IN THE SUPREME COURT OF GEORGIA

SHAWN G. EVANS, Individually and as Guardian of JANICE K. EVANS,	)	
Plaintiff,	)	**CASE NO. S18C1190**
vs.	)	
ROCKDALE HOSPITAL, LLC d/b/a ROCKDALE MEDICAL CENTER,	)	
Defendant.	)	

BRIEF OF APPELLANT

Leighton Moore
The Moore Law Firm, P.C.
100 Peachtree Street, NW
Suite 2600
Atlanta, GA 30303
678-237-0330
leighton@moorefirmpc.com

Lloyd N. Bell
Bell Law Firm
1201 Peachtree Street, NE
Suite 2000
Atlanta, Georgia 30361
(404) 249-6768
bell@belllawfirm.com

Lawrence B Schlachter, M.D., J.D.
The Schlachter Law Firm PC
1201 Peachtree Street, NE
Suite 2000
Atlanta Ga 30361
larry@schlachterlaw.com

James O. Wilson, Jr.
315 Washington Ave.
Suite 110
Marietta, GA 30060
770-427-2476
jwilson@wilsonlawatlanta.com

I. PRELIMINARY STATEMENT

For more than a century, the general rule in Georgia has been that, "where a judgment appealed from can be segregated, so that correct portions can be separated from the erroneous, the court will not set aside the entire judgment, but only that portion which is erroneous." *Chicago Bldg. & Mfg. Co. v. Butler*, 139 Ga. 816, 819 (1913). In *Bridges Farms v. Blue*, 267 Ga. 505 (1997), however, this Court held that "reversal of the judgment entered on a general verdict returned for the plaintiff in a case in which comparative negligence will be an issue on retrial necessarily mandates that the retrial encompass both the issues of damages and liability." 267 Ga. 505, 506 (1997). And in *Robinson v. Star Gas*, 269 Ga. 102 (1998), this Court — without analysis or explanation — extended that rule to the retrial of a case in which the first trial had yielded a special verdict that fixed the plaintiff's percentage of comparative negligence. The result was what this Court in *Martin v. Six Flags Over Ga. II, L.P.*, 301 Ga. 323 (2017), termed a "categorical rule" prohibiting damages-only retrials in comparative-negligence cases.

The time has come for this Court to abandon the categorical rule of *Bridges Farms* and its progeny. This rule should be abandoned, first, because it has been legislatively superseded by the enactment of the apportionment statute, O.C.G.A. § 51-12-33. As this Court has held, the concept of "fault" in the apportionment statute subsumes the common-law doctrine of comparative negligence. *Zaldivar v.*

Prickett, 297 Ga. 589, 594 (2015). But rather than allowing the jury to reduce an award for comparative negligence, the apportionment statute requires that the jury make separate and express findings of the total damages and the percentage of fault of the plaintiff, if any. O.C.G.A § 51-12-33(a).

The fact that every apportioned verdict in any comparative-negligence case must contain these express and distinct findings means that the legal and practical reasons for the categorical rule in *Bridges Farms* no longer exist. No longer are the questions of total damages and comparative fault "inextricably joined," *Bridges Farms*, 267 Ga. at 505 (quoting *Thomas v. Clark*, 188 Ga. App. 606, 608 (1988)); instead, the jury is required to make separate findings on each issue, and it is the job of the trial judge to reduce the total damages by the plaintiff's percentage of fault. The transparency of this process ensures that neither the reviewing courts nor the trial court on remand will be faced with an opaque general verdict and forced to speculate as to the percentage of fault that the jury attributed to the plaintiff.

There is no reason why the categorical rule of *Bridges Farms* should continue to exist after its legal and practical foundations have been eliminated. For retrial purposes, a jury's assignment of fault to the Plaintiff is no different from its assignment of fault to third parties, which this Court held in *Martin* is amenable to a separate retrial. In either case, allocating fault is a "distinct second step" from determining the total damages. *Martin*, 301 Ga. at 339. The same strong policy

interests this Court relied upon in *Martin* — judicial economy, cost savings for litigants, finality of judgments, and respect for jury verdicts — all weigh equally in favor of limited retrial, regardless of whether the first jury has apportioned fault to a third party or to the Plaintiff. And *stare decisis* cannot sustain an unsound rule, of recent vintage, which engenders no reliance and has been superseded by statute.

This is the case in which the "categorical rule" of *Bridges Farms* should be overturned. Plaintiff appealed to the Court of Appeals solely on the grounds that the jury's award of damages was inadequate pursuant to O.C.G.A. § 51-12-12. Plaintiff did not challenge the jury's findings of liability or apportionment, and Defendants did not cross-appeal. The Court of Appeals correctly reversed the jury's award of damages as inadequate. *Evans v. Rockdale Hosp., LLC*, 345 Ga. App. 511, 511-12 (2018). And under the reasoning of *Martin* and the plain text of O.C.G.A. § 51-12-12(b), this limited holding should have resulted in a new trial on damages only. *See Martin*, 301 Ga. at 338-39 (holding that apportionment and damages can be segregated on retrial); O.C.G.A. § 51-12-12(b) (providing that "the trial court may order a new trial as to damages only"). But the Court of Appeals held that it was "not at liberty to disregard the rule enunciated in . . . *Bridges Farms*." *Evans*, 345 Ga. App. at 521. This Court should remove this impediment by overturning the categorical rule against damages-only retrials in comparative-negligence cases, as set forth in *Bridges Farms* and its progeny.

II. STATEMENT OF RELEVANT FACTS

Viewed in the light most favorable to the jury's verdict against Rockdale, the evidence at trial showed the following.

A. Proof of Rockdale's liability.[1]

On the morning of January 16, 2012, Jan Evans called her husband Shawn at work and told him that "she was sick to her stomach. She had been throwing up, and she had a headache." T.V 715:18-19. Thinking that she had food poisoning, he came home and took her to the Rockdale Medical Center emergency room. *Id.*, 715:20-716:24. Jan and Shawn saw the triage nurse, Mr. Harold Hildreth, and told him about Jan's nausea, vomiting, and headache. *Id.*, 717:11-25. Shawn testified at trial that there was no doubt in his mind Jan told Hildreth about her headache. *Id.*, 723:21-724:6. Hildreth also took Jan's blood pressure, which was extremely high at 213 over 105. T.IV 298:7-16. A blood pressure this high is within the American Heart Association's guidelines for hypertensive crisis. T.IV 299:13-18. But Hildreth testified that, based on his education and experience, Jan's elevated blood pressure could have been due to nervousness at being in the ER. *Id.*, 299:23-300:5. He did not recall asking, and the triage records did not reflect that he asked, any

[1] The trial concerned claims not only against Rockdale, but also against an emergency-department physician, Taumaurus Sutton, M.D., and Dr. Sutton's employer, Emerginet, LLC. The jury found these Defendants not liable, and that finding was not appealed. Accordingly, the liability portion of this Statement of Relevant Facts focuses on the facts relating to Rockdale.

questions about Jan's blood pressure or her headache. *Id.*, 300:12-301:13. Indeed, Shawn did not recall Hildreth asking Jan any questions at all. T.V, 721:12-13. Shawn did recall Hildreth noting that Jan's blood pressure was high. *Id.* 721:16-19.

After Jan was admitted, she again reported a headache with a pain level of 8 out of 10, and was treated with morphine. *Id.*, 725:3-8; T.IV 369:17-370:3. Her systolic blood pressure remained above 200, which is extremely high, throughout her entire stay. T.IV 369:5-16. Another Rockdale nurse, Trina Williams, took Jan's blood pressure at 8:55 that evening and found that her systolic blood pressure was 218 — even higher than when Jan was admitted. *Id.*, 373:8-13. But the records do not indicate that Ms. Williams asked Jan any questions about her blood pressure. *Id.*, 373:14-23. A third nurse, Linda Donaghy, took over Jan's care around 11:55 and had the benefit of all the previously charted information about Jan's extreme hypertension, headache, nausea, and vomiting. T.5 491:24-493:4. In fact, Donaghy herself took Jan's blood pressure and found it to be an astonishing 228 over 87 — again, **higher** than when she came into the emergency department. *Id.*, 493:22-494:5. Donaghy understood that this combination of symptoms is consistent with a brain bleed. *Id.*, 493:14-17. She did not consider the possibility of a brain bleed, although she admitted that she had a duty under the standard of care to assess the patient for that condition at that point. *Id.*, 494:6-494:22. The medical records also do not reflect that Donaghy informed Dr. Sutton that Jan's blood pressure had

increased to such a dangerous level, although she agreed on cross that it would have been important to do so. *Id.*, 497:9-18.

Jan was discharged around 12:30 a.m., still registering a systolic blood pressure above 200. *Id.*, 503:21-24 (time of discharge); *id.*, 506:11-13 (blood pressure). Her diagnosis was high blood pressure, nausea, and vomiting, with no specific cause identified. *Id.*, 5-4:25-505:3. The entire time Jan and Shawn were in the Rockdale ER, they believed Jan was suffering from food poisoning, and no one at Rockdale ever told them otherwise. T.V 725:12-17. The next day, Shawn filled Jan's prescription for Phenergan (an anti-nausea medication). *Id.* 730:3-7. He also called a local primary-care practice and made Jan a doctor's appointment for the following Monday, which was the first available appointment. *Id.*, 732:2-19.

During the week, Jan took her nausea medication (with limited effect) and continued to experience headaches. *Id.*, 737:5-17. The following Saturday, January 21, Jan encouraged Shawn to attend a previously planned dinner with some friends from church, although she did not feel well enough to join him. *Id.*, 740:11-741:11. During dinner, though, she began sending him text messages indicating that she had fallen and was unable to get up. *Id.*, 741:22-744:2. Shawn settled his check and went home to see about her. *Id.*, 744:3-19. He believed she was exhausted from food poisoning and nausea. *Id.*, 744:20-745:4. When he got home, she was asleep, and he let her stay asleep, thinking this would be good for her. *Id.*, 745:19-746:3.

But the next morning at breakfast, he noticed her moving her mouth unnaturally while eating. *Id.*, 746:25-747:16. She tried to get up from the couch to go to the bathroom, but could not get up. *Id.*, 747:22-748:3.

Shawn called 911, *id.*, 748:4-5, and Rockdale County EMS transported Jan back to Rockdale Medical Center's emergency department. *Id.*, 750:18-753:10. A CT scan revealed blood on her brain. *Id.*, 755:4-8. She was transferred to Emory, and Shawn followed behind the ambulance in his car. *Id.*, 755:9-23. Shawn never heard his wife talk again. *Id.*, 756:3-14.

B. The proof of damages was essentially undisputed.

From the very outset of the trial, defense counsel expressly acknowledged the "catastrophic" and "devastating" nature of Jan's injuries. *See* T-III 13:1 (Ms. McGrotty, referring to Jan as "catastrophically injured"); T-III 198:6-7 (Mr. Weathington: "One thing we can all agree on this case, is that Ms. Evans suffered a catastrophic injury."); T-III 202:17-22 (Mr. Weathington: "I can tell you the focus in my case for two weeks will not be the damages. But it will be manifest, and it is manifest that Ms. Evans is injured, and concurrently, Mr. Evans has suffered. So nobody is — nobody is going to argue about that."); T-III 237:2-7 (Mr. Huff: "certainly, the rupture of these brain aneurysms, it's a catastrophic event. And no one, Mr. Weathington and I, no one with the hospital or Dr. Sutton or Emerginet

are trying in any way to minimize the loss to Ms. Evans or to Mr. Evans. It's — it's a tragedy. It's devastating.").

The evidence of damages unequivocally supported this assessment. The jury heard evidence that Jan's brain injury caused past and future medical costs, past and future lost wages, and pain and suffering, as well as loss of consortium.

1. Past and future medical costs.

Jan's total past medical costs were $1,196,288.97. T.V 762:24-763:3; Pl. Exh. 17. The jury also heard expert testimony regarding Jan's likely future medical costs, including the testimony of a brain-injury rehabilitation physician, Dr. Payal M. Fadia, M.D.; a life care planner and registered rehabilitation nurse, Cathy Gragg-Smith, R.N.; and an economist, Dr. Francis Rushing, Ph.D. *See* T.VII 1245-1284 (Dr. Fadia); 1284-1315 (Ms. Gragg-Smith); 1345 (Dr. Rushing). Nurse Gragg-Smith presented a life-care plan that itemized what, to a reasonable degree of medical certainty, Jan will need for her future care. T.VII 1284-1314 (testimony of Nurse Gragg-Smith); Pl. Exh. 12a (list of items, admitted without objection at T.VII 1300:1-7); T.VII 1300:12-24 (foundational testimony). Dr. Fadia testified that she signed off on the life-care plan as well, and that she believed the modalities itemized in the plan were appropriate. *Id.*, 1273:10-1280:19. Defendants' cross-examination of Dr. Fadia did not address that topic at all. *Id.*, 1280:21-1284:3. The cross-examination of Nurse Gragg-Smith regarding the items

in the plan was limited to whether a certified nursing assistant would suffice as a caregiver, rather than a nurse. *Id.*, 1306:18-1309:18; *see also id.*, 1313:21-1314:17 (re-cross by Mr. Huff, which did not address any of the items on the life care plan). Defendants did not present any alternative plan for Jan's future care.

2. Past and future lost wages.

The jury heard extensive evidence of Jan's work history with U.S. Airways. Jan was working for U.S. Airways when she and Shawn met, T.V 690:18-25, and she continued to do so after she married Shawn and moved to Georgia in June, 2001. *Id.*, 697:5-13. Jan was furloughed along with other U.S. Airways employees after the tragic events of September 11, 2001; but after the furlough period she took the first available position, commuting to Charlotte, NC to do so. *Id.*, 697:20-698:14. After about a year, a part-time position opened up in Atlanta, and Jan accepted it so she could be closer to home. *Id.*, 698:22-699:13. At the time of the incident, she was working five six-hour shifts per week. *Id.*, 702:2-9. Jan's supervisor, Regina Hofele, testified that Jan was "an excellent employee . . . one that you didn't have to worry about being supervised." T.VII, 1056:8-9; *see also* T.V 700:9-702:9 (testimony of Shawn Evans regarding Jan's work). On the Sunday that Jan went to Rockdale Medical Center for the first time, she called Ms. Hofele to report sick for work with nausea and a severe headache. *Id.*, 1057:10-18. Jan never came back to work. *Id.*, 1059:6-7. Defendants did not contend at trial

that Jan will ever be capable of working again, nor did they dispute that she would have continued to work if she had not suffered her injury.

3. Pain and suffering and loss of consortium.

The jury also heard evidence about Jan's life: her independence, creativity, humor, and energy; her devotion to her Catholic faith; and, above all, the love she found late in life and the happy marriage she shared with Shawn. T.V 689:17-696:25; 777:22-778:18. But perhaps the most compelling evidence of their bond came from the period after Jan's injury. For three-and-a-half years from Jan's release from the rehabilitation center through the date of trial, Shawn personally cared for Jan in their home. *Id.*, 778:19-779:6. The jury met Jan during a brief courtroom visit and saw a day-in-the-life video that showed the daily tasks that Shawn performed for her. *Id.*, 776:55-777:4; Pl. Exh. 18. He prepared her medications; bathed her; changed her diaper; and transferred her from her wheelchair to her bed and back. *Id.*, 768:5-15. But Shawn is more than a nurse to Jan, despite her disability. The evidence was that he regularly takes her out to dinner in the community and includes her in conversations "like she's going to get up out of the chair and answer him." T.VII 1238:13-14. A friend of the family testified that, "it's just like he loves her as much as he did on the day that he married her." *Id.*, 1238:2-4.

4. Defendants did not challenge damages in closing.

In closing, defense counsel did not try to argue that any specific items of damages had been caused by anything other than Ms. Evans's brain bleed. Dr. Sutton's lawyer, Ms. McGrotty, commenced her argument by stating: "There is no doubt that a subarachnoid hemorrhage and a bleed into the tissue of your brain as a result of a ruptured aneurysm is one of the most devastating things that can happen to anyone. . . . And, frankly, I wouldn't wish on my worst enemy the situation that Jan Evans finds herself in, and that Mr. Evans finds himself in." T-IX 1912:11-14, 19-21. She then spent the next nineteen pages of the trial transcript arguing about liability issues, and concluded by stating: "I'm not going to talk to you about damages. There is no doubt that Ms. Evans is neurologically devastated. There is no doubt about it." T.IX 1931:19-21. Likewise, Rockdale's counsel, Mr. Huff, focused solely on the issues of liability and comparative fault, and did not dispute that Ms. Evans's brain bleed caused her significant damages. T-IX 1950:12-21; *see* Slip Op., p. 6 ("Rockdale did not contest that Mrs. Evans was catastrophically injured and did not address the issue of damages during closing argument.").

5. The jury's special verdict made clear and discrete findings on liability, apportionment, and damages.

The jury found Rockdale 51% liable for the damage caused by Jan's untreated ruptured brain aneurysm, and found Jan herself 49% liable for that damage. R.2 47-48 (¶ 3). The jury awarded Jan the full amount of her past medical

expenses, but it wrote in **zero** for future medical expenses; **zero** for past and future lost wages; and **zero** for past and future pain and suffering. *Id.*, 47 (¶¶ 1(b)-1(f)). As to Shawn's loss of consortium claim, the jury awarded only the cost of renovating his house – an item that was set forth only in Jan's life care plan and which legally is not an item of consortium damages at all. *Id.* (¶ 2). The trial court entered judgment on the verdict on March 10, 2016, noting that the award of damages to Jan was only "for past medical expenses . . .." R.2 60-61.

6. The trial court incorrectly denied Plaintiff's request for a new trial on damages only and upheld the verdict in full.

Plaintiff timely filed his Motion for Additur or for a New Trial on Damages Only on April 11, 2016. R.2 62-71. In a two-page Order dated August 24, 2016, the trial court summarily denied Plaintiff's Motion. R.II 124-25. Plaintiff filed a timely Notice of Appeal on September 14, 2016. R.II 1.

7. The Court of Appeals reversed, but held that this Court's case law required a new trial on all issues, not just damages.

The Court of Appeals correctly reversed the trial court, holding that the jury's award of zero for pain and suffering to a catastrophically injured plaintiff was so clearly inadequate as to shock the conscience and necessitate a new trial. 345 Ga. App. 511, 516-21. The Court noted that Georgia's old comparative-negligence regime had been superseded by the apportionment statute, and that, "[a]ccordingly . . . the jury in the present case was tasked with calculating the total

damages owed to Mrs. Evans, including damages for past pain and suffering, as a distinct first step, separate and apart from any subsequent reduction in the total damages based on the percentage of Mrs. Evans's comparative fault . . .." *Id*. at 516. But the Court of Appeals went on to hold that it was obligated to follow this Court's pre-apportionment decisions in *Head*, *Robinson*, and *Bridges Farms* until this Court overrules them, and that those decisions required a new trial on all issues, not on damages only. *Id.* at 521-22.

This Court granted the Writ of Certiorari on January 7, 2019. This Brief is timely filed pursuant to an extension of time granted by Order dated January 23, 2019, a copy of which is attached hereto as Exhibit A.

III. ENUMERATION OF ERROR

The Court of Appeals erred in remanding this case for a retrial on both liability and damages pursuant to the rule in *Bridges Farms*. This Court should disapprove that rule and should remand the case for a new trial on damages only.

IV. ARGUMENT AND CITATION TO AUTHORITY

The general rule in Georgia is that the retrial of a case should be limited to matters affected by error in the first trial, unless the first jury's resolution of an issue cannot be ascertained from the verdict. Where a verdict reflects an inadequate or excessive damages award, O.C.G.A. § 51-12-12 expressly authorizes a retrial on damages only. But this Court's precedents under *Bridges Farms* did not give effect

to that statutory text. Where comparative negligence was at issue, the reversal of a clearly excessive or inadequate verdict under O.C.G.A. § 51-12-12 was held to require a full retrial even where a special verdict made clear precisely how much comparative negligence the first jury had found.

In 2005, however, the Legislature reframed the concept of comparative negligence in the apportionment statute. Under this statute, the reduction of an award for comparative negligence no longer takes place behind the scenes. Instead, the jury makes express and separate findings of total damages and a percentage of comparative fault, and the trial judge then applies the reduction. This procedure supersedes the common-law comparative-negligence rules and solves the problems that led the *Bridges Farms* Court to depart from the general rule of limited retrials. Indeed, the apportionment of fault to a plaintiff is identical in all relevant respects to the apportionment of fault to third parties, which this Court held in *Martin* to be amenable to a limited retrial. This Court should follow *Martin* here and disapprove *Bridges Farms* and its progeny.

A. The apportionment statute supersedes the rule in *Bridges Farms* and solves the problems that gave rise to that rule.

This Court's 1997 decision in *Bridges Farms* addressed the following question:

> Where a general verdict is returned in favor of plaintiff in a trial of a personal injury action, at which trial evidence of plaintiff's comparative negligence was introduced and a charge thereon given, does the reversal by

> the appellate court on the basis that the trial court erred in instructing on future medical expenses require a new trial as to liability and damages or a new trial only as to the amount of damages?

Bridges Farms, 267 Ga. at 505. *Bridges Farms* answered this question by holding that "reversal of the judgment entered on a general verdict returned for the plaintiff in a case in which comparative negligence will be an issue on retrial necessarily mandates that the retrial encompass both the issues of damages and liability." *Id.* at 506 (emphasis added).

The *Bridges Farms* Court cited the decision of the Court of Appeals in *Thomas v. Clark*, which held that a new trial must include liability where there was a general verdict and an issue of comparative negligence, for in such a case "the issue of comparative negligence is inextricably joined with the issue of damages." 188 Ga. App. 606, 608 (1988). A complete new trial was needed even though the error in *Thomas* related solely to the issue of medical expenses, because a general verdict "does not expressly reveal what proportion of the amount awarded to each appellant was for medical expenses, if any." *Id.* In *Bridges Farms*, which also involved a general verdict, this Court quoted the "inextricably joined" language from *Thomas*, holding that "reversal of the judgment entered on a general verdict returned for the plaintiff in a case in which comparative negligence will be an issue on retrial necessarily mandates that the retrial encompass both the issues of damages and liability." *Bridges Farms*, 267 Ga. at 506.

Considered in its pre-apportionment context, the narrow holding of *Bridges Farms* made practical sense. First, the opacity of a general verdict can obscure the effects of trial error, rendering it difficult, if not impossible, for an appellate court to fashion a remedy short of a full new trial. *See Thomas*, 188 Ga. App. at 608 (noting that it was not feasible to limit a reversal to the award of medical expenses because the general verdict "does not expressly reveal what proportion of the amount awarded to each appellant was for medical expenses, if any"). Second, because a general verdict did not include a finding of a specific percentage of comparative fault, it did not provide a sufficiently concrete resolution of that issue for the trial court to carry over into the second trial. A finding of liability, of course, would show that the jury must have found the defendant to be more at fault than the plaintiff. But beyond that, there was no reliable way to tell whether the reason for a lesser award was that the jury found more comparative fault, or that it found less total damages, or both. Practically speaking, a jury's resolution of issues cannot be afforded the same finality when it takes place solely in the "black box" of the jury room as it can when explicitly set forth on the face of the verdict.

The very next year, however, this Court extended the categorical rule of *Bridges Farms* beyond these supporting rationales. *Robinson v. Star Gas* was a wrongful-death case involving comparative negligence. The jury, in a special verdict, had found the defendant 51% at fault for the wrongful death of the

plaintiff's wife, but had awarded only $4,157.25 in damages. *See Star Gas v. Robinson*, 225 Ga. App. 594, 595 (1997). After reversing this inadequate award under O.C.G.A. § 51-12-12, this Court turned to the question of whether a new trial solely on damages was the proper remedy. Although the jury in *Robinson* — like the jury in this case — had made a specific finding that the defendant was 51% at fault, this Court **did not discuss** whether that specific finding should affect the result. Instead, it just followed the categorical rule laid down in *Bridges Farms*, holding that, "when a Georgia court grants a new trial under O.C.G.A. § 51-12-12 (b) in a case involving comparative negligence, that trial must necessarily encompass issues of liability and damages." *Robinson*, 269 Ga. at 105 (citing *Thomas* and *Bridges Farms*). Thus, the *Robinson* decision extended the rule of *Bridges Farms* (without explanation) to a case where the jury in the first trial had specifically resolved the degree of comparative fault.

There is good reason to conclude that *Robinson* was wrong when it was decided. Among other things, the rule in *Robinson* fails to give effect to the text of O.C.G.A. § 51-12-12(b), which unequivocally authorizes a damages-only retrial when the jury's award of damages is clearly inadequate or excessive. The statute provides:

> If the jury's award of damages is clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence, the trial court may order a new trial as to damages only, as to any or all parties,

> or may condition the grant of such a new trial upon any party's refusal to accept an amount determined by the trial court.

As this Court has held:

> Under the plain language of the statute a judge has three alternatives when a jury makes an award of damages that is clearly inadequate or excessive. The judge may (1) grant a motion for new trial; (2) grant a motion for new trial as to damages only; or (3) conditionally grant a motion for new trial.

Spence v. Hilliard, 260 Ga. 107, 108 (1990). Contrary to this holding, *Robinson* purported to take away one of the options — damages-only retrials — that the Legislature clearly gave to trial courts in O.C.G.A. § 51-12-12(b).

The *Robinson* Court did not really explain why it reached this result. Clearly it followed the categorical rule laid down in *Bridges Farms*; but the Court did not address the fact that *Bridges Farms* arose from a general verdict. *Robinson*, 269 Ga. at 104-05. Ironically, both parties in *Robinson* conceded that a special verdict form would enable a trial court to make the "simple, nondiscretionary calculation" of a final award, just as the apportionment statute dictates today. 269 Ga. at 102, n.1. Yet the Court did not take the logical step of distinguishing *Bridges Farms* and ordering a damages-only retrial in which the trial judge would apply the percentage of comparative negligence found by the first jury. In fairness, the issue likely was not briefed, as it was not one of the questions on which certiorari had been granted. *See* 269 Ga. at 102 and n.1 (describing questions on certiorari).

In 2005, Georgia's Legislature passed the apportionment statute, O.C.G.A. § 51-12-33. As this Court has held, this legislation abrogated the old common-law comparative negligence decisions such as *Thomas*, *Bridges Farms*, and *Robinson*, and established a new set of legal rules. *See Couch v. Red Roof Inns*, *Inc*., 291 Ga. 359, 364-65 (2012) (holding that O.C.G.A. § 51-12-33 "displaces" and "supplants" the common-law doctrine of comparative negligence); *Zaldivar*, 297 Ga. at 594 (holding that the apportionment statute replaced the old common-law comparative negligence regime with a statutory system of "assigning responsibility for an injury to a plaintiff according to his 'fault' under subsections (a) and (g) of [O.C.G.A. § 51-12-33]").

Under the apportionment statute:

> 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.

O.C.G.A. § 51-12-33(a). Thus, in an apportionment case, the jury is no longer legally authorized to reduce its total award based on the comparative fault of the plaintiff, as juries once did under the common-law comparative negligence regime. Rather, the statute directs the jury to determine a total amount of damages and a percentage of comparative fault, and then directs the **judge** to reduce the total award in proportion to the percentage found by the jury. *Id.*

This statutory regime abrogates the common-law rule of *Bridges Farms* and *Robinson*. Indeed, this Court in *Zaldivar* expressly cited *Bridges Farms* as belonging to the body of common law that was superseded by the apportionment statute:

> Prior to the adoption of the present apportionment statute, when a plaintiff breached that duty, and when his breach was a proximate cause of his injuries, the plaintiff was chargeable with comparative negligence, see *Whatley v. Henry*, 65 Ga. App. 668, 674 (6) (16 SE2d 214) (1941), and his damages were to be "diminished … in proportion to the degree of fault attributable to him," *Union Camp Corp. v. Helmy*, 258 Ga. 263, 267 (367 SE2d 796) (1988), unless his comparative negligence equalled or exceeded that of the defendants, in which event, "the plaintiff could not recover." *Bridges Farms*, 267 Ga. at 505 (citation and punctuation omitted). Today, these same ends are accomplished by assigning responsibility for an injury to a plaintiff according to his "fault" under subsections (a) and (g) of the apportionment statute.

Zaldivar, 297 Ga. at 594; *see also Couch*, 291 Ga. at 364-65 (holding that O.C.G.A. § 51-12-33 "displace[d]" and "supplant[ed]" the common-law doctrine of comparative negligence).

The apportionment procedure solves the problem that gave rise to the rule in *Bridges Farms* and its progeny. The reason why those cases required a retrial of liability in comparative-negligence cases is that the reduction of damages for comparative negligence happened behind the closed door of the jury room, creating uncertainty for reviewing courts and for the trial judge at a second trial. But that problem no longer exists in the post-apportionment world. The apportionment statute removes from the jury the power to reduce the total amount

of its award of damages on the basis of comparative fault, and requires the jury make a specific percentage finding of the Plaintiff's fault that can then be applied by the judge. O.C.G.A. § 51-12-33(a). Of course, the same finding can be applied again just as easily in a second trial.

This Court's recent decision in *Martin* further demonstrates that the scope of any retrial here should be determined under the apportionment statute and should be limited to the issues affected by the jury's error. In *Martin*, this Court affirmed the jury's findings of liability and total damages, but remanded for a new trial solely as to the apportionment of fault. *Martin*, 301 Ga. at 341 ("We thus conclude that the apportionment error here requires a retrial only as to apportionment, and we reverse the judgment of the Court of Appeals to the extent it ordered this case be retried in its entirety.").

Like the Defendant here, Six Flags argued that the line of cases stemming from *Bridges Farms* required a retrial of the entire case. *Id.* at 340. Because the question before it dealt solely with non-party fault, this Court reserved ruling on the general issue of whether the "categorical rule" of *Bridges Farms* "continues to apply in comparative negligence cases after enactment of the apportionment statute." *Id.* But this Court's analysis of the apportionment statute in *Martin* made quite clear that this categorical rule does **not** survive:

> The apportionment statute requires that, once liability has been established and the damages sustained by the plaintiff have been calculated, the trier of

> fact must then assess the relative fault of all those who contributed to the plaintiff's injury — **including the plaintiff himself** — and apportion the damages based on this assessment of relative fault. . . . Thus, once liability has been established, the calculation of total damages sustained by the plaintiff is the first step, and the allocation of relative fault and award of damages according to that allocation is a distinct second step. **There is no reason these two steps cannot be segregated for purposes of retrial.**

Martin, 301 Ga. at 338-39 (emphases added). This passage states that the jury's apportionment of fault – "including [to] the plaintiff" – is a "distinct second step" from the award of "total damages sustained by the plaintiff," and that these two steps can be "segregated for purposes of retrial." *Id.* And because they can be segregated, they generally should be. "Limiting the scope of retrial to only those distinct portions of the judgment that are infirm serves the dual objectives of judicial economy and respect for the jury's verdict." *Id.* at 338.

The inescapable conclusion from this Court's decisions in *Couch*, *Zaldivar*, and *Martin* is that liability and comparative fault are no longer "inextricably joined" for retrial purposes, and that the apportionment statute has abrogated the "categorical rule" of *Bridges Farms*. This Court should draw that conclusion and should hold expressly that *Bridges Farms* and its progeny are no longer good law.[2]

---

[2] Apart from *Robinson*, the only other decision of this Court to follow the "categorical rule" of *Bridges Farms* was *Head v. Csx Transp.*, 271 Ga. 670, 673 (1999). *Head* was a Federal Employers Liability Act case, in which the trial court, sitting as thirteenth juror, had granted a new trial on damages only as a remedy for an inadequate verdict. As in *Bridges Farms*, the verdict was a general one. *See Head*, 271 Ga. at 670 (describing "a verdict for Head in the amount of $ 8,000").

B. The rule of *Bridges Farms* offends the principle of finality of judgments.

A second reason why the categorical rule of *Bridges Farms* should be abandoned is that it violates the well-established principle that matters settled by judgment should not be disturbed absent a compelling reason. This Court suggested as much in *Martin*, stating:

> in the ordinary case, the issue of apportionment among tortfeasors will be sufficiently distinct from the issue of liability and calculation of damages that the correction of an error in apportionment will not require a full retrial. In fact, where the issue of apportionment is distinct from the issues of liability and damages sustained, our "law of the case" doctrine will in most instances ***preclude*** the re-litigation of these issues once the jury's verdict on them has been affirmed.

Martin, 301 Ga. at 340-41. This point is correct: when an issue has been litigated to a judgment in the first trial, and then either is not appealed or is affirmed on appeal, the principle of finality of judgments (whether considered as *res judicata* or as law of the case) precludes its being relitigated without good reason. *See Smith v. Lockridge*, 288 Ga. 180, 186 (2010) (applying *res judicata* to bar restyled claims that could have been raised in a previous appeal from a summary judgment order in the same case); *see also Kennedy Dev. Co. v. Newton's Crest Homeowners' Ass'n*, 322 Ga. App. 39, 43 (2013) (Boggs, J.) (same); *Kent v. A.O. White, Jr., Consulting Eng'rs, P.C.,* 266 Ga. App. 822, 824 (2004) (applying law-of-the-case

doctrine to reject arguments that could have been, but were not, raised in a prior appeal in the same case).

The rule of *Bridges Farms* violates this principle because it categorically requires relitigation of issues that were litigated to judgment in a first trial, without regard to whether those issues were appealed or were affected by error. This is clear in the case of *Robinson*, where this Court held that the *Bridges Farms* rule required a new trial as to comparative negligence, even though the first trial had yielded a special verdict finding the defendant 51% responsible and this Court did not identify any error in that finding. *Robinson*, 269 Ga. at 104. The point is at least equally clear in the present case, where the Court of Appeals applied *Bridges Farms* to require retrial of a finding of comparative negligence that is perfectly clear on the face of the verdict and was not challenged by either party on appeal. Under normal circumstances, the resolution of such an issue by judgment is final and binds the parties in all further proceedings unless reversed on appeal. There is no reason for an exception to that general rule.

C. The doctrine of *stare decisis* does not apply.

The doctrine of *stare decisis* sometimes sustains wrong decisions; but it does not sustain this one. As this Court has explained:

> [S]tare decisis is not an "'inexorable command,' nor 'a mechanical formula of adherence to the latest decision.' . . . Stare decisis is instead a 'principle of policy.'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, ___ (130 S. Ct. 876, 920, 175 L.E.2d 753) (2010) (Roberts, C. J., concurring)

> (citations omitted). In considering whether to reexamine a prior erroneous holding, we must balance the importance of having the question *decided* against the importance of having it *decided right*. *Id.* In doing so, we consider factors such as the age of the precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning. See *Montejo v. Louisiana*, 556 U.S. ___, ___ (129 S. Ct. 2079, 2088-2089, 173 L.E.2d 955) (2009).

State v. Jackson, 287 Ga. 646, 658 (2010).

Consideration of these factors does not save the rule in *Bridges Farms*. The case is two decades old, which is not a particularly long period in the evolution of the law. *See Woodard v. State*, 296 Ga. 803, 812 (2015) (collecting cases that overruled precedents as much as 38 years old). It does not establish the type of rule that could give rise to vested reliance interests; rather, the scope of retrial after an appellate reversal in a tort case is essentially a matter of judicial housekeeping with which the public at large is not concerned. The *Bridges Farms* rule imposes a significant cost in time and money and is not more workable than a rule of limited retrial. The Court should not await a legislative solution: this is a judicially created rule, and the Legislature already has undermined the soundness of its reasoning by enacting apportionment. (Indeed, as argued above, the reasoning behind the rule's extension in *Robinson* was questionable from the outset.) On the whole, it is more important to have this issue decided correctly than it is to preserve a rule that the development of Georgia law has left behind.

CONCLUSION

For the foregoing reasons, this Court should disapprove the "categorical rule" of *Head*, *Robinson*, and *Bridges Farms*, and should remand for a new trial on damages only.

Respectfully submitted, this 11th day of February, 2019.

s/ Leighton Moore
Leighton Moore
Ga. Bar No. 520701
The Moore Law Firm, P.C.
100 Peachtree St. NW
Suite 2600
Atlanta, GA 30303
678-237-0330
leighton@moorefirmpc.com

Exhibit A

SUPREME COURT OF GEORGIA
Case No. S18G1190

Atlanta, January 23, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

SHAWN G. EVANS et al. v. ROCKDALE HOSPITAL, LLC

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until February 11, 2019.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1)-(2). No extensions of time for requesting oral argument will be granted. Rule 50(3).

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing **BRIEF OF APPELLANT** upon Defendant's counsel of record by U.S. Mail at the following address:

Daniel J. Huff, Esq.
R. Page Powell, Jr., Esq.
ppowell@huffpowellbailey.com
Huff Powell & Bailey, LLC
999 Peachtree St., NE, Suite 950
Atlanta, GA 30309

This 11th day of February, 2019.

s/ Leighton Moore
Leighton Moore
Ga. Bar No. 520701