal act, he or she then has a duty to exercise ordinary care to guard against injury from dangerous characters."[19]

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10. "Six Flags" here and in the appellate opinions refers collectively to Six Flags Over Georgia II, L.P., and Six Flags Over Georgia, LLC. *See id.* at 324 n.1, 801 S.E.2d at 27 n.1.

11. *See Six Flags*, 335 Ga. App. at 352, 780 S.E.2d at 800.

12. *Id.* at 365, 780 S.E.2d at 809. One of the proposed nonparties did have a criminal conviction connected to the attack, but the judge "expressed reluctance to include" him "because there was no evidence that the person physically touched Martin." *Id.*

13. *See id.* at 361–62, 780 S.E.2d at 806–07.

14. *Martin*, 301 Ga. at 324, 801 S.E.2d at 27.

15. *Id.*

16. *Six Flags*, 335 Ga. App. at 350, 780 S.E.2d at 799. Martin's cross-appeal of a jury-charge issue and a technical matter regarding the judgment were dismissed as moot by the Georgia Court of Appeals and not addressed by the Georgia Supreme Court. *Martin*, 301 Ga. at 324, 801 S.E.2d at 27; *Six Flags*, 335 Ga. App. at 350, 780 S.E.2d at 799.

17. O.C.G.A. § 51-3-1 (2017).

18. Jackson v. Post Props., Inc., 236 Ga. App. 701, 701, 513 S.E.2d 259, 261 (1999); *accord* Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 785–86, 482 S.E.2d 339, 340 (1997); TGM Ashley Lakes, Inc. v. Jennings, 264 Ga. App. 456, 462, 590 S.E.2d 807, 816 (2003); Warner v. Arnold, 133 Ga. App. 174, 179, 210 S.E.2d 350, 353 (1974).

19. *Sturbridge Partners*, 267 Ga. at 786, 482 S.E.2d at 341 (internal quotation marks omitted) (quoting Lau's Corp. v. Haskins, 261 Ga. 491, 492, 405 S.E.2d 474, 476 (1991)).

In an ordinary negligent-security case, a landowner's liability turns on questions of foreseeability and superior knowledge; the matter of whether the criminal act even occurred on the premises and approaches will be straightforward.[20] *Martin*, however, presented a more complicated scenario.[21] The build-up to the criminal activity began within and immediately outside the park, but Martin was not actually beaten until after he moved off the property and away to the bus stop in an effort to escape the attackers.[22]

The court of appeals framed the issue as whether the CCT bus stop could be considered to come within the "approaches" of the Six Flags premises.[23] Approaches generally include public ways that are "directly contiguous, adjacent to, and touching" the premises' entryways so they are "within the last few steps taken by invitees" when entering or exiting the premises and "a reasonable invitee would find it necessary or convenient to traverse" them in order to enter and exit.[24] Prior case law demonstrated, however, that noncontiguous areas also could be deemed "approaches" under certain circumstances:

> "[N]on-contiguous property can be deemed an approach because the landowner extended the approach to his premises by some *positive action* on his part, such as constructing a sidewalk, ramp, or other *direct* approach." . . . [T]his exception is premised on the fact that "the owner or occupier of land, *for his own particular benefit*, has affirmatively exerted control over a public way or another's property."[25]

The court reviewed the evidence and determined that under the specific facts of the case, Six Flags had exerted sufficient control over the CCT bus stop and public roadways—for example, directing customers to use the bus stop, constructing barricades and signs to direct foot traffic toward it, sending security staff to aid in directing traffic on the public streets leading to the park, and maintaining the pertinent stretch of roadway and sidewalk—that the bus stop could be considered an

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20. *Martin*, 301 Ga. at 328, 801 S.E.2d at 30.

21. Six Flags also argued on appeal that the evidence related to foreseeability and causation was insufficient to support the jury's verdict. *See Six Flags*, 335 Ga. App. at 360–63, 780 S.E.2d at 806–08. The court of appeals and supreme court both upheld the jury's findings of fact on this quintessential jury question. *Id.* at 363, 780 S.E.2d at 807–08, *aff'd*, *Martin*, 301 Ga. at 332, 801 S.E.2d at 32–33.

22. *Martin*, 301 Ga. at 326, 801 S.E.2d at 28–29.

23. *Six Flags*, 335 Ga. App. at 352, 780 S.E.2d at 801.

24. Motel Props., Inc. v. Miller, 263 Ga. 484, 485–86, 436 S.E.2d 196, 198 (1993).

25. *Six Flags*, 335 Ga. App. at 353–54, 780 S.E.2d at 801 (quoting *Motel Props., Inc.*, 263 Ga. at 486, 436 S.E.2d at 198).

"approach," and that the jury correctly found Six Flags owed a duty to its business invitees who used the stop.[26]

The supreme court disagreed with the reasoning of the court of appeals.[27] In its view, the facts did not support the conclusion that Six Flags had shown such a positive exercise of dominion over the bus stop and surrounding roadways as to bring them within the park's approaches.[28] The court did not end its inquiry there, however. Instead, it reframed the question entirely: What happens to the landowner's duty if foreseeable criminal activity begins within its premises and approaches but the act is concluded, and the injuries inflicted, after the victim and attacker have moved outside the premises?[29]

The court decided that "[t]his case stands for the common sense proposition that a property owner does not escape liability for an attack that begins on its premises simply because the victim moves outside the premises before the attack is completed."[30] Nothing in the statute required the victim's injuries to "be inflicted within the four corners of a landowner's premises and approaches in order for liability to attach."[31] In fact, prior Georgia Court of Appeals cases such as *Wilks v. Piggly Wiggly Southern, Inc.*[32] and *Double View Ventures, LLC v. Polite*[33] had found landowner liability where an invitee stepped off the premises into a nearby footpath or vacant area.[34] These cases recognized that a landowner's liability in a negligent-security case "from an attack that originates on the premises does not dissipate as soon as the invitee steps—or flees—off the property, so long as the invitee's injuries were proximately caused by the landowner's failure to exercise ordinary care in maintaining safety and security within its premises and approaches."[35] The court expressly adopted the principle "that although the landowner's duty is to maintain safety and security within its premises and approaches, liability may arise from a breach of that duty that proximately causes injuries even if the resulting injury ultimately is

26. *Id.* at 354–60, 780 S.E.2d at 801–05.

27. *Martin*, 301 Ga. at 324, 801 S.E.2d at 27.

28. *Id.* at 333–36, 801 S.E.2d at 33–35.

29. *Id.* at 329, 801 S.E.2d at 30.

30. *Id.* at 329, 801 S.E.2d at 30–31.

31. *Id.* at 329, 801 S.E.2d at 31.

32. 207 Ga. App. 842, 429 S.E.2d 322 (1993).

33. 326 Ga. App. 555, 757 S.E.2d 172 (2014).

34. *Martin*, 301 Ga. at 329–30, 801 S.E.2d at 31 (discussing *Wilks*, 207 Ga. App. at 842–43, 429 S.E.2d at 322 and *Double View Ventures*, 326 Ga. App. at 560, 757 S.E.2d at 177, as well as cases from other jurisdictions).

35. *Martin*, 301 Ga. at 329, 801 S.E.2d at 31.

completed beyond that territorial sphere."[36] In this case, the court held that Six Flags owed a duty to Martin and that the jury's finding of liability was sound.[37]

While not a dramatic shift in premises-liability law, this holding is, as the court notes, a common-sense approach to landowner liability for conduct completed off the landowner's premises and usefully clarifies the reach of prior case law. The CCT bus stop was about 200 feet from the Six Flags property line, down the street and around the corner from the entrance to the park[38]—significantly further removed than the footpath at issue in *Double View Ventures*.[39] The decision in *Martin* makes clear that when an attack arises from foreseeable criminal activity on a landowner's property, but the attack spills off the premises or the victim attempts to flee, the landowner may not claim that mere lack of proximity of the final act absolves the landowner of responsibility for its failures.[40] Instead, the court and factfinders still must consider the traditional factors for landowner liability—foreseeability, equal or superior knowledge, and ordinary care[41]—while simply taking the crime's physical proximity to the premises and its temporal proximity to the invitee's presence on the premises into account *as part of the foreseeability analysis*.[42] "The landowner's duty is to take the steps within its premises that are necessary to protect its invitees from risks that could reasonably be foreseen *in connection with the invitee's presence on the premises*, which necessarily requires both temporal and physical proximity . . . ."[43] Including temporal and physical proximity among the other foreseeability factors "ensure[s] that a landowner's liability to its invitees maintains its connection to the landowner-invitee relationship giving rise to the duty in the first place."[44]

III. APPORTIONMENT OF DAMAGES

Although substantively a case about the scope of premises liability, *Martin* also presented a question of first impression in a procedural area: How to correct errors in the jury's apportionment of damages. The legal

36. *Id.* at 330, 801 S.E.2d at 31.

37. *Id.* at 335–36, 801 S.E.2d at 35.

38. *Id.* at 334, 801 S.E.2d at 34.

39. *See Double View Ventures*, 326 Ga. App. at 559, 757 S.E.2d at 176–77.

40. *Martin*, 301 Ga. at 331–32, 801 S.E.2d at 32.

41. *Jackson*, 236 Ga. App. at 701–02, 513 S.E.2d at 261; *Sturbridge Partners*, 267 Ga. at 785–86, 482 S.E.2d at 340–41.

42. *Martin*, 301 Ga. at 330–31, 801 S.E.2d at 31–32.

43. *Id.* at 331–32, 801 S.E.2d at 32 (emphasis added).

44. *Id.* at 331, 801 S.E.2d at 32.

context in which *Martin* arose highlights the significance of the Georgia Supreme Court's opinion.

The Tort Reform Act of 2005[45] (the Act) eliminated joint and several liability in Georgia, replacing it with a scheme of apportioning fault among joint tortfeasors.[46] Section 51-12-31[47] of the Official Code of Georgia Annotated (O.C.G.A.) previously provided that in a case brought against joint tortfeasors, "the plaintiff may recover damages for the greatest injury done by any of the defendants against all of them."[48] The 2005 Act replaced this Code section with new language providing only for several liability: "Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury."[49]

At the same time, O.C.G.A. § 51-12-33[50] was amended to create a framework for assigning such liability among defendants.[51] Subsection (b) of the statute provides that each liable defendant shall only be responsible for the percentage of the damages apportioned to that defendant by the jury:

> [T]he trier of fact, in its determination of the total amount of damages to be awarded, if any, shall . . . 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.[52]

Particularly relevant here, subsections (c) and (f) of the statute provide for apportionment of fault to nonparties:

> (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

45. Ga. S. Bill. 3, Reg. Sess., 2005 Ga. Laws 1 (codified in tits. 9, 24, 33, 43, and 51 of the O.C.G.A.).

46. *See* McReynolds v. Krebs, 290 Ga. 850, 850–53, 725 S.E.2d 584, 586–88 (2012).

47. O.C.G.A. § 51-12-31 (2017).

48. Ga. H.R. Bill 1188, Reg. Sess., 1992 Ga. Laws 6, § 51 (codified at O.C.G.A. § 51-12-31) (prior to 2005 amendment).

49. O.C.G.A. § 51-12-31.

50. O.C.G.A. § 51-12-33 (2017).

51. Ga. S. Bill 3, Reg. Sess., 2005 Ga. Laws 1, § 12 (codified at O.C.G.A. § 51-12-33).

52. O.C.G.A. § 51-12-33(b).

> damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.
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> . . . .
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> (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.[53]

In the years since the Act's passage, the Georgia Supreme Court has issued several opinions addressing the real-world operation of nonparty apportionment. *Couch v. Red Roof Inns, Inc.*[54] clarified that the jury must determine, according to "the degree to which each tortfeasor's actions *contributed* to the damages" of the plaintiff, "the percentage of *fault* of each person," including both negligent and intentional tortfeasors—such as, in that instance, a criminal assailant in a negligent-security case.[55]

In *Zaldivar v. Prickett*,[56] the court addressed nonparty apportionment in a scenario where the allegedly at-fault nonparty not only was not sued, but legally could not be held liable.[57] The court held that "fault" as used in the statute is not equivalent to "liability"; rather, fault exists when someone commits a tort that is the proximate cause of the plaintiff's injuries, but the person may have defenses or immunities that cut off liability for that tort.[58] Therefore, the factfinder is to consider the contributions of "all persons or entities who have breached a legal duty in tort that is owed with respect to the plaintiff, the breach of which is a proximate cause of the injury sustained by the plaintiff," including "every . . . tortfeasor whose commission of a tort as against the plaintiff was a proximate cause of his injury, regardless of whether such tortfeasor would have actual liability in tort to the plaintiff."[59] Importantly, the court also clarified the defendant bears the burden of proof to show the nonparty owed a legal duty in tort to the plaintiff, the nonparty breached that duty, and the nonparty's breach was a proximate cause of the

53. O.C.G.A. § 51-12-33(c), (f)(1)–(2) (2017).
54. 291 Ga. 359, 729 S.E.2d 378 (2012).
55. *Id.* at 361–62, 729 S.E.2d 380–81 (internal quotation marks omitted).
56. 297 Ga. 589, 774 S.E.2d 688 (2015).
57. *Id.* at 589–91, 774 S.E.2d at 690–91.
58. *Id.* at 597–98, 774 S.E.2d at 695.
59. *Id.* at 600, 774 S.E.2d at 697.

plaintiff's injuries; the trier of fact cannot assign fault to the nonparty unless that burden is met.[60]

As the court worked through the details of which nonparties may be included in the apportionment of fault, the mechanics of correcting errors in the inclusion or exclusion of nonparties remained less clear. Indeed, at the time the courts reviewed the *Martin* case, there were no post-Act cases directly on point. *Martin*, then, provided the first clear opportunity to address squarely how apportionment errors should be corrected and retried.

Six Flags argued, and the Georgia Court of Appeals agreed, that the trial court erred by refusing to allow the jury to consider whether fault should be apportioned to three of the men allegedly involved in the attack on Martin.[61] The question, then, was how to correct this error.[62] Was a full retrial required or could a portion of the jury's verdict be preserved?[63]

The majority acknowledged that nothing in the plain language of O.C.G.A. § 51-12-33 expressly mandated a full retrial, but decided the language of subsection (b)—that "the trier of fact, *in its determination of the total amount of damages to be awarded, if any*, shall . . . apportion its award of damages"—indicated that the same jury must both find liability and "determine the respective fault of those involved."[64] Furthermore, the majority believed a full retrial was required by the court's prior ruling in *Double View Ventures*: "Since there is some evidence showing that the [nonparty] may have contributed to [the victim's] injuries, we [were] constrained to *reverse the jury's verdict* because the jury did not have the opportunity to consider whether the [nonparty] should be apportioned fault."[65] The court acknowledged that retrial would impose a significant burden and that the jury's finding of liability was valid, but the majority

60. *Id.* at 604, 774 S.E.2d at 699. The court's subsequent opinion in *Walker v. Tensor Machinery, Ltd.*, 298 Ga. 297, 779 S.E.2d 651 (2015), reaffirmed that fault may be apportioned regardless of whether defenses and immunities to liability exist, clarifying that fault may be apportioned to those immune from suit due to the exclusive-remedy provision of the Worker's Compensation Act, O.C.G.A. § 34-9-11. *Walker*, 298 Ga. at 304, 779 S.E.2d at 656.

61. *Six Flags*, 335 Ga. App. at 363–65, 780 S.E.2d at 808–09. The Georgia Supreme Court did not grant certiorari as to whether the trial court erred in this regard, limiting its apportionment question to how the error found by the Georgia Court of Appeals should be corrected. *Martin*, 301 Ga. at 336–37, 801 S.E.2d at 35.

62. *Martin*, 301 Ga. at 336, 801 S.E.2d at 35.

63. *Id.* at 337, 801 S.E.2d at 35.

64. *Six Flags*, 335 Ga. App. at 366, 780 S.E.2d at 810 (quoting O.C.G.A. § 51-12-33(b)).

65. *Id.* (alteration in original).

nevertheless felt the significance of the apportionment error and the court's commitment to the right to a fair jury trial required a full retrial.[66]

In a special concurrence, Judge Yvette Miller disagreed.[67] She opined that Six Flags and the other named defendants should not "get a second opportunity to dispute their liability when the overwhelming evidence in the case establishes their liability for Martin's injuries and when the error in the case related solely to a determination of damages."[68] The statute expressly provides that the fault of nonparties relates only to the percentage of the damages for which the named parties shall be held liable; it does not affect *whether* the named parties are liable.[69] Therefore, if the only error is in the apportionment of fault to nonparties, there should be no need to retry the issue of the named parties' liability.[70] Judge Miller further noted that the law-of-the-case doctrine should preclude the relitigation of liability.[71] She concluded the majority was wrong to rely on *Double View Ventures* as precedent for this issue; none of the parties in that case questioned whether the retrial should be full or partial, and the court had not squarely considered it.[72] Judge Miller would have remanded the case for a retrial only as to damages rather than impose the significant burden of a full retrial.[73]

The Georgia Supreme Court largely sided with Judge Miller. As both she and the majority had acknowledged below,[74] the language of the statute does not specify how apportionment errors should be corrected.[75] The supreme court noted, however, that common law prescribes severing issues for retrial where possible:

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

66. *Id.* at 367, 780 S.E.2d at 810.

67. *Id.* at 367–68, 780 S.E.2d at 811 (Miller, J., concurring specially). Judges McFadden and McMillian joined in this special concurrence. *Id.* at 369, 780 S.E.2d at 812.

68. *Id.* at 368, 780 S.E.2d at 811.

69. *Id.*

70. *Id.*

71. *Id.* at 369, 780 S.E.2d at 812.

72. *Id.* at 368–69, 780 S.E.2d at 811–12.

73. *Id.* at 369, 780 S.E.2d at 812.

74. *See id.* at 366, 780 S.E.2d at 810 (majority opinion).

75. *Martin*, 301 Ga. at 337, 801 S.E.2d at 36.

> erroneous, the court will not set aside the entire judgment, but only that portion which is erroneous."[76]

Apportionment is an issue that lends itself to such severability. O.C.G.A. § 51-12-33 "requires that, once liability has been established and the damages sustained by the plaintiff have been calculated, the [jury] must then assess the relative fault of all those who contributed to the plaintiff's injury—including the plaintiff himself—and apportion the damages based on this assessment of relative fault."[77] Thus, finding liability and the total amount of damages "is the first step, and the allocation of relative fault and award of damages according to that allocation is a distinct second step."[78]

The court concluded "[t]here is no reason these two steps cannot be segregated for purposes of retrial," agreed with Judge Miller that the law-of-the-case doctrine would preclude re-litigation of liability, and went a step further to say the amount of damages sustained also would be settled.[79] Furthermore, the statutory language cited by the Georgia Court of Appeals in assuming a single factfinder would make all these determinations is no different from the usual presumption of a single factfinder in contexts where partial retrials have been permitted.[80] Construing the language to preclude partial retrials would conflict with existing law, including § 51-12-33(f),[81] stating that nonparty fault should not bear on the assessment of named parties' liability or on the determination of the plaintiff's damages.[82]

The defendants' final argument for a full retrial arose from pre-2005 cases involving errors in the finding of comparative negligence of plaintiffs and defendants, but the court held that even if those precedents remained good law, the percentage of comparative negligence assigned to a plaintiff can affect the defendant's liability in a way nonparty fault

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76. *Id.* at 338, 801 S.E.2d at 36 (alteration in original) (quoting Chicago Bldg. & Mfg. Co. v. Butler, 139 Ga. 816, 819, 78 S.E. 244, 246 (1913)).

77. *Id.* at 338, 801 S.E.2d at 36–37.

78. *Id.* at 338–39, 801 S.E.2d at 37.

79. *Id.* at 339–40, 801 S.E.2d at 37–38. The court also took the precautionary step of overruling *Double View Ventures* to the extent it suggested apportionment errors required a full retrial, though the court agreed with Judge Miller's position that the lack of analysis to that effect meant the majority had, perhaps, over-interpreted that language in the *Double View Ventures* opinion. *See id.* at 341 n.12, 801 S.E.2d at 38 n.12.

80. *Id.* at 339, 801 S.E.2d at 37.

81. O.C.G.A. § 51-12-33(f) (2017).

82. *Martin*, 301 Ga. at 339, 801 S.E.2d at 37.

almost never will.[83] Therefore, in "the ordinary case"—which this was—the finding of liability and the calculation of damages will be distinct and segregable from the assessment of the relative fault of parties and nonparties, and the correct procedure is to remand the case for retrial only as to the issue of how fault should be apportioned.[84]

This holding truly is significant. Twelve years after the abolishment of joint and several liability and the introduction of the apportionment scheme—which introduced significant added complexity to judges' and juries' work at trial—the law still provided no guidance on the essential issue of how to fix the errors that inevitably would arise. The court's decision to allow partial retrials of apportionment errors where the liability finding and total damages calculation are sound is a common-sense approach to this challenge. Upholding the liability and damages findings is consistent with the law of the case and shows the respect for jury verdicts that is fundamental to our justice system. Although the court acknowledged much of the evidence related to apportionment will overlap with that pertaining to liability,[85] a partial retrial does at least provide the opportunity to streamline the scope of the new trial and to reduce the burden imposed by a retrial of what was likely a complicated case.

Practitioners may also note a potential implication of how the court described the jury's task under O.C.G.A. § 51-12-33. The court described the jury as completing two "distinct" steps: First, the jury must decide whether the named defendants were liable and calculate the amount of the plaintiff's damages, and second, the jury must allocate fault among the various parties, including the plaintiff, and nonparties.[86] The verdict forms proposed for use in apportionment trials today vary from lawyer to lawyer, from case to case, and from judge to judge. However, *Martin* suggests a structure the jury's verdict form generally should track: First, whether the jury's verdict is in favor of the plaintiff or the named defendants, and if the former, a calculation of the plaintiff's total amount of damages, without consideration of how anyone contributed to those damages; second, how fault for those damages should be allocated among the parties and approved nonparties. The opinion in *Martin* does not specifically disapprove of an alternate verdict form (such as placing the damages calculation at the end or even combining the liability and

83. *Id.* at 340–41, 801 S.E.2d at 37–38. The rule that a plaintiff may not recover at all if they are 50% or more at fault for their own injuries is codified currently at O.C.G.A. § 51-12-33(g) (2017).

84. *Martin*, 301 Ga. at 341, 801 S.E.2d at 38.

85. *Id.* at 341 n.13, 801 S.E.2d at 38 n.13.

86. *Id.* at 338–39, 801 S.E.2d at 36–37.

apportionment findings into a single step).[87] It appears, though, the best practice for a clean appellate record is to organize the verdict form around the Georgia Supreme Court's description of the separate and distinct tasks the jury must perform.

IV. CONCLUSION

The *Martin* case presented the Georgia Supreme Court with a valuable opportunity to clarify an uncommon but important issue in negligent-security law and to resolve a critical complication created by the Georgia General Assembly's scheme of nonparty apportionment. While the case may appear at first blush to be relevant primarily to premises-liability lawyers, the supreme court's apportionment ruling makes *Martin* a foundational case important for all trial lawyers.

87. *See generally id.*