IN THE SUPREME COURT
STATE OF GEORGIA

Supreme Court Case No: S18C1190

SHAWN G. EVANS, Individually and as Guardian of JANICE K. EVANS,

Appellant

v.

ROCKDALE HOSPITAL, LLC d/b/a ROCKDALE MEDICAL CENTER,

Appellee

BRIEF OF APPELLEE

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I. INTRODUCTION

Appellants Shawn and Janice Evans ("the Evans") seek a self-serving change to existing law which, if combined with the Court of Appeals' unprecedented decision to grant a new trial in this case, would result in extreme prejudice to Appellee Rockdale Hospital, LLC d/b/a Rockdale Medical Center ("Rockdale") by dramatically increasing the likelihood of an excessive monetary award in favor of the Evans. Although the Court of Appeals granted the Evans a new trial, the court properly rejected the Evans' request for a retrial on damages only. The Evans now ask this Court to reverse that decision, arguing that the passage of O.C.G.A. § 51-12-33 ("the apportionment statute") in 2005 somehow rendered obsolete multiple decisions from this Court which hold categorically that a retrial only on damages is not permitted where (as here) comparative fault is an issue. There is no legitimate reason for this Court to revisit those decisions, and Rockdale therefore asks this Court to affirm the Court of Appeals' decision that, if a retrial is to occur, it must encompass the issues of liability and damages.

In support of their appeal, the Evans primarily argue that the apportionment statute "superseded" and "abrogated" existing comparative negligence law, including the "categorical rule" that issues of comparative fault preclude a retrial on damages only. [Brief of Appellants, pp. 1, 20, 22.] This argument simply is wrong,

and it ignores this Court's holdings in Martin v. Six Flags Over Georgia, II, LP, 301 Ga. 323 (2017) and Zaldivar v. Prickett, 297 Ga. 589, 594 (2015). Rather than superseding or abrogating existing comparative negligence law, this Court unambiguously has held that the apportionment statute in fact ***codified*** the doctrine of comparative negligence and accomplishes the "same ends" as the comparative fault rules that existed before the statute was passed. See Zaldivar, 297 Ga. at 594. Thus, the Evans' entire premise is false; the apportionment statute did not change existing comparative negligence law, and therefore it provides no basis for disregarding this Court's pre-apportionment decisions in Head v. CSX Transportation, Inc., 271 Ga. 670, 672 (1999), Robinson v. Star Gas of Hawkinsville, Inc., 269 Ga. 102, 104 (1998), and Bridges Farms v. Blue, 267 Ga. 505 (1997).

The Evans also argue that the apportionment statute eliminates the "legal and practical reasons for the categorical rule" set forth in Head, Robinson, and Bridges Farms. [Brief of Appellant, pp. 2, 19, 20.] Without providing any citation or objective support, the Evans' argue that, prior to the passage of the apportionment statute, a reduction of damages due to comparative fault always occurred "behind the closed door of the jury room," creating uncertainty regarding the reason for the reduction. [Id., p. 20.] According to the Evans, the "opacity" that resulted from this closed-door process was the reason for the pre-apportionment categorical rule

against damages-only retrials in comparative fault cases. This argument is not accurate and is not supported by any authority in the Evans' Brief.

In truth, in comparative fault cases decided prior to 2005 in which a special verdict form was used, the jury followed the same process that subsequently was codified by the apportionment statute—the jury assigned a percentage of fault to the plaintiff and the trial judge then reduced the award accordingly. This Court's decision in Robinson confirms that, in such cases, the trial judge, rather than the jury, reduced the award based upon the percentage of fault assigned to the plaintiff by the jury—the exact process later prescribed by the apportionment statute. There simply is no material difference between the process that applied to comparative fault cases before 2005 and the process that applies now, and thus there is no "legal or practical" reason to abandon the prior controlling decisions of this Court.

The Evans also overstate the reach of this Court's holding in Martin. In Martin, of course, this Court did not focus on comparative fault; it focused on apportionment among non-party tortfeasors. The Court found that 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." 301 Ga. at 340-341. Apportionment among tortfeasors, however, is a different issue entirely than traditional comparative

fault, yet the Evans repeatedly conflate the two concepts in their Brief. This Court in Martin obviously did not hold that the issues of liability and damages shall in all cases be considered so legally distinct that a retrial only on damages will always be a viable option. Instead, this Court in Martin only authorized a limited retrial under the specific circumstances of that "ordinary case."

Moreover, in Martin, this Court expressly declined to address whether the apportionment statute had any effect on the "categorical rule" set forth in Head, Robinson, and Bridges Farms. Yet, in their Brief, the Evans claim the Martin decision somehow "made quite clear that this categorical rule does **not** survive." [Brief, p. 21 (emphasis in original).] In fact, the opposite more likely is true. In Martin, while discussing whether issues of liability and damages are "inextricably joined," this Court expressly distinguished cases involving the "assessment of the plaintiff's relative fault" from those involving only the "relative fault among tortfeasors." See Martin, 301 Ga. at 340. Thus, Martin implicitly suggests that a different analysis ***still*** must be applied where "the plaintiff's relative fault" is an issue, contradicting the arguments in the Evans' Brief.

Finally, the Evans argue that this case presents an ideal opportunity for this Court to address whether the apportionment statute affects the rule from Head, Robinson, and Bridges Farms. [Brief, p. 3.] This argument is difficult to understand,

since the apportionment statute hardly applied to this case at all. Here, the jury returned a verdict against one defendant, but found plaintiff Janice Evans to be 49 percent at fault. There was no "apportionment among tortfeasors" here; instead, this was a pure case of comparative fault between one defendant and one plaintiff and, as such, it is not an appropriate case for consideration of the issue raised in the Evans' Brief.

Additionally, this is not the type of "ordinary case" referenced by this Court in Martin where a limited retrial conceivably might be appropriate. Instead, in this case, liability was closely contested at trial, but Ms. Evans' injuries undeniably were severe. The jury obviously compromised on the issues of liability and damages, resulting in a verdict for the Evans but a monetary award well below the amount they requested. Thus, the jury in this case obviously considered the issues of liability and damages to be "inextricably joined," and its decision demonstrates that a limited retrial on damages in this case would be extraordinarily unfair to Rockdale. This Court should reject the Evans' arguments, therefore, because even if this Court for some reason is inclined to reexamine the "categorical rule" from Head, Robinson, and Bridges Farms, this would not be the type of "ordinary case" where a retrial on damages could ever be fairly conducted.

II. STATEMENT OF FACTS

A. Background Facts

During the night on January 14, 2012, Janice Evans awoke up from her sleep and exclaimed "oh my head." [T. V. 5, 710:5–11.] She then ran out of the bedroom, into another room, and vomited on herself. [Id.] Shawn Evans, Ms. Evans' husband, followed her and escorted her to the bathroom, where she continued to experience episodes of vomiting and diarrhea. [Id., 710:12–19.] The couple slept on the floor of the bathroom for the rest of night. [Id., 711:1–4.] Ms. Evans continued to experience these symptoms for nearly 44 hours, until she finally presented to the Emergency Department at Rockdale around 8:00 p.m. on January 16, 2012. [Id., 789:2–790:1.] Upon presentation to the Emergency Department, Ms. Evans documented that the reason for her visit was "dehydration." [Id., 791:12–25.]

At Rockdale, Ms. Evans was first assessed by a triage nurse, Mr. Harold Hildreth. [T. V. 4, 319:17–320:2.] Mr. Hildreth was not informed of the events that occurred on January 14, 2012, nor was he informed that Ms. Evans was experiencing a headache. [Id., 324:21–325:1.] Ms. Evans was taken from triage to a room in a timely fashion and was soon evaluated by the emergency room physician, Dr. Tamaurus Sutton. [Id., 319:22–320:2; T. V. 7 1181:12–15.] Similarly, Ms. Evans did not make a complaint of headache to Dr. Sutton, nor did she mention the events

which occurred on January 14, 2012. [T. V. 7, 1185:8–19.] Indeed, it is undisputed that Ms. Evans did not inform any healthcare provider at Rockdale of the January 14, 2012 incident of waking up from her sleep, vomiting on herself and sleeping on the bathroom floor. [T. V. 5, 810:1–6.]

Ms. Evans was discharged around 12:30 a.m. on the morning of January 17, 2012, and she was given discharge instructions which included the following:

(1) Follow-up with a primary care physician by January 20, 2012 due to uncontrolled hypertension [T. V. 7, 1204:22–1205:5], and

(2) Return to the Emergency Department if her condition worsened [T. V. 8, 1654:17–22].

Ms. Evans signed the discharge instructions, attesting to her understanding of the instructions. [Id.] During the next several days, Ms. Evans' physical condition continued to deteriorate, as she experienced at least three falls [T. V. 5, 809:2–3], slurred speech [T. V. 7, 1501:20–1502:1] and reported leaning to the left when she walked. [T. V. 5, 810:7–12.] In fact, although Ms. Evans had never previously missed a day of work, she was unable to attend work for the next five days. [Id., 803:14–20.] Moreover, on the evening of January 21, 2012, Ms. Evans experienced an episode of falling after which she was unable to get up and was forced to crawl to bed. [T. V. 5, 805:12–20.] Despite these dramatic, worsening symptoms, by the morning of January 22, 2012, Ms. Evans still had not seen a primary care physician

as she had been instructed to do, nor had she returned to the Emergency Department. [T. V. 5, 732:13–19.] It was not until January 22, 2012—five days after Ms. Evans' discharge from Rockdale—that the Evans finally contacted 911 Emergency Services. [Id., 749:8–11.] Ms. Evans subsequently was diagnosed with significant brain damage due to an intracranial hemorrhage which likely was caused by her longstanding, uncontrolled hypertension. [T. V. 6, 834:19–835:24.]

B. The Trial And The Jury's Verdict

The trial of this medical malpractice case proceeded over the course of nine days in February 2016. During the trial, the jurors heard testimony from 27 witnesses and reviewed hundreds of pages of documentary exhibits. Although the parties agreed that Ms. Evans was catastrophically injured, Rockdale challenged the nature and extent of the damages sought by the Evans in multiple ways, including through cross-examination of two of the Evans' damages experts, Payal M. Fadia M.D. and Cathy Gragg-Smith, R.N. [T. V. 7, 1280:22– 1283:12; 1301:8–1309:11; 1312:25–1313:20.] Specifically, Dr. Fadia, a brain injury rehabilitation specialist, confirmed on cross-examination that the rehabilitative and supportive medical care and services Ms. Evans had been receiving were "excellent," undercutting to some degree the Evans' argument that Ms. Evans needed to receive future care from more experienced (and more expensive) healthcare providers. [Id., 1282:4-22.] Similarly,

Ms. Gragg-Smith, a life care planner, was questioned regarding her limited training, education and experience in preparing life care plans, the limited information she obtained when preparing Ms. Evans' life care plan, the availability of less-expensive treatment options, and other similar issues. [Id., 1301:14-1309:11.] Indeed, it was revealed that the life care plan Ms. Gragg-Smith authored in this case was the first life care plan she had ever prepared independently. [Id., 1301:24–1302:1.] Like Dr. Fadia, Ms. Gragg-Smith conceded on cross-examination that the ongoing care Ms. Evans had been receiving was "wonderful" and "excellent." [Id. 1306:15-1307:20.]

In addition, during trial, the jury was presented with evidence related to Ms. Evans' failure to properly care for her own health by receiving basic, routine medical care and treatment. Mr. Evans conceded, for example, that his wife had not seen a primary care physician since 2002, nor had she seen a gynecologist or obtained other yearly screenings such as pap smears and mammograms since at least 2007. [T. V. 5, 783:11-16; 786:14–21.] Additionally, despite her known history of uncontrolled hypertension, Ms. Evans did not see any physician on a routine basis to monitor her high blood pressure, nor did she regularly take any medications to control her high blood pressure. [Id., 784:15–785:2.] Importantly, it was well accepted at trial that Ms. Evans' longstanding, uncontrolled hypertension was the primary cause of her aneurysm, intracranial hemorrhage and subsequent brain damage.

Based upon multiple, undisputed facts, *e.g.* that Ms. Evans failed to generally care for her own health, failed to regularly see a primary care physician, failed to receive treatment for uncontrolled hypertension, failed to provide a complete history to the healthcare providers at Rockdale, failed to follow the discharge instructions given to her on January 17, and failed to seek further treatment after discharge despite alarming, worsening symptoms, the jury was charged on the issue of comparative negligence at trial. [T. V. 10, 1994:22–1996:11.] The jury subsequently deliberated for approximately 13 hours, asking numerous questions to the trial judge along the way. At the end of the proceedings, the jury returned a verdict for the Evans against Rockdale. [Id., 2042:23–2043:12.] The jury assigned 51% responsibility to Rockdale and 49% to Ms. Evans. In total, the jury awarded the Evans $1,263,843.97, although this amount was reduced by 49% according to the percentage of fault assigned to Ms. Evans by the jury. [Id., 2043:15–17.] The remaining defendants, Dr. Sutton and his professional corporation, received a defense verdict.

C. Post-Trial Motion And Subsequent Appeal

After the trial, the Evans filed a Motion for Additur or, in the Alternative, For a New Trial as to Damages Only pursuant to O.C.G.A § 51-12-12. The parties filed extensive briefs regarding the Evans' motion, with thorough citations to the trial

record and the applicable law, and the trial court held a lengthy hearing on the motion during which the parties fully argued their respective positions. Subsequently, the trial judge, who served as the "thirteenth juror" and heard all the evidence presented during trial, concluded that the jury's award of more than $1.2 million in damages was consistent with the preponderance of the evidence introduced at trial. He therefore denied the Evans' post-trial motion, and an appeal followed. [R. V. II, 124-125.]

In the Court of Appeals, the Evans again sought additur or a new trial on damages only. On April 12, 2018, in an opinion authored by Presiding Judge Anne E. Barnes, the Court of Appeals reversed the trial court's denial of the Evans' motion for additur, holding that the jury's award of more than $1.2 million was "so clearly inadequate under a preponderance of the evidence as to shock the conscience. . . ." [Court of Appeals' Opinion, p. 1.] However, the court held that it was "not at liberty to disregard the rule enunciated in *Head, Robinson,* and *Bridges Farms*," and therefore held that the retrial of this case "must encompass both liability and damages." [Id., p. 20.]

This Court granted the Evans' Petition for a Writ of Certiorari by Order dated January 7, 2019.[1] In its Order, this Court identified the following issue of particular concern:

> **If the Court of Appeals properly applied the appropriate standard for reviewing a claim that a trial court erred in considering a claim under O.C.G.A. § 51-12-12, did the Court of Appeals err by remanding this case for a retrial on both liability and damages?**

III. ARGUMENT AND CITATION OF AUTHORITY

A. A Retrial Only On Damages Is Not Permitted When Comparative Fault Is An Issue.

Under the longstanding doctrine of comparative negligence in Georgia, a plaintiff whose negligence is less than that of the defendant is not denied recovery, but the damages awarded are diminished by the degree of fault attributable to her; however, where the negligence of the plaintiff and the defendant are equal, or the negligence of the plaintiff is greater than that of the defendant, the plaintiff may not recover. Zaldivar v. Prickett, 297 Ga. 589, 594 (2015); Bridges Farms, Inc. v. Blue, 267 Ga. 505 (1997); Union Camp Corp. v. Helmy, 258 Ga. 263, 267 (1988).

[1] In the same Order, this Court granted Rockdale's Petition seeking review of the Court of Appeals' reversal of the trial court's denial of the Evans' motion for additur. That appeal currently is pending under Case No. S18C1189. If this Court rules in favor of Rockdale in Case No. S18C1189, the issues raised in this appeal would be rendered moot.

Historically, inadequate damage awards in cases involving issues of comparative negligence were categorically precluded from review under O.C.G.A. § 51-12-12. Beringause v. Fogleman Truck Lines, Inc., 209 Ga. App. 470 (1993); Palo v. Meisenheimer, 199 Ga. App. 24 (1991). More recently, however, this Court has held that comparative negligence awards are subject to review under O.C.G.A. § 51-12-12, but with one important caveat—if a new trial is ordered it must encompass all issues and may not be limited to damages only. See, e.g., Head v. CSX Transportation, Inc., 271 Ga. 670, 672 (1999); Robinson v. Star Gas of Hawkinsville, Inc., 269 Ga. 102, 104 (1998); Bridges Farms, 267 Ga. at 505; see also Metro Atlanta Rapid Transit Auth. v. Mitchell, 289 Ga. App. 1, 5 (2007).

Here, there is no dispute that the issue of comparative fault was one of the central issues at trial. There was ample evidence that Ms. Evans' own behavior contributed substantially to her damages, including Ms. Evans' failure to care for her own health, failure to give a complete and accurate history to the healthcare providers at Rockdale, and failure to follow the discharge instructions she was given. The trial court charged the jury on comparative fault principles, and the jury obviously considered Ms. Evans' contributory conduct to be quite significant, as it assigned 49 percent of the fault to her. There can be no question, therefore, that this

case involved substantial issues of comparative fault, bringing it squarely within the scope of the "categorical rule" set forth in Head, Robinson, and Bridges Farms.

The scope of any retrial in this case is controlled by this Court's decision in Robinson, which involved remarkably similar procedural circumstances. In Robinson, the plaintiff filed a wrongful death action against a liquid propane supplier and several healthcare providers. On the claims against the propane supplier, the jury found the defendant 51 percent responsible but assigned 49 percent responsibility to the plaintiff's decedent. The damages awarded by the jury included an award of $4,157.25 on the wrongful death claim, and the plaintiff subsequently filed a motion for new trial under O.C.G.A. § 51-12-12, arguing that the wrongful death award was so inadequate as to be inconsistent with the preponderance of the evidence. 269 Ga. at 102. The motion was denied by the trial court and the Court of Appeals affirmed, relying on the rule that inadequate damage awards cannot be set aside in comparative negligence cases. Star Gas of Hawkinsville, Inc. v. Robinson, 225 Ga. App. 594 (1997). This Court reversed, however, holding that comparative negligence awards are reviewable under O.C.G.A. § 51-12-12. In doing so, however, this Court stated

> While comparative negligence cases are subject to the same analysis in regard to claims of excessive or inadequate verdicts, the cases do differ from other tort cases should a new trial be necessary. Although O.C.G.A. § 51-12-12(b) provides that upon a party prevailing on a claim of excessive/inadequate verdict, "the trial court may order a new trial as to damages only," this Court recently recognized . . . . that such

> ***"cherry-picking"*** in a comparative negligence case is not permissible inasmuch as "in a comparative negligence case, the recovery of damages and the liability of the defendant are issues which are 'inextricably joined.'" Accordingly, 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 104 (emphasis added).

The similarities between Robinson and this case are readily apparent. In each case, a special verdict form was used, only one of several defendants was found 51 percent liable, and the plaintiff was found 49 percent responsible. See id. at n.1 (acknowledging that a special verdict form was used by the jury at trial). The issue of comparative negligence obviously was prevalent in each case, and the plaintiffs in each case sought relief under O.C.G.A. § 51-12-12 from an allegedly inadequate jury award. Here, like the appellants in Robinson, the Evans sought either additur or a new trial on damages—they did not seek a full retrial on all issues in the trial court. By seeking a retrial on damages only, however, the Evans have engaged in the exact type of "cherry picking" that the Robinson Court expressly prohibited. As a result, this Court's decision in Robinson makes it clear that the relief sought by the Evans simply is not allowed under Georgia law in a case such as this.

B. The Enactment Of O.C.G.A. § 51-12-33 Did Not Change Existing Comparative Negligence Law.

In their Brief, the Evans go to great lengths to establish that the enactment of the apportionment statute fundamentally changed existing comparative negligence law in Georgia. They claim, for example, that the statute "abrogated," "superseded," "supplanted," and "displaced" the prior law, rendering this Court's decisions in Head, Bridges Farms, and Robinson obsolete. [Brief of Appellant, pp. 1, 3, 20.] These gross overstatements are not supported by either the statutory language or by this Court's decisions in Martin and Zaldivar.

There is nothing in the language of the apportionment statute that changed, either expressly or implicitly, the existing rules governing comparative fault in Georgia. Under both pre- and post-apportionment rules, juries may assign a percentage of fault to a plaintiff, the amount of damages otherwise awarded to the plaintiff is reduced in proportion to her percentage of fault, and a plaintiff is not entitled to receive any damages if she is 50 percent or more responsible for the injury or damages claimed. See O.C.G.A. § 51-12-33(a) and (g). Thus, in all material respects, the rules governing cases involving comparative fault are exactly the same now as they were before the apportionment statute was enacted.

Recognizing this truth, this Court twice has acknowledged that the apportionment statute "codified"—rather than abrogated—the existing doctrine of comparative negligence. See, e.g., Martin, 301 Ga. at 340 n.10 ("We note that the apportionment statute did codify the existing law of comparative negligence."); Zaldivar, 297 Ga. at 594 ("Together, subsections (a) and (g) [of the apportionment statute] codify the doctrine of comparative negligence.") This Court's discussion of the issue in Zaldivar is particularly illustrative, where the Court ultimately held

> Together, subsections (a) and (g) codify the doctrine of comparative negligence, ...a doctrine that was recognized in Georgia long before the present apportionment statute was enacted in 2005. . . . Prior to the adoption of the present apportionment statute, when a plaintiff breached [his] duty [to exercise ordinary care for his own safety], and when his breach was a proximate cause of his injuries, the plaintiff was chargeable with comparative negligence. . . .and his damages were to be "diminished . . . .in proportion to the degree of fault attributable to him," . . . .unless his comparative negligence equaled or exceeded that of the defendants, in which event "the plaintiff could not recover." [cits. 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 (emphasis added).

Moreover, contrary to the argument made by the Evans in their Brief, the procedure for reducing awards due to comparative fault is no different now than it was before the enactment of the apportionment statute—when a special verdict form is used, the jury determines the total amount of damages and assigns a percentage of

fault to the plaintiff, and the trial judge reduces the jury's award according to the assigned percentage. [Cf. Brief of Appellant p. 20 (claiming that before enactment of the apportionment statute "the reduction of damages for comparative negligence happened behind the closed door of the jury room") with Robinson, 269 Ga. at 102 (recognizing that the damage award in that case was reduced by the trial judge after the jury published its decision regarding the plaintiff's percentage of comparative fault).]

In fact, in Robinson, this Court originally granted certiorari on the question of "whether a trial court may appropriately instruct jurors not to reduce their damage awards in proportion to a plaintiff's negligence, instructing them rather that the court would do so after its verdict is returned." 269 Ga. at 102 n.1. On this issue, this Court ultimately concluded

> We do not address this issue on certiorari as each party concedes that such a simple, nondiscretionary calculation could be properly performed by trial judges where, as here, a special verdict form has been used.

Id.

The Evans also seem to misunderstand the basis for the "categorical rule" set forth in Head, Robinson, and Bridges Farms. The Evans repeatedly claim in their Brief that the rule was created due to the "opacity" that sometimes accompanied a general verdict in a pre-apportionment comparative fault case. [Brief of Appellant,

pp. 2, 16.] Yet, the Evans provide no support whatsoever for their argument in this regard. When a jury verdict is returned in any case, whether comparative fault is an issue or not, the jury's reasoning obviously will be less transparent when it returns a general verdict rather than a special verdict. No Georgia court ever has held, however, that the relative lack of transparency associated with a general verdict is the basis for the rule that issues of liability and damages are "inextricably joined" in cases involving comparative fault. Instead, this Court in Bridges Farms explained the reason for the rule quite simply

> On retrial, the issue of damages cannot be addressed without also addressing the extent to which each party's negligence proximately caused the injury to the plaintiff.

Bridges Farms, 267 Ga. at 505. The categorical rule from Head, Robinson, and Bridges Farms is based upon fundamental fairness, and it arises from the recognition that, to ensure a fair trial, ***the same jury must evaluate the issues of proximate causation and damages when comparative fault is involved.***

Thus, the Evans are simply mistaken—the apportionment statute did not change Georgia's law of comparative fault. In fact, nothing has changed at all in cases involving comparative fault since the statute was enacted in 2005, and therefore there is no reason to depart from the "categorical rule" set forth in Head,

Robinson, and Bridges Farms that a retrial only on damages is not permitted when comparative fault is at issue.

C. This Court's Decision In *Martin* Does Not Support The Evans' Argument.

In their Brief, the Evans rely heavily on this Court's decision in Martin, arguing that "this Court's analysis of the apportionment statute in *Martin* made quite clear that the categorical rule (from Head, Robinson, and Bridges Farms) does **not** survive." [Brief of Appellant, p. 21 (emphasis in original).] It is true that this Court recognized that the "categorical rule" did not need to be addressed in Martin since comparative fault was not an issue in that case. Importantly, however, in holding that a limited retrial on apportionment was permitted in Martin, this Court plainly distinguished between assessment of a plaintiff's relative fault versus assessment of relative fault among tortfeasors, stating

> As Six Flags notes, we have said in the past that "where comparative negligence is an issue at trial, liability and damages are so 'inextricably joined' that a new trial on damages only is impermissible." . . . Assuming without deciding that this categorical rule continues to apply in comparative negligence cases after enactment of the apportionment statute, it does not demand a particular result here in any event. ***Unlike the assessment of the plaintiff's relative fault***—which, if greater than or equal to 50 percent of total fault, will preclude the plaintiff's recovery altogether, see O.C.G.A. § 51-12-33 (g)—the assessment of fault among tortfeasors will in most if not all cases have no impact on the jury's finding of liability or on the total amount of damages to which the plaintiff is entitled. Accordingly, relative fault among tortfeasors will not in all cases be "inextricably joined" with the issues of liability and damages so as to preclude a retrial on apportionment only.

Id. (emphasis added). Thus, despite the Evans' arguments to the contrary, the actual implication from Martin is that the assessment of a plaintiff's relative percentage of fault is distinctly different than the comparably simpler matter of allocating fault among tortfeasors. In the former circumstance, the issues of liability and damages remain "inextricably joined" even after the enactment of the apportionment statute, just as they were before the statute was passed.

The Evans also argue that Martin made apportionment of fault—"including [apportionment to] the plaintiff"—a distinct second step from the award of total damages. [Brief of Appellant, pp. 22.] It is true that isolated language to this effect appears in the Martin decision, although in making this argument the Evans again seem to conflate the concepts of apportionment and comparative fault. Regardless, the issue in Martin was the allocation of fault to "alleged tortfeasors not appearing on the verdict form" and "the correction of an error in apportionment" to certain non-parties. See, e.g., 301 Ga. at 340-341. Certainly, there is nothing in Martin that suggests that this Court intended its decision to permanently separate issues of liability and damages for all cases, especially those involving comparative fault.

D. This Is Not An Appropriate Case For This Court To Reexamine The Categorical Rule From *Head, Robinson, and Bridges Farms*.

Fundamentally, this case is no different than Head, Bridges Farms, and Robinson because it does not involve the apportionment of fault among tortfeasors. Instead, this a pure case of comparative fault where, like Robinson, liability was closely contested, and the jury assigned 49 percent responsibility to the plaintiff. Thus, even if this Court is inclined to at some point directly address whether the apportionment statute somehow changed the "categorical rule" from Head, Robinson, and Bridges Farms, the issue would be better addressed in a case where apportionment among tortfeasors actually was an issue. The apportionment statute simply did not apply to this case except, of course, for the provisions of the statute which codified existing comparative negligence law. See O.C.G.A. § 51-12-33(a) and (g).

Moreover, in Martin, this Court acknowledged that its holding would apply to the "ordinary case" involving apportionment, but also held that "there may be instances in which the particular circumstances of the case or the nature of the apportionment error militate otherwise . . . ." 301 Ga. at 340. Thus, even in cases where the only issue is correction of an apportionment error, this Court recognized that a full retrial will sometimes still be required. There is little doubt that a limited

retrial on ***the amount of damages to be awarded*** is potentially far more prejudicial to any defendant than a limited retrial on ***the apportionment of damages*** only. This is especially true where, as here, the jury considered the issues of liability and damages to be "inextricably joined," as evidenced by the obvious compromise verdict the jury returned. The jury's verdict in this case demonstrates that this is not the type of "ordinary case" where a limited retrial could fairly occur under any circumstances, even if this Court struck down the "categorical rule" from Head, Robinson and Bridges Farms. As a result, this is not an appropriate case for this Court to allow a limited retrial because fundamental fairness would require a full retrial regardless.

E. The Doctrine Of Stare Decisis Weighs Heavily Against The Evans' Request For Reversal Of *Head, Robinson and Bridges Farms*.

Under the doctrine of stare decisis, courts generally stand by their prior decisions because "it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." State v. Hudson, 293 Ga. 656, 661 (2013). "No judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that

a respect for precedent is, by definition, indispensable." Etkind v. Suarez, 271 Ga. 352, 356-357 (1999) (*quoting* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854, 112 S.Ct. 2791 (1992)). As this Court stated in Etkind

> The application of the doctrine of stare decisis is essential to the performance of a well-ordered system of jurisprudence. In most instances, it is of more practical utility to have the law settled and to let it remain so, than to open it up to new constructions, as the personnel of the court may change, even though grave doubt may arise as to the correctness of the interpretation originally given to it.

271 Ga. at 357 (*quoting* Cobb v. State, 187 Ga. 448, 452 (1939)).

Here, the Head, Robinson and Bridges Farms cases were decided six to eight years before the enactment of the apportionment statute in 2005. "[A]ll statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law." Plummer v. Plummer, 2019WL272679 *3 (Ga. 01/22/2019) (*quoting* Grange Mutual Casualty Co. v. Woodard, 300 Ga. 848, 852 (2017)). Presumably, therefore, when the legislature enacted the apportionment statute it was fully aware of the "categorical rule" established by this Court in Head, Robinson and Bridges Farms. The fact that the legislature chose not to change the law of comparative negligence ***at all*** when it enacted the apportionment statute leads to the presumption that it did not intend for the statute to "abrogate" the prohibition against damages-only trials in cases where

comparative negligence is an issue. See Etkind, 271 Ga. at 358. As this Court stated more than a century ago

> Stare decisis is a rule to insure uniformity. This tribunal, when it ceases to regard it, will greatly impair its value, and fail to secure public confidence. If this Court has been wrong from the beginning, on this subject, let the legislative power be invoked to prescribe a new rule for the future; until altered by that power, we are disposed to adhere to the rule which has been so long applied by our Courts and is so well known to the legal profession.

Rockdale respectfully requests that this Court follow its prior decisions and reject the Evans' attempt to overturn existing precedent and "cherry pick" an unfair, prejudicial, damages-only trial in this case.

IV. CONCLUSION

For the foregoing reasons, Appellee Rockdale Hospital, LLC d/b/a Rockdale Medical Center respectfully requests that this Court affirm the Court of Appeals' decision that, if a retrial is to occur in this case, it must encompass the issues of liability and damages.

Respectfully submitted this 4th day of March 2019.

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IN THE SUPREME COURT
STATE OF GEORGIA

Supreme Court Case No: S18C1190

SHAWN G. EVANS, Individually and as Guardian of JANICE K. EVANS,

Appellants

v.

ROCKDALE HOSPITAL, LLC d/b/a ROCKDALE MEDICAL CENTER

Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing **BRIEF OF APPELLEE** by U.S. Mail to assure delivery to the following addresses:

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This 4th day of March 2019.

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