GEORGIA DEFENSE LAWYERS ASSOCIATION

Advancing the Civil Defense Bar©

2008 JOURNAL

From The President

GDLA Increasing Statewide Stature

One of the most telling signs that the Georgia Defense Lawyers Association is increasing its visibility and role in statewide matters of importance to the civil defense bar is that our board meetings are now stretching to four-hour, jam-packed work sessions with more than 20 attorneys from across the state gathering to discuss dozens of items that affect the practices of lawyers in our area of the profession.

From responding to tort reform to adding more training for younger lawyers, from filing amicus briefs in important matters before our appellate courts to increasing our face-to-face social contacts with the judiciary, from improving opportunities for women and minorities to participate in the association to creating a vibrant younger lawyer section, from providing more specific practice area information via our substantive law committees to building a database of expert witnesses and trial work product . . . the GDLA is becoming known today as a very strong and more respected voice of the civil defense bar in Georgia.

-- In recent years, Georgia's Judicial Nominating Commission has begun requesting that the GDLA review the applications of potential candidates and participate in the screening process, including appearing before the Commission.

-- Membership is increasing each year, as more and more Georgia lawyers learn about the breadth and quality of the benefits we offer to their practice . . . and renew their memberships after they've liked what they've seen.

-- Industry vendors are approaching us in record numbers to work with us on CLE seminars, provide articles for our newsletter and to provide speakers at our academies and meetings.

-- More and more judges are attending our cocktail receptions in cities across the state and getting to hear our voices.

-- Our relationship with DRI remains strong, as Georgia appoints their next Southeast Region representative for a three-year term.

We are even making inroads with the one group of attorneys who have traditionally not participated in the GDLA — those who practice at the "mega firms" in Atlanta. These firms have traditionally viewed the GDLA as insurance defense lawyers, and have had little to no knowledge of what the association actually does.

Recently, the perception of the GDLA at these firms has begun to change, and they are learning about the value of GDLA membership for their associates, including our invaluable blast e-mail system which connects an attorney with close to 700 of his or her peers across the state for case research at the touch of a button.

While many associations ask their members to "support the association," the GDLA board of directors has worked hard in recent years to ensure that the association supports the members.

If we can get you involved with the GDLA, you will not simply be supporting your association, but rather helping your peers advance the civil defense bar in Georgia.

Never before has there been a time when the possibilities for you to make your mark on the profession have been this great.

Please visit www.gdla.org and click on the "About Us" button to see how you can make a substantive contribution to the profession in our state.

We look forward to continuing to serve you and hope you will join us in pursuing the mission of the GDLA — "Advancing the Civil Defense Bar" in Georgia.

Yours for the Defense,

Bob Travis
President, GDLA

In Memoriam:

James Edward Humes, III
Hatcher, Stubbs, Land, Hollis & Rothschild

Melburne D. "Mac" McClendon
Past President
Founder, GDLA Trial Academy

EDITOR'S ACKNOWLEDGMENT

It has been a pleasure and privilege this year working with the many authors and contributors to the Journal whose work will undoubtedly be of great interest to our readership. Advice from my former Co-Editor of the Journal, Bubba Hughes, has been deeply appreciated, and I would be remiss if I did not also thank Johnny Foster and Steve Milano for their assistance in putting the Journal together.

The hard work, dedication and unselfish willingness to contribute to this issue on the part of the following authors cannot be overstated or praised enough:

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We believe this year's Journal represents a quantum leap forward in the ongoing efforts of the GDLA to educate its members and the judiciary on numerous, important areas of substantive law.

Finally, I wish to extend my sincerest thanks to my trusted, longtime paralegal Doreen F. Long and my assistant Trish Toney without whose help the Journal would never have come to fruition. Doreen spent many hours assisting with editing, formatting, and related activities which were far beyond this editor's limited abilities.

We hope that all of you will enjoy and benefit from the Journal, and I have appreciated the opportunity to serve.

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THE EVOLUTION OF RISK-UTILITY ANALYSIS UNDER GEORGIA PRODUCT LIABILITY LAW

*By Franklin P. Brannen, Jr.**

With over a decade of use, the risk-utility analysis adopted by the Georgia Supreme Court in *Banks v. ICI Americas, Inc.1* has become routine in the assessment of design defect cases. Back when the opinion was rendered in 1994, legal commentators recognized that *Banks* was "surely to be reckoned as the most significant Georgia products liability decision in a generation."[2] Fourteen subsequent years have proven this claim true.

This article examines the pre-*Banks* analysis of design defect claims, the adoption of the risk-utility test in *Banks*, and the evolution of the standard over the past fourteen years as the trial and appellate courts of Georgia have applied the standard to actual product liability claims.

A. Pre-*Banks*: "Safe for Normal Handling and Consumption"

Before the adoption of the risk-utility test, *Center Chemical Co. v. Parzini*[3] and *Mann v. Coast Catamaran Corp.*[4] controlled product liability lawsuits in which the plaintiff alleged a defect in a the design of a product.

In *Parzini*, the plaintiff was injured by industrial drain cleaner that was spilled when the plaintiff tried to open the top of the bottle with pliers.[5] Although plaintiff contended that the product at issue was defectively designed, the Georgia Supreme Court treated the lawsuit solely as a manufacturing and packing defect case.[6] In reversing the court of appeals, the Georgia Supreme Court held that the issue was "whether the product was defective in its manufacture, its packaging, or the failure to adequately warn of its dangerous propensities. If so, the question arises here as to whether the user knew of the defect and the danger it presented but proceeded unreasonably to use the product."[7]

In trying to assess the meaning of "defect", the court explained "the term 'defect' has been defined on a case-by-case basis and has generally not been found susceptible of any general definition."[8] But the court offered criteria for assessing defectiveness, including that "a product is defective if it is not reasonably fit for the ordinary purpose for which such products are sold and used."[9] The *Parzini* standard became the guiding force in Georgia law for the assessment of design defect cases for almost twenty years.

Ten years after *Parzini*, *Mann* reinforced the principle that a product that is safe for normal handling is not defective. In *Mann*, the plaintiff was injured when he piloted his sailboat into an uninsulated electrical line that crossed Lake Hartwell and of which plaintiff was aware.[10] Plaintiff claimed that the mast on the sailboat should have been insulated or grounded to protect consumers from harmful electrical charges.[11]

Although the trial court denied both parties' motions for summary judgment, the court of appeals reversed the denial of the defendant's motion for summary judgment.[12] The appellate court held that the sailboat was not defective because it was "reasonably suited for its intended use."[13] The supreme court concurred and reaffirmed that "a product is not in a defective condition when it is safe for normal handling and consumption."[14]

B. ***Banks v. ICI Americas*: The Standard Is Adopted**

Banks v. ICI Americas offered the Georgia Supreme Court the opportunity to adopt the risk-utility test that numerous jurisdictions had adopted in the 1980s and 1990s.[15] To undo its previous decisions in *Parzini* and *Mann*, the court first limited the application of *Parzini* to manufacturing defect claims.[16] The court explained that while the plaintiff in *Parzini* had alleged a design defect, the court did not address that claim in its opinion.[17] Thus, the court's decision in *Parzini* has no application to design defect cases.[18]

For *Mann*, the court admitted that lawsuit involved a design defect claim, but the court had improperly looked for guidance to its previous decision in *Parzini*, which analyzed a manufacturing defect.[19] Unlike manufacturing defect claims in which the defect arises from the dissimilarity between the challenged product and the remainder of the product line, design defect claims lack an external measure of effectiveness of the design.[20] "It is only in design defect cases that the court is called upon to supply the standard for defectiveness: the term 'defect' in design defect cases is an expression of the legal conclusion to be reached, rather than a test for reaching that conclusion."[21] The Georgia Supreme Court concluded that it had never truly adopted a test to assess design defect claims.[22]

After surveying other jurisdictions, the court found that a general consensus existed for the standard for assessing liability in design defects

cases: a risk-utility balancing test.[23] The Georgia Court of Appeals has succinctly set forth the risk-utility test as follows:

> Under the risk-utility analysis, the risks inherent in a product design are weighed against the utility or benefit derived from the product. When a jury decides that the risk of harm outweighs the utility of a particular design, it is saying that in choosing the particular design, the manufacturer exposed the consumer to greater risk of danger than it should have.[24]

The factors considered in the risk-utility analysis include:

1) the usefulness of the product;
2) the gravity and severity of the danger posed by the design;
3) the likelihood of that danger;
4) the avoidability of the danger (which includes the consumer's knowledge of the product, publicity surrounding the danger, or the efficacy of warnings, as well as common knowledge and the expectation of danger, and the consumer's ability to avoid danger);
5) the state of the art at the time the product is manufactured;
6) the manufacturer's ability to eliminate the danger without impairing the product's usefulness or making it too expensive; and
7) the feasibility of spreading the loss in the price or through insurance.
8) compliance with federal regulations; and
9) the availability of a marketable and feasible alternative design.[25]

C. Post-*Banks*: The Risk-Utility World

1. Must an Expert Affidavit Be Filed With the Initial Pleading?

One of the first issues considered by the Georgia appellate courts under the risk-utility test was whether strict liability claims required an expert

affidavit in plaintiff's initial pleading. In *S K Hand Tools v. Lowman*,[26] the defendant contended that the plaintiff was required to file an affidavit in support of his claim because an allegedly negligent engineering decision was at the heart of plaintiff's defective design claim.[27] The defendant argued that the alternative design factor set forth in *Banks* and the expert affidavit pleading requirement of O.C.G.A. § 9-11-9.1 (1996) focused the design defect analysis on the professional judgment of the engineers who designed the product.[28]

While the court of appeals noted that *Banks* appeared to "blur the distinction Georgia cases have historically made between negligence and strict liability claims," the risk-utility test did not obliterate the distinction between negligence and strict liability under "every conceivable factual scenario."[29] A strict liability action focuses on the analysis of whether a defect existed at the time the product left the control of the manufacturer.[30] In contrast, a professional negligence action centers on the reasonableness of the judgment of the professional.[31]

Although expert affidavits are required in actions in which a plaintiff alleges professional malpractice, the issue in a design defect lawsuit is whether the product is defective.[32] Furthermore, the court emphasized that evidence of a safer alternative design is merely a factor that the jury *may* – not *must* – consider and does not change the focus of the analysis from the product to the designer.[33]

2. The Open and Obvious Rule Is Partially Extinguished, While the Assumption of the Risk Defense Survives.

Within two years after *Banks*, in *Sharpnack v. Hoffinger Indus., Inc.*,[34] the court of appeals considered whether the assumption of the risk defense was viable in a design defect case analyzed through the risk-utility prism.[35] The court explained that "*Banks* does not mean that summary judgment is no longer appropriate in any case in which a design defect is alleged."[36] Summary judgment is appropriate in cases in which the plaintiff assumed the risk of the injury and the action of the plaintiff was the sole proximate cause of the injuries.[37]

The court of appeals cited two federal district courts which concluded that affirmative defenses could serve as the basis for summary judgment in the risk-utility world.[38] The defendant in *Morris v. Clark Equip Co.*,[39] obtained summary judgment because the plaintiff was aware of the potential injury

mechanism and admitted that he could have "totally avoided the danger."[40] Likewise, the court granted summary judgment to the defendant in *Raymond v. Amada Co. Ltd.*,[41] after finding that assumption of the risk remained a viable defense in design defect claims maintained in the jurisdictions from which the Georgia Supreme Court adopted the risk-utility test.[42]

Focusing more on the level of evidentiary proof instead of parsing the specific requirements of the affirmative defense, the court of appeals held that it was proper to grant summary judgment because plaintiff assumed the risk in "cases in which the facts are clear, palpable and indisputable…."[43]

In contrast, the open and obvious danger rule, which previously had served as a dispositive defense, was implicitly rejected by *Banks*.[44] Obviousness of the defect to a reasonable user is one of the many factors considered under the risk-utility test.[45]

Although the open and obvious danger rule is no longer a complete defense in a design defect case, it is a factor in the risk-utility analysis.[46] Trial courts may include in the jury charges the open and obvious nature of the danger as factor in the risk-utility test.[47]

3. Compliance with Federal Standards Is Merely A Factor in the Risk-Utility Analysis.

Before *Banks*, the Georgia Court of Appeals held in *Honda Motor Co. v. Kimbrel*[48] that a plaintiff in an automotive product liability lawsuit could not recover for an allegedly defective condition if the manufacturer complied with the applicable federal regulations.[49] But after *Banks*, in *Doyle v. Volkswagenwerk Aktiengesellschaft*,[50] an automotive product liability lawsuit in which the defendant was granted summary judgment because the vehicle at issue complied with the applicable federal regulation, the Eleventh Circuit Court of Appeals certified the following question to the Georgia Supreme Court:

> When an automobile manufacturer sells an automobile to a Georgia citizen and the automobile is in compliance with the National Automobile Safety Act, does Georgia law preclude a personal injury product liability claim?[51]

Invoking the standard it adopted in *Banks*, the Georgia Supreme Court held that the decision of the court of appeals in *Kimbrel* was inconsistent with

the risk-utility test because compliance with industry practices, state of the art, or federal regulations is merely a factor in the risk-utility analysis – not a preclusive issue.[52] The court explained:

> Under the risk-utility test, compliance with federal standards or regulations is a factor for the jury to consider in deciding the question of reasonableness…. It does not render a manufacturer's choice of design immune from liability. That is not to say that evidence of such compliance is not significant, for it is. But, instead of acting as an impenetrable shield from liability, compliance, more appropriately, is to be a piece of the evidentiary puzzle.[53]

4. The Risk-Utility Test Broadens the Definition of "Use."

One consequence of *Banks* is the broadening of the claims that can be brought as design defect lawsuits. In *Jones v. Nordictrack, Inc.*,[54] plaintiff filed a design defect claim for injuries she sustained when she fell against a ski exercise machine.[55] After the federal district court granted the defendant judgment on the pleadings and the plaintiff appealed that decision, the Eleventh Circuit Court of Appeals certified the following question to the Georgia Supreme Court:

> Must a product be in use at the time of injury for a defendant to be held liable for defective design under theories of strict liability, negligence, or failure to warn?[56]

The supreme court held that in a design defect action the focus is not on use of the product but whether the risks inherent in a product design outweigh the utility of the product.[57] The court illustrated this point by focusing on the facts of *Banks* (a child's ingestion of rodenticide) to show that "use" of the product was solely a factor in the risk-utility analysis.[58] According to the court, the need for finding a "use" of the product as a predicate to liability is a fallacy.[59] Instead, the consumer's method of interaction with the product is one of the factors that the decisionmaker considers under the risk-utility analysis.

5. The Risk-Utility Test Applies to Prescription Drugs.

It took almost a decade after *Banks* for a Georgia appellate court to consider the appropriate test for a design defect allegation in the context of

pharmaceutical products. In *Bryant v. Hoffmann-La Roche, Inc.*,[60] the court of appeals surveyed other jurisdictions and found that there is a wide variance in the standards that states apply to the assessment of whether a pharmaceutical product is defective.[61]

Defendant Hoffmann-LaRoche urged the court to adopt the California standard, which is taken from Comment k to section 402A of the Restatement (Second) of Torts and prohibits design defect claims against prescription drug manufacturers.[62] Under the Restatement approach, a drug manufacturer can only be liable for manufacturing defects or failure to warn about reasonably known side effects.[63] The public policy reason for eliminating strict liability for design defects is that manufacturers may be reluctant to develop new drugs if there is "a fear of large adverse monetary judgments."[64]

But the court of appeals found this rule had been adopted by a minority of courts and was inconsistent with the *Banks* risk-utility test.[65] Instead, the court adopted Comment k as an affirmative defense.[66] Thus, when a prima facie case of defective design has been shown, a manufacturer is relieved from liability only if it shows:

1) the product is properly manufactured and contains adequate warnings;
2) its benefits justify its risks; and
3) the products was at the time of manufacture and distribution incapable of being made more safe.[67]

Likewise, the court rejected Hoffmann-Roche's request that the court adopt section 6(c) of the Restatement (Third) of Torts (1997), which states that a drug is defectively designed only when it provides no net benefit to any class of patients.[68] Although prescription drugs create unique risk and benefit concerns, the Georgia Court of Appeals found the risk-utility balancing test was capable of appropriately accommodating the competing issues.[69]

D. Conclusion

The adoption of the risk-utility test by the Georgia Supreme Court in *Banks* was a dramatic alteration to the standard for assessing liability in design defects under Georgia law. As the Supreme Court of Georgia presciently noted:

> Indeed, the adoption of the risk-utility analysis in this state has actually increased the burden of a defendant, in seeking a

> judgment as a matter of law, to show plainly and indisputably an absence of any evidence that a product as designed is defective.[70]

Accordingly, adjudication of cases as a matter of law has shifted to lawsuits in which plaintiffs fail to come forward with any evidence to support the risk side of the risk-utility test or cases in which plaintiffs' experts fail to satisfy the reliability requirements of O.C.G.A. § 24-9-67.1. Given the decisions from Georgia courts over the past fourteen years, it is clear that *Banks v. ICI Americas* is the preeminent product liability opinion from its generation of Georgia case law.

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1. 264 Ga. 732, 450 S.E.2d 671 (1994).
2. Cynthia T. Adams, et al., *Torts*, 47 Mercer L. Rev. 311, 336-37 (1995).
3. 234 Ga. 868, 218 S.E.2d 580 (1975).
4. 254 Ga. 201, 326 S.E.2d 436 (1985).
5. *Parzini*, 234 Ga. at 870, 218 S.E.2d at 583.
6. *Id.* at 871, 218 S.E.2d at 583.
7. *Id.*
8. *Id.* at 868, 218 S.E.2d 582.
9. *Id.*
10. *Mann*, 254 Ga. at 201, 326 S.E.2d at 436.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 202, 326 S.E.2d at 437.

15. *Banks*, 264 Ga. at 734, 450 S.E.2d at 673.

16. *Id.* at 733, 450 S.E.2d at 672-73.

17. *Id.*

18. *Id.*

19. *Id.* at 733, 450 S.E.2d at 673.

20. *Id.* at 733-34, 450 S.E.2d at 673.

21. *Id.* at 734, 450 S.E.2d at 673.

22. *Id.*

23. *Id.*

24. *Dean v. Toyota Indus. Equip. Mfg. Inc.*, 246 Ga. App. 255, 259, 540 S.E.2d 233, 237 (2000).

25. *Id.*

26. 233 Ga. App. 712, 479 S.E.2d 103 (1996).

27. *Id.* at 712, 479 S.E.2d at 103.

28. *Id.* at 714, 479 S.E.2d at 106.

29. *Id.* at 715, 479 S.E.2d at 106-07.

30. *Id.* at 716, 479 S.E.2d at 107.

31. *Id.*

32. *Id.*

33. *Id.* at 715 n.1, 479 S.E.2d at 106 n.1.

34. 233 Ga. App. 833, 479 S.E.2d 435 (1996).

35. *Id.* at 834-35, 479 S.E.2d at 436.

36. *Id.*

37. *Id.*

38. *Id.* at 835, 479 S.E.2d at 436-37.

39. 904 F. Supp. 1379 (M.D. Ga. 1995).

40. *Sharpnack*, 223 Ga. App. at 835, 479 S.E.2d at 437.

41. 925 F. Supp. 1572 (N.D. Ga. 1996).

42. *Sharpnack*, 223 Ga. App. at 835, 479 S.E.2d at 437.

43. *Id.*

44. *Ogletree v. Navistar Int'l Trans. Corp.*, 269 Ga. 443, 444-45, 500 S.E.2d 570, 571-72 (1998); *Bodymasters Sports Indus., Inc. v. Wimberley*, 232 Ga. App. 170, 172, 501 S.E.2d 556, 559 (1998); *Rubin v. Cello Corp.*, 235 Ga. App. 250, 252, 510 S.E.2d 541, 543 (1998).

45. *Ogletree*, 269 Ga. at 445, 500 S.E.2d at 572.

46. *Cornish v. Byrd Welding Serv. Inc.*, 252 Ga. App. 793, 794, 557 S.E.2d 432, 433 (2001).

47. *Id.*

48. 189 Ga. App. 414, 376 S.E.2d 379 (1988).

49. *Id.* at 419, 376 S.E.2d at 383.

50. 267 Ga. 574, 481 S.E.2d 518 (1997).

51. *Id.* at 574, 481 S.E.2d at 519.

52. *Id.* at 577, 481 S.E.2d at 521.

53. *Id.*

54. 274 Ga. 115, 550 S.E.2d 101 (2001).

55. *Id.* at 116, 550 S.E.2d at 102.

56. *Id.* at 115, 550 S.E.2d at 101-02.

57. *Id.* at 115, 550 S.E.2d at 102.

58. *Id.* at 117-18, 550 S.E.2d at 103.

59. *Id.* at 117, 550 S.E.2d at 103.

60. 262 Ga. App. 401, 585 S.E.2d 723 (2003).

61. *Id.* at 403, 585 S.E.2d at 726.

62. *Id.*

63. *Id.*

64. *Id.* at 404, 585 S.E.2d at 726.

65. *Id.*

66. *Id.* at 406, 585 S.E.2d at 728.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Ogletree v. Navistar Int'l Trans. Corp.*, 271 Ga. 644, 646, 522 S.E.2d 467, 470 (1999).

The Challenges of the Joint Defense

By Paul W. Burke and Brian T. Moore

It all comes down to learning how to play nicely with others. Not surprisingly, when lawyers are called upon to play well with others, it gets complicated. The most common situation that property insurance lawyers are likely to face is where multiple carriers are defending a claim involving a large loss. To defend this sort of action as effectively as possible, counsel may require the easy exchange of information. In this context, a joint defense agreement can be used to protect communications under the attorney-client privilege and facilitate all counsel working together.

Joint counsel arrangements have many useful benefits. If implemented correctly, these agreements allow lawyers to share knowledge, resources, experts, and tasks. This can form a great benefit to clients by, among other things, significantly lowering costs. Further, such agreements promote efficiency, particularly with relation to the hiring of expert witnesses. Joint defense agreements also allow for the apportionment of tasks and the sharing of resources, data, and even consultants.[1]

Significantly, joint defense agreements can also help multiple parties avoid creating duplicative expert testimony, or even worse, inconsistent expert testimony on the same issues. It can also make scheduling depositions much easier and allow for better usage of limited trial and argument time. Ideally, at its greatest use, it can encourage candid conversations among defense counsel to avoid inconsistent defenses and focus on the consistent strong defense.

We begin with a brief discussion of the joint defense privilege that is the cornerstone of any joint defense working arrangement. We then discuss ethical issues that come up in joint venture relationships and finally focus on practical aspects of drafting joint defense agreements.

Attorney-Client Privilege

The cornerstone of joint defense agreements is the existence of a joint defense privilege that "enables counsel for clients facing a common litigation opponent to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege."[2] The joint defense privilege flows from the attorney-client privilege and the work product doctrine, and is not a separate privilege. The joint defense

privilege "expands application of the attorney-client privilege or the work-product doctrine to circumstances in which it otherwise might not apply."[3]

To establish a joint defense privilege, several elements must be shown:

1. that the communications were made in the course of a joint defense effort,
2. that the statements were designed to further the effort, and
3. that the privilege had not been waived.[4]

Further, it is also important that the communication be part of a joint defense effort and that the privilege must arise out of "the need for a common defense, as opposed to merely a common problem."[5]

It is possible to waive this privilege. The "mere existence of an agreement between parties to keep documents confidential is not, in itself, sufficient to protect them from discovery under the attorney-client privilege."[6] Further, waiver of this joint defense privilege requires that all the parties participating in the joint defense assent to the waiver. In this way, the joint defense privilege presents an exception to the general understanding that a privilege is waived if information is disclosed to third parties. When the individual party having participated in a joint defense discloses protected information outside of the group, it only waives the privilege as to itself, not the group.[7]

This exception to the normal attorney-client privilege waiver rule is necessitated to ensure that joint defense efforts are not inhibited or even precluded by the fear that one party to the joint defense communication may later choose to waive the privilege of all the participants. This fear could actually prevent any attorney from willingly entering into a joint defense agreement.[8]

Finally, since the joint defense agreement flows from the attorney-client privilege and the work product doctrine, any exceptions that exist to the attorney-client privilege and the work product doctrine, such as the crime-fraud exception, would apply to the joint defense privilege as well.[9]

Ethical Issues

Several ethical issues naturally arise from joint defense agreements. This is not surprising, as sharing information with other parties, even similarly

situated parties, is counterintuitive to the confidentiality that all lawyers are trained to jealously guard. Nevertheless, the benefits of joint defense agreements to the clients have outweighed these initial concerns. It is still valuable, however, to focus on four particular topics that can cause problems.

Confidentiality.[10] Joint defense agreements focus mainly on the issue of privilege. Privilege, stated another way, is the right to discuss a matter freely with certain people while keeping the matter from being discovered. A number of courts have held that communications among counsel for multiple parties are privileged. The courts have called this privilege the "common interest doctrine," the "allied lawyer privilege," the "joint defense privilege," and many other names.[11]

Curiously, while under the common defense privilege, shared confidential communications enjoy some security, but legal authorities do not generally assert that a lawyer owes an ethical duty of confidentiality to the clients of coordinating lawyers. The American Bar Association (ABA) was asked to address this ethical issue when an insurance defense lawyer, who had regularly participated in a joint defense consortium as counsel for an insurance company, was then approached by a client who wanted him to file suit against other members of the consortium. In Formal Opinion 95-395, the ABA stated:

> A lawyer who has represented one, but only one, of the parties in a joint defense consortium does not thereby acquire an obligation to the other parties to the consortium that poses an ethical bar to the lawyer thereafter taking on a related representation adverse to any of the other parties.

The ABA instead found the lawyer's confidentiality obligation may exist elsewhere, stating that "the lawyer's obligation to the party he represented may present such a bar, and the lawyer will certainly have to undertake fiduciary obligations to the other parties that may have the same effect."[12] Further, if there was a signed joint defense agreement, under contract principles, a lawyer who participates in a common interest agreement with other lawyers may have a contractual duty to the other lawyers pursuant to that agreement—and may thus be liable for breach of those duties even if he is not ethically barred from later pursuing other members of the consortium.

A question of loyalty. If, under a joint defense agreement, the parties have agreed to divide the work between various lawyers and a lawyer does not

do his or her share of the work, has any ethical duty been breached by this lawyer to the other parties, or just to his or her own client? Further, if one of the lawyers wants to pursue advantageous strategies for his or her client that work to the disadvantage of the other clients, can a joint defense agreement ethically constrain him or her from pursuing this strategy?

Usually, a written joint defense agreement will directly address these concerns, but any constraints again flow from contractual or fiduciary duties, but apparently not from any ethical duties to the other parties. This issue was addressed directly by the New York Bar Association when they explained:

> The notion that, merely because of the desire to engage in such brainstorming, an attorney takes on a duty to zealously represent each participant and owes each participant the highest duty of loyalty far exceeds what either attorney or the individual participant could reasonably expect.[13]

The best way to strike this balance between the advantages of counsel coordination and the client's need for lawyers is through an agreement. Although an agreement does not necessarily provide the inherent ethical protection that a lawyer's client may expect, it would still provide guidance to lawyers and will also give lawyers participating in the agreement an important opportunity to discuss what their clients want to do.

Conflicts of interest. Joint defense situations can also raise unexpected conflict of interest problems. These conflicts most often arise concerning trial strategy, division of settlement funds, and even mundane matters such as the scheduling of discovery or trials dates.

Additionally, conflicts of interest can also arise relating to future representations against a party that may have been a participant in a joint defense agreement. For example, a lawyer working together with other defendants and sharing confidences as part of a defense group later wants to represent someone suing one of the other defendants. Is that a conflict? Again, ABA Form Opinion 95-395 addressed this and stated that there was, in fact, no ethical duty preventing the lawyer from accepting representation. However, as noted above, fiduciary or contractual obligations may bar the representation.

Legal malpractice. May a lawyer participating in a joint defense agreement be held liable to the clients of the lawyers in the agreement for malpractice? For example, imagine a scenario where the lawyers divide their

work and each client depends upon the quality and timeliness of the other lawyers' work. Suppose one lawyer misses a deadline that then damages the entire group. In addition to liability to his own client, do the other clients have a right to seek compensation for this lawyer's malpractice? Or are they able to state a cause of action against their own attorneys for the lawyers' arguably negligent trust of the incompetent lawyer.

The Restatement of the Law Governing Lawyers, in its chapter on malpractice liability, suggested a lawyer owes a duty of care to a non-client to the extent that "(a) the lawyer . . . invites the non-client to rely on the lawyer's opinion or provision of other legal services, and the non-client so relies, and (b) the non-client is not, under applicable tort law, too remote from the lawyer to be entitled to protection."

As such, this sort of liability is at least envisioned by the Restatement.[14]

Drafting the Agreement

Before even considering entering a Joint Defense agreement, there are some very basic points that should be addressed. Specifically, the following three issues should be of paramount importance.

1. The lawyers should honestly evaluate before entering the agreement the level of trust they have for the other lawyers. Do they trust them to do good work? Do they trust them to do their fair share of the work?

2. The lawyers should address the question of whether their client is a central focus of the litigation and, if so, is it necessarily in their interest to allow other lawyers and less effective codefendants to influence their defense strategy?

3. Conversely, if your client is only a minor defendant, it is in their ultimate interest to agree to and help pay for a strategy devised by the target defendants?

Assuming the above concerns have been addressed, attorneys should consider several points when drafting joint defense agreements. In no particular order, some points to weigh are listed below.

1. The agreement should emphasize that the parties wish to pursue their common interest without waiving any protection of attorney-client privilege or the work product doctrine.

2. The parties should agree to adopt steps necessary to protect the pool of information and not to disclose it to outsiders without the consent of all parties to the agreement. No party should be obligated to share any information it has or to refrain from any negotiation with adverse parties, but the agreement may require notice if a settlement is reached.

3. The parties should be barred from using shared information in any manner adverse to any of the other parties to the agreement.

4. The agreement should explicitly recite that the attorney-client privilege and work product protection extend beyond the withdrawal of a party from the agreement, and the parties may agree that all shared material should be returned upon withdrawing.

5. Specific performance or injunctive relief should be specified as the appropriate remedies to compel performance with the terms of the agreement.

6. The agreement should demand all modifications be made in writing and should explicitly state that nothing in the agreement is intended to interfere with the attorney's obligation to ethically and zealously advocate the individual client.

7. The parties should certify that counsel has explained the agreement to their clients and that they agree to abide by its terms.

8. What experts can or should you share? Who will do the work to prepare them and their testimony? What happens to the expert if one member withdraws?

9. The agreement should acknowledge each party is represented exclusively by his or her own attorney.

10. The agreement should contain a waiver by the participating clients of any conflict of interest claim or right to disqualify against any attorney who receives confidential information pursuant to the agreement.

11. The agreement should contain a statement describing the process for terminating participation in the agreement.

Immediately following is a sample joint defense agreement that illustrates the types of issues that can and should be covered, for the benefit of your client and the other parties involved.

SAMPLE:
PRIVILEGED AND CONFIDENTIAL JOINT DEFENSE AGREEMENT

This Joint Defense Agreement ("Agreement") by and between _____, _____ Insurance Company, Inc., _____ Insurance Company, Inc. (collectively referred to as "_____") and _____ (jointly referred to as "_____") with respect to the lawsuit styled as _____; Civil Action File No. _____; In the _____ Court of _____ County ("the Litigation"), filed by _____ against _____ ("Parties") and any other proceedings of any nature that may relate to the subject matter of the Litigation, whether brought against the Parties or against any person or entity related to or affiliated with them.

The Litigation presents certain legal and factual issues of common interest to _____, thus requiring joint efforts in exchanging information and confidences, including information and confidences which are subject to the attorney-client privilege, work product, or other privileges or protections. The Parties and their counsel agree that communication and disclosures between them on matters of common concern are essential to the effective representation of the Parties in the Lawsuit.

The purpose of this Agreement is to maintain the protections afforded to communications, documents and other materials by the attorney-client privilege, the work product doctrine, the self-critical examination privilege, the trade secret doctrine, the common interest privilege, or any other privilege or protection (collectively, "Confidential Communications") such that the disclosure among Parties and their counsel of Confidential Communications does not waive or otherwise alter any such privilege or protection.

1. *Oral Confidential Communications*. The undersigned counsel and their respective Parties agree that there is a mutuality of interest in a common

defense in the Litigation or any related proceedings. In order to avoid any suggestion that privileges for Confidential Communications have been waived, it is agreed that past and future oral communications by and between (a) the undersigned counsel; (b) other counsel for the Parties, including in-house counsel; (c) agents or designees of counsel acting at counsel's direction or under counsel's supervision; (d) representatives of the Parties acting at counsel's direction or under counsel's supervision, and (e) joint interviews of prospective witnesses in connection with the Lawsuit, or any related proceedings, are Confidential Communications and are protected from discovery and from disclosure to any third party by the Parties' respective attorney-client privileges and attorney's work product protections, pursuant to the "joint defense" or "common interest" doctrine.

2. *Written Confidential Communications*. It is further agreed that all information, documents, materials, technical reports and analyses, client and witness statements, interviews, memoranda of law, debriefing memoranda, factual summaries, transcript digests, document indices and such other material and information, recorded in whatever media, that is otherwise protected from discovery and disclosure to third parties may be exchanged between _____ and their counsel.

The undersigned firms or among counsel for the Parties in connection with the Lawsuit or any related proceedings, shall constitute Confidential Communications, and will remain protected from discovery and disclosure to any third party by the Parties' respective attorney-client privileges and work product protections, pursuant to the "joint defense doctrine."

3. *Non-Disclosure*. Confidential Communications referred to in paragraphs 1 and 2 of this Agreement shall not be disclosed to third parties without the prior written consent of the counsel that made the information available in the first instance, or by an order of court. Moreover, none of the Parties may disclose the existence of this Agreement or its contents to anyone not a party to this Agreement without prior written approval of all Parties, unless required to do so by court order. This non-disclosure provision does not prevent or prohibit any Party or its counsel from asserting the joint defense doctrine in support of any objection in any hearing, discovery response, proceeding, or deposition. In the event that a Party is served with a subpoena or other form of compulsory process seeking disclosure of information obtained pursuant to this Agreement, that Party shall promptly notify the other Parties so as to afford them the opportunity to seek appropriate protection from disclosure of such information.

4. *No Agency Relationship*. This Agreement shall not create any agency relationship among the Parties. Accordingly, no Party shall have the authority to waive any applicable privilege on behalf of any other Party, nor shall the conduct of any Party deemed to constitute a waiver of a privilege be imputed to any other Party.

5. *Withdrawal*. Any Party to this Agreement is free to withdraw upon five (5) days prior written notice to all other signatories, in which case this Agreement shall no longer apply to the withdrawing party but shall continue to protect all Confidential Communications disclosed to the withdrawing party and its counsel prior to their withdrawal. A withdrawing Party and its Counsel shall immediately return all copies of all written Confidential Communications, and all other joint defense materials and copies thereof received from any other Party to this Agreement. A withdrawing Party and its counsel shall continue to protect all Confidential Communications and other information disclosed to them or otherwise learned or obtained by them prior to withdrawal, and shall be bound by this Agreement in all other respects.

6. *Disputes Between Parties*. Nothing in this Agreement shall affect any claims or defenses that may be asserted by one Party to this Agreement against the other.

7. *Admissibility of Confidential Communications and Derivative Information*. No oral or written Confidential Communication not otherwise obtainable or discoverable except by virtue of this Agreement shall be admissible in evidence in any proceeding arising from a claim made by one party to this Agreement against the other Party. Likewise, no evidence obtained by any Party that would not have been obtained except as a result of disclosure of Confidential Communications under this Agreement shall be admissible in any proceeding arising from a claim made by one Party to this Agreement against the other Party. The Party disclosing such Confidential Communications in the first instance shall bear the burden of proving that the proffered evidence would not have been obtained except as a result of the disclosure of Confidential Communications.

8. *No Duty of Production*. This Agreement does not create a duty or obligation on the part of the undersigned to provide, produce or otherwise disclose or exchange any documents, Confidential Communications, or other information with any other counsel or Party.

9. *No Limitation of Discovery/Cross Examination*. Nothing in this Agreement shall prevent or limit the efforts of any Party to obtain information from the other Parties through formal discovery. Nothing in the Agreement shall limit the use or disclosure of information obtained independently of the joint defense efforts described herein, or of Confidential Communications obtainable or that would be discoverable notwithstanding this Agreement. Each Party further understands and agrees that if the Party (or its corporate representative) testifies at trial or any related proceeding, counsel for the other Parties may cross-examine the Party, and neither the existence of this Agreement, nor the fact that counsel has obtained information pursuant to this Agreement, shall be grounds to prevent or disqualify counsel from conducting such cross-examination.

10. *No Conflict of Interest*. Nothing contained in this Agreement, including the production of information or materials contemplated by this Agreement, shall be the basis of a claim of conflict of interest asserted by any of the Parties to this Agreement against counsel for any other Party so long as such counsel is acting in the course of his/her representation of his/her client Party.

11. The Parties agree and acknowledge that the decision to enter into this Agreement and to participate in the activities contemplated by this Agreement is based upon the exercise of the independent judgment of each of the Parties after consultation with their respective counsel.

12. The Parties understand and agree that their interests may be adverse, that each Party's attorney must represent his or her own client and no other, and that this Agreement does not create an attorney-client or fiduciary relationship between any lawyer and any client other than the client by whom the lawyer and his or her firm have signed below. The Parties recognize that circumstances may arise in which an attorney or a law firm, while participating in this Agreement, may become adverse to another Party to this Agreement. Accordingly, after receiving advice of its own counsel, each Party consents to such adverse representations. The Parties agree that the participation of any of the undersigned counsel in this Agreement will not be used as a basis for seeking to disqualify any counsel from representing his or her client in the Lawsuit or any related proceedings.

13. Nothing herein shall waive or limit the right of any Party to assert any present or future claim for relief or cause of action against any other

Party.

14. This Agreement shall be binding upon the Parties and their respective successor assigns, agents, affiliates and representatives.

15. Subject to the written Agreement of all Parties, additional individuals or entities may be permitted to join this Agreement.

16. This Agreement may be executed in multiple counterparts, each of which shall, constitute an integrated and enforceable whole.

17. Any modification of this Agreement other than in writing signed by all Parties shall be void.

18. This Agreement constitutes the entire Agreement of the Parties concerning the exchange of information among them in connection with their joint defense of the Lawsuit.

19. This Agreement shall be governed, construed and enforced under the substantive laws of the State of Georgia, regardless of the substantive law that might otherwise govern under any applicable principles of conflicts or choice of laws.

By execution of this Agreement, each of the undersigned certifies that the contents of this Joint Defense Agreement have been explained to their respective Parties, and that each agrees to be bound and abide by the understandings reflected herein.

[Insert signatures and party names below.]

Paul W. Burke and Brian T. Moore *are partners in the Atlanta law firm of Drew Eckl & Farnham, specializing in complex insurance litigation, professional liability, and subrogation.*[1]

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Notes

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[1] Mark P. Fitzsimmons & Teresa Allyn Queen, *Maintaining Healthy Relationships with Co-Counsel in Complex Tort Litigation*, PRAC. LITIGATOR (Nov. 2006); Corporate Counsel Section of the New York State Bar Association, *Report on Cost-Effective Management of Corporate Litigation,* 59 ALBANY L. REV. 263, 308–12 (1995); RICHARD A. HORDER, CASE MANAGEMENT OF MASS TORT LITIGATION FROM THE PERSPECTIVE OF INSIDE COUNSEL: WHAT CLIENTS WANT IN PREPARATION AND TRIAL OF THE TOXIC TORT CASE (PLI Practice Course Handbook Series, Nov. 1, 1988).

[2] Richard A. Sheehy, *Joint Defense Privilege and Its Ethical Implications*, 66 DEF. COUNSEL'S J. 347, 366 (1999); *see also In re* United Mine Workers of Am. Employee Benefit Plans Litig., 159 F.R.D. 307, 313 (D.D.C. 1994).

[3] *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995).

[4] *Haines v. Ligett Group, Inc.*, 975 F.2d 81, 94 (3d Cir. 1992).

[5] *Medcom Holman Co. v. Baxter Travenol Labs, Inc.*, 689 F. Supp. 841, 845 (N.D. Ill. 1988).

[6] *Visual Scene, Inc. v. Pilkington Bros.*, PLC, 508 So. 2d 437, 442 (Fla. Dist. Ct. App. 1987).

[7] *W. Fuels Ass'n v. Burlington R.R. Co.*, 102 F.R.D. 201, 203 (Wyo. 1984).

[8] *Id.*

[9] *Am. Tobacco Co. v. Florida*, 697 So. 2d 1249 (Fla. Dist. Ct. App. 1997).

[10] The reader is encouraged to read an excellent article, Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

[11] *See In re* Regents of the Univ. of Cal., 101 F.3d 1386; United States v. Hsia, 1998 WL 63,4646 (D.D.C. Sept. 10, 1998).

[12] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (1995).

[13] Committee on Professional Responsibility, Association of the Bar of the City of New York, *Ethical Implication of the Joint Defense/Interest Agreements*, 51 REC. OF ASS'N OF THE BAR OF THE CITY OF NEW YORK, 115, 122 (1996).

[14] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2) (tentative draft no. 8, 1997).

Georgia Labor and Employment Law

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I. Introduction

This article surveys recent developments in state statutory and common law that affect labor and employment relations of Georgia employers. Accordingly, it surveys published decisions from the Georgia Court of Appeals and Georgia Supreme Court from June 1, 2006 to May 31, 2007, as well as selected District Court cases purporting to refine principles of Georgia employment law. This article also highlights specific revisions to the Official Code of Georgia Annotated ("O.C.G.A.").[1]

II. Recent Legislation

A. Substance Abuse Testing

During the survey period, the General Assembly passed important legislation affecting substance abuse testing.[2] Senate Bill 96 amends the existing Georgia statute relating to drug-free workplace programs.[3] It allows employers to conduct alternative methods of drug testing, which is required "in order to qualify for workers' compensation insurance premium discounts . . . ."[4] Specifically, in addition to the previous methods, "[u]rinalysis conducted by laboratories, testing at the employer worksite with on-site testing kits, or use of oral testing that satisfies testing criteria . . . shall be deemed [as] suitable and acceptable substance abuse testing [methods]."[5] Additionally, only for pre-job offer screening, the Act permits qualified individuals to administer on-site tests or oral tests.[6] These additions to the existing staute seek to provide employers with both immediate and easily accessible methods to deter and detect drug and alcohol abuse.[7]

B. Employment Security

The most significant legislation passed during the survey period amended O.C.G.A. Section 34-8-35, commonly known as Georgia's Employment Security Act.[8] Specifically, this Act amends the meaning of the

term "employment" within the scope of employment security.[9] It dictates the circumstances under which the Georgia Department of Labor is required to pay unemployment benefits. Unlike other areas of employment law, the burden of proof is on the employer to prove a worker constitutes an independent contractor and does not fall under "employee" status.[10]

Prior to the amendments, there was a three part test an employer had to meet to prove a worker was an independent contractor.[11] If the employer could meet this burden of proof, then it would not be required to pay unemployment taxes on that individual. The legislature simplified this test by eliminating the confusing second element.[12] An employer now must prove only two elements to remove a worker of "employee" status.[13] The worker must be free from the employer's control, and the worker must traditionally practice a separately established trade from that of the employer.[14] Furthermore, the legislature added an alternative basis for defining a worker's employment status.[15] If an employer concludes, after considering the elements needed to be proven, that a worker's status is questionable, it can submit an SS-8 determination form to the United States Internal Revenue Service for a definitive answer.[16] The amended definition of employment under Georgia's Employment Security Act is as follows:

> (f) Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown that:
> (1)(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact; and (B) Such individual is customarily engaged in an independently established trade, occupation, profession, or business; or
> (2) Such individual and the services performed for wages are the subject of an SS-8 determination by the Internal Revenue Service, which decided against employee status.[17]

The legislature also amended O.C.G.A. Section 34-8-35(n)(17) regarding employment exemptions.[18] Specifically, the common carrier exclusion was expanded to include trips as a basis of remuneration.[19] Additionally, the written contract that is required between an individual and a common carrier was expanded so that the term "employment" shall not include common carriers who deliver person(s).[20]

(17) Services performed for a common carrier of property, persons, or property and persons by an individual consisting of the pickup, transportation, and delivery of property, persons, or property and persons; provided that:
(B) Remuneration for the individual is on the basis of commissions, trips, or deliveries accomplished;
(F) The written contract does not prohibit such individual from the pickup, transportation, or delivery of property, persons, or property and persons for more than one common carrier or any other person or entity; or[21]

C. Firearms Transportation

Senate Bill 43, which would permit employees to keep guns in vehicles parked on company property, did not survive the legislative affair commonly known as Crossover Day.[22] Despite this setback, S.B. 43 was later incorporated into House Bill 89, which was to be considered by the Senate.[23] However, in lieu of the Virginia Tech deaths occurring the day prior to consideration of the Bill, it was decided to delay deliberations. Subsequently, the Senate chose not to add H.B. 89 on the calendar before the legislative session ended.

Proponents of H.B. 89 are wary of amending the original bill to add S.B. 43. While some would like both bills to pass, incorporating S.B. 43 into H.B. 89 significantly reduces the chances of H.B. 89 becoming law. Prior to its amendment, H.B. 89 was expected to pass with no problems once it was introduced to the Senate floor; however, the amended H.B. 89 will likely split votes. Accordingly, the chance of the amended H.B. 89 becoming law slowly diminishes with the ghost of S.B. 43.

III. Employment Law Principles – Case Law

A. Wrongful Termination

1. Employment-at-Will.

Georgia's employment-at-will doctrine has two notable characteristics. First, either the employee or employer may terminate the employment relationship at any time, with or without cause.[24] Second, and a corollary of the first characteristic, upon the termination of an employment-at-will

contract, the employee may not successfully maintain a wrongful termination claim.[25]

While the employment-at-will doctrine is gradually eroding in other jurisdictions,[26] O.C.G.A. § 34-7-1 provides that employment contracts in Georgia are at-will unless the parties implicitly or explicitly contract otherwise.[27] Generally, this means that in the absence of a specified length of employment, the relationship is employment-at-will.[28] Contract provisions specifying "permanent employment, employment for life, or employment until retirement" are indefinite, and therefore, they are employment-at-will contracts.[29]

2. Terms of an At-Will Contract.

In an employment-at-will contract, the employee agrees to work for the reasonable salary he is paid. If, for example, the employee does not like the salary, or the employer feels that the employee is not worth his agreed upon salary, either party is free to terminate the employment relationship.[30] However, *CPD Plastering, Inc. v. Miller*[31] illustrates that unless a forfeiture clause exists, a terminable at-will employee shall not be deprived "of earned commissions, even if those commissions become payable after termination."[32]

In *CPD* the court held that a former employee was entitled to certain commissions earned after termination, even though some of the contingent bids were not completed until after the employee left.[33] The employee, Miller, and CPD entered into an oral agreement in which Miller received a commission for each bid the employer received that he helped formulate.[34] Miller prepared commission sheets every two years; however, due to Y2K complications, Miller was unable to complete commission sheets beginning in 1998.[35] In addition, CPD converted to a new system after 2000 that no longer required him to prepare the sheets.[36] Thereafter, disputes arose that resulted in Miller voluntarily leaving CPD when the two could not resolve the calculation of his commissions, and CPD had not paid him for any commissions from 1998 to 2002.[37] Believing that CPD owed him additional commission payments, Miller filed suit to recover the unpaid money.[38]

The court rejected the employer's argument that Miller was not entitled to commissions that were open while he was employed, but subsequently closed after his departure.[39] Nowhere did the agreement obligate Miller to engage in post-bid work in order to receive his commission.[40] CPD even admitted that the oral agreement was "to pay a

commission for jobs bid by Gerald Miller," and the court emphasized that the agreement centered solely on the bid.[41] Additionally, the court reasoned that since the oral agreement did not contain a forfeiture clause, a terminable at-will employee, such as Miller, may recover certain compensation, including commissions, for services already rendered.[42] Accordingly, the court affirmed the lower court's summary judgment in favor of the employee regarding the unpaid commissions.[43]

3. Quantum Meruit.

In *Walker Elec. Co. v. Byrd*,[44] the Georgia Court of Appeals affirmed that an employee's at-will status does not preclude a cause of action for recovery of the value of services already rendered.[45] The employee, Byrd, filed suit for breach of contract, claiming Walker Electric breached its oral agreement regarding his compensation.[46] The parties agreed that Byrd would be paid $40 a day as per diem compensation, in addition to his hourly wages.[47] The employer's argument that "an at-will employee may not sue for breach of contract" was rejected, and instead the court found that because Byrd had already rendered services, his employment status was not decisive.[48] Further, the court reasoned that despite involving an at-will employee who received per diem compensation under an oral agreement, the case was analogous to the same type of employee alleging he received less pay in dollars per hour than what was agreed to originally.[49] Because Byrd's at-will status did not bar his cause of action, if an oral agreement was made, Byrd could recover for the services rendered prior to termination.[50] Accordingly, the case was remanded to determine whether there was an oral agreement.[51]

In *Powell Co. v. McGarey Group, LLC*,[52] the Northern District Court of Georgia held that as a matter of law, if the conditions of an express contract govern an employment relationship, an employee cannot seek recovery under a quantum meruit claim.[53] In this case, Powell, an employee of McGarey, filed suit for unpaid earnings.[54] The parties had previously entered into a written contract, which contained a renewable clause.[55] Throughout the duration of the contract, both parties acted pursuant to its terms.[56] Moreover, when the contract expired, both parties continued to act under the terms, thereby impliedly consenting to the renewal of the contract.[57]

The court found that the terms of the contract regarding the employee's additional compensation were ambiguous, and the issue could not be resolved in the employee's favor without extrinsic evidence.[58] Since the employee lacked evidence, he pursued an alternative method of recovery – a

quantum meruit claim.[59] Because the court reasoned that an express contract continued to exist through its renewal, the employee's claim under quantum meruit could not stand, unless the employee presented enough evidence to the contrary so as to raise a question of fact.[60] The court reaffirmed the principle that "implied and express contracts regarding the same subject matter cannot exist."[61] Accordingly, because the plaintiff lacked evidence to raise a question of fact, the court ruled in favor of the employer regarding the employee's quantum meruit claim.[62]

B. Torts Associated With Employment

1. Negligent Hiring and Retention

Under O.C.G.A. section 34-7-20, "[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency."[63] For an employee to sustain an action for negligent hiring and retention, a plaintiff "must show that 'the employer knew or should have known of the employee's propensity to engage in the conduct which caused the plaintiff's injury.'"[64] This propensity '"must consist of evidence substantially related to the injury-causing conduct.'[65] Generally, the determination of whether an employer used ordinary care in hiring an employee is a jury issue."[66]

Courts generally rule in favor of the employer when there is no evidence showing that an employer knew an employee was unsuited for a position or that an employer ignored its own policy.[67] However, in *Western Indus., Inc. v. Poole*,[68] even though there was no evidence the employer knew or should have known that one of its employees had a bad driving history, the court still turned the case over to a jury.[69] The court reasoned that since the employer failed to follow its own hiring policy of requiring driving records prior to employment, a reasonable jury could conclude the employer should have known the employee had a bad driving history.[70] Here, the employer failed to perform the required driving background check for the employee, which was in direct conflict with its hiring policy.[71] Moreover, the employee lied on his application about his driving history, claiming he had not been in any accidents, nor had his license been suspended in the past three years.[72] When the employee injured the Plaintiff, Poole, suit was subsequently filed against the employer for negligent hiring/retention.[73]

The Georgia Court of Appeals reaffirmed that "[t]he appropriate standard of care in a negligent hiring/retention action is whether the employer knew or should have known the employee was not suited for the particular employment."[74] Because Western Industries did not perform a driver background check on the employee, a jury could find it should have known the employee was unsuited for a driving position.[75] The court concluded that a reasonable jury could find the employer liable for negligent hiring/retention since it failed to follow its own hiring procedures.[76] Accordingly, the court affirmed the lower court's denial of summary judgment in favor of the employer.[77]

Similarly in *Remediation Res., Inc. v. Balding*,[78] the court denied an employer's motion for summary judgment when an employee, driving a company truck, ran a stop sign and killed another driver.[79] The court reasoned that despite the employee's excellent driving record, a reasonable jury could find that the employer should have foreseen injury occurring when it lacked policy manuals governing an employee's "conduct while driving a company vehicle . . .."[80] In addition, the employer neither kept "driver history or qualification files for any employees."[81] Although it is unnecessary for an employer to anticipate the precise injuries a plaintiff sustains, the court emphasized that an employer has a duty to exercise ordinary care when hiring future employees.[82] Plus, the employer should not hire individuals that it knows or should know will pose a risk of harm to others.[83] Because Remediation did not have a policy regarding employee drivers and did not perform driving background checks, the court denied summary judgment in its favor finding that a jury could determine the employer should have known its employees posed a risk to others.[84] The above cases are recent examples of the importance to employment practitioners of documenting, implementing, and consistently enforcing policies and procedures regarding employee hiring and retention.

"[I]n order to bring a claim for negligent retention under Georgia law, a plaintiff must either demonstrate a physical impact/pecuniary loss or show that the defendant's conduct was 'wilful [sic] or wanton and was directed to harm them.'"[85] Punitive damages are available to a plaintiff who satisfies the elements of a negligent retention claim.[86] Moreover, if it is shown by clear and convincing evidence that there was specific intent to cause harm, then there is "no limitation regarding the amount which may be awarded as punitive damages."[87]

In *Tomczyk v. Jocks and Jills Rests., LLC*,[88] a former employee, Tomczyk, filed suit against her employer seeking punitive damages for a negligent retention claim.[89] The jury rejected Tomczyk's assertion that she suffered physical injury, but agreed that the employer's conduct directed towards her was malicious, willful or wanton.[90] Even though the jury found that Tomczyk established a negligent retention claim, it did not find that the employer displayed specific intent to cause harm.[91] The court rejected the employer's argument that a finding of "'no specific intent to cause harm . . . ' precludes a finding of liability under a non-physical injury negligent retention claim."[92] Instead, the court concluded that "a jury finding of 'willful or wanton' acts 'directed' toward[s a p]laintiff along with a finding that there was no 'specific intent to cause harm'" can exist simultaneously.[93] Accordingly, the plaintiff satisfied the elements of a negligent retention claim, but was not entitled to punitive damages since specific intent to cause harm was not found.[94]

2. Respondeat Superior

Under the doctrine of respondeat superior, an employer may be held vicariously liable for negligent or intentional torts of employees committed within the scope of the employer's business.[95] To hold an employer-defendant vicariously liable for torts of an employee, "first, the [employee] must be in furtherance of the master's business; and, second, he must be acting within the scope of his [employer's] business."[96] Vicarious liability under respondeat superior does not apply to the acts of independent contractors.[97]

For example, the court in *Cotton States Mut. Ins. Co. v. Kinzalow*[98] held that an insurance agent, under the circumstances, was an independent contractor for purposes of the respondeat superior claim.[99] In this case, two former employees sued Cotton Sales under the doctrine of respondeat superior, for their former supervisor's conduct.[100] The lower court found the employer vicariously liable for the supervisor's conduct; however, the Georgia Court of Appeals reversed this holding finding that the supervisor was an independent contractor, thereby relinquishing the employer's liability.[101] The test to determine whether a worker is an independent contractor is "whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work as distinguished from the right merely to require certain definite results in conformity to the contract."[102] The court further explained:

> Where the contract of employment clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control. On the other hand, where the contract specifies that the employee's status shall be that of independent contractor but at the same time provides that he shall be subject to any rules or policies of the employer which may be adopted in the future, no such presumption arises.[103]

> Here the employment contract expressly stated:

> Sweet [the former supervisor] was "not an employee of [Cotton Sales] for any purpose," but was rather "an independent contractor for all purposes, having the right to exercise independent judgment as to the time, place and manner of soliciting policies, servicing Policyholders, and otherwise carrying out the provisions of th[e] Contract and [was] not subject to the control of [Cotton Sales] except as set forth herein."[104]

Additionally, Sweet worked and set his own schedule, had exclusive control over his own employees, and was responsible for business expenses, such as paying taxes and filing returns, maintaining liability insurance, and acquiring the appropriate business license for his practice.[105] Nonetheless, the contract did contain certain restrictions and requirements.[106] For example, Sweet was to inform and keep accurate records of all his sales and future sales, and Cotton Sales had authority to monitor these activities.[107] The court reasoned that "[s]uch activity evidences Cotton Sales' right to require certain results under its agency contract, as opposed to its controlling of the time, method and manner by which the results are achieved."[108]

The court found that Cotton Sales' willingness to supply Sweet with materials for his business did not illustrate its ability to control Sweet's operations, nor did Sweet's submission to advertising restrictions interfere with his daily operations.[109] The court further explained that "advertising restrictions do not make Plaintiff an employee [as opposed to an independent contractor]."[110] The employment contract, along with other records, provided sufficient evidence to presume that Cotton Sales did not control the time, manner and method of Sweet's daily operations, and therefore Sweet was an independent contractor.[111] Accordingly, Cotton Sales was not subject to vicarious liability under the doctrine of respondeat superior for Sweet's

misconduct, and summary judgment in the employer's favor was appropriate.[112]

C. Restrictive Covenants

1. Noncompete Agreements

Agreements that place general restraints on trade and have the effect of lessening competition and encouraging monopolies are void as against public policy.[113] Generally, noncompete agreements are disfavored in contractual relations because they place restrictions on trade, thereby thwarting competition.[114] Nonetheless, courts will uphold a noncompete agreement when the agreement merely places a partial restraint upon trade.[115] In general, a noncompetition agreement is valid as a partial restraint on trade if the agreement is in writing and is reasonable as to duration, territorial coverage and the scope of activities prohibited.[116] Whether the terms are reasonable is a question of law for the court to decide.[117] However, depending on the type of contract, the court will apply different levels of scrutiny to the reasonableness of the contract.[118] If the agreement is ancillary to an employment agreement, a stricter standard is applied, and if any provision of the agreement is considered overbroad or unreasonable, the entire agreement is invalid.[119] But, if the agreement is pursuant to a contract for the sale of business, a less stringent standard allows broader provisions, and even if one provision is deemed overbroad or unreasonable, the court may "blue pencil" to rewrite or sever the overly-broad provision.[120]

In *Impreglon, Inc. v. Newco Enters., Inc.*,[121] the court held that a non-competition agreement prohibiting a person from practicing a particular activity in all fifty states is overbroad and unenforceable.[122] Additionally, prohibiting a person from engaging in business activities by referencing to the employer's business is also overbroad and unenforceable for lack of specificity.[123] Impreglon and Jarrell entered into an employment agreement which included a non-compete clause.[124] When Jarrell split ways with Impreglon, he decided to work for Newco, a competing company.[125] Thereafter, Impreglon filed suit against Jarrell for breach of the non-competition agreement.[126]

Because the non-competition agreement was included in Jarrell's employment contract, and the agreement was put into effect after his termination, the court found that it was ancillary to Jarrell's employment and applied strict scrutiny.[127] The non-competition agreement included a

geographic, as well as a scope of activity restriction.[128] Jarrell was prohibited "from 'engag[ing] in the same business, or essentially the same business, as that of the Corporation' anywhere 'within the territorial United States' for a period of two years following his termination from Impreglon."[129] The court rejected the former employer's argument that the geographic restriction was reasonable since Impreglon was a nationwide business.[130] In fact, the court found that Impreglon was not actually serving in all fifty states.[131] Furthermore, Impreglon did not conduct business, or ever plan to conduct business in Hawaii or Alaska.[132] Since the geographic restriction was subject to the highest level of scrutiny, the court found that prohibiting Jarrell from engaging in business in all fifty states, when Impreglon did not even conduct business in at least two of the states, was overbroad and unenforceable.[133]

In addition, the court considered whether prohibiting Jarrell from engaging in the same business or essentially the same business was specific enough to meet the strict scrutiny standard.[134] The court concluded that the scope of activity restriction was also overbroad and unenforceable.[135] The non competition agreement was not specific enough as to what activities Jarrell was prohibited from engaging.[136] The court found that the prohibitions were "indefinite business activities," meaning that the prohibited activities were common in the workplace and could virtually restrain Jarrell from engaging in a broad field of business activities.[137] Agreeing "not to engage or be employed by any 'business similar to employer's business'" lacked specificity and could significantly limit Jarrell's opportunity for employment.[138] Accordingly, the Georgia Court of Appeals denied summary judgment in the former employer's favor as to the non-competition agreement.[139]

2. Nonsolicitation Agreements

In *Variable Annuity Life Ins. Co. v. Joiner*,[140] the court held that the nonsolicitation covenant drafted between the employer, VALIC, and former employees Bobby and Kimberly Joiner, met the reasonableness test and was therefore enforceable.[141] As a pre-employment condition, the Joiners signed a nonsolicitation agreement.[142]

> During the term of this Agreement and for a period of one (1) year after its termination, Registered Representative will not directly or indirectly induce or attempt to induce any Protected Customer to either (a) end or alter his or her relationship with Broker-Dealer or Protected Companies, or (b) accept business

> relating to competing products or services from any Protected Customer, except in the performance of his or her regular duties as a Registered Representative of Broker-Dealer. A "Protected Customer" is defined as any person who is or was a customer of Broker-Dealer or its Protected Companies, and who was within Registered Representative's Territory and assigned to Registered Representative at any time during the one-year period immediately preceding termination of this Agreement.[143]

Thereafter, the Joiners decided to leave VALIC and pursue a career with Merrill Lynch, a competitor of VALIC.[144] After their departure, the Joiners attempted to solicit forty of VALIC's high-paying clients to move their accounts to Merrill Lynch.[145] Moreover, ninety percent of VALIC's customers that rolled their accounts to Merrill Lynch were solicited directly by the Joiners.[146] VALIC subsequently filed suit against the Joiners for breach of the nonsolicitation covenant.[147] Because the nonsolicitation agreement was a pre-condition of employment with VALIC and the Joiners were powerless in negotiating the terms of the agreement, the court concluded the agreement was ancillary to the employment contract and therefore subject to strict scrutiny.[148]

"Under Georgia law, restrictive covenants are enforceable if the restraint imposed: (1) is reasonable; (2) is founded on valuable consideration; (3) is reasonably necessary to protect the interest of the party in whose favor it is imposed; and (4) does not unduly prejudice the interests of the public."[149] Here, the nonsolicitation agreement was founded on valid consideration because both parties signed the covenant.[150] Furthermore, a three-part test, examining the elements of duration, territorial coverage, and scope of activity, is applied to determine the reasonableness of a nonsolicitation agreement.[151] The Joiners signed an agreement promising not to solicit, directly or indirectly, Protected Customers to either end their business relations with VALIC or accept business from VALIC competitors.[152] The court rejected the argument that the covenant was ambiguous, and instead found that "VALIC narrowly tailored the nonsolicitation covenant at issue as reasonably necessary to protect its valuable confidential and proprietary information."[153] Accordingly, the court held that the nonsolicitation covenant was reasonable and enforceable against the former employees.[154]

D. Trade Secrets

Unlike patents and copyrights, which are exclusively federal issues, trade secrets are regulated by state statutes.[155] The Georgia Trade Secrets Act of 1990[156] protects trade secrets from misappropriation.[157]

> [Under this Act,] "[t]rade secret means information . . . which: (A) [d]erives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (B) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[158]

"A person misappropriates a trade secret when he 'acquires, uses or discloses a trade secret using improper means, or acquires a trade secret from a person who he knows or has reason to know acquired the trade secret by improper means.'"[159] Generally, an injunction is sought by the owner of a trade secret to prohibit any misappropriations.[160] However, the owner of a trade secret who is injured by any misappropriations may also seek damages for the "actual loss and value of the trade secret . . .."[161]

Information constituting a trade secret covers an array of areas, "including, but not limited to, technical or non-technical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers."[162] For example, in *Hilb, Rogal & Hamilton Co. of Atlanta, Inc. v. Holley*,[163] the court held that "[t]angible customer lists are the property of the employer and may warrant protection as trade secrets."[164] In this case, the former employee signed a confidentiality agreement promising to keep customer lists confidential during and after his employment with Hilb, Rogal & Hamilton ("HRH").[165] The agreement read in part:

> In order to protect the value of Employer's business, Employee covenants and agrees that, in the event of the termination of his employment, whether voluntary or involuntary, he shall not directly or indirectly as an owner, stockholder, director, employee, partner, agent, broker, consultant or other participant during the Restricted Period:

(a) contact or solicit or accept an entreaty from, a Known Customer for the purpose of providing Prohibited Services to such Known Customer;

(b) contact or solicit, or accept an entreaty from, a Prospective Customer for the purpose of providing Prohibited Services to Prospective Customer; and

(c) engage in the Business in the Restricted Area without the prior written consent of Employer and HRH.[166]

After his departure from HRH, the employee, Holley, took the customer list, which was in the form of an electronic organizer, and used it to look up phone numbers of HRH customers.[167] Subsequently, HRH filed suit against Holley alleging misappropriation of trade secrets.[168] In order to assert a successful claim, the trade secret owner must prove its trade secret was misappropriated according to Georgia's definition of trade secret and misappropriation.[169] Here, the customer list could be considered a trade secret and Holley's taking of the list for improper use could be considered a misappropriation.[170] Because he signed an agreement promising to keep customer lists confidential, there was enough evidence to "create a genuine issue of material fact as to whether Holley misappropriated trade secrets."[171] Accordingly, the Georgia Court of Appeals affirmed the lower court's denial for summary judgment in favor of the former employee.[172]

"Whether a particular type of information constitutes a trade secret is a question of fact."[173] For example, in *Insight Tech., Inc. v. FreightCheck*,[174] *LLC*, the court held that a jury could find that accounting software specifically used for the factoring company, Insight Technology, could be considered a trade secret.[175] When Brewer began working for Insight, he signed an employment agreement promising to keep Insight's trade secrets confidential.[176] During his employment, Brewer developed the company's website, "drafted forms, [and] designed procedures . . . ."[177] Moreover, Brewer created FactorPlus, which was an accounting software program specifically designed for factoring companies.[178] While employed with Insight, Brewer started his own factoring company, GetLoaded, which used the same FactorPlus software and appeared virtually identical to Insight's website.[179] Brewer purposely concealed his activity until Insight discovered his secret from an employee whom Brewer solicited to train GetLoaded employees.[180] Thereafter, Insight filed suit against Brewer for misappropriation of trade secrets, specifically the FactorPlus software.[181] The

lower court granted Brewer's motion for summary judgment, concluding that the software could not be considered a trade secret under O.C.G.A. § 10-1-761.[182]

However, the Georgia Court of Appeals reversed the lower court's holding, and without much explanation, found that there was enough evidence for a jury to conclude that the FactorPlus software constituted a trade secret under O.C.G.A. § 10-1-761.[183] Additionally, there was supporting evidence that Brewer misappropriated FactorPlus since his actions were in direct conflict with his confidentiality agreement with Insight.[184] Accordingly, the court held that summary judgment in favor of Brewer was inappropriate.[185]

IV. Conclusion

Although labor and employment issues derived from Georgia law often are not as complex as their federal counterparts, the issues arising under state law are becoming more challenging with each passing year. Adding to this challenge is the growing overlap between state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, trial, or other matters pertaining to labor and employment law, it is important to recognize that any one law or legal proceeding can and does impact other relations between employer and employee.

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[1] Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See* Daily Lab. Rep. (BNA); THE DEVELOPING LABOR LAW (Patrick Hardin et al. eds., 4th ed. 2001); BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (Paul W. Cane, Jr. et al. eds., 3d ed. & Supps. 1996-2002). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

[2] Ga. S.B. 96, § 1, Reg. Sess. (2007) (amending O.C.G.A. § 34-9-415 (2004)).

[3] *Id*.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *See id*.

[8] Ga. H.B. 443, § 1, Reg. Sess. (2007) (amending O.C.G.A. § 34-8-35 (2004 & Supp. 2006)).
[9] O.C.G.A. § 34-8-35(f) (2004 & Supp. 2006).
[10] *Compare* Remediation Res., Inc. v. Balding, 281 Ga. App. 31, 635 S.E.2d 332 (2006) (burden of proof is on Plaintiff to show "employee" status under respondeat superior), *with* Ga. H.B. 443 (Act presumes employment till employer proves otherwise).
[11] "Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown that:
(1) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact;
(2) Such service is outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed; and
(3) Such individual is customarily engaged in an independently established trade, occupation, profession, or business." (O.C.G.A. § 34-8-35(f) (2004 & Supp. 2006) (amended 2007)).
[12] O.C.G.A. § 34-8-35(f).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] O.C.G.A. § 34-8-35(n)(17) (2004 & Supp. 2006).
[19] O.C.G.A. § 34-8-35(n)(17)(B).
[20] O.C.G.A. § 34-8-35(n)(17)(F).
[21] O.C.G.A. § § 34-8-35(n)(17)(B), 34-8-35(n)(17)F).
[22] Ga. S.B. 43, § 1, Reg. Sess. (2007) (failing to pass Senate vote).
[23] Ga. H.B. 89, § 3, Reg. Sess. (2007) (removed from General Calendar and committed to Rules Committee in Senate).
[24] *See generally,* JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW 20-21 (3d Ed. & Supp 2005).
[25] *Id.*
[26] *See* Mark A. Fahleson, *The Public Policy Exception to Employment-At-Will–When Should Courts Defer to the Legislature?* 72 NEB. L. REV. 956 (1993); Cortlan H. Maddux, *Employers Beware! The Emergin Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997); Kimberly Anne Huffman, Salt v. Applied Analytical, Inc.: *Clarifying the Confusion in North Carolina's Employment-at-Will Doctrine*,

70 N.C. L. REV. 2087 (1992); Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197 (1990); and Melanie Robin Galberry, *Employers Beware: South Carolina's Public Policy Exception to the At-Will Employment Doctrine is Likely to Keep Expanding*, 51 S.C. L. REV. 406 (2000).

[27] O.C.G.A. §34-7-1 (1998).

[28] *See generally* WIMBERLY, *supra* note 2, at 20-21.

[29] WIMBERLY, *supra* note 2, at 20.

[30] *See generally* WIMBERLY, *supra* note 2, at 20-21.

[31] 284 Ga. App. 172, 175, 643 S.E.2d 392, 395 (2007).

[32] *Id*. at 175, 643 S.E.2d at 395.

[33] *Id*. at 175, 643 S.E.2d at 395.

[34] *Id*. at 172-73, 643 S.E.2d at 393.

[35] *Id*. at 173, 643 S.E.2d at 393.

[36] *Id*., 643 S.E.2d at 393.

[37] *Id*. at 173, 643 S.E.2d at 393.

[38] *Id*. at 173, 643 S.E.2d at 393.

[39] *Id*. at 175, 643 S.E.2d at 395.

[40] *Id*., 643 S.E.2d at 395.

[41] *Id*., 643 S.E.2d at 395.

[42] *Id*. at 176, 643 S.E.2d at 395 (citing Lacey Mills, Inc. v. Keith, 183 Ga. App. 357, 359-60(2), 259 S.E.2d 148 (1987)).

[43] *Id*. at 176, 643 S.E.2d at 395.

[44] 281 Ga. App. 190, 635 S.E.2d 819 (2006).

[45] *Id*. at 192, 635 S.E.2d at 820.

[46] *Id*. at 190, 635 S.E.2d at 820.

[47] *Id*., 635 S.E.2d at 820.

[48] *Id*. at 191, 635 S.E.2d at 820.

[49] *Id*., 635 S.E.2d at 820.

[50] *Id*. at 192, 635 S.E.2d at 820.

[51] *Id*., 635 S.E.2d at 820.

[52] 2007 WL 951759 (N.D. Ga. Mar. 28, 2007).

[53] *Id*. at *13.

[54] *Id*. at *1.

[55] *Id*. at *13.

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*.
[61] *Id*. (quoting Haldi v. Watson, 240 Ga. App. 801, 802, 522 S.E.2d 696 (1999)).
[62] *Id*.
[63] O.C.G.A. § 34-7-20 (1998).
[64] *Id*. (quoting Harper v. City of E. Point, 237 Ga. App. 375, 376, 515 S.E.2d 623, 625 (1999)).
[65] *Id* at 741, 552 S.E. 2d at 912 (quoting *Harper*, 237 Ga. App. at 376, 515 S.E.2d at 625).
[66] *Id.* (citing Sparlin Chiropractic Clinic v. TOPS Pers. Servs., 193 Ga. App. 181, 387 S.E.2d 411 (1989)).
[67] Western Indus., Inc. v. Poole, 280 Ga. App. 378, 382, 634 S.E.2d 118, 122 (2006).
[68] 280 Ga. App. 378, 634 S.E.2d 118 (2006).
[69] *Id*. at 382, 634 S.E.2d at 122
[70] *Id*., 634 S.E.2d at 122
[71] *Id*. at 379, 634 S.E.2d at 120
[72] *Id*. at 379, 634 S.E.2d at 120
[73] *Id*. at 379-80, 634 S.E.2d at 120
[74] *Id*. at 381-82, 634 S.E.2d at 121
[75] *Id*. at 382, 634 S.E.2d at 122
[76] *Id*., 634 S.E.2d at 122
[77] *Id*. at 383, 634 S.E.2d at 123
[78] 281 Ga. App. 31, 34, 635 S.E.2d 118, 335 (2006).
[79] *Id*. at 34, 635 S.E.2d at 335.
[80] *Id*., 635 S.E.2d at 335.
[81] *Id*., 635 S.E.2d at 335.
[82] *Id*., 635 S.E.2d at 335.
[83] *Id*., 635 S.E.2d at 335.
[84] *Id*., 635 S.E.2d at 335.
[85] Tomczyk v. Jocks & Jills Rests., LLC, 2007 WL 781328, at *9 (N.D. Ga. Mar. 6, 2007) (quoting Evans v. Willis, 212 Ga. App. 335, 337 (1994)).
[86] *Id*.
[87] *Id*.
[88] 2007 WL 781328, at *9 (N.D. Ga. Mar. 6, 2007)
[89] *Id*. at *1.
[90] *Id*. at *9.
[91] *Id*.
[92] *Id*.
[93] *Id*.

[94] *Id*.
[95] CHARLES R. ADAMS, III, GEORGIA LAW OF TORTS § 7-2 (2002).
[96] *Id.*
[97] *Id.*
[98] 280 Ga. App. 397, 634 S.E. 2d 172 (2006).
[99] *Id*. at 399, 634 S.E. 2d at 175.
[100] *Id*. at 397, 634 S.E. 2d at 172.
[101] *Id*. at 399, 634 S.E. 2d at 175.
[102] *Id*. at 400, 634 S.E. 2d at 175.
[103] *Id*., 634 S.E. 2d at 175.
[104] *Id*., 634 S.E. 2d at 175.
[105] *Id*., 634 S.E. 2d at 175.
[106] *Id*. at 401, 634 S.E. 2d at 176.
[107] *Id*., 634 S.E. 2d at 176.
[108] *Id*., 634 S.E. 2d at 176.
[109] *Id*., 634 S.E. 2d at 176.
[110] *Id*., 634 S.E. 2d at 176.
[111] *Id*., 634 S.E. 2d at 176.
[112] *Id*., 634 S.E. 2d at 176.
[113] *See* O.C.G.A. § 12-8-2 (1982 & Supp. 2003).
[114] WIMBERLY, *supra* note 2, § 2-11.
[115] *Id.*
[116] W.R. Grace & Co. v. Movyal, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992).
[117] WIMBERLY, *supra* note 2, § 2-11.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] 2007 WL 1020834 (N.D. Ga. Mar. 30, 2007).
[122] *Id*. at *11.
[123] *Id*.
[124] *Id*. at *1.
[125] *Id*. at *3.
[126] *Id*.
[127] *Id*. at *10.
[128] *Id*. at *11.
[129] *Id*. (quoting 1997 Agreement ¶ 5(a)).
[130] *Id*.
[131] *Id*.
[132] *Id*.

[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] *Id*.
[139] *Id*.
[140] 454 F. Supp. 2d 1297 (S.D. Ga. 2006).
[141] *Id*. at 1303.
[142] *Id*. at 1300.
[143] *Id*.
[144] *Id*. at 1301.
[145] *Id*.
[146] *Id*.
[147] *Id*. at 1302.
[148] *Id*. (rejecting the employees' argument that the restrictive covenant did not constitute an employment agreement, Judge Edenfield stated, "[o]ne can call a stallion a cow until one tries to get milk from it." (Wachovia Ins. Servs., Inc. v. Paddison, et al., CV406-83 (S.D. Ga. July 18, 2006)).
[149] *Id*.
[150] *Id*. at 1302-03.
[151] *Id*. at 1303.
[152] *Id*.
[153] *Id*.
[154] *Id*.
[155] *See generally* WIMBERLY, *supra* note 2, at 92.
[156] O.C.G.A. § 10-1-760 *et seq.* (1990).
[157] *Id*., WIMBERLY, *supra* note 2, at 93.
[158] O.C.G.A. § 10-1-761(4) (1990).
[159] WIMBERLY, *supra* note 2, at 94 (quoting O.C.G.A. § 10-1-761(2) (1990)).
[160] *Id*. at 93.
[161] *Id*. at 94.
[162] O.C.G.A. § 10-1-761(4) (1990)
[163] 284 Ga.App. 591, 644 S.E.2d 862 (Ga. App. 2007)
[164] *Id*. at 597, 644 S.E.2d at 867.
[165] *Id*., 644 S.E.2d at 867.
[166] *Id*. at 593, 644 S.E.2d at 865.
[167] *Id*. at 597, 644 S.E.2d at 867.
[168] *Id*. at 591, 644 S.E.2d at 864.
[169] *Id*. at 597, 644 S.E.2d at 867.

[170] *Id*. at 597, 644 S.E.2d at 867.
[171] *Id*. at 597, 644 S.E.2d at 867.
[172] *Id*. at 597, 644 S.E.2d at 867.
[173] Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 27, 633 S.E.2d 373, 380 (2006) (quoting Camp Creek Hospitality Inns, v. Sheraton Franchise Corp., 139 F.3d 1396, 1410-1411(IV) (11th Cir. 1998).
[174] 280 Ga. App. 19, 27, 633 S.E.2d 373, 380 (2006).
[175] *Id*. at 27, 633 S.E.2d at 380.
[176] *Id*. at 20, 633 S.E.2d at 375.
[177] *Id*., 633 S.E.2d at 375.
[178] *Id*., 633 S.E.2d at 375-76.
[179] *Id*. at 22, 633 S.E.2d at 376.
[180] *Id*., 633 S.E.2d at 377
[181] *Id*. at 19, 633 S.E.2d at 375.
[182] *Id*. at 27, 633 S.E.2d at 380.
[183] *Id*., 633 S.E.2d at 380.
[184] *Id*., 633 S.E.2d at 380.
[185] *Id*., 633 S.E.2d at 380.

"They Tried To Make Me Go To Rehab"
A Practitioner's Guide
To Striking Jurors For Cause
In The Wake of *Kim v. Walls*

Jason D. Lewis[i]
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Georgia law gives all parties to civil actions the right to individually examine the panel of jurors from which a jury will be chosen. O.C.G.A. § 15-12-133 (2007). The scope of the individual examination is of course quite broad and the relevant statute provides that:

> In the examination, the counsel for either party shall have the right to inquire of the individual jurors examined touching any matter or thing which would illustrate any interest of the juror in the case, including any opinion as to which party ought to prevail, the relationship or acquaintance of the juror with the parties or counsel therefor, any fact or circumstance indicating any inclination, leaning, or bias which the juror might have respecting the subject matter of the action or the counsel or parties thereto, and the religious, social, and fraternal connections of the juror.

O.C.G.A. § 15-12-133.

Every litigator knows it when he hears it - a statement is uttered by a potential juror that seems to favor your client and you are convinced you have to get this person on the jury. And while you're excited about the prospect of this individual sitting on the jury, your adversary is hashing out a list of questions to knock that potential juror out of the running.

There are mountains of cases concerning the various factual circumstances surrounding grounds for dismissing jurors for bias, relationship, or interest in the outcome of the trial. This article will focus on more recent developments in Georgia Courts related to the latitude afforded a lawyer in fleshing out potential bias on the part of a juror and the responsibilities of the Court pursuant to O.C.G.A. § 15-12-134 and *Kim v. Walls*, 275 Ga 177, 178 (2002) in ensuring that a juror is properly rehabilitated before he or she is given a place on the jury.

Georgia law provides that:

> In all civil cases it shall be good cause of challenge that a juror has expressed an opinion as to which party ought to prevail or that he has a wish or desire as to which shall succeed. Upon challenge made by either party upon either of these grounds, it shall be the duty of the court to hear the competent evidence respecting the challenge as shall be submitted by either party, the juror being a competent witness. The court shall determine the challenge according to the opinion it entertains of the evidence adduced thereon.

O.C.G.A. § 15-12-134 (2007).

The only person in the courtroom that truly wants an impartial jury is the judge as each attorney is hoping for jury members who favor their side. See *Walls v. Kim*, 250 Ga. App. 259, 260 (2001) (acknowledging that the primary desire of the parties is not to have a truly fair and impartial jury but one that is inclined to favor their side of the case). For this reason and because the trial judge is considered to be in the best position to judge the credibility of the juror, the judge is vested with the discretion to simply remove any juror who, based on common sense and experience, seems partial to one side. See *Kim*, 275 Ga. at 178; *Cohen v. Baxter*, 267 Ga. 422, 423 (1997). A trial judge's decision regarding a challenge for cause will only be reversed by appellate courts upon a manifest abuse of discretion. To these ends, the Georgia Supreme Court has held that if there is going to be error in selecting a jury, the error should be in favor of impartiality by excusing too many jurors, not too few for cause. *Cambron v. State*, 164 Ga. 111, 113-14 (1927).

Nevertheless, this seemingly broad discretion to remove jurors is tempered by the requirement that a trial court may not excuse a juror for cause unless that juror has an opinion that is so fixed that it does not waiver in the face of the evidence or the charge of the court. *Remillard v. Longstreet Clinic, P.C.*, 267 Ga. App. 230, 231 (2004) (citing *Gragg v. Neurological Assoc.*, 176 Ga. App. 516, 518 (1985). The judge's discretion is further marginalized by the presumption that potential jurors are impartial. *Cohen v. Baxter*, 267 Ga. 422, 424 (1997).

"There is no specific test for the disqualification of a juror for favor in a civil context . . . ." *Kim*, 275 Ga. at 178. For years, when confronted with a

juror who may be biased, the trial judge would ask a well-intentioned but inherently loaded question that went something like this: "Do you believe that after you have heard all the evidence and the court's charge on the law that you can render a fair an impartial verdict" or "will you be able to put aside your personal feelings and base your decision upon the evidence as presented and the law as given?" Naturally, the answer was usually 'yes' and the judge would deem the potential juror rehabilitated, refuse to allow any further questioning of the potential juror, and proceed with the trial.

The error in this process is that potential jurors are oftentimes not the best judges of their own impartiality and in some cases a juror's self-report of indifference needs further examination. Many potential jurors who are standing in front of a judge, the litigants in the case, and their peers on the panel of jurors, are hesitant to admit in open court that they are unwilling or incapable of following the law or the court's instructions. Moreover, potential jurors can feel pressured to say what they think the judge wants to hear and oftentimes do not understand the true meaning of the legal terms that are used during voir dire. For these reasons, it is imperative that the practitioner take full advantage of his/her right, and perhaps duty after *Kim*, to question the potential juror who has expressed a bias using context-specific questions to elicit more information to ensure impartiality.

In 2001, the Georgia Court of Appeals addressed the issue of what it perceived to be the adoption of a talisman as justification in retaining biased jurors. *Wall*s, 250 Ga. App. at 259-60. The court's concern was the obviously loaded rehabilitation questions posed by trial judges and the frequent browbeating of jurors by attorneys attempting to get a juror to answer a series of leading questions that lead to the ultimate answer of "I can put away my preconceptions and apply the law to the evidence." *Id*. It is well understood that a juror can infer from the "tone, direction, and repetitive nature" of questions that the court or attorney desires that they relent and state that they can be impartial. *Gouth v. Hamilton*, 273 Ga. App. 435, 440 (2005)

In *Walls*, a juror expressed concern as to whether she could be impartial because she was a nurse who worked with the defendant doctor. *Id.* at 260. The juror expressed her desire to see the case work out in favor of the defendant, but when asked if she could put that aside and judge the case based on the evidence and the law she said she could but then immediately contradicted herself. *Id*. at 260. The judge cut off any attempts by the plaintiff's counsel to get the juror to explain the contradiction, and the judge retained the juror. *Id.*

The Court of Appeals held that the trial judge abused his discretion in not allowing further inquiry into the expressed partiality of one juror. *Id.* at 261. In *Kim v. Walls*, the Supreme Court of Georgia affirmed the Court of Appeals' decision and held that "counsel should be given the broadest of latitude in questioning prospective jurors who have expressed bias" while the judge must conduct a voir dire that is sufficient in scope and depth to discover any potential partiality given the circumstances. *Kim*, 275 Ga. at 179. "[T]he trial court must do more than "rehabilitate" the juror through the use of any talismanic question. The court is *statutorily bound to conduct voir dire adequate to the situation*, whether by questions of its own or through those asked by counsel." *Id.* at 178. (emphasis added.)

The Aftershock

Since *Kim*, both trial judges and attorneys have struggled to meet the requirements of fleshing out potential bias by implementing voir dire of sufficient scope and depth. Certainly the court must bear in mind that exhaustive questioning of potentially biased jurors comes at substantial efficiency costs. Nevertheless, since the court's decision in *Kim*, the trial courts are charged with carefully crafting questions to ferret out bias in an effort to rehabilitate a juror before placing the juror in the jury box. *Gouth*, 273 Ga. App. at 440; see also *Bennett v. Mullally*, 263 Ga. App. 215 (2003) (holding that the trial judge erred in retaining a juror who stated that personal injury plaintiffs should only be entitled to recover expenses. The trial court's only attempt to rehabilitate was a general question stating "Are any of you here unwilling to follow the law?"); *Sellers v. Burrowes*, 283 Ga. App. 505 (2007) (holding that the trial court erred in retaining a juror who followed the court's attempt to rehabilitate by stating she would demand clear and convincing proof to find against the defendant doctor).

Of course *Kim* is not to be interpreted in a way that makes it impossible to rehabilitate a juror as soon as a statement is made that shows some potential bias. To the contrary, what is prudent is that the judge or the attorneys investigate the basis for the bias. Even in cases where a juror expresses doubts as his own impartiality, the juror need not be excused as a matter of law. *Remillard v. Longstreet Clinic, P.C.*, 267 Ga. App. 230, 234 (2004). If the judge conducts an investigation or allows questioning through counsel that convinces the judge that the potential juror can put aside her preconceptions and decide the case based on the evidence and law, then the juror may be retained.

In the long line of cases following *Kim*, there are two cases that stand out as guides to the practitioner on how to best manage the rehabilitation of a potentially biased juror and avoid grounds for appeal. In *Brown v. Columbus Doctors Hosp., Inc.*, 277 Ga. App. 891 (2006), the Court of Appeals held that counsel and the court attempted to but ultimately failed to conduct a voir dire that was sufficient in scope and depth to uncover the basis of the bias on the part of a juror. *Id.* at 894. In that case, a juror, who had a financial and working relationship with the defendant hospital, "indicated that if he were the plaintiff, he would not want someone in his frame of mind to be sitting as a juror on the case." *Id.* at 891. The juror had worked in the health care industry for 26 years and believed he could not put aside sympathy or prejudice to render a fair verdict. *Id.*

Despite numerous attempts to get the juror to provide some sort of definitive answer as to his ability to render a fair and impartial verdict, the juror could do no better than provide ambiguous answers. *Id.* at 892-93. Ultimately, the trial court decided that, although it might be "difficult," the juror could rise to the occasion. *Id.* at 893. The Court of Appeals was critical of the fact that the court only focused on the juror's statement that it would be difficult for him to be impartial when he also said that he absolutely could not say that his prejudices would not enter his decision. *Id.* at 894. The Court of Appeals wanted more investigation into the fact that the juror stated he could not say his prejudices would not impact his decision. *Id.* The juror had not been sufficiently rehabilitated by the court because the juror's last statement should have prompted more questions regarding potential bias.

For a good example of how thorough questioning of a potential juror can successfully rehabilitate a juror one can look to *Clack-Rylee v. Auffarth*, 273 Ga. App. 859 (2005). In that case the trial court properly applied the requirements of Kim in order to successfully rehabilitate a juror who initially made statements showing possible bias. *Id.* at 861. The juror in question, a pastor, responded that he believed, based on theological reasons, that it was just wrong for one person to sue another. *Id.* at 860.

Of course, the juror's statement prompted a long series of questions from both plaintiff's counsel and the court. *Id.* at 860-861. In response to those questions the pastor explained that he could sit on a jury, not as a pastor but as a citizen of the state of Georgia. *Id.* at 861. Additionally, he could apply the law of the state and not the teachings or doctrines of his own theology. *Id.* After the juror stated that he could apply state law and sit as an

impartial juror, plaintiff's counsel asked the juror if "he would marry homosexuals if Georgia legalized such marriages." *Id.* At that point, the trial court indicated that the plaintiff's attorney may have gone too far, but the juror stated he would like to answer the question. *Id.* The juror stated that "I'll just tell you, what I do in my church and the practice of my religion is entirely different from what's going on in this courtroom." *Id.* At that point, plaintiff's counsel stated he had no further questions. *Id.*

The Plaintiff's counsel moved to excuse the pastor, a request that was refused by the trial court. *Id.* at 862. The Court of Appeals held that the trial court properly retained the juror because the totality of his statements showed that he had no fixed and definite opinions and in fact could draw distinctions between his legal duties and his personal life. *Id.* Additionally, the appellate court seemed persuaded by the fact that the trial court did not curtail further inquiry by plaintiff's counsel, who said he had no further questions. *Id.* at 861-862. As this case shows, had it not been for the persistent and context-specific questioning, a potentially desireable jury panel member would have been lost. Moreover, this case demonstrates that a judge may not curtail counsel's questioning into a juror's potential bias until an adequate inquiry has been conducted.

Why this should matter to you as a litigator

In the wake of the decisions that post-date *Kim*, there is a new trend of appellate challenges arising from the process of jury selection. To illustrate, here is an example of the new post-*Kim* scenario: During voir dire a potential juror indicates a possible bias in favor of your client. The judge and/or counsel engage in less-than adequate follow-up questioning. Thereafter, opposing counsel moves to strike the potential juror. The judge overrules the motion and retains the juror. You receive a verdict in your favor. Twenty-nine days later you receive an appeal from opposing counsel on the grounds that the trial court failed to adequately investigate the potential juror to feret out bias as required by *Kim*. The remedy is a new trial. To avoid this cycle, the practitioner must question the potential juror who has expressed a bias using context-specific questions to elicit more information so that any verdict you obtain will not be exposed to appeal for a violation of the requirements of *Kim*.

Conclusion

The courts have refrained from creating a bright line test for rehabilitating a potential juror that has been challenged for cause/indicated a bias. Thus, it is the responsibility of the practitioner to ensure that the court, through questioning from the judge or counsel, probes deeper with a potential juror who has expressed a bias before placement on the jury or excusing the juror. The judge and counsel should not rely on the lengthy, leading, and coercive rehabilitative questions such as the ones that have been criticized in recent cases. Nor should the court prematurely cut off an inquiry into the nature of the juror's prejudices before an adequate investigation has been accomplished. As shown in the decisions that post-date *Kim*, counsel must actively pursue their right to ask context specific follow-up questions of potential jurors to decrease the likelihood that the losing party at trial will be able to appeal the decision based on a violation of the requirements of *Kim*.

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Are Joint Liability and the Right to Contribution Dead?

Kirby G. Mason

Joint liability among defendants and the corresponding rights of contribution impact plaintiffs' and defendants' strategy and conduct in litigation. If such rights were abolished, the solvency of each of the defendants would play a greater role in decisions to file suit, and would impact the relationships among co-defendants in mediation, settlement negotiations and litigation. Undoubtedly, developing persuasive methods to differentiate degrees of fault would become more significant

The Law Prior to Tort Reform

Under common law, no apportionment of damages among joint tortfeasors was allowed. This approach served to increase an injured plaintiff's chance of recovering the amount awarded in a favorable verdict because the insolvency of an individual defendant could be overcome by the assets of another responsible party. While not entirely equitable to individual defendants, the rationale of this policy was that it was better for the wrongdoers to bear the loss as opposed to an innocent plaintiff who had sustained harm. The common law rule applies unless the legislature enacts a statute which expressly contradicts it.

Prior to the tort reform legislation enacted in 2005, Georgia had three principal statutes directly bearing on the liability of joint tortfeasors and the apportionment of damages: O.C.G.A. § 51-12-31; O.C.G.A. § 51-12-32; O.C.G.A. § 51-12-33.

Prior to the enactment of tort reform, O.C.G.A. § 51-12-31 read:

> 51-12-31 Recovery against joint trespassers.
>
> Except as provided in Code Section 51-12-33, where an action is brought jointly against several trespassers, the plaintiffs may recover damages for the greatest injury done by any of the defendants against all of them. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

This statute related to the plaintiff's right to recover the entire amount of damages from any of the joint tortfeasors and indicated that the jury **could** apportion the damages among the defendants. If done, the judgment was to be entered severally. Although the language of the statute did not limit its application, courts historically interpreted the statute to apply **only to cases involving injury to property**. Hightower v. Landrum, 109 Ga. App. 510 (1964); Craven v. Allen, 118 Ga. App. 462 (1968); Jones v. Hutchins, 131 Ga. App. 808 (1974). Courts also held that while the jury could elect to apportion the amount of damages to each responsible defendant, the defendants were not entitled to demand such apportionment. Ivey v. Cowart, 124 Ga. 159 (1905); General Oil Co. v. Crowe, 54 Ga. App. 139 (1936).

The second statute, O.C.G.A. § 51-12-32, provided:

> O.C.G.A. § 51-12-32 Right of contribution among joint trespassers; effect of settlement.
>
> (a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.
>
> (b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.
>
> (c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims of injury to person or property or for wrongful death and release therefrom.

This statute generally provided that a joint tortfeasor who paid damages was entitled to contribution from other liable defendants.

Prior to tort reform, the third relevant statute, O.C.G.A. § 51-12-33, read:

> 51-12-33 Apportionment of award according to degree of fault; individual liability.
>
> (a) Where an action is brought against more than one person for injury to person or property and the plaintiff is himself 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, may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if 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.
>
> (b) Subsection (a) of this Code section shall not affect venue provisions regarding joint actions.
>
> (c) This Code section shall apply only to causes of action arising on or after July 1, 1987.

This statute generally permitted the jury to apportion damages in a personal injury or property damage case where the plaintiff was contributorily negligent and partially responsible for the harm. Again, the jury was given the ability to apportion the damages, but was not obligated to do so. If done, however, each defendant was severally liable for their proportionate share and consequently, had no right of contribution from the other defendants.

The Law after Tort Reform

In 2005, tort reform legislation was enacted which amended O.C.G.A. § § 51-12-31 and 51-12-33. While it appears that the intent of the legislature may have been to abolish joint liability, the amendments did not expressly state such intention. Additionally, the amendments did not encompass all pertinent statutory language, leaving conflicts among the existing statutes and creating the opportunity for parties to argue about whether joint liability and the corresponding right of contribution are dead. This opportunity is being tested in the courts.

Effective on February 16, 2005, the amended O.C.G.A. § 51-12-31, read as follows:

> 51-12-31 Recovery against joint trespassers.
>
> Except as provided in Code Section 51-12-33, where an action is brought jointly against several ~~trespassers~~ persons, the plaintiffs may recover damages for ~~the greatest~~ an injury done by any of the defendants against ~~all of them~~ only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

The purpose of the changes in this statute is subject to some speculation. It may be that the purpose of changing "trespasssers" to "persons" was intended to expand the scope of the statute beyond property cases to personal injury matters. Perhaps not. Perhaps it was merely discarding older language and replacing it with more modern terms. It may be that the change relating to recovery against "only the defendant or defendants liable for the injury" was meant to require recovery proportional with fault, but it does not explicitly say this, and may only be intended to specify that liable defendants are subject to the verdict. If the former, it is certainly unfortunate that the legislature left the words "**may** specify the particular damages to be recovered of each defendant" in the next line unchanged, as "may" is commonly interpreted as optional rather than compulsory.

O.C.G.A. § 51-12-32 relating to contribution was left unchanged. If the Legislature intended to require apportionment of liability, in all cases there would be no need for this statute. The fact that the Legislature did not delete it may suggest that the Legislature did not intend to require apportionment of liability in all circumstances.

Each of the two statutes just mentioned begin with the introductory phrase "Except as provided in Code Section 51-12-33 . . .." O.C.G.A. § 51-12-33 was amended in many respects and the consequences of all of these amendments are beyond the scope of this article. As it relates to the issue of joint liability, however, the statute has been amended as follows:

> 51-12-33 Reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties.

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damage to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution . . . .

By the plain reading of the statute, it applies to situations involving property and/or personal injury. Upon first blush, it appears that it applies only to situations where the plaintiff is at least partially responsible, as was the case in the previous version. However, a closer reading of section (b) appears to indicate that even if plaintiff is not at fault and damages are not reduced, the trier of fact must apportion damages. ("Where an action is brought against more than one person, the trier of fact, after reducing the amount of damages attributable to plaintiff's conduct, ***if any***, shall apportion liability among the responsible defendants"--***shall*** being mandatory rather than permissive).

It is difficult to reconcile all of these statutes except in the situation where the plaintiff is to some degree at fault. If courts continue to interpret O.C.G.A. § 51-12-31 to apply ***only*** to property cases, no conflict arises in the application of the mandatory apportionment statute, O.C.G.A. § 51-12-33, to personal injury cases. However, a direct conflict exists with regard to property damage cases where one statute provides the jury with the option of apportioning damages while the other statute requires apportionment. The conflict between statutes also exists if O.C.G.A. § 51-12-31 is interpreted as now being applicable to personal injury cases. In such event, the mandatory

apportionment statute's language would render the other two statutes superfluous.[1]

While an important rule of statutory construction is to ascertain the intent of the legislature, Cotton v. Phillips, 280 Ga. App. 280 (2003), and there is evidence that the purpose of the statutory changes was "to ensure that a defendant only pays for his/her fair share of the damages for which he/she is responsible according to his/her percentage of fault," GA S. Weekly, 2005 Reg. Sess. No. 5, such interpretation creates conflicts with the other two statutory provisions and contradicts the legislative purpose expressed in relation to them. As a result of the conflicting provisions, the current state of the law is uncertain.

In the case of Bunkley-Walton v. CSX Transportation, Inc., Civil Action No. 06A46436-2, a case tried in the State Court of Dekalb County in December 2007, the issue of joint and several liability was addressed. CSX contended that the legislature had eliminated joint liability and required apportionment of damages. Defendants countered that this was not so. In the end, the parties and court agreed upon a jury instruction informing the jury that it could, but was not obligated to, award damages against the individual defendants.

Further, the court approved a two page verdict form. The first page asked the jury to determine the amount of damages to be awarded and to designate the individuals liable. The second page stated "You, the jury, may choose, but are not required to, apportion your award of damages, if any, among the persons you found to be liable. If you wish to apportion your award, please proceed with the remainder of this sub-section," which then provided a space for the jury to specify the percentage of liability of each defendant, to total 100%. The jury elected to apportion damages. Due to the fact that the liability was weighted heavily on the party with the assets, the effect of this was insignificant with regard to the recovery of damages in the context of the Bunkley-Walton case.

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[1] Under Georgia's rule rules of statutory construction, Georgia Court's are required "to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage." Slakman v. Continental Cas. Co., 277 Ga. 189, 191 (2003); *see also* Cotton v. Phillips, 280 Ga. App.280 (2003).

Naturally, that will not always be the case. For defendants arguing that joint liability has been abolished, they will have to confront the issue of construing O.C.G.A. § 51-12-31 in relation to O.C.G.A. §51-12-32. For defendants desiring joint liability and rights of contribution, they will have to confront the language contained in O.C.G.A. § 51-12-33, requiring apportionment. These inconsistent provisions create fodder for creative legal arguments, and creative legal rulings, but no clear solution.

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Timely Payment of Income Benefits Revisited: *Renu Thrift Store, Inc. et.al v. Figueroa*

By: Andrea R. Mitchell

O.C.G.A. §34-9-221(b) and Board Rule 221(b) requires that indemnity benefits be commenced on the twenty-first day after an employer has knowledge or notice of disability caused by a compensable injury. Because of these strict time constraints, often times benefits are commenced based on an erroneous average weekly wage because the insurer may not have enough time to obtain actual wage records from the employer before twenty-one days elapse. The recent decision in *Renu Thrift Store, Inc. et. al. v. Figueroa* now makes it clear the importance of obtaining such information on a timely basis. Furthermore, *Renu Thrift Store* shows the ramifications of an employer/insurer's unilateral suspension of benefits and its failure to pay indemnity benefits on a weekly basis, rather than bi-weekly or in some other fashion, without a prior Order from the Board.

In *Renu Thrift Store*, the employer/insurer began paying temporary total disability (TTD) benefits to the claimant based on an average weekly wage that was materially more than the claimant's actual average weekly wage. In fact, the employer/insurer paid TTD benefits based on the incorrect average weekly wage for almost five (5) years, from September 2000 to March 2005. Furthermore, for approximately fourteen (14) months, from November 2003 to January 2005, the claimant received double the amount of TTD benefits. On January 26, 2005, after discovering the error, the employer/insurer filed a WC-2 stating that the claimant had been overpaid $9,280.49 in income benefits, which would be credited toward future permanent partial disability (PPD) benefits. On February 11, 2005, the employer/insurer filed an additional WC-2 stating that benefits would be suspended effective February 21, 2005. It is unclear from the facts of the case reported in the decision, but it does not appear as though the February 11, 2005 WC-2 was filed following a regular duty release to return to work.

Needless to say, on April 19, 2005, the claimant filed a motion requesting recommencement of benefits. The employer/insurer timely objected, and in its response, ultimately requested reimbursement in the amount of $23,754.00. A hearing followed, after which the ALJ denied the claimant's request for recommencement of benefits, denied the claimant's request for attorney's fees based on the employer/insurer's unilateral suspension, but granted the employer/insurer's request for a credit. However, the ALJ limited the credit to payments made within two (2) years before the

employer/insurer's request for reimbursement pursuant to O.C.G.A. § 34-9-245, and the ALJ performed its own calculation of the correct TTD rate, which resulted in an award of a credit in the amount of $2,981.39.

On appeal, the Full Board affirmed the ALJ's ruling with respect to the credit awarded to the employer/insurer, but assessed a fifteen percent (15%) penalty against the employer/insurer for making the erroneous payments on a bi-weekly basis, as opposed to a weekly basis, and assessed a $2,000.00 attorney fee against the employer/insurer for its unilateral suspension of benefits. The employer/insurer appealed to the superior court, who affirmed the Board's ruling, which led to the employer/insurer's appeal to the Court of Appeals. In addition to affirming the Full Board's award of late payment penalties for the employer/insurer making TTD payments on a bi-weekly basis, and affirming the award of assessed attorney's fees, the Court of Appeals also affirmed the Full Board's ruling that the employer/insurer was barred from obtaining credit for overpayments made more than two years before its application for reimbursement.

With respect to the holding regarding the credit for overpayment of TTD benefits based on the incorrect average weekly wage, the employer/insurer argued that the two-year bar outlined in O.C.G.A. § 34-9-245 did not apply, but, instead, its right to reimbursement was governed by O.C.G.A. § 34-9-243(a), which, among other things, provides for a credit for benefits paid when they are not due. Typically, O.C.G.A. § 34-9-243 is used by employer/insurer's to obtain a credit for unemployment benefits, short-term benefits, and long-term benefits paid during a time in which TTD benefits were owed. However, in this case, the employer/insurer reasoned that the amounts paid in excess of the correct TTD rate were, in fact, "benefits paid when not due."

In rejecting this argument, the Court of Appeals relied on *Trax-Fax, Inc. v. Hobba*, which held that O.C.G.A. § 34-9-245, as a statute of repose, "destroys the previously existing rights so that, on expiration of the statutory period, the cause of action [for reimbursement] no longer exists." Indeed, a "statute of repose" defines the time period in which a right may accrue. If the injury, or in this case the request for a credit, occurs outside that period, it is not actionable. The Court reasoned that since the purpose of O.C.G.A. § 34-9-245 was to provide claimant's with the certainty of knowing when past benefit payments are no longer subject to reimbursement claims, allowing an employer/insurer to reduce future benefit payments, when those benefits are due and undisputed, based on overpayments made outside the [two-year]

statutory period would result in an outcome inconsistent with the purpose of O.C.G.A. § 34-9-245 and would frustrate the purpose behind the statute.

The Court of Appeals also affirmed the Board's assessment of a fifteen percent (15%) penalty against the employer/insurer for making bi-weekly, as opposed to weekly, payment of TTD benefits payments on a weekly basis. In doing so, the Court held that O.C.G.A. § 34-9-221(b) **requires** that income benefits be paid in weekly installments." Absent an alternative schedule approved by the Board, failure to comply with this provision can result in assessment of a fifteen percent (15%) penalty. The Court suggests that had the employer/insurer provided a satisfactory explanation (possibly by showing that the parties agreed to bi-weekly payments) or petitioned the Board for an order approving bi-weekly payments, the assessment of late payment penalties would not have been proper.

Finally, the Court affirmed the Board's assessment of a $2,000.00 attorney fee for the employer/insurer's unilateral suspension of benefits. Simply put, the Court agreed with the Board's finding that the employer/insurer's unilateral suspension of benefits without a Board order was unreasonable because the overpayments were entirely the employer/insurer's fault.

Renu Thrift Store does not necessarily shed any new light on the issues of the two-year statute of limitations contained in O.C.G.A. § 34-9-245, the potential for late payment penalties, or the assessment of attorney's fees. However, the case does confirm the Board's strict adherence to following the requirements set forth in the Code with regard to payment of benefits. First, it is clear that the Board is not inclined to deviate from requiring payment of benefits on a weekly basis, even when, as here, the bi-weekly payments actually resulted in the claimant receiving benefits one week early. Second, there are only certain circumstance under which unilateral suspension of benefits is appropriate and deviating from the acceptable circumstances can lead to the assessment of attorney's fees. Finally, it is imperative that claims be monitored regularly to ensure that payments are being made timely and in the proper amount because an employer and its insurer can only recoup overpayments made within two (2) years after its request for reimbursement. Indeed, failure to closely monitor compensable claims can prove to be very costly.

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THE IMPACT OF O.C.G.A. § 24-9-67.1 IN MEDICAL MALPRACTICE CASES

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The Georgia legislature enacted sweeping tort reform in 2005. Its purpose was to address the "crisis affecting the provision and quality of health care services in this state" and to "promote predictability and improvement in … the resolution of health care liability claims …." Ga. L. 2005, p. 1, § 1. While the General Assembly recognized that the reforms would affect other types of civil actions, its central goal was to limit the increasing number of medical malpractice claims and otherwise protect Georgia physicians. *Id*.

As part of the reform, the General Assembly enacted O.C.G.A. § 24-9-67.1, which governs the admissibility of expert testimony in civil cases. Section 24-9-67.1 essentially adopts the federal standards for admission of expert testimony in civil cases and applies additional requirements for expert testimony in medical malpractice cases. The General Assembly expressly codified its intent that, "in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states." O.C.G.A. § 24-9-67.1(f).

Clearly, the General Assembly's purpose was to require a more rigorous scrutiny of expert opinions by trial judges, particularly in medical malpractice cases. But will Section 24-9-67.1 actually realize its goal in creating a paradigm shift in how expert testimony is admitted in medical malpractice cases? Many attorneys have predicted and experienced that little will change in the courts' rulings in medical malpractice cases despite the General Assembly's clear intent. In an insightful article on the topic, Professor Daniel W. Shuman explains that "[n]otwithstanding the call for courts to address claims of medical expertise more rigorously under *Daubert*, subsequent case law does not reflect that this potential has been realized." *Expertise in Law, Medicine, and Health Care*, 26 J. Health Pol., Pol'y & L. 267, 278 (2001).

This article is part one of a two-part series that will address the relevance of O.C.G.A. § 24-9-67.1 to medical malpractice cases, its application by Georgia courts and proposed strategies for strengthening the judiciary's interpretation of the statute. This part discusses the application of the new statute to expert testimony relating to the standard of care in medical

malpractice cases. The next article will discuss the application of the statute to expert testimony on the element of causation.

A. Georgia law pre-reform.

Prior to the tort reform, Georgia courts welcomed the guidance of expert witnesses in civil trials. O.C.G.A. § 24-9-67 commanded, "[t]he opinions of experts on any question of science, skill, trade, or like questions shall always be admissible." A more lenient admissibility standard could hardly be written. Notwithstanding the broad language of the statute, there were some minimal limitations in place. Courts required a requisite level of education, skill, or experience in the expert's field. They also required that any scientific procedures or techniques used to develop the testimony must have "reached a scientific stage of verifiable certainty to be admissible in the trial of this case." *See Harper v. State*, 249 Ga. 519, 525-526 (1982). While this "verifiable certainty" test would seem to be more stringent than the *Daubert* analysis discussed below, the doctrine was rarely applied under Georgia law.

The recent case of *Home Depot U.S.A., Inc. v. Tvrdeich*, 268 Ga. App. 579 (2004), illustrates the courts' lenient approach to scientific matters under the former statute. There the plaintiff fell while shopping in a Home Depot store. She began suffering chronic debilitating headaches, underwent a surgical fusion of two vertebrae, and, ultimately, was diagnosed with an autoimmune connective tissue disorder. *Id*. at 580. Can a slip and fall cause an autoimmune connective tissue disorder? This was the question before the court.

Home Depot moved to exclude the expert's opinion because whether "trauma can cause the onset of the disease was a novel scientific theory which had not reached a scientific stage of verifiable certainty, rendering the evidence inadmissible under *Harper*." *Id*. The plaintiff did not dispute that the scientific theory was truly novel and not at a "stage of verifiable certainty," despite the clear ramifications under the *Haper* precedent. However, the trial court admitted the opinion without analyzing the substance of the expert's opinion, or the scientific evidence from which it derived. The court's decision was upheld on appeal because Georgia courts limited *Harper* to instances when the underlying scientific procedure was *actually presented in the trial* (which is almost never). Because the experts "drew their conclusions from testimony and evidence in the record, rather than from any

scientific test or technique," the "verifiable certainty" test did not apply. *Id*. at 583.

As demonstrated in *Home Depot*, "Georgia evidence law favor[ed] the admission of relevant expert opinion testimony, leaving the jury to determine the weight to give such evidence." *Id*. at 581. Rarely, if ever, would a court analyze the techniques or level of scientific analysis required to render an opinion, even if the opinion was a novel scientific approach. Hence, a witness who qualified as an expert in the field was given *carte blanche* authority to provide an opinion, regardless of whether it was based on legitimate scientific evidence or not. *Id.*; s*ee Layfield v. DOT,* 280 Ga. 848, 849 (2006) ("In Georgia, properly qualified expert witnesses 'may render an opinion on any matter within their realm of expertise, so long as it is based upon conclusions drawn by the expert that the jury could not ordinarily determine for themselves.'"); *see also id*. (Sears, j., dissenting) ("Under the majority opinion, summary judgment will never be appropriate so long as a party can find an expert to make a statement supporting that party's case, even if that statement is nothing more than an unsupported conclusion.").

O.C.G.A. § 24-9-67.1 purports to change Georgia law by essentially adopting federal law governing expert testimony as found in Federal Rule of Evidence 702 and the United States Supreme Court's *Daubert* opinion and its progeny. Subsection (b) of the statute provides that

> If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

O.C.G.A. § 24-9-67.1(b). Subsection (f) of the statute states that Georgia courts may draw on United States Supreme Court decisions and federal cases

that have applied these standards. The three United States Supreme Court decisions cited in the statute – *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999) – interpret and apply Rule 702 of the Federal Rules of Evidence, which is nearly identical to O.C.G.A. § 24-9-67.1(b).

B. The Generic Daubert Analysis

In *Daubert*, the United States Supreme Court recognized that expert testimony carries special dangers to the fact-finding process because it "can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force … exercises more control over experts than over lay witnesses."
509 U.S. at 595. The Court thus created a gatekeeping role for judges, and directed them to "ensure that any and all scientific testimony or evidence is not only relevant, but reliable." 509 U.S. at 589 (emphasis added). This gatekeeping function applies not only to scientific testimony but also, more generally, to all expert testimony. *See Kumho Tire*, 526 U.S. at 141. The primary inquiry established by *Daubert* is whether the specific testimony of an expert is sufficiently supported by scientific facts. This is premised on the notion that even a "supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based on some recognized scientific method." *McDowell v. Brown*, 392 F.3d 1283, 1293 (11th Cir. 2004).

Daubert established a two-pronged analysis to determine the admissibility of the proffered expert testimony based on its (1) reliability and (2) relevance. To meet the reliability standard, the testimony must be "scientific," meaning grounded in the methods and procedures of science, and must constitute "knowledge," meaning something more than subjective belief or unsupported assumptions. *Daubert*, 509 U.S. at 590. *Daubert's* reliability prong sets out four guideposts that a district court may consider in assessing the reliability of the expert testimony, which include, but are not limited to: (1) whether the expert's methodology has been tested or is capable of being tested; (2) whether the technique has been subjected to peer review and publication; (3) the known and potential error rate of the methodology; and (4) whether the technique has been generally accepted in the proper scientific community. *See Daubert*, 509 U.S. at 593-94; *Kumho Tire*, 526 U.S. at 149; *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999).

"[A] court should meticulously focus on the expert's *principles and methodology*, and not on the conclusions that they generate." *McDowell*, 392 F.3d at1299 (emphasis added, citing *Allison*, 184 F.3d at 1312 and *Daubert*, 509 U.S. at 595). "A court is expected to reject any subjective belief or speculation." *Ammons v. Aramark Unif. Servs*., 368 F.3d 809, 816 (7th Cir. 2004)

The Advisory Committee Notes to Federal Rule of Evidence 702 offer the following five factors for the court to consider on the issue or reliability:

> (1) Whether experts are proposing to testify about matters flowing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
> (3) Whether the expert has adequately accounted for alternative explanations;
> (4) Whether the expert is being careful as he would be in his regular professional work outside his paid litigation consulting; and
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

The relevance prong of the *Daubert* analysis asks whether the expert testimony is "'relevant to the task at hand,' ... i.e., [whether] it logically advances a material aspect" of the case. *Daubert*, 509 U.S. at 591. The testimony must be an appropriate "fit" with respect to the offered opinion and the facts of the case and have a justified scientific relationship to the pertinent facts. *Id*. at 591 (holding "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes"). After determining that the principles relied upon by the expert are valid, a court should thus scrutinize "whether those principles and methods have been properly applied to the facts of the case." Advisory Committee Notes to Rule 702. "For example, there is no fit where a large analytical leap must be made between the facts and the opinion." *McDowell*, 392 F.3d at 1299. *See, e.g., General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (animal studies showing one type of cancer in mice cannot establish causation of another type of cancer in humans because it is "simply too great an analytical gap between the data and the opinion offered"). Judges should "exclude proffered scientific evidence … unless they

are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury." *Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1321 n.17 (9th Cir. 1995).

A trial court is thus required to act as a gatekeeper "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152 (emphasis added). "Something doesn't become 'scientific knowledge' just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were 'derived by the scientific method' be deemed conclusive." *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1316 (9th Cir. 1995).

Finally, the Court has made clear that the above criteria are simply guideposts. The *Daubert* inquiry is flexible, and the specific factors set out in *Daubert* should be considered "where they are reasonable measures of the reliability of expert testimony." *Kumho*, 526 U.S. at 152.

C. Standard of Care opinions.

For medical malpractice cases, the general rule in Georgia prior to section 24-9-67.1 was that a physician's testimony must be introduced to inform the jurors of the standard measure which they are to use in measuring the acts of the doctor in determining whether the doctor exercised a reasonable degree of care and skill. *Horney v. Lawrence*, 189 Ga. App. 376, 377 (1988). The "standard of care" applicable to physicians in Georgia is "that degree of care and skill ordinarily employed by the medical profession generally, under similar conditions and like surrounding circumstances." *Critser v. McFadden*, 277 Ga. 653, 655 (2004). As historically applied in Georgia, there is little analysis that could be performed by a judge to screen the proposed expert prior to admitting an opinion on the standard of care. Generally, any physician was accepted as having knowledge of the degree of care and skill ordinarily employed by his fellow practitioners from the same school of medicine. *Bethea v. Smith*, 176 Ga. App. 467 (1985). Once an expert was found qualified, his opinion was admitted and the judgment of his methods and procedures was left to the jury. *Id*.

Professor Shuman reports that even in the *Daubert* era, little has changed in the judiciary's acceptance of expert standard of care opinions. 26 J. Health Pol., Pol'y & L. 267. Some courts reject outright *Daubert's* application to standard-of-care issues in medical malpractice cases, while

others show preference for a conventional analysis because the expert's medical opinion is based on practical experience and acquired knowledge rather than a specific scientific experiment. *Id*.

Georgia's new statute mandates a more drastic change by establishing minimum objective criteria related to the education, skill, or experience required for an expert to testify as to the standard of care applicable to physicians. Section 24-9-67.1(c) requires an expert witness to have been licensed in Georgia and practicing or teaching "in the area of practice or specialty in which the opinion is to be given" for at least three of the five years preceding the alleged medical negligence. The relevant area of practice is not the area of practice of the defendant doctor, but the area of practice relevant to the acts or omissions that the plaintiff alleges constitute malpractice. *Nathans v. Diamond*, 282 Ga. 804, 806 (2007).

The Georgia Supreme Court has accepted this restriction and narrowly construed the term "area of practice or specialty" to strictly limit the types of physicians who are qualified to testify in a given case. For example, in *Nathans*, an otolaryngologist allegedly failed to adequately inform the plaintiff of the potential risks and complications of a surgical procedure. The Court held that the area of specialty "in which the opinion is to be given" concerns the type of otolaryngology surgery performed on the plaintiff and the risks associated with it. 282 Ga. at 806. Applying this narrow definition, the court upheld the exclusion of an expert who had not performed surgeries like the one in question or obtained informed consents for similar surgeries. While he had consulted with surgeons such as otolaryngologists, he did not sufficiently demonstrate that the surgeries he had performed involved risks similar to those involved in the lawsuit. *Id*.

The Georgia Court of Appeals extended the limitations of § 24-9-67.1(c) even further by focusing on language requiring that the expert have practiced in the specialty "with sufficient frequency to establish an appropriate level of knowledge" in performing a procedure, diagnosis, or treatment at issue. *Spacht v. Troyer*, 288 Ga. App. 898, 902 (2007). In *Spacht* the defendant allegedly misdiagnosed a vascular ring. The court held that the proffered expert satisfied the "area of practice or specialty" requirement because he had "over thirty years of experience in diagnosing and surgically managing children with vascular rings." However, the court excluded his testimony because the expert did not indicate when he had last diagnosed a vascular ring. Thus, he could not demonstrate that he had an "appropriate level of knowledge" to testify as to the procedure at issue in the case.

In both the *Nathan* and *Spacht* cases, Georgia courts have demonstrated that they are willing to disqualify Georgia experts and apply *Daubert*-like criteria. A keen legal practitioner will focus his attention on narrowly defining the "area of practice or specialty" in which the alleged negligence occurred. In *Nathan*, the court narrowly defined the area of practice as the particular risks associated with one type of surgery. In *Spacht*, the court narrowed its analysis to the specific *diagnosis* of vascular rings rather than the *management* of vascular rings.

As demonstrated in *Nathan* and *Spacht*, § 24-9-67.1(c) successfully increased the courts' examination of medical experts.
Georgia courts appear to be bucking the trend of ambivalence to the *Daubert*-type inquiry in medical malpractice cases. The *Nathan* Court's analysis closely resembles that "relevance" prong of a *Daubert* inquiry, though the opinion does not reference any federal precedent in the process. Had the Court intentionally applied the *Daubert* rubric, it would have similarly held that while the expert might have sufficient scientific basis to opine on the risks of another type of surgery, his scientific knowledge or data was not a sufficient "fit" to be relevant to the issue before the court. The *Spacht* court similarly scrutinized the expert's experience in the relevant procedure to the point of requiring him to state a date of the last diagnosis of the relevant condition.

However, Georgia courts have yet to truly apply a *Daubert* inquiry to challenge a substantive opinion proffered by an expert. Recall that the point of the *Daubert* analysis is to determine whether the substantive testimony of a medical expert is sufficiently supported by scientific facts. While Georgia courts have accepted their role of thoroughly applying the objective criteria of § 24-9-67.1(c), will the courts truly apply *Daubert* and endeavor to evaluate a substantive opinion of a medical expert on the standard of care? Recent case law from the Georgia Court of Appeals seems to suggest not.

In *Cotten v. Phillips*, 280 Ga. App. 280 (2006), an appellant challenged the objective credentials of an expert to testify as to standard of care. The court ultimately held that § 24-9-67.1(c) does not require that plaintiff experts and defendant doctors share the same specialty. *Id*. at 285. However, in the process it stated that "Daubert's role of ensuring that the courtroom door remains closed to junk science is not served by excluding testimony such as this expert's that is supported by extensive relevant experience." *Id*. Subsequently, in *Mays v. Ellis*, 283 Ga. App. 195, 199

(2007), the appellant challenged both an expert's objective credentials under § 24-9-67.1(c) and his substantive testimony under § 24-9-67.1(b) and *Daubert*. Though holding that the appellant had not preserved this issue for appeal, the Court made a passing citation to *Cotton* and suggested in dicta that it would admit testimony that is "supported by extensive relevant experience." 283 Ga. App. at 199, n.3.

Finally, in *Canas v. Al-Jabi*, 282 Ga. App. 764, 792 (2006) (overruled on other grounds), Canas challenged the principles and methods relied on by an expert for Al-Jabi to demonstrate the standard of care because two of the sources he identified disagreed with his opinion, and the third could not be considered medical literature. The court declined to perform a *Daubert* analysis and summarily concluded that, viewing the testimony as a whole (without elaboration), "the trial court was authorized to conclude that he applied reliable principles and methods reliably to the facts of the case." *Id*. The court was comforted by the fact that "through cross-examination, the appellees have tested and may continue to test [the expert's] application of the authorities upon which he relies to the facts of the case." *Id*.

The Georgia Supreme Court has yet to opine on this issue. While it has previously demonstrated a willingness to vigorously enforce O.C.G.A. § 24-9-67.1, there is a strong trend of adopting a relaxed approach to the *Daubert* inquiry in medical malpractice cases, particularly with regard to the standard of care. In order to overcome this trend, practitioners need to provide compelling arguments that clearly articulate the new statute's requirements and the weaknesses in the expert's testimony as to the applicable standard of care. *See generally* Shuman, 26 J. Health Pol., Pol'y & L. 267.

This begins with questioning the expert witness to establish a record on which to challenge the expert's opinion. Defense attorneys should seize on the building blocks established in *Nathan* and *Spacht* to inquire deeply into the relevant experience of the expert witness. Narrowly pin down the expert to the precise conduct that he alleges was negligent, and then carefully question him as to how he has come to know the standard of care for that narrow subject matter. Questions might cover the following:

1. Narrowing the expert to the precise actions, procedures, or diagnosis that he alleges fell below the standard of care.
2. Specific occasions in which the expert has performed that precise procedure, diagnosis, or technique.

3. Specific results from the procedure observed in his personal experience.
4. Does his knowledge flow from *his individual* practice or from "consultations" with other physicians.
5. Specific occasions on which he has witnessed other physicians performing the procedure to discern the standard of care.
6. What journals establish that the technique is "standard"?
7. Was the expected action of the Defendant doctor something that was taught in medical school, in residency, through experience?
8. Have surveys been performed to determine consistent application by physicians and what were the results of those surveys?
9. What is the efficacy of the recommended alternative procedure(s) or technique(s)?
10. What alternative(s) was available to the physician within the standard of care – known through studies or personal experience?
11. Is the expert's opinion peer reviewed;
12. Is there any disagreement with the expert's opinion among doctors in the area of specialty.
13. What percent of physicians would agree with the expert's opinion if polled?

Hopefully the expert's responses to these inquiries reveal that the expert has not performed any surveys of physicians generally, and has only diagnosed or treated the specific condition in question on a limited number of occasions. Most important, however, is establishing that the expert has little basis for knowing exactly what other medical practitioners would have done under similar circumstances.

Once the expert is on record, the critical *Daubert* factors should be thoroughly explained in a pretrial hearing under O.C.G.A. § 24-9-67.1(d). According to *Schuman,* Many judges are unfamiliar with *Daubert* or its progeny, and most judges feel inadequate to undertake a review of opinions proffered by a purported expert on the subject. Additionally, even if capable enough, judges may not have the time necessary to decipher the scientific issues and truly analyze the expert's substantive opinion. *See Schuman,* 26 J. Health Pol., Pol'y & L. at 283 ("Rigorous independent judicial review of the reliability of the expert's methods and procedures demands more time from an overburdened judiciary. Moreover, it demands a set of skills that are neither

required of those who enter the legal profession nor taught as a required part of the law school curriculum."). Judges must therefore be educated both as to what § 24-9-67.1 and *Daubert* require, and as to the methods of examining the substance of an expert's opinion.

First, emphasize the "gatekeeper" role under *Daubert* and explain that judges are required to make a *"*preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." 509 U.S. at 593. "The judge's role is to see that the jury hears reliable and relevant evidence because of its ability to assist in factual determinations, its potential to clarify issues, and its probative value." *McDowell,* 392 F.3d at 1299. Georgia's statute expressly requires judges to determine of the expert's testimony is based on sufficient information and whether he has applied reliable scientific principles appropriately to the facts of the case.

It may be necessary to point out that the statement in *Cotten* (that courts should not exclude testimony from an expert "that is supported by extensive relevant experience."), flies directly in the face of the statute and evades the fundamental point of *Daubert*, which is that judges must assess the validity of the expert's substantive opinion. *Daubert*¸ 509 U.S. at 591 (Courts must assess "whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."). The very purpose of the *Daubert* analysis is to prevent a supremely qualified expert from waltzing into court and rendering an "expert" opinion that is not supported by the underlying data and scientific process. *McDowell*, 392 F.3d at 1293.

Briefs should incorporate common citations that the underlying information and the expert's opinion should have a logical connection beyond the *ipse dixit* of the expert. *GE v. Joiner*, 522 U.S. 136, 146 (1997). A court should analyze this connection and "may conclude that there is simply too great an analytical gap between the data and the opinion proffered" to allow such expert testimony. *Id*. Once again, this seems to conflict with the premise established in *Cotton*, which would accept the opinions of a well-qualified expert without performing a gatekeeper review.

In briefs to the court, practitioners might strategically point out the failure of the expert to qualify under the objective criteria of O.C.G.A. § 24-9-67.1, followed by a *Daubert* analysis indicating why the substantive foundation of the expert's opinion is lacking based upon his answers to the above questions. Courts often recognize that when "the relevant reliability

concerns may focus upon personal knowledge or experience, inquiries into an expert's qualifications, the reliability of his proffered opinion and the helpfulness of that opinion frequently overlap to a significant degree." *United States v. Frazier*, 387 F.3d 1244, 1296 (11th Cir. 2004) (quotes and citation omitted, citing *Kumho Tire*, 526 U.S. at 150).

If asserted together, the courts' inclination to rule under the objective criteria of O.C.G.A. § 24-9-67.1 may give the overlapping *Daubert* analysis some teeth. This approach also allows the practitioner to avoid the *Cotton* view of well-qualified experts. Unless the expert has worked with other doctors on a regular basis, he likely does not have a scientific explanation to legitimately explain how he determined the applicable standard of care. Point out the utter lack of survey evidence to demonstrate that the expert is merely testifying from his own limited personal experience. Any flaws in the expert's experience under the objective criteria in § 24-9-67.1(c) can thus be highlighted by attacking the substantive opinions that he offers.

Georgia law expressly excludes an expert's "personal views and personal opinions as to the care and treatment he himself would have rendered." *Johnson v. Riverdale Anesthesia Assocs*., P.C., 275 Ga. 240, 242 (2002). This concept is so ingrained in Georgia law that an expert is not permitted to testify as to the "course of treatment he personally would have followed." *Id*. Ironically, the basis of most experts' opinions is exclusively derived from their personal experience and the course of treatment they would have followed. The objective criteria required by § 24-9-67.1(c), simply assures a minimal level of personal experiences on which to base on opinion. But this objective inquiry should be the beginning point of a *Daubert* analysis and not the ending point. *Legg v. Chopra*, 286 F.3d 286, 292 (6th Cir. 2002).

Even if the expert meets the objective criteria, his personal experience alone should not be sufficient to support a scientifically-based opinion as to the relevant standard of care. Individual experiences (i.e., case studies) are generally not a sufficient foundation for scientific opinion. *McClain v. Metabolife Int'l, Inc*., 401 F.3d 1233, 1253 (11th Cir. 2005) ("Because they are anecdotal, case studies lack controls and thus do not provide as much information as controlled epidemiological studies do . . . . [They] must be regarded with caution."). Instead, courts look to studies that consider a critical mass of events in order to produce legitimate data. *Id*. As to the standard of care, survey evidence would be the most reliable means of determining the standards ordinarily employed by the medical profession.

A standard of care opinion must inherently focus not on what one doctor does, but on what is the *standard* practice "ordinarily employed by the medical profession generally." *Critser*, 277 Ga. at 655. The reason that an expert cannot testify to what he would have done under the circumstance is that the testimony is presumably inconsequential to the applicable standard. *Johnson*, 275 Ga. at 242. Similarly, an expert who has only viewed a few physicians perform a procedure should not have sufficient knowledge of the standards in the industry. His testimony is more similar to a single case study than a scientific survey of the standards applied in the industry generally.

D. Conclusion

Georgia courts have demonstrated that they will strictly enforce the objective criteria under O.C.G.A. § 24-9-67.1(c) before qualifying an expert to testify in a medical malpractice case. However, so far they appear less willing to apply the *Daubert* analysis suggested under Section 24-9-67.1(f) to examine an expert's substantive opinion.

By challenging an expert under both the objective criteria and the *Daubert* principles in tandem, practitioners may be able to maximize the effect of the statute in excluding medical experts who provide questionable testimony as to the standard of care in medical malpractice cases. They might also gradually convince the courts to shift the paradigm for medical experts such that courts examine the substantive opinion proffered by the medical experts and not just the credentials that make them experts.

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SUBROGATION, ASSIGNMENTS AND LOAN RECEIPTS IN GEORGIA PROPERTY INSURANCE: AN UPDATE

By: Brian T. Moore and Clayton H. Farnham

In the Spring 1995 issue of the Georgia State Bar Journal, *Subrogation, Assignments, and Loan Receipts in Georgia Property Insurance: A Walk Through the Maze* the writers explored the rules and pitfalls of property insurance subrogation.[1] Since that time, the Georgia Court of Appeals has handed down new full-bench cases, expanding on one of the principles treated in the article.

At paragraph IV. Minefields, subparagraph C. Waiver of Claims Based on the Insured's Contract With the Tortfeasor, the Spring 1995 article dealt with the potential for barring subrogation damages based on waivers appearing, or legally implied, in leases, construction contracts, and the like. The seminal case in this area is *Tuxedo Plumbing & Heating Co. v. Lie-Nielson, Inc.*, wherein a covenant by one party to a construction contract to obtain insurance was held to imply that both parties were to be insured, that both parties had further impliedly agreed to look to insurance to cover any damages inflicted by either, and that the subrogated insurer(s) of either were barred from pursuing subrogation claims against the other party.[2] The article dealt with specific waivers of subrogation as well as implied ones.

Thereafter, in *Southern Trust Ins. Co. v. Center Developers, Inc.*, a full-bench review fractured the Georgia Court of Appeals.[3] In *Southern Trust*, the Court dealt with a shopping center fire which had damaged nine insured tenant premises. Seven subrogated insurers, by name, and two tenants filed negligence actions against the property management company, a sign company, and an electrical contractor.[4] Each of the nine leases contained one of three clauses dealing with insurance carried or to be carried, purporting to waive actions for damages between landlord and tenant. The trial court found all actions to be waived, and all nine cases were consolidated on appeal.

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[1] *Georgia State Bar Journal*, Vol. 31, No. 3, Spring 1995.

[2] *Tuxedo Plumbing, Etc. Co. v. Lie-Nielsen, Inc.*, 245 Ga. 27, 262 S.E.2d 794 (1980).

[3] *Southern Trust Ins. Co. v. Center Developers, Inc.*, 217 Ga. App. 215, 456 S.E.2d 608 (1995), *aff'd sub nom., May Apartment Store v. Center Developers Inc.,* 266 Ga. 806, 471 S.E.2d 194 (1996).

[4] If the two tenants' suits were really brought by insurers operating under loan receipts, the record does not reveal it.

The Court of Appeals dealt separately with all three lease clauses, to differing results. The first clause waived subrogation "for loss or damage . . . arising from any cause insured against the . . . fire insurance policy . . . carried by such waiving party". This language was attacked as an impermissible release of one in advance from the consequences of his own negligence under O.C.G.A. § 13-8-2(b), since the lease did not require the carrying of insurance.[5] Without that requirement, argued the insurers, there was no intent to shift the risk to the insurer, leaving the attempt at waiver subject to O.C.G.A. § 13-8-2(b), *supra*.

The court noted that the 1994 case *Glazer v. Crescent Wall Coverings* clearly established that no specific requirement to carry insurance was necessary to give effect to such a waiver arising from a loss actually covered, which "by the terms do not apply in the absence of insurance."[6] The suing parties affected by this lease were therefore barred by the waiver clause.

The second lease clause dealt only with uninsured losses to one of the tenants who was party to the lease. This clause expressly waived "the rights of either against the other" as to damage or destruction by "fire or any other cause recoverable by insurance maintained by either," and required the landlord to maintain fire insurance as to improvements, naming the tenant as an insured.

The Court of Appeals held that "a waiver of subrogation analysis is not germane to the claims for allegedly uninsured losses . . ." This is consonant with *Southern Railway v. Malone Freight Lines*, which held that a subrogated insurer's entitlement to payment was limited to funds actually paid under its obligation to its insured.[7] *Southern Trust* now holds that only those rights are waived in a contract waiver.

The third lease clause waived any and all subrogation by the tenant against the landlord as a result of "any insurance procured by Tenant as herein

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[5] O.C.G.A. § 13-8-2(b): A covenant, promise, agreement, or understanding in or connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to indemnify or hold harmless the promise against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promise. . .is against public policy and is void and unenforceable. . ..

[6] *Glazer v. Crescent Wallcoverings, Inc.,* 215 Ga. App. 492, 451 S.E.2d 509 (1994).

[7] *Southern Ry. v. Malone Freight Lines, Inc.,* 174 Ga. App. 405, 330 S.E.2d 371 (1983).

required." However, the trouble for the landlord, here, was that all it had required in the lease was the obtaining of liability insurance. The Court of Appeals reversed the trial court's finding of a waiver in this instance, because liability insurance indemnifies only against "non-contractual legal liability" of third parties, and accordingly, could not encompass a mutual exculpation of each other by the landlord and tenant through a contract. Accordingly, subrogation was waived.

The lessons from this case underscore the point made in the original article to the effect that "an additional layer of complexity" in this area of the law lies in contracts the insured may have entered into with the tortfeasor. It also underscores that it behooves the defendant which is sued for property damage, and which has such a contact with its plaintiff, to investigate its opportunities to determine if the suit is rooted in subrogation. Such is obvious, of course, if it is brought in the insurer's name. However, the "plaintiff" may actually be an insurer operating in its insured's name pursuant to a loan receipt, and if so, the defendant may have a significant opportunity to bar a substantial part or all of the plaintiff's action. Finally, the case is a message to those drafting or approving the formats of leases, construction contracts and the like, to be sure that the purported waiver of subrogation is properly drawn to bring about its intended effects.

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PREMISES LIABILITY UPDATE 2008

Lynn M. Roberson

This paper outlines current premises liability law in Georgia appellate courts. Premises liability covers a broad spectrum of cases, including *inter alia* slip and fall, trip and fall, and negligent security claims. Dram shop liability is also covered.

1. Premises Liability Generally:

In Georgia, "an owner or occupier of land has a duty to exercise ordinary care to protect invitees from 'unreasonable risks of harm of which the owner has superior knowledge.'"[1] Although details may change, the basic formula remains the same.

These risks take many forms. In Frank Robinson Flowers, II v. Wal-Mart Stores,[2] the risk was a defective ladder that collapsed beneath an employee / plaintiff. Many cases are based on the hazardous presence of foreign substances, like liquid or trash, on premises floors. Defendants can be liable if they should know the substance is there and fail to remove it. Other risks include negligent lack of security that facilitates a third party's criminal act. In Post Properties v. Doe,[3] a woman sued her apartment complex for negligent security after being raped in her first floor apartment.

Georgia law is clear regarding what plaintiff must prove. For a plaintiff to recover from a premises owner, s/he "must establish both that the landowner had actual or constructive knowledge of the hazard, and that the invitee lacked knowledge of that hazard despite the exercise of ordinary care."[4] Thus, "the **true** basis for an owner's liability is his superior knowledge of the existence of a condition that could subject his invitees to an unreasonable risk of injury."[5] There is no duty to prevent a reasonably unanticipated hazard.

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[1] Frank Robinson Flowers, II v. Wal-Mart Stores, Inc., 2005 U.S. Dist LEXIS 25578, at *4 (2005) (citing Hamblin v. City of Albany, 272 Ga. App. 246, 612 S.E.2d 69 (2005).).
[2] Id.
[3] Post Properties v. Doe, 230 Ga. App. 34, 495 SE2d 573 (1997).
[4] Frank Robinson Flowers, 2005 U.S. Dist. LEXIS at * 5.
[5] Id. (emphasis added).

Constructive knowledge is when a party objectively *should have known* of a hazard but subjectively did not.[6] A plaintiff proves defendant's constructive knowledge one of two ways: (1) by demonstrating that defendant's employee was in the vicinity with the opportunity to discover / remove the hazard; or (2) by demonstrating that the hazard existed long enough that it should have been discovered if the proprietor reasonably inspected the area.[7] In Somers v. M.A.U. Inc.,[8] the Court of Appeals reversed the grant of summary judgment to the defendant in a personal injury suit arising out of Ms. Somers' slip and fall on a softball-sized accumulation of sticky liquid on the defendants' restaurant floor, close to the counter. The Court held that a factual question existed as to whether the defendants had constructive knowledge of the hazard, since three restaurant employees with a clear, unobstructed view of the floor area where the fall occurred were within a short distance of the hazard and Ms. Somers testified that the hazard was visible (even though she did not see it before she fell).

In Washington v. J.D. Royer Wholesaler Florist,[9] plaintiff could not recover for tripping over a door mat because defendant had no knowledge of the hazard. The mat turned up at the edge when plaintiff opened the door. Then, he tripped over this edge stepping through the door. Defendant had no constructive knowledge of this hazard because the edge was not frayed and didn't tend to turn up. Moreover, no employee had the opportunity to help the plaintiff before he tripped.

2. The Summary Judgment Standard

As we are well familiar, many defendants pursue early resolution through Motions for Summary Judgment in premises liability cases. In Lau's Corp. v. Haskins, the Georgia Supreme Court set forth the standard to be applied in ruling on Motions for Summary Judgment: "To prevail at summary judgment…the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law."[10]

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[6] See "**Premises Cases: Adequate Inspection"** section, Infra.
[7] See Washington v. J.D. Royer Wholesale Florist, 275 Ga. App. 407, 620 S.E.2d 626 (2005).
[8] Case No. A08A0612 (Ga.App., Feb. 22, 2008).
[9] Id.
[10] Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474 (1991).

The Georgia Supreme Court established a high standard for premises liability cases in Robinson v. Kroger Co.[11] The evidence must be "plain, palpable, and undisputed."[12] Thus, "where two reasonable minds can differ" as to "whether an owner / occupier breached the duty of care to invitees and whether an invitee exercised reasonable care for personal safety, summary adjudication is not appropriate."[13]

Under this standard, many claims survive summary judgment. In Rozy Investments, Inc. v. Bristow, [14] plaintiff's claim for injuries after she tripped over a gas station hose survived. Unlike the hose in question, "she and most customers" hung the gas pump hoses "in such a manner that the hose would lie only on the gas pump island" and not the pavement.[15] Thus, although plaintiff used this pump for 60 years, the court held that she may not know the excess hose could lie on the ground. In other words, she may not have equal knowledge of the risk.

Defendant countered by arguing the "plain view" doctrine applied because the hazard "was in plain view at a location where it is customarily found and can be expected to be."[16] The court disagreed, stating, "our law does not require…Bristow keep her eyes firmly on the ground."[17] Citing Robinson, it held "plaintiff's lack of ordinary care for personal safety" was a triable issue of fact.[18]

Compare, however, Garrett v. Hanes,[19] wherein the court affirmed summary judgment, noting that the plaintiff did not notice that the porch extended slightly over the top step. Instead, "'she was looking up.'"[20] She could not recover for tripping over this overhanging edge because she should have seen it, the step was not negligently designed, constructed, or maintained, and—although defendant's home—there was no superior knowledge of the risk. See also Rowland v. Murphy Oil USA, Inc.,[21] where the Court of Appeals affirmed summary judgment to the gas station. Plaintiff

[11] 268 Ga. 735, 493 S.E.2d 403.
[12] Id. at 739.
[13] Id. at 738.
[14] 276 Ga. App. 278, 623 S.E.2d 171 (2005).
[15] Id. at 280.
[16] Id. at 283.
[17] Id. at 281-282.
[18] Id. at 283.
[19] 273 Ga. App. 894, 616 S.E.2d 202 (2005).
[20] Id. at 895.
[21] 280 Ga. App. 530, 634 S.E.2d 477 (2006).

tripped and fell over the legs of an advertising sign. The Court found the station was not liable as the sign was a static condition.

In addition, "mere speculation" is "not enough to defeat summary judgment."[22] In Bryant v. DIVYA, Inc.,[23] plaintiff slipped in the hotel shower, although anti-skid strips lined the floor and a safety bar ran along the back. The plaintiff complained that this was not reasonable: it was not enough to prevent her fall. The court noted she "did not allege that [there was] any transient foreign substance on the shower floor…other than the soap she herself used."[24] It concluded that there was no evidence of a hazard "other than her fall."[25] Considering the previous lack of complaints and compliance with safety code, the injury alone could not create a basis for recovery.[26]

Similarly, in Norman v. Jones Lang Lasalle Americas, Inc.,[27] the court noted that "although Norman, as nonmovant, is entitled to all reasonable inferences from the evidence presented, such inferences cannot be based upon mere conjecture or possibility."[28] In Norman, plaintiff tripped over boxes entering her darkened office Monday morning. The boxes contained lights to be installed in the office that were not there before the weekend. The maintenance staff denied knowing anything about the boxes. Moreover, the plaintiff's allegation that "common sense dictates" the proprietor "left the boxes in her office is insufficient to create a jury issue."[29] Under Lau's, the court held the Defendant demonstrated that "there is no evidence to support at least one essential element" of plaintiff's claim and plaintiff could not point to specific competent evidence as to a fact question: summary judgment was appropriate.

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[22] Bryant v. DIVYA, 278 Ga. App. 101, 5, 628 S.E.2d 163 (2006). See "**Proof of Fault and Negligence Per Se**" section, infra.
[23] Id.
[24] Id. at 5.
[25] Id.
[26] See also Ford v. Bank of America Corp., 277 Ga. App. 708, 627 S.E.2d 376 (2006) ("'Proof of nothing more than the occurrence of the fall is insufficient to establish proprietor's negligence… Without first establishing that a dangerous condition existed, the plaintiff cannot establish that the defendant know about the danger and therefore cannot recover."); Gibson v. Symbion, Inc., 277 Ga. App. 721, 627 S.E.2d 84 (2006) (Plaintiff slipped down a handicapped ramp because, from her angle, she couldn't see the slope. Defendant was entitled to summary judgment because there was no evidence of improper design or construction.)
[27] 277 Ga. App. 621, 627 S.E. 382 (2006).
[28] Id. at 10.
[29] Id. at 11.

In contrast, credibility and conflicting accounts may create an issue of fact. In Nancy Fuchs v. Wal-Mart Stores, Inc.,[30] Plaintiff's story was materially different from the cashier's. While the cashier produced evidence that she handled a 24-pack of colas with care, Plaintiff testified that the cashier's sloppy attempt to stuff the pack into a small bag caused the cola to spill and Plaintiff to slip. The court held, "there being contradicting evidence as to issues of negligence, under the Robinson standard, this court cannot conclude that no material issue of fact remains."[31]

See also McNeely v. Wal-Mart Stores, Inc.[32], wherein the Court overturned summary judgment granted to Wal-Mart based upon the testimony of "an off-day employee eye-witness, whose testimony was impeached by a prior felony conviction and by disproving the facts to which he testified. The employee, Stephen Hightower, who was not working that day, testified by affidavit and by deposition that he was in the store as a customer, was sitting in the McDonald's, saw the plaintiff fall, and saw water on the floor, eight to twelve inches in circumference. He testified that when he entered the area five to ten minutes earlier there had been no liquid on the floor. However, Hightower had been convicted in 1970 of possession of a controlled substance and in 1966 of felony breaking and entering in Orlando, Florida, and served a year in prison. He testified under oath that the breaking and entering charge had been thrown out when in fact he pled guilty to the charge to serve five years on probation. After reporting what he saw to Wal-Mart loss control personnel after the fall, he later asked for a promotion and received it along with a 40¢ per hour pay raise. Based upon Hightower's testimony, the trial court granted summary judgment to Wal-Mart. The Court of Appeals reversed, because determination of interest and of the weight and credibility of a witness's testimony and whether the witness has been impeached is uniquely for the jury as triers of the facts.

"It was error for the trial court to grant summary judgment under the circumstances of this case, because the trial court usurped the jury's function, the determination of impeachment and weight and credibility of an impeached witness. . . Under OCGA § 24-9-84, a witness may be impeached by evidence as to his general bad character. The conviction of an offense involving moral turpitude or a felony is a proper method of showing bad character and tends to impeach the credibility of that witness within the meaning of this Code section."

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[30] 2005 U.S. Dist. LEXIS 38051 (2005).
[31] Id. at 10.
[32] 246 Ga.App. 852, 852-853, 542 S.E.2d 575, 577 (2000)

A Plaintiff also may not create a question of fact and avoid summary judgment through contradictory testimony. Pinckney v. The Covington Athletic Club and Fitness Ctr.[33]

Notably, the weight of *defendant's* burden is often unclear. Many plaintiffs believed that the higher standard adopted in Robinson v. Kroger would uniformly defeat defendants' motions for summary judgment. However, in Cleveland v. Snowdrop Properties, N.V.,[34] the Court of Appeals specifically noted, "[a]lthough Robinson v. Kroger changed the burdens on motion for summary judgment with regard to proof of the *plaintiff's* negligence, it did not alter Lau's formula as it applies to proof that the defendant had actual or constructive knowledge of the hazard."[35]

Significantly, the appellate courts currently require defendants to bear a heavier burden on a motion for summary judgment in many premises cases involving the presence of a foreign substance. This burden contradicts the express language of the Georgia Supreme Court in Lau's that instructs,

> If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards. . . **A defendant who will not bear the burden of proof at trial need not affirmatively disprove the non-moving party's case**; instead, the burden on the moving party may be discharged by pointing out, by reference to affidavits, depositions and other documents in the record, that there is an absence of evidence to support the non-moving party's case.[36]

In spite of this apparent mandate, the Court of Appeals carves out an exception for premises liability cases involving foreign substances. The Court now requires that the defendant in a slip-and-fall foreign substance case *affirmatively* disprove the plaintiff's case by introducing evidence that the defendant had no knowledge of the dangerous circumstances in spite of a reasonable inspection procedure.

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[33] 288 Ga. App. 891, 655 S.E.2d 650 (2007).
[34] 232 Ga. App. 447, 501 S.E.2d 546 (1998).
[35] 232 Ga. App. 447, 449 n.1, 501 S.E.2d 546 (1998), cert. denied. See also Steele v. Rosehaven Chapel, Inc., 233 Ga. App. 853, 854, 505 S.E.2d 245 (1998), cert. denied (1999).
[36] Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474. 475-476 (1991)(emphasis added).

In Ingles Markets, Inc. v. Martin,[37] defendant Ingles contended that summary judgment was appropriate because plaintiff could not show how long the slippery liquid was on the floor. The court "emphatically rejected Ingles'" motion for summary judgment and held that defendant had the *initial burden* to introduce evidence of reasonable inspection.[38] It specifically held, "…to prevail at summary judgment based on lack of constructive knowledge, the owner must demonstrate not only that it had a reasonable inspection program in place, but that such program was actually carried out at the time of the incident."[39]

Also, in Straughter v. J.H. Harvey Co., Inc.,[40] the court refused to grant summary judgment. In that case, the shopper slipped on a "green item" in the grocery store.[41] The shopper didn't have to show how long the item was there until the defendant presented evidence of its inspection procedure. To meet this burden, defendant submitted "sweep cards" documenting their inspection. The court held that "even if the cards were admissible, they do not establish defendant's [actual] compliance with reasonable inspection and cleaning procedures."[42] Because it couldn't adequately show it followed this procedure on the day of the accident, defendant could not have summary judgment.

This approach of requiring a defendant to affirmatively prove it followed reasonable inspection procedures has not been reviewed by the Supreme Court—although it contradicts Georgia Supreme Court precedent. Moreover, this approach also contradicts the Court of Appeal's own precedent. In Sharfuddin v. Drug Emporium, Inc.,[43] the court did not require affirmative evidence from the defense. It stated:

> As Sharfuddin produced no evidence directly showing that Drug Emporium had constructive knowledge of the water nor any evidence from which such knowledge might be inferred, the trial court did not err by granting summary judgment to Drug Emporium.

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[37] 236 Ga. App. 810, 513 S.E.2d 536 (1999).
[38] Id. at 811
[39] Id.
[40] 232 Ga. App. 29; 500 S.E.2d 353 (1998).
[41] Id. at 30.
[42] Id. at 31.
[43] 230 Ga.App. 679, 498 S.E.2d 748, 754 (1998), cert. denied.

> The dissent has misconstrued and impermissibly redefined the burden on movants for summary judgment stated in Lau's Corp. v. Haskins, which was not altered by Robinson v. Kroger Co.[44]

Because Plaintiff could not establish constructive knowledge, defendant had no affirmative duty. Like Ingles, the plaintiff could not show defendant's constructive knowledge of the puddle. Notably, the Straughter case was decided March 20, 1998, one month after the Sharfuddin decision, without ever addressing the fact that the two cases are inconsistent.

The Court of Appeals continues to apply the higher Straughter standard.[45] Still, in Patrick v. Macon Housing Authority,[46] the Court cited the Straughter standard but held, "The circumstances here are different from those in supermarkets or fast food restaurants where the nature of the business creates conditions which cause slip and falls to occur with some frequency. Under those circumstances, we have held that premises owners have a duty to inspect with greater frequency…"[47] However, in the Patrick case, defendant exercised "the ordinary care required under OCGA § 51-3-1 to keep the common areas safe by inspecting [the laundry room] every two hours."[48] Thus, defendant was entitled to summary judgment because he had no constructive knowledge.

Under these precedents, summary judgment continues to be a viable option for defendants in many premises liability cases, despite this added proof requirement. Do not forget, however, that defendant's additional evidentiary burden on summary judgment does not apply at trial. At trial, plaintiff continues to have the burden of proving each element of his / her case.

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[44] Id. at 684-685.

[45] See, e.g., Blocker v. Wal-Mart Stores Inc., 287 Ga. App. 588, 651 S.E.2d 845 (2007), wherein the Court of Appeals partially reversed the grant of summary judgment to Wal-Mart in Blocker's suit, arising after she slipped on a grape on her way to a Wal-Mart bathroom and fell, holding that Wal-Mart did not show that it lacked constructive knowledge of the hazard because it failed to present evidence showing that it actually carried out its inspection procedure, in which Wal-Mart employees would look for hazards in their areas once each hour; Davis v. Bruno's Supermarkets, Inc. , 263 Ga.App. 147, 587 S.E.2d 279 (2003).

[46] 250 Ga.App. 806, 552 S.E.2d 455 (2001), cert. denied

[47] Id. at 812-813.

[48] Id.

3. *Res Ipsa Loquitur*: Exclusive Control

Res ipsa loquitur is a rule of evidence that allows a plaintiff's claim to survive summary judgment despite an "'evidentiary gap."[49] This alternative to Plaintiff's prima facie requirements "allows an inference of negligence," even though Plaintiff lacks affirmative evidence of negligence.[50]

Alternatively, *res ipsa* requires Plaintiff to show (1) the injury sustained would not ordinarily occur absent negligence; (2) the injury was caused by an agency or instrumentality within defendant's exclusive control; and (3) the injury was not due to any voluntarily action or contribution by Plaintiff.[51]

Exclusive control is the lynch pin in Plaintiff's case and must exist "at the time of the accident."[52] Still, older cases explain exclusive control "'does not mean that the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door.'"[53]

However, courts apply *res ipsa* "with caution and only in extreme cases."[54] It is "not applicable when there is an intermediary cause which could have produced the injury."[55]

Several cases establish the evidentiary burden for plaintiffs injured by falling objects in Defendant's store. In Sams v. Wal-Mart Stores, Inc.,[56] cookware fell from a shelf and struck Plaintiff from behind. She claimed the store negligently stacked the items. Because the boxes were "within the reach of other customers," Plaintiff could not establish exclusive control.[57] Summary judgment was appropriate.

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[49] Metts v. Wal-Mart Stores, Inc., 269 Ga. App. 366, 368, 604 S.E.2d 235 (2004).
[50] Evans v. Heard, 264 Ga. 239, 240, 442 S.E.2d 753 (1994).
[51] Kmart Corp. v. Larsen, 240 Ga. App 351, 522 S.E.2d 763 (1999), cert. denied.
[52] Green v. Home Depot, 277 Ga. App. 779, 782, 627 S.E.2d 836 (2006).
[53] Smith v. Telecable of Columbus, Inc., 142 Ga. App. 535, 536, 236 S.E.2d 523 (1977).
[54] Sams v. Wal-Mart Stores, Inc., 228 Ga. App. 314, 316, 491 S.E.2d 517 (1997). See also, Kmart Corp. v. Larsen, 240 Ga. App. 351, 353, 522 S.E.2d 763 (1999).
[55] Harrelson v. Wild Adventures, Inc., 263 Ga. App. 569, 571, 588 S.E.2d 341 (2003) .
[56] 228 Ga. App. 314, 491 S.E.2d 517 (1997).
[57] Id. at 316.

In Metts v. Wal-Mart Stores,[58] Plaintiff could produce no evidence regarding the events surrounding her injury: "She did not know what caused the boxes to fall, nor did she see any employee in the area where she was hit."[59] Citing Sams, the court held Plaintiff "cannot show that Wal-Mart retained exclusive control over the falling boxes at the time of the accident, since other customers also had access to them."[60]

In Green v. Home Depot U.S.A, Inc.,[61] a janitor knocked a box of light bulbs onto Plaintiff's head. The court held that "the fact that the box fell, in and of itself," does not raise "a jury question as to the negligence of Home Depot."[62] The janitor was an independent contractor and "there was ample evidence that the falling box was not within Home Depot's exclusive control at the time of the accident."

The court properly granted summary judgment in a case where the customer sought recovery under the doctrine of res ipsa loquitur, as the customer failed to show that the retailer retained exclusive control over the box that fell from its position on a shelf and injured him. Aderhold v. Lowe's Home Ctrs., Inc.[63]

4. Premises Cases: Adequate Inspection

Like other premises liability cases, in a slip and fall case involving a foreign substance, plaintiff must show (1) that the defendant had actual or constructive knowledge of the foreign substance on its floor and (2) that plaintiff had no knowledge of the substance or was unable to discover it by some act of the defendant.[64] Most summary judgment cases involve constructive knowledge because proof of actual knowledge is rare.

As discussed above, Plaintiffs can prove defendant's constructive knowledge by showing that an employee "was in the immediate area… and could have easily seen the substance" or that the substance "remained on the floor for such a time that ordinary diligence by the proprietor should have

[58] 269 Ga. App. 366, 604 S.E.2d 235 (2004).
[59] Id. at 367.
[60] Id. at 368.
[61] 277 Ga. App. 779, 627 S.E.2d 836 (2006).
[62] Id. at 782, n. 2.
[63] 284 Ga. App. 294, 643 S.E.2d 811 (2007).
[64] Robinson v. Kroger Co., 268 Ga. 735, 736, 493 S.E.2d 403 (1997); Matthews v. The Varsity, Inc., 248 Ga. App. 512, 512-513, 546 S.E.2d 878, 880 (2001).

effected its discovery."[65] On the other hand, defendants may obtain summary judgment by demonstrating they had a reasonable inspection program and followed it on the day in question. Defendants may also prevail if they can demonstrate that the area was inspected shortly prior to the fall, whether or not they had a formal "inspection program."[66]

Constructive knowledge turns on the facts. In Quarles v. Georgia Service Systems, LLC, the restaurant owner was entitled to summary judgment where he testified he had (1) "a general inspection procedure of conducting a walk-through inspection of the grounds surrounding the restaurant prior to the opening of the restaurant for business" and (2) "that he followed this procedure on the day Quarles fell..."[67]

The court rejected plaintiff's argument that the procedure was inadequate. It explained, "'when the nature of a business is likely to produce a spill or other hazard, frequent inspections may be necessary.'"[68] However,

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[65] Straughter v. J.H. Harvey Co., Inc., 232 Ga. App. 29, 29, 500 S.E.2d 353, 354 (1998), cert. denied.

[66] E.g., Wallace v. Wal-Mart Stores, Inc., 272 Ga. App. 343, 612 S.E.2d 528 (2005)(store not liable for slip and fall on grape where the area had been inspected 15-20 minutes prior to the fall. Such an inspection was reasonable as a matter of law.); Markham v Schuster's Enterprises, Inc., 268 Ga. App. 313, 601 S.E.2d 712 (2004) (defendant disproved constructive knowledge as a matter of law testifying it inspected floor 5-10 minutes before plaintiff fell, despite risk of frequent spills); Matthews v. The Varsity, Inc., 248 Ga. App. 512, 512-513, 546 S.E.2d 878 (2001) (stairs inspected 4-5 minutes before fall); Deloach v. Food Lion, 228 Ga. App. 393, 394-95, 491 S.E.2d 845 (1997) (area of fall inspected 10 minutes prior); Jenkins v. Bi-Lo, Inc., 223 Ga. App. 735, 736-37, 479 S.E.2d 14 (1996); Super Discount Markets v. Clark, 213 Ga. App. 132, 133, 443 S.E.2d 876 (1994) (inspection 15-20 minutes prior to fall). But see Crook v. Racetrac Petroleum, Inc., 257 Ga. App. 179, 570 S.E.2d 584 (2002), in which the Court of Appeals reversed summary judgment despite uncontroverted evidence Defendant conducted inspections of the property every two hours and that that procedure was followed on the day of the accident. Defendant last inspected the area around the gas pumps approximately one to 1 ½ hours before Plaintiff slipped in a large puddle of gas. The trial court found the company did not have constructive knowledge of a hazard due to its "reasonable inspection procedures…that were followed at the time of this incident." The Court of Appeals reversed because the procedure reasonableness was a fact question. It considered that "spills near the pumps were common and that there was at least one spill per shift. During some shifts, as many as 20 customers would report spills. Employees used a substance called 'oil-dri' to soak up gas and oil spills, sometimes as often as ten times a day. These facts raise an issue about whether the frequent spills required RaceTrac to conduct inspections more frequently than every two hours."

[67] 263 Ga. App. 563, 588 S.E.2d 338 (2003).

[68] Id. at 565.

if a slip occurs where the proprietor "has no reason to believe is dangerous, the proprietor is under no duty to constantly inspect the area."[69]

The evidence showed: the mat never caused anyone else to fall and Plaintiff was the only person who ever complained that it was unsafe. In fact, the day of the accident, the restaurant served approximately 955 meals without receiving a single complaint. Finally, the restaurant inspected the mat one hour and fifteen minutes before the fall. Under these circumstances, the restaurant's inspection procedures were reasonable; Quarles failed to demonstrate constructive knowledge. But see Valentin v. Six Flags Over Ga. II LP,[70] wherein the Court reversed the grant of summary judgment to Six Flags, finding that a question of fact remained as to whether Six Flags breached its duty to conduct a reasonable inspection, which would have revealed the alleged hazard-an unsecured and mildewed rubber mat on the stairway exiting the Thunder River water ride, the presence of which allowed for an inference that the hazard existed for an unreasonable period of time.

In contrast, in Hicks v. Walker,[71] the defendant was not entitled to summary judgment because the court recognized several bases for constructive knowledge. The Hicks case involved a visiting child injured when the owner's deck collapsed. The court explained, "There is no evidence that the Walkers actually knew about the deck's dangerous condition. However, there is evidence from which a jury could find that the Walkers at least had constructive knowledge of the defects because the defects were construction defects, because the defects amounted to code violations, or because the defects could have been discovered through the exercise of reasonable care in inspecting the deck."[72]

Compare Wingo v. Harrison,[73] a similar case. In Wingo, the court granted summary judgment absent evidence of actual or constructive knowledge that the deck was unsafe. One year and three months prior to the accident, a home inspector examined the eighteen-year-old property. (It wasn't clear how old the deck was, however.) This inspector never informed the owners of any deck problems: "The report does not list the deck as one of the fourteen major or minor findings or as one of the three items that required

[69] Id.
[70] 286 Ga. App. 508, 649 S.E.2d 809 (2007)
[71] 262 Ga. App. 216, 585 S.E.2d 83 (2003).
[72] Id. at 219.
[73] 268 Ga. App. 156, 601 S.E.2d 507 (2004).

the Wingos' attention after they moved in."[74] Moreover, next to the section 'Deck(s) - Rot Observed,' the condition column was blank. This "obviously indicates that none had been" observed.[75]

Finally, although the report indicated that the deck was not bolted to the house, "nothing in the report communicates the notion that…[this was] considered a safety or a legal problem."[76] In fact, the practice was acceptable: the court stated "even if we were to construe the report as putting the Wingos on notice that they needed to inquire further into whether the deck *should* have been bolted to the house, the only evidence in the record is that they would have found that it was not required."[77]

The deck collapse appeared to have been caused by undetectable rotten wood. Neither the owners *nor the plaintiff* observed the rot. Without evidence of actual or constructive knowledge, the homeowners were entitled to judgment as a matter of law.

The defendant homeowner prevailed in Thomas v. Deason,[78] wherein the Court of Appeals affirmed the grant of summary judgment to Deason in Thomas' premises liability suit. The Court (assuming the invitee standard applied) held that Thomas failed to show that Deason had actual or constructive knowledge of the alleged hazard-a hole in the flat, grassy area to the side of Deason's house. Thomas testified that grass obscured the hole and you could not see it. Deason and his wife, who inspected the yard one to two hours before the incident, denied any knowledge of the hole in the yard. The Court found that Deason did not have constructive knowledge of the hole, since the hole was difficult to see and Thomas failed to show that by ordinary care in inspecting the premises Deason could have discovered and remedied the hazard.

In Gibson v. Halpern Enters.,[79] the Court of Appeals reversed the grant of summary judgment to a shopping center owner in a case arising from a slip on loose gravel in the center's parking lot, which the owner had recently repaved. The Court held that a jury question remained as to whether the

[74] Id. at 159.
[75] Id.
[76] Id.
[77] Id.
[78] Case No. A07A2290 (Ga.App., Feb. 8, 2008).
[79] 288 Ga. App. 790, 655 S.E.2d 624 (2007)

owner's weekly inspection procedure was reasonable under the circumstances. The Court stated:

> Halpern has presented evidence that it had a weekly inspection procedure and that its property manager performed the weekly inspections, but it has not presented any evidence to establish that, as a matter of law, the frequency and extent of the inspections were reasonable under the circumstances. Our decision in *Chastain v. CF Georgia North DeKalb L. P.*, cited by the court below, does not compel a different result; it concerned a hazard that could not have been detected despite the property owner's reasonable policy of continuous inspections, whereas here there is a question of fact about whether the gravel could have been detected on reasonable inspection.

Thus, it appears that, in addition to proving it had a regular inspection procedure which was followed at the time, the Defendant may also have to submit evidence that its procedure was reasonable. I would think this could be accomplished by showing that the hazardous condition was not detectable in a reasonable inspection or that there was no prior problem to put the owner on notice that the frequency of its inspections was not adequate.

5. Slip and Fall Cases: Natural Substances

In cases involving natural substances such as rain or leaves, premises owners are only liable if they have superior knowledge of the hazard; plaintiffs who have equal knowledge cannot recover. Sunlink Health Sys. Inc. v. Pettigrew,[80] (Court of Appeals reversed the denial of the hospital's motion for summary judgment, holding that Pettigrew had equal knowledge of the accumulation of rainwater on the hospital's flat concrete entrance walkway). See also Leibel v. The Sandy Springs Historic Community Foundation, Inc.[81] In Leibel, the Court affirmed summary judgment to the defendant. Plaintiff returned to the public parking area after attending a jazz concert. While attempting to help her child who had fallen, the plaintiff put her left foot on the grassy hill and her right foot on the paved shoulder of the driveway. The plaintiff 's left foot slipped out from under her and she fell. Plaintiff claimed that she had slipped on gum balls from surrounding sweet gum trees. The Court affirmed summary judgment to the facility operator, holding that where

[80] 286 Ga. App. 339, 649 S.E.2d 532 (2007).
[81] 281 Ga. App. 390, 636 S.E.2d 27 (2006), cert. denied.

an accumulation of substances on a premises was naturally occurring and not attributable to any affirmative action on the proprietor's part, the proprietor had no affirmative duty to discover and remove it in the absence of evidence that it had become an obvious hazard by means other than natural accumulation. Judges Phipps, Ruffin and Smith issued the decision. But see The Augusta Country Club, Inc. v. Blake.[82] In Blake, the Court affirmed judgment for the plaintiff who fell while visiting the club for the first time to participate in a tennis match. She did not see a magnolia seed pod located at the base of a step before she slipped on it and fell. The Court of Appeals affirmed judgment for the plaintiff, finding that ample evidence supported a finding that the club had constructive knowledge of the magnolia seed pod and that it did not satisfy its duty under O.C.G.A. § 51-31-1 to use reasonable care to make the premises safe. Despite the club's knowledge of the danger of pods, which caused it to institute an inspection and cleaning schedule, evidence showed that not only was no inspection done the morning of the accident, but that the employee responsible for blowing this walkway did not do so that morning. The Court distinguished the "naturally occurring" cases by holding that,

> The accumulation of a naturally occurring condition "does not negate an owner's duty to exercise ordinary care in inspecting the premises in every circumstance. Ice forming [or seed pods falling] due to inevitable natural forces unaffected by human agency 'does not preclude examination into the question of whether or not the defendant was negligent in failing to take remedial action.'"

Judges Blackburn, Mikell and Adams issued the Blake decision.

In Walker v. Sears Roebuck & Co., the court recently held that "store proprietors are not liable to patrons who slip and fall on floors made wet by rain conditions unless there has been an unusual accumulation of water and the proprietor has failed to follow reasonable inspection and cleaning procedures."[83] In Walker, the plaintiff admitted she knew it had rained and that customers can track water into a store on rainy days. Thus, absent evidence of an unreasonably large puddle, the premises owner did not have superior knowledge of the hazard; the owner was entitled to summary judgment.

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[82] 280 Ga. App. 650, 634 S.E.2d 812 (2006), cert. denied.
[83] Walker v. Sears Roebuck & Co., 278 Ga. App. 677, 629 S.E.2d 561 (2006).

In Emory University v. Smith,[84] plaintiff sued defendant hospital when, on a rainy day, she slipped walking up a wheelchair access ramp. Plaintiff alleged that the ramp was more slippery than regular pavement because it was freshly painted.[85] The hospital countered that the "paint" was a yellow, granular, *non-slip* safety coating.

The Court of Appeals held that a slippery surface "caused solely by rainwater is not a hazard because it presents no unreasonable risk of harm."[86] Accrual of water on a business' floor "is not unusual or unreasonable in itself, but…one to which all who go out on a rainy day may be exposed and which all may expect or anticipate."[87] Thus, although questions remained as to alleged ramp-design defects, plaintiff assumed the risk of injury because she saw its design before attempting to negotiate it. The Court of Appeals reversed the trial court's denial of summary judgment. To recover, plaintiff had to prove that the ramp was hazardous *and* that the hospital had superior knowledge of the hazard.

The Court of Appeals continues to assert that slippery conditions caused by rainwater present no unreasonable risk of harm.[88] In Flagstar Enters, Inc. v. Burch,[89] the Court of Appeals reversed the trial court's summary judgment denial because the customer's knowledge was equal to the restaurant's. The customer admitted that it was cloudy and wet outside the day he fell, although not raining hard enough to use an umbrella. He also admitted that he noticed the restaurant floor was wet but fell even though he used extra caution. The Court of Appeals held summary judgment appropriate under these facts.

Still, the plaintiff can prove that a combination of the rain water *and other factors* gave defendant superior knowledge. In Flournoy v. Hosp. Auth.

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[84] 260 Ga. App. 900, 581 S.E.2d 405 (2003).

[85] See, e.g., Mansell v. Starr Enters./Texaco, Inc., 256 Ga. App. 257, 568 S.E.2d 145 (2002)("plaintiffs are charged with equal knowledge that water is apt to be found in any area frequented by people coming in from the rain outside."); Cohen v. Target Corp., 256 Ga. App. 91, 567 S.E.2d 733 (2002).

[86] Emory University, supra, 260 Ga. App. at 901.

[87] Id. (citing Cook v. Arrington, 183 Ga. App. 384, 385, 358 S.E.2d 869 (1987).).

[88] Quarles v. Georgia Service Systems, LLC, 263 Ga. App. 563, 588 S.E.2d 338 (2003), at n.2. See also Music v. Steamco, Inc., 265 Ga. App. 185, 593 S.E.2d 370 (2004), wherein summary judgment was proper where the plaintiff fell on stairs containing standing water. She could have exited to the left or right of the stairs.

[89] 267 Ga. App. 856, 600 S.E.2d 834 (2004).

of Houston County,[90] plaintiff claimed that a "combination" of the ramp's slick surface, its sloped sides, and its location, presented a hazard about which she lacked knowledge. She offered expert testimony that the ramp's excessive slope and worn surface were, in fact, hazardous. Unlike the unsubstantiated speculation in Emory University, this testimony defeated summary judgment. It created a fact question whether the plaintiff had equal knowledge of the hazard posed by this combination. Thus, the "fact that plaintiff had successfully walked up the wet ramp the day of the accident cannot be said as a matter of law to have given him actual or constructive knowledge of the hazard of walking down the wet ramp."[91] See also Roberts v. Outback Steakhouse of Fla., Inc.[92]

In Dickerson v. Guest Servs. Co. of Va.,[93] the Supreme Court reversed the judgment of the Court of Appeals, which had upheld the grant of summary judgment to the defendant. The Supreme Court held that, for summary judgment purposes, the defendant must be deemed to have had superior/actual knowledge of the alleged hazard-accumulated water on the stairs leading from the defendant's restaurant to the defendant's store in the same building-since some evidence showed that Dickerson's daughter informed a store employee of the hazard prior to Dickerson's fall and was told that the employee knew about the water on the stairs and had called someone to deal with it. The Court also noted that the evidence, at most, showed only constructive knowledge of the hazard on Dickerson's part.

6. Relinquishment of Property to Another

O.C.G.A. §51-3-1 creates a "nondelegable duty" on an owner or occupier to "exercise ordinary care to keep the premises and approaches safe for invitees."[94] However, a property owner is not liable for injuries "if full possession and complete control of the [property] were delivered and surrendered to an independent contractor."[95]

In Nair v. Aramark,[96] lessor Emory University was *not* entitled to summary judgment. The plaintiff was injured when he sat on the cafeteria's

[90] 232 Ga. App. 791, 504 S.E.2d 198 (1998).
[91] Id. at 793.
[92] 283 Ga. App. 269, 641 S.E.2d 253 (2007).
[93] 282 Ga. 771, 653 S.E.2d 699 (2007).
[94] Nair v. Aramark Food Service Corp., 276 Ga. App. 793, 794, 625 S.E.2d 78 (2005).
[95] Id. at 794-795.
[96] Id.

outdoor picnic table. The contract between Emory and the independently-contracted foodservice provided the latter had full responsibility for "all premises and equipment under its control." [97] However, this table wasn't clearly under either party's control.

In Green v. Home Depot U.S.A, Inc.,[98] the Court noted that Home Depot could escape liability for the negligence of an employee of an independently contracted janitorial service who dropped a box of light bulbs on plaintiff's head simply because he was an independent contractor. "Home Depot cannot avoid liability for the acts and omissions of its independent contractors where it has a duty imposed by statute—here the duty to exercise ordinary care to keep its premises and approaches safe for its customers as invitees." [99] Where there was no evidence that Home Depot had actual knowledge that any hazard existed, "Home Depot could only be liable upon evidence that it had constructive knowledge of the alleged danger."[100] Since nothing of record showed that any Home Depot employee was in the immediate vicinity and in a position to easily notice the alleged danger, nor "was there any evidence of similar prior incidents that might have served to put Home Depot on constructive notice of the potential hazard", Home Depot was not liable.[101]

O.C.G.A. § 44-7-14 determines a landlord's liability to third parties injured on his leased property. [102] The code states:

> Having fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair.[103]

Accordingly, an out-of-possession landlord can only be held liable in tort to a third party if the landlord constructed the structure which caused

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[97] Id. at 795.
[98] Green v. Home Depot U.S.A., Inc., 277 Ga. App. 779, 627 S.E.2d 836 (2006), cert. denied.
[99] Id. at 3.
[100] Id. at 5.
[101] Id. at 5.
[102] Martin v. Johnson-Lemon, 271 Ga. 120, 123, 516 S.E.2d 66 (1999); Colquitt v. Rowland, 265 Ga. 905, 906, 463, S.E.2d 491 (1995).
[103] O.C.G.A. § 44-7-14.

damages, if he failed to keep the premises in repair, or if he had knowledge of the hazard.[104] Note, however, "defective construction exists only in cases where the structure is built by [the landlord] in person or under his supervision or direction.'[105]

Further, "[t]he mere presence of a lease clause reserving the right to enter for repairs and inspection cannot impose a general duty to exercise ordinary care in making reasonable inspection of those areas of the building over which the landlord retained neither a right to control nor a duty to repair."[106] For example, in Ray v. Smith,[107] summary judgment was appropriate where plaintiff fell through the closet ceiling located next to an interior skating ramp constructed by the tenant. In this case, the Court affirmed that the out-of-possession landlord had no liability under O.C.G.A.§44-7-14 even though the landlord reserved the right to inspect the residential-loft / warehouse area he had leased to the tenant.

7. "Premises or Approaches"

Plaintiff cannot recover if s/he cannot show s/he was on the defendant's premises or approaches. See, e.g., Robinson v. Kroger Co.[108] (trial court correctly determined that the parking lot in which a customer fell was owned and maintained by grocery store's landlord, and was not an "approach" to the premises for purposes of O.C.G.A. § 51-3-1 so the store was properly granted summary judgment.) See also Harris v. Inn of Lake City,[109] wherein the Court stated:

> Under OCGA § 51-3-1, "[w]here an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in

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[104] Colquitt, supra at 905. Norman v. Jones Lang LaSalle Americans, Inc, 277 Ga. App. 621, 627 S.E. 382 (2006). See also Gainey v. Smacky's Invests. Inc., 287 Ga. App. 529, 652 S.E.2d 167 (2007).

[105] Martin v. Johnson-Lemon, 271 Ga. 120, 123, 516 S.E.2d 66, 69 (1999), quoting Flagler v. Savage, 258 Ga. 335, 337, 368 S.E.2d 504 (1988).

[106] Ladson Invs. v. Bagent, 151 Ga. App. 24, 258 S.E.2d 718 (1979). See also Ranwez v. Roberts, 268 Ga. App. 80, 601 S.E.2d 449 (2004) (summary judgment where plaintiff was injured by two pit-bulls on premises without landlord's knowledge, because out-of-possession landlords are liable only for damages arising out of defective construction or their failure to keep the premises in repair generally).

[107] 259 Ga.App. 749, 577 S.E.2d 807 (2003).

[108] 284 Ga. App. 488, 644 S.E.2d 316 (2007).

[109] 285 Ga. App. 521, 647 S.E.2d 277 (2007).

damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises *and* ***approaches*** safe." (Emphasis supplied.) In this context, the term **"approach"** has been defined

> to mean that property directly contiguous, adjacent to, and touching those entryways to premises under the control of an owner or occupier of land, through which the owner or occupier, by express or implied invitation, has induced or led others to come upon his premises for any lawful purpose, and through which such owner or occupier could foresee a reasonable invitee would find it necessary or convenient to traverse while entering or exiting in the course of the business for which the invitation was extended. By "contiguous, adjacent to, and touching," we mean that property *within the last few steps taken by invitees*, as opposed to "mere pedestrians," as they enter or exit the premises. It is only within the confines of this limited **approach** that [case law] imposes a duty on a landowner to exercise ordinary care over property not within the landowner's control.

(Emphasis supplied; citation omitted.) . . .

Here, it is undisputed that the stairs are located on land owned by Glynn County, not the Resort. The evidence of record shows that when a person passes through the gate at the edge of the Resort property, the person steps onto the final portion of the county's paved pathway leading from the street to a short wooden walkway (over a rock erosion barrier), which connects to the wooden stairs where Harris and Carter fell. The record shows that the county owns all areas outside the Resort's gate: the paved pathway, the wooden walkway, the stairs leading to the beach, and the beach.

The plaintiffs' injuries occurred at the bottom of the stairs when they stepped from the last available step and fell into a hole in the sand, on the county-owned beach, apparently filled with

tide water. At the point where their injuries occurred, the plaintiffs had passed through the Resort gate (at the Resort's property line), stepped onto the county-owned paved pathway, walked across the short wooden walkway over the rock barrier, and descended the stairs. In light of these facts, and in light of the case law construing the term "approach," we hold that the plaintiff's injuries did not occur on an "approach" for which the Resort has a duty to maintain under OCGA § 51-3-1. The plaintiffs' injuries occurred as they stepped from the wooden stairs to the beach, not on a "sidewalk or other approach that is directly contiguous, adjacent to, and touching the premises under control of the" Resort. *Elmore of Embry Hills, Inc. v. Porcher*, supra, 124 Ga. App. at 420. Nor did the plaintiffs' injuries occur "within the last few steps taken by invitees." *Motel Properties v. Miller*, supra, 263 Ga. at 486 (2). Indeed, pedestrians passing by the resort and walking along the county-owned pathway from the street to the beach would use the same set of stairs. Therefore, based on the record before us, the trial court did not err in ruling that the Resort did not have a duty under OCGA § 51-3-1 to keep safe the stairs where plaintiffs were injured.

8. Plaintiffs' Equal or Actual Knowledge

The Plaintiff cannot recover if plaintiff has equal knowledge of the risk, assumed the risk, or negligently created the risk. The Court of Appeals recently wrote, "recovery is allowed only when the proprietor had knowledge and the invitee did not."[110] Thus, the "ultimate" issue becomes "whether [the Defendant] was negligent in maintaining a hazardous condition on the property" because "in every day life, persons are required to negotiate floors, steps and doorways."[111] The Court of Appeals explains, "if his invitee knows of the condition or hazard there is no duty on the part of the proprietor to warn [her] and there is no liability for resulting injury."[112]

To prove knowledge, defendant can use direct or circumstantial evidence. The Court of Appeals holds that, "when a person has successfully negotiated an alleged dangerous condition on a previous occasion, that person

[110] Bryant v. DIVYA, 278 Ga. App. 101, 4, 628 S.E.2d 163 (2006).
[111] Wright v. JDN Structured Finance, Inc., 239 Ga. App. 685, 687, 522 S.E.2d 4 (1999).
[112] Id. at 686.

is presumed to have knowledge of it and cannot recover for a subsequent injury resulting therefrom."[113]

In the recent case The Right Stuff Food Stores, Inc. v. Gilchrist,[114] as the plaintiff "walked to go around the rear of her vehicle [while pumping gas into her car at a gas station], she saw a hose from a nearby pump that was lying on the ground near the side of her vehicle. She attempted to avoid the hose by walking between it and her vehicle, but as she did so, her left heel caught on the hose, causing her to fall and become injured. At her deposition, plaintiff testified that she saw the second hose and knew it was there, that there was nothing hidden or concealed about the nature of the hose, that she intended to walk around it and was not distracted, and that she had no idea how the hose became caught on her boot."[115] Under these facts, the Court of Appeals held that the trial court had erred in denying summary judgment to the gas station because plaintiff had actual knowledge of the hazard and was therefore unable to establish that the proprietor had superior knowledge of the hazard.[116]

In Gantt v. Dave & Busters of Ga. Inc.,[117] the Court of Appeals affirmed summary judgment to the proprietor of a restaurant/gaming establishment. Plaintiff and her sister stepped onto a raised platform to play a video game. After playing games, Plaintiff stepped down the same step and fell. Although she looked, she couldn't see the step-down. While the "step-up was marked by a white border across the vertical portion of the top level (visible only from the bottom level)," the top edge was marked with only a brown strip.[118] Still, the Court held that the plaintiff had equal knowledge of the step-down because she had successfully negotiated the step-up. She couldn't recover because she had constructive knowledge of the step.

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[113] Mechanical Equipment Co. v. Hoose, 241 Ga. App. 412, 413, 523 S.E.2d 575 (1999), cert. denied; see also Hannah v. Hampton Auto Parts, 234 Ga. App. 392, 394, 506 S.E.2d 910 (1998); Pierce v. Wendy's International, Inc., 233 Ga. App. 227, 504 S.E.2d 14 (1998); Ray v. Rest. Mgmt. Servs., Inc., 230 Ga. App. 145, 146, 495 S.E.2d 613 (1998); Williams v. Sing Bros., Inc., 226 Ga. App. 657, 658, 487 S.E.2d 445 (1997); Steinberger v. Barwick Pharmacy, Inc., 213 Ga. App. 122, 125(1), 444 S.E.2d 341 (1994); Souder v. Atlanta Family Rest., Inc., 210 Ga. App. 291, 292, 435 S.E.2d 764 (1993).

[114] 279 Ga. App. 784, 632 S.E.2d 405 (2006), cert. denied.

[115] Id.

[116] Id.

[117] 271 Ga. App. 457, 610 S.E.2d 116 (2005).

[118] Id. at 457.

Dave & Busters did not have a duty to *warn her* of the step-down because she "failed to show she was distracted [by the revelry] as she stepped down."[119] In fact, Gantt asserted that she was looking where she was walking.

In Trans-Vaughn Dev. Corp v. Cummings,[120] plaintiff was not entitled to recover for falling down uneven steps at the rear of her office building. "Nothing had changed about the rear entrance, which had four outside steps without a handrail or stairway landing."[121] Plaintiff previously carried her son through the same entrance. Thus, she "'was well aware that the rear stairs were of uneven height, that the door opened out directly onto the staircase, that the door handle was difficult to grab, and that there was no landing or handrail.'"[122] She also knew that the rear entrance "had always been 'free-swinging' and lacked 'tension' to prevent it from flinging open."[123] Because she had equal knowledge, she was unable to recover.[124] See also Briddle v. Cornerstone Lodge of America[125] (hotel guest not entitled to recover when she slipped due to an overflowing toilet which she knew was overflowing before her fall – in fact, she had reported it to the hotel); Petrosky v. Embry Crossing Condo. Ass'n.[126] (no recovery where plaintiff had actual knowledge of ice) and Rayburn v. Ga. Power Co. [127] (employee tree cutter not allowed to recover as he had observed the conditions. He already knew that cutting trees with a chain saw was hazardous. The appeals court found that he had actual knowledge of the danger associated with the activity and appreciated the risk involved.)

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[119] Id. at 458.
[120] 273 Ga. App. 505, 615 S.E.2d 579 (2005), cert. denied.
[121] Id. at 506.
[122] Id.
[123] Id.
[124] Similarly, in Trulove v. Jones, 271 Ga. App. 681, 610 S.E.2d 649 (2005), the court affirmed summary judgment to the homeowner where Plaintiff fell off an unfinished deck surrounding a pool. Plaintiff fell backing away from a child who tried to push her into the water. Although the homeowner allowed the horseplay, the guest was a mere licensee and fully aware of the lack of railings around the pool deck. Likewise, in Young v. Richards Homes, Inc., 271 Ga. App. 382, 609 S.E.2d 729 (2005), defendant prevailed due to Plaintiff's equal knowledge. In this case, Plaintiff knew the temporary stairs were made of 2x4s (as opposed to 2x8s) and had no railing. The court held it immaterial whether these conditions violated regulations.
[125] 288 Ga. App. 353, 654 S.E.2d 188 (2007).
[126] 284 Ga. App. 354, 643 S.E.2d 855 (2007).
[127] 284 Ga. App. 131, 643 S.E.2d 385 (2007), cert. denied.

In the recent case of La Quinta Inns Inc. v. Leech,[128] the Court of Appeals held that any error in the trial court's ruling that the evidence demanded a finding that the hotel guest committed suicide by jumping out the guest room window did not warrant reversal, even assuming that the guest's death was accidental, since the evidence showed that his knowledge of any hazard the window presented (such as the absence of window stops and the width to which the window would open) was at least equal to the hotel's thereby extinguishing the premises liability claim.

The equal or superior knowledge defense also succeeded in Sudduth v. Young.[129] There, the infirm homeowner was sued by the Plaintiff caretaker when she slipped and fell on the hallway floor. Plaintiff alleged that the floor "which had been heavily waxed and was extremely slippery" caused her fall.[130] The Court of Appeals affirmed summary judgment, however, because Plaintiff produced no evidence of defendant's superior knowledge or even a hazardous condition. In contrast, Plaintiff used the hallway for three nights before the fall; her knowledge of the hallway's condition was at least equal to the defendant's. The court reiterated, "the law is clear that '[w]hen a person has successfully negotiated an alleged dangerous condition on a previous occasion, that person is presumed to have knowledge of it and cannot recover for a subsequent injury resulting therefrom.'"[131]

Still, Plaintiff avoided summary judgment in Barton v. City of Rome.[132] The court reversed summary judgment in a case in which the plaintiff fell into a deep uncovered hole next to a city dumpster. Although cover plates ran over most of the opening, "the cover plates did not continue along the full length of the side of the dumpster, leaving a substantial area near one corner unprotected; and that the area contained no warning signs or visual markings to warn of the fall hazard."[133] The city had constructive

[128] Case Nos. A07A2432; A07A2433 (Jan. 25, 2008)
[129] 260 Ga. App. 56, 579 S.E.2d 7 (2003).
[130] Id. at 57.
[131] See also Pye v. Reagin, 262 Ga. App. 490, 586 S.E.2d 5 (2003)(plaintiff could not recover for tripping over tree roots in the unpaved parking lot); Music v. Steamco, Inc., 265 Ga. App. 185, 593 S.E.2d 370 (2004)(plaintiff failed because she admitted she noticed standing water on the steps before she began her descent); Watson v. Travelcenter Inc., 265 Ga. App. 362, 593 S.E.2d 908 (2004) (plaintiff not entitled to recover where the gas nozzle jumped out of the gas tank. She saw fuel spill onto the ground and quickly moved to turn off the pump. Thus, summary judgment was proper after she slipped on the fuel.).
[132] 271 Ga. App. 858, 610 S.E.2d 566 (2005).
[133] Id. at 861.

knowledge of defective design and construction. The fact that the plaintiff dumped his trash weekly did not bar his claim.[134]

Plaintiff overcame the equal knowledge argument in Schuessler v. Bennett,[135] where the Court of Appeals affirmed the denial of summary judgment to the city of Jackson, the city's mayor, the city council members and Jackson Electric Department, holding that factual questions remained as to whether the Department failed to exercise ordinary care in inspecting and maintaining the service line to Schuessler's home, whether the Department was contacted and asked to disconnect the lines prior to Bennett's accident and whether the Department's failure to maintain an inspection procedure amounted to constructive knowledge of the defect, since repair crews could not find evidence of a cover or other insulation material in the area on the day after the accident. The Court held that the evidence did not demand a finding that Bennett assumed the risk of his injuries, since no evidence showed that he knew of or appreciated the risk of electricity arcing from an exposed wire.

9. Plaintiff's Assumption of Risk or Negligence

Plaintiff's voluntary action, "in view of [his/her] knowledge[,] assumes the risks and dangers incident to the known condition."[136] Importantly, assumption of the risk requires the plaintiff's *actual knowledge*; constructive knowledge is insufficient. The Court of Appeals elaborates that knowledge here "means both actual and subjective knowledge on the plaintiff's part."[137] If plaintiff assumes the risk, s/he has a heightened duty to act for his/her own safety.[138]

Courts mandate that, to assume a risk, Plaintiff's knowledge must be to "the specific, particular risk of harm associated with the activity or

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[134] See also Berson v. American Golf Corp., 265 Ga. App. 772, 595 S.E.2d 622 (2004), in which plaintiff was entitled to get to a jury when she slipped while walking in her golf cleats on the clubhouse's waxed floor.

[135] 287 Ga. App. 880, 652 S.E.2d 884 (2007).

[136] Id.

[137] Frank Robinson Flowers, II v. Wal-Mart Stores, Inc., 2005 U.S. Dist LEXIS 25578, at * 13 (2005).

[138] In White v. Georgia Power, 265 Ga. App. 664, 595 S.E.2d 353 (2004), cert. denied, two young boys tragically drowned when they entered a river knowing they couldn't swim. Their parents could not recover for their death due to this knowledge. See also Fowler v. Alpharetta Family Skate Ctr., LLC, 268 Ga. App. 329, 601 S.E.2d 818 (2004) (affirming summary judgment for skating rink because plaintiff was aware of and assumed the risk of colliding with other skaters).

condition that proximately causes injury."[139] In Frank Robinson Flowers, II v. Wal-Mart Stores, Inc.,[140] the employee / plaintiff used a ladder multiple times before it collapsed. However, summary judgment was improper because he had no reason to suspect that the step / platform would collapse. "The knowledge requirement does not refer to a plaintiff's comprehension of general, non-specific risks that might be associated with such conditions or activities."[141] Moreover, the ladder's warning labels did not put him on notice. The court found that, "there is no evidence that [plaintiff] failed to heed any of these warnings…Nothing in the record indicates that he had any knowledge of this particular risk, and the labels provided no warning that the platform might collapse."[142]

Plaintiff may also prevail if s/he proves that s/he did not voluntarily assume a risk. In Gillis v. Foodonics International, Inc., plaintiff cites a line of cases in which "plaintiffs complained to defendants about certain dangers on the premises, but nonetheless exposed themselves to the cited dangers in order to fulfill their employment requirements."[143] In these cases, plaintiffs did not exercise "free choice."[144] In Gillis, Plaintiff fell down her employer's slippery stairs after complaining about them several times. The employer countered that she was not required to go down those stairs: she could have used the dry inside stairwell. Although she showed her equipment would not fit in that stairwell, she was not carrying equipment when she fell. Thus, she voluntarily assumed the risk and could not recover.[145]

The Court of Appeals carves out another exception: the Necessity Rule. This rule allows "tenants to pursue their premises liability claims even though they had knowingly risked injury."[146]

In Norman v. Jones Lang LaSalle Americas, Inc.,[147] the plaintiff argues that her equal knowledge is immaterial. She *had to* navigate past the boxes that caused her fall; she had no alternative route into her dark office. Rejecting this argument, the court clarified the scope of the exception. It is

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[139] Id.
[140] Id.
[141] Id.
[142] Id. at 14-15.
[143] 273 Ga. App. 759, 760, 615 S.E.2d 854 (2005).
[144] Id.
[145] Id. at 761.
[146] Norman v. Jones Lang LaSalle Americas, Inc., 277 Ga. App. 621, 631, 627 S.E.2d 382 (2006).
[147] Id.

"expressly limited …to cases involving residential landlord / tenant relationships 'where the tenant is required to traverse a known hazard in order to enter or leave his home."[148] The rule didn't apply in Norman because the building was *commercial*.[149] Furthermore, plaintiff could not show the boxes obstructed the doorway nor that they were an "unavoidable hazard that would have prevented her from entering or leaving."[150]

On a different note, plaintiff cannot recover if the court considers him the real or proximate cause of his own injuries. In Kull v. Six Flags Over Ga. II, L.P.,[151] a technician could not recover because the sole "proximate" cause of his injury was his own negligence. Kull was responsible for changing light bulbs on Six Flag's electric scoreboard. Believing a fuse had blown, he failed to turn off the board's power and did not check the circuit. However, the circuit remained energized due to a wiring defect. Plaintiff broke the globe replacing the light bulb and used metal, uninsulated pliers to try to remove the base. He was shocked and fell from the ladder.

The court held that Kull, himself, was to blame: "Kull violated OSHA regulations and NFPA standards governing electrical safety in numerous respects. Most importantly, he failed to 'deenergize' [or shut off power to] the scoreboard…he also failed to lock out or tag the circuit energizing the part as required…or to confirm that the circuit was deenergized as required."[152] Finally, Kull "failed to use a ladder with *nonconductive siderails*" and "failed to use insulated tools…or personal protective equipment properly rated for the voltage."[153] Kull's acts of negligence per se were the proximate cause of Kull's injury; he could not recover.

In La Quinta Inns Inc. v. Leech,[154] the Court of Appeals reversed the denial of the hotel defendants' motion for summary judgment since there was

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[148] Id.

[149] Compare Belcher v. Kentucky Fried Chicken Corp 266 Ga. App. 556; 597 S.E.2d 604 (2004). There, the court held Plaintiff did not assume the risk when she entered a men's room to use the facilities. Her sister warned her that the lady's room was flooded, that there was "water everywhere," and that she should use the men's room. Plaintiff did not see the water in the men's restroom and didn't know the warning extend to *inside* the men's restroom. Finally, the restaurant didn't place a warning cone either at the door of or inside the men's restroom.

[150] Norman, 277 Ga. App. at 632.

[151] 264 Ga. App. 715, 592 S.E.2d 143 (2003).

[152] Id. at 716.

[153] Id. at 717.

[154] Case Nos. A07A2432; A07A2433 (Jan. 25, 2008)

no evidence that that the hotel guest's suicide was triggered by anything that the hotel defendants did or failed to do and the guest's act of suicide was the sole proximate cause of his death.

10. Superior Knowledge by Defendant

Plaintiff cannot recover unless s/he can demonstrate that the defendant had superior knowledge of the hazard. See, e.g., Schuessler v. Bennett[155]. In Klein v. Weaver,[156] a limb fell from Defendant's tree and struck the Plaintiff. Plaintiff could not recover, although a large limb fell from the same tree just two weeks before. "'The owner of a tree is liable for injuries from a falling tree only if he knew or reasonably should have known the tree was diseased, decayed or otherwise constituted a dangerous condition.'…'[T]he manifestation of decay must be visible, apparent, and patent.' "[157] See also Schuessler v. Bennett,[158] where the Court of Appeals held that the trial court erred in denying homeowner's motion for summary judgment. Bennett was injured when an exposed electrical wire arced, causing him to fall 24 feet from the ladder he was using while painting Schuessler's home. Although some evidence showed that Schuessler knew about a problem with the wiring, Bennett could not show that Schuessler had superior knowledge of the alleged hazard, since Bennett noticed the frayed wires before he started painting that day, he admitted that his employer warned him about the condition of the wires and both his employer and Schuessler told him to be careful about the wires.

In Diaz v. Wild Adventures Inc.,[159] the Court of Appeals affirmed the grant of summary judgment to Wild Adventures Theme Park, holding that the plaintiffs failed to show that the park had superior knowledge of the alleged hazard-carbon deposits from a bumper car ride mixed with rainwater, which made the floor of the ride more slippery. Diaz testified in his deposition that he was aware of rainwater mixed with "'dirt'" on the floor of the ride, before he walked onto the floor and his wife testified that "it is normal for puddles to

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[155] 287 Ga. App. 880, 652 S.E.2d 884 (2007).
[156] 265 Ga. App. 390, 593 S.E.2d 913 (2004).
[157] Id. at 392. See also Gibson v. Rezvanpour, 268 Ga. App. 377, 601 S.E.2d 848 (2004), cert. denied (real estate agent was not liable for dog-bite suffered by client when showing house; both parties knew pets were in the house but neither knew they were dangerous); Theesfeld v. Image Electrolysis & Skin Care, Inc., 274 Ga. App. 38, 619 S.E.2d 303 (2005) (summary judgment was appropriate where employee who regularly used stool fell off when it rolled out from beneath her).
[158] 287 Ga. App. 880, 652 S.E.2d 884 (2007).
[159] Case No. A07A2335 (Jan. 30, 2008).

occur when it rains, and accidents happen in such circumstances." There was no evidence that Wild Adventures had knowledge of any hazard other than the rainwater of which the plaintiffs had equal knowledge; and the plaintiffs could not show constructive knowledge, since the undisputed evidence showed that Wild Adventures cleaned the floor of the ride every morning.

In Fernandez v. Georgia Theatre Co. II,[160] a battered patron could not recover from the theater owner. Plaintiff Fernandez was seated in the theater when another patron entered, cursing loudly. This patron sat behind Fernandez and his family and continued to curse loudly for the next several minutes. Fernandez's sister suggested they move. Instead, Fernandez asked the loud man if he was going to curse and talk loudly throughout the whole movie. The patron responded by asking what he would do about it. When Fernandez got up, the man asked him where he was going. Fernandez replied that he was getting the theater manager. The loud man then body-slammed Fernandez into a wall, knocked him to the floor, and stomped on his ankle. The Court of Appeals held that the plaintiff could not recover because the theater owner had no superior knowledge as to the threat posed by the loud patron.

Likewise, in Cobb Venture, LLC v. Donaldson,[161] a tenant could not recover because her landlord did not have more knowledge than she did of the hazardous pile of debris. The tenant admitted that she stepped over the same pile outside her apartment about four to six times before tripping. Moreover, she had alternative access to her apartment. In other words, she had equal knowledge of the debris.[162]

The Court of Appeals recently held that, where both plaintiff and defendant have *no* knowledge of a hazard, defendant is entitled to summary

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[160] 261 Ga. App. 892, 583 S.E.2d 926 (2003).
[161] 256 Ga. App. 131, 567 S.E.2d 750 (2002).
[162] But see Hicks v. Walker, 262 Ga.App. 216, 585 S.E.2d 83 (2003), cert. denied, where a child social guest was entitled to a trial after suffering injuries in a deck collapse at the home of a friend. The Court noted that the property owner is presumed to have knowledge of a construction defect, citing Freyer v. Silver, 234 Ga. App. 243, 507 S.E.2d 7 (1998). The Court also stressed the owner' s duty to comply with building codes. See also O'Connell v. Historic Invs. of the South, Inc., 265 Ga. App. 262, 593 S.E.2d 731 (2004) (denying summary judgment to landlord because of questions whether the ceiling collapse resulted from landlord's negligence as well as whether he knew about the dangerous condition). Yet, in Mitchell v. Austin, 261 Ga. App. 585, 583 S.E.2d 249 (2003), the Court granted summary judgment where the plaintiff slipped and fell while descending stairs—although those stairs violated the building code.

judgment. In Norman v. Jones Lang LaSalle Americas, Inc.,[163] the court reasoned that, because defendant was as naive as plaintiff, plaintiff had "knowledge of the hazard…*equal or greater than*" defendant.[164] Because neither knew more than the other, recovery was barred.

However, when there is evidence that both plaintiff and defendant had knowledge of the defect, superior knowledge may be a question for the jury. In Frank Robinson Flowers, II v. Wal-Mart Stores, Inc.,[165] the court recognized that both defendant and plaintiff had knowledge. There, the store manager commented that he knew the ladder was defective before it collapsed beneath the employee / plaintiff. However, the employee used the ladder at least fourteen times before the accident. The court noted that "it is hard to imagine any defect in the ladder that would have been apparent to Mr. Sherman but not equally apparent to Mr. Flowers in the exercise of ordinary care."[166] The court acknowledged "this single statement is a small peg on which to hang an entire case, but it is enough at least to get past summary judgment."[167]

11. Foreseeability

Plaintiff could not recover for an injury sustained while making a phone call from a pay phone owned by the premises owner because there was no evidence that the owner had actual knowledge that the specific pay phone that caused the injury had been damaged during a theft and posed a danger to customers using it. Further, while the owner was aware of the increased incidents of theft and the consequent damage to its pay phones, no evidence of prior incidents of theft-damaged phones falling and injuring customers was presented. Since it was not foreseeable that the theft damage of its pay phone would fall on his head while the plaintiff was kneeling on the ground and pulling on the phone cord, plaintiff could not recover. McAfee v. ETS Payphones, Inc.[168]

The appeals court found that because previous accidents involving tomato towers were not in any way similar to the manner in which the plaintiff was injured, it was not foreseeable that a customer would place the tower in

[163] 277 Ga. App. 621, 627 S.E.2d 382 (2006).
[164] Id. at 8.
[165] 2005 U.S. Dist LEXIS 25578 (2005).
[166] Id. at 12.
[167] Id.
[168] 283 Ga. App. 756, 642 S.E.2d 422 (2007)

his cart with the sharp tips protruding through the front of the cart and then push the cart forward just as the customer was bending over, striking her in the eye. Therefore, the trial court did not err in concluding that the retailer had no duty to protect the customer against the unforeseeable acts of a third party, and the practices of a nursery owner did not change the standard of care from that of ordinary to extraordinary. Thomas v. Home Depot, U.S.A., Inc.[169]

12. No Duty – O.C.G.A. § 51-3-1 Applies Only to Owners and Occupiers

Defendant's duty is normally the first element a plaintiff must prove. Duty is usually presumed in premises liability cases because O.C.G.A. § 51-3-1 imposes an affirmative duty of ordinary care on *owners and occupiers*. That duty only applies to owners or occupiers. See, e.g., Dixon v. Infinity Broadcasting East Inc. d/b/a Waok & Wvee,[170] wherein the Court of Appeals affirmed the grant of summary judgment to Infinity in Dixon's suit for injuries she sustained when her foot was allegedly caught in an indentation on a stage at a conference on the Georgia World Congress Center's premises, which two Infinity-owned radio stations sponsored. The Court held that Dixon's allegations of premises liability were inapplicable to Infinity, since the license agreement between the Georgia World Congress Center and Infinity provided that the Georgia World Congress Center retained responsibility for the facilities' condition and Infinity was a mere licensee with permission to use those facilities.

13. No Requirements of *Extraordinary* Care

A premises owner has an affirmative duty to use *ordinary care* to protect invitees. However, if something only *extraordinary* would prevent the injury, the owner cannot be liable. The basis of defendant's duty is foreeseeabiltiy: "'[o]ne is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what is only remotely and slightly probable.'"[171] Still, "there is no duty to warn of the obvious."[172]

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[169] 284 Ga. App. 699, 644 S.E.2d 538 (2007)
[170] 289 Ga. App. 71, 656 S.E.2d 211 (2007)
[171] Sotomayor v. TAMA I, LLC, 274 Ga. App. 323, 327, 617 S.E.2d 606 (2005), cert. denied.
[172] Bonner v. Southern Rest. Group, Inc., 271 Ga. App. 497, 610 S.E.2d 129 (2005).

In Sisson v. Elliott,[173] the Court of Appeals held that defendants had no reason to know of the hazard and could not be liable for failure to remove it. Defendants owned property that contained an abandoned well. While the owners knew of the well, the previous owner reassured them that it had been filled when, in fact, it was covered with boards just inches below the soil. The plaintiff fell through the boards while taking care of the landowners' dogs.

The court first dismissed Plaintiff's argument that the owners were liable per se under O.C.G.A. § 44-1-14 for not reporting the well to the county. This statute authorizes the county to fill an abandoned well or hole. The court noted that "…the abandoned well or hole on the [defendant] Sissons' property did not becomes an 'open' abandoned well or hole until after [plaintiff] Elliott stepped into it." [174] Moreover, the owners did not construct the well and the former owner misrepresented that it was filled. Defendants' had no duty to report the well to the county or fill it themselves.

The court also held that "because it is further undisputed that there was nothing in the appearance or character of the property to indicate that the well had been defectively covered rather than filled, the law imposed no duty" to inspect the property for its whereabouts or to warn plaintiff of its existence.[175] This duty would exceed the limits of ordinary diligence. The court explained, "to hold otherwise would be to impose a duty on the defendant to anticipate the existence of a hazard which they had no reason to believe existed or to impose a duty to exercise extraordinary care…"[176] This would effectively make the proprietors "absolutely liable for all defective conditions on their property."[177]

14. Proof of Fault and Negligence Per Se

If plaintiff cannot point to *any evidence* that defendant breached his duty of ordinary care, summary judgment is appropriate. In Norman v. Jones Lang LaSalle Americas, Inc.,[178] the court reiterated that "a landowner (or one managing the property on his behalf) is not an insurer of the safety of invitees." It explained, "falling and injuring one's self proves nothing. Such happenings are commonplace wherever humans go." There must be a basis

[173] 278 Ga. App. 156, 628 S.E.2d 232 (2006).
[174] Id. at 4.
[175] Id. at 5.
[176] Id. at 6.
[177] Id. at 7.
[178] 277 Ga. App. 621, 627 S.E.2d 382 (2006).

for blaming defendant: he must be negligent. When Plaintiff could only prove she fell over boxes, there was no superior knowledge of a hazard to create fault.

In Pirkle v. Robson Crossing, L.L.C.,[179] the court affirmed summary judgment to the premises owner after Plaintiff fell off a curb at a shopping center. "Here . . .there is no evidence, expert or otherwise, that the allegedly 'hazardous' curb was negligently designed, constructed or maintained, or that there were lighting or other issues that made it difficult to see."[180] Instead, Plaintiff testified that she did not appreciate the curb's height. Plaintiff's failure was unforeseeable; protecting against it would impose an extraordinary duty.

Similarly, in Hamblin v. City of Albany,[181] the court denied recovery when the plaintiff injured her hand on a swinging bridge handrail. She had no proof the park owners were aware of the dangerous splinter nor that they failed to maintain the handrail. Plaintiff introduced evidence that pressure washing and coating would have prevented the hazard. However, she did not show that an ordinarily prudent owner would have taken these precautions.

In Sotomayor v. TAMA I, LLC, et al.,[182] the Court of Appeals again denied recovery. In this case, the family sued the apartment complex for failing to prevent the death of their five-year-old daughter who was struck and killed by a car. The driver "drove across marked parking spaces, over a raised concrete curb, four feet of sidewalk, and 13 feet of grass before striking Leslie and crushing her against the brick wall of her apartment building."[183] The plaintiff argued the landlord should have installed "a 'barrier curb' or 'bumper stop' instead of the lower, mountable curb" to protect her daughter.[184] Summary judgment was appropriate because "there was no competent evidence that the landlord had a duty" to install the higher bumper stops.[185]

Notably, the complex had bumper stops near the leasing office to prevent residents from parking on the grass. The devices were not installed to protect pedestrians. However, Plaintiff's expert opined the landlord should

[179] 272 Ga. App. 259, 612 S.E.2d 83 (2005).
[180] Id. at 261.
[181] 272 Ga. App. 246, 612 S.E.2d 69 (2005).
[182] 274 Ga. App. 323, 617 S.E.2d 606 (2005), cert. denied.
[183] Id. at 323.
[184] Id.
[185] Id. at 324.

have installed the bumper stops in front of the apartment building. In his opinion, ordinary care depended on the reasonableness of design and operation under state and national standards *for roads and highways*. Specifically, he relied upon the manual, 'Geometric Design of Highways and Streets,' issued by the American Association of State Highway and Transportation Officials ('AASHTO'). However, there were no state, federal, local laws, or ordinances mandating the use of bumper stops nor applying AASHTO standards to parking lots.

The Court disagreed: the manual and bumper stops elsewhere on the property did not establish a duty. The manual did not dictate ordinary care because it did not apply to parking lots. The testimony amounted to "bolstering, particularly with regard to [the expert's] opinion as to what measures would be reasonable." The court stated,

> [T]he scope of what is admissible as expert opinion testimony is not unlimited. It is the established rule in Georgia, that where (a) the path from evidence to conclusion is not shrouded in the mystery of professional skill or knowledge, and (b) the conclusion determines the ultimate issues of fact in a case, the jury must make the journey from evidence to conclusion without the aid of expert testimony. A party may not bolster his case as to the ultimate issue with expert testimony when the jury could reach the same conclusion independently of the opinion of others.[186]

The expert testimony did not create an issue of fact because installing bumper stops would be extraordinary care.

Furthermore, the landlord did not *assume the duty* to install the bumper stops in front of the Plaintiff's apartment building "when it installed the devices in front of the leasing office." There is "no evidence that the landlord was aware that the devices should have been installed for the protection of pedestrians. . . the devices were installed to prevent tenants from parking on landscaped areas." Moreover, this was the first incident to put the owner on notice that the bumper stops may be necessary safety precaution.

The court explained that "duty cannot be divorced from foreseeability."[187] An event is not foreseeable if it is an "extraordinary

[186] Id. at 326.
[187] Id. at 327.

coincidence, or a conjunction of circumstances, or would not occur save under exceptional circumstances; if it is unusual and unlikely to happen, or if it is a rare event in experience, or if other and contingent experiences preponderate largely in causing the injurious effect."[188] The death was a remote possibility and an "extraordinarily rare event."[189] Thus, the landlord had no duty to guard against it.

In Mock v. The Kroger Company,[190] Plaintiff slipped on a small puddle of water while cutting through an empty Kroger checkout lane. Plaintiff testified that the puddle blended in with the white, shiny floor. The store manager testified the water came from some dripping lettuce in the cart of a customer. Water would drip on the floor if a customer didn't bag their produce. Plaintiff argued that Kroger had constructive knowledge because it knew about this risk. It should have posted signs to require all produce be bagged and assign employees to ensure compliance / warn customers of the risk.

The Georgia Court of Appeals held Kroger was not negligent. Kroger did not create the puddle. Absent evidence Kroger had constructive knowledge of the puddle, summary judgment was proper.

In Rather v. Worrell et al.,[191] the plaintiff fell when climbing onto a stage in a retirement community meeting room. She believed she would not have fallen if there had been a handrail. The Court of Appeals affirmed summary judgment to the premises owner because Plaintiff had no evidence Defendant had knowledge that the step was a hazard. Even with a handrail, causation was a problem because Plaintiff didn't remember trying to catch herself. Thus, the fall was a result of her own negligence. Plaintiff knew there was no handrail and that residents were usually assisted climbing onto the stage.[192]

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[188] Id.
[189] Id.
[190] 267 Ga. App. 1, 598 S.E.2d 789 (2004), cert. denied.
[191] 260 Ga. App. 174, 581 S.E.2d 568 (2003).
[192] See Also, Duvall v. Green, 262 Ga. App. 669, 586 S.E.2d 369 (2003). The Court of Appeals held that defendant homeowner was not negligent. In this case, Green, the caretaker, sued Duvall when her knee buckled walking down the stairs. Green alleged that Duvall had knowledge of the steepness. However, the plaintiff produced no other evidence regarding the stairs other than this assertion. In fact, she claimed she did not know why her knee buckled. She traveled the stairs several times and couldn't identify any basis for fault. The court held, "she failed to rebut in any way Duvall's affidavit testimony that the stairs were properly constructed and maintained." Defendant did not have superior knowledge of any dangerous

In Walker v. Bruhn,[193] Plaintiff, an acquaintance of the pawn shop manager, was injured when he showed a circular saw to one customer while the manager was busy with another customer. The one customer asked to have the saw plugged in to make sure it worked. Plaintiff plugged in the saw. The saw immediately started running and cut into plaintiff's arm. The manager stated that when the saw was first brought in, he inspected it to make sure it was working properly before accepting it and the saw operated with no problems at that time. The manager discovered after plaintiff's injury that the saw alternated between working properly and turning on immediately when plugged in. The Court affirmed summary judgment to the pawn shop. The pawn shop had a duty under O.C.G.A. § 51-3-1 to inspect the premises to discover possible dangerous conditions. The pawn shop lacked actual or constructive knowledge that the saw was defective. Plaintiff failed to show that the pawn shop failed to exercise reasonable care in inspecting the saw. An inspection was performed on the saw before it was accepted. Nothing in the inspection placed the pawn shop on notice that the saw would subsequently malfunction.

Moreover, courts grant summary judgment when Plaintiff cannot point to a substance that s/he slipped on. For example, summary judgment was appropriate for the fast food restaurant in Flagstar Enters, Inc. v. Burch.[194] The plaintiff fell on the "slick floors" but could not show what made the floors "slick."[195]

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condition. But see, Caswyck JSB LLC v. Crowe, 265 Ga. App. 316, 593 S.E.2d 758 (2004) (summary judgment denied where plaintiff was injured crossing a grassy area between the parking lot and the sidewalk); Thomas v. Exec. Comm. of the Baptist Convention of the State of Georgia, 262 Ga. App. 315, 585 S.E.2d 217 (2003), (no summary where plaintiff tripped in a parking lot and her ability to see the pothole was a question of fact); Mac Int'l-Savannah Hotel, Inc. v. Hallman, 265 Ga. App. 727, 595 S.E.2d 577 (2004), cert. denied, (summary judgment was not appropriate when Plaintiff fell descending stairs she had just climbed. There was evidence the stairs violated the building code and were in a poorly lit area.)

[193] 281 Ga. App. 149, 635 S.E.2d 322 (2006), cert. denied.

[194] 267 Ga. App. 856, 600 S.E.2d 834 (2004).

[195] Id. at 857. See also, Chapman v. C.C. Dickson Co., 273 Ga. App. 640, 616 S.E.2d 478 (2005), (summary judgment affirmed because plaintiff had no idea what caused him to slip and fall). Belk Dept Store of Charleston, S.C., Inc. v. Cato, 267 Ga. App. 793, 600 S.E.2d 786 (2004). In Belk, Plaintiff fell passing between two cosmetics counters on crutches. He assumed he must have slipped on a substance although he did not see or feel any. A store employee testified there was no substance on the floor; the floor was clean and dry when she examined it after the fall. Plaintiff was unable to recover. In Metts v. Wal-Mark Stores, Inc., 269 Ga. App. 366, 604 S.E.2d 235 (2004), Wal-Mart was entitled to summary judgment. Plaintiff had no evidence the display rack which fell on him had a defective design / construction, the boxes were stacked hazardously, or that Wal-Mart had superior knowledge to any hazard.

In contrast, Plaintiff raised a fact question in Hagadorn v. Prudential Ins. Co.[196] The Plaintiff stepped into a steeply-graded area leading directly into a storm drain on the defendant's property. Plaintiff testified the pavement surface appeared flat when, in fact, the gradation was very steep. Moreover, leaves covered the hole. Finally, the Plaintiff's expert testified that the lighting created the illusion the pavement was not steep and, at the time of the fall, there were "no paint markings alerting pedestrians to the presence of the steep grade near the catch basin."[197] Defendant arguably had constructive notice the storm drain was hazardous.

Proof of fault can also be established through negligence per se. A statutory violation constitutes negligence per se; no other evidence regarding the duty of care is necessary.[198]

In Norman v. Jones Lang LaSalle Americas, Inc.,[199] the Court of Appeals discussed negligence per se stemming from a building code violation. In this case boxes placed in the entrance of an office violated building and safety codes. The court noted that violations have established negligence per se in other cases. However, "to the extent…[these holdings] suggests that proof of *any* building code violation would automatically establish negligence per se under any circumstances, it is overly broad and misleading."[200] To establish negligence per se, plaintiff must present evidence that

> defendants violated a specific code provision, that the provision was mandatory and had the force of law, that she was in the class the provision was intended to protect, that she suffered the types of harm that the provisions were intended to guard against, and that the alleged negligence per se proximately caused her injuries.[201]

Defendant was entitled to summary judgment because Plaintiff did not meet this burden. The Plaintiff did not "specify which building or safety code provisions the Defendant allegedly violated in this case or…request that the trial court take judicial notice of such provisions."[202]

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[196] 267 Ga. App. 143, 598 S.E.2d 865 (2004).
[197] Id. at 145.
[198] See Mitchell v. Austin, 261 Ga. App. 585, 583 S.E.2d 249 (2003).
[199] 277 Ga. App. 621, 627 S.E.2d 382 (2006).
[200] Id. at 627.
[201] Id. at 628.
[202] Id. at 629.

Moreover, the court clarified: defendant's superior knowledge is *still* required. It stated, "negligence per se does not equal liability per se, and Norman's equal knowledge of the hazard would still entitled Jones Lang to summary judgment."[203]

15. Static Defect / Open and Obvious

A static defect is one that is unchanging or "passive."[204] In Delk v. Quiktrip Corp.,[205] the customer could not recover against the service station when she twisted her ankle on the cover of a gasoline storage tank. The court held, "[W]hen the alleged dangerous condition is a static defect, a person is presumed to have knowledge of it when that person has successfully negotiated the alleged dangerous condition on a previous occasion and, therefore, cannot recover for a subsequent injury."[206]

In Bonner v. Southern Rest. Group, Inc.,[207] Plaintiff fell over a curb in the TGI Friday's parking lot. The court affirmed Defendant's summary judgment because there was no basis for fault. Plaintiff alleged the curb was "dark due to inadequate lighting" and because it was the "same color as the curb apron."[208]

For the first allegation, the court noted that plaintiff's evidence was flawed. Plaintiff admitted that she was unaware of the lighting that night. Plaintiff's witness, Marion Hawk, testified he was "familiar" with this parking lot, and "averred that the curb…was dark due to inadequate lighting."[209] In light of the restaurant maintenance logs and testimony that the lighting was adequate that night and had been inspected twice that day, the court dismissed the first claim because "in passing upon a motion for summary judgment, a finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists."[210] "The [trial] court determined that Hawk's affidavit had no probative value as to the lighting conditions because Hawk did not purport to have any expertise in the area of parking lot design or

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[203] Id.
[204] Harrison v. Plaint Improvement Co., Inc., 273 Ga. App. 884, 887, 616 S.E.2d 123.
[205] 258 Ga. App. 140, 572 S.E.2d 676, 677 (2002).
[206] Id. at 141.
[207] 271 Ga. App. 497, 610 S.E.2d 129 (2005).
[208] Id. at 499.
[209] Id.
[210] Id.

illumination and because he did not state when he observed the lighting in the parking lot."[211]

On the second allegation, the court noted that the curb's color was, if anything, a static defect. "Because the curb was a static condition and Bonner successfully negotiated it prior to entering the restaurant, she cannot recover for her subsequent injury."[212]

In Rowland v. Murphy Oil USA, Inc., the Court of Appeals affirmed summary judgment to the gas station in a case where the Plaintiff tripped and fell over the legs of an advertising sign. The Court found the station was not liable as the sign was a static condition in spite of the Plaintiff's assertion that the sign could be moved. The Court noted that, although the sign theoretically could be moved, there was no evidence it ever had been moved or that the sign was a transient or temporary condition.

In addition, where the hazard is open and obvious, plaintiff cannot recover.[213] See also Nemeth v. RREEF Am., LLC, [214] wherein the Court affirmed summary judgment to a landowner in a tenant's slip and fall action, holding that the uneven and unstable brick-paver walkway where he fell was visibly uneven, and the plaintiff had been to that area of the patio a few times, and had already walked across it once that day before he fell. The uneven and unstable surface of the patio was a static defect which the plaintiff was presumed to have knowledge of, given that he had already successfully traversed the area. As a result, the owner did not have superior knowledge of the patio's condition. See also Wright v. K-Mart Corp.,[215] wherein the Court of Appeals affirmed the grant of summary judgment to K-Mart in a case where Plaintiff tripped and fell on a shelving unit at a K-Mart store, holding that plaintiff failed to come forward with evidence showing that K-Mart had superior knowledge of the alleged hazard. The Court noted that Wright had at least equal knowledge of and could have avoided the corner of the shelving unit, which caught his pants cuff, since it was a static defect, he made the turn at issue many times before and he was able to observe the open and obvious hazard for at least 10 seconds before he fell.

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[211] Id. at 499.
[212] Id. at 500.
[213] See Brazier v. Phoenix Group Management, 280 Ga. App. 67, 633 S.E.2d 354 (2006), cert. denied, wherein summary judgment was mandated where both the decedent mother and her 13 year old autistic son were aware of the lake in the subdivision. The mother drowned after entering the lake to rescue her son.
[214] 283 Ga. App. 795, 643 S.E.2d 283 (2007).
[215] 286 Ga. App. 765, 650 S.E.2d 300 (2007).

16. Proof of Causation

Defendants may also prevail if plaintiff cannot establish the defendant's breach of duty was the proximate cause of the injuries to the plaintiff. See, e.g., Gay v. Redland Baptist Church[216]. For example, in Mitchell v. Austin,[217] summary judgment was proper because plaintiff failed to present any evidence that the building code violations in the construction of the stairs caused her to fall. In Sturdivant v. Moore,[218] Plaintiff sued for the wrongful death of her decedent who died after being found unconscious in the pool at the home where he was attending a party. The plaintiff claimed that the defendant homeowner negligently failed to turn on the pool's interior lights as the day grew dark, preventing witnesses from seeing the decedent in time to prevent his death. The trial court granted the defendant's Motion for Summary Judgment, finding that the decedent chose to swim in spite of equal or superior knowledge of the conditions of the pool. The appellate court affirmed the judgment. The plaintiff failed to show a causal connection between any breach of duty on the homeowner's part and the drowning of the decedent. The record did not include the times at which the decedent was discovered or was last seen before the drowning. No evidence showed how long he was in the water or the time at which discovery might have averted injury or death, nor was there any evidence as to how much more quickly he might have been discovered if the pool had been lit.

17. Plaintiff's Status on the Property

The plaintiff's status on the defendant's property determines the level of care defendant owes to the plaintiff. Georgia courts recognize three categories of plaintiffs: an invitee, a licensee, and a trespasser. The owner or occupier receives some benefit, real or supposed, from an invitee. The owner owes an invitee (usually a customer) a duty of ordinary care to keep the premises safe because he has some interest in the visit.[219]

In contrast, the premises owner only owes licensees and trespassers the duty not to willfully or wantonly injure them.[220] A licensee is permitted to go on the property for his / her own interest but is neither a customer, a servant,

[216] 288 Ga. App. 28, 2007 Ga. App. LEXIS 1130 (2007).
[217] 261 Ga. App. 585, 583 S.E.2d 249 (2003).
[218] 282 Ga. App. 863, 640 S.E.2d 367 (2006).
[219] O.C.G.A. § 51-3-1.
[220] O.C.G.A. § 51-3-2.

nor a trespasser, nor in privity with the premises owner. A social guest, for example, is a licensee. Finally, a person is a trespasser if s/he is unauthorized to be on the property

A plaintiff's status is not permanent. A person can lose their status as an invitee if s/he strays from the portion of the premises to which the invitation extended[221] or remains on the premises after it closes to the public.[222] In Clark Atlanta University, Inc. v. Williams, [223] the Court of Appeals declined to conclude that the student lost his invitee status simply because he stopped to socialize for 45 minutes, a normal activity for college students.

In Howard v. The Gram Corp.,[224] Plaintiff accompanied her adult daughter to her job interview and fell on a step in the radio station's lobby. There was no evidence of willful or wanton acts. Because plaintiff was a licensee, she could not recover.

Many times, the ultimate issue is whether an action was willful or wanton. The courts seem to have less tolerance for trespassers as compared to licensees.

In Spear v. Calhoun,[225] plaintiff's daughter was killed on New Year's Eve by a falling bullet. Plaintiff sued the apartment complex owner where the accident occurred, alleging that he breached his duty to keep his premises safe. Plaintiff asserted that the owner "knew or should have known of the risks posed by dangerous characters involved in criminal activity in and around the premises."[226]

The court held that plaintiff was, at best, a licensee because the daughter did not reside in the complex. Moreover, the evidence was unclear whether she was a trespasser or lawfully using her friend's telephone. The complex owner wasn't liable because he hadn't acted willfully and wantonly.

In so holding, the court would not apply premises liability precedent involving prior similar incidents. Plaintiff failed to offer evidence of

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[221] Swanson v. Smith, 199 Ga. App. 471, 405 S.E.2d 301 (1991).
[222] Armstrong v. Sundance Entertainment Inc., 179 Ga. App. 635, 347 S.E.2d 292 (1986).
[223] 288 Ga. App. 180 (2007)
[224] 268 Ga. App. 466, 602 S.E.2d 241 (2004), cert. denied.
[225] 261 Ga. App. 835, 584 S.E.2d 71 (2003).
[226] Id. at 836.

substantially similar crimes on the property. Moreover, Defendant testified that, before this incident, he had never heard about any incident of teenagers firing guns into the air on New Year's Eve. Thus, Plaintiff could not show the requisite willful or wanton conduct.

In Nunn v. Page,[227] summary judgment was appropriate to neighbors / homeowners. The homeowners gave the visiting four-year-old boy permission to jump on a trampoline with their daughter where he was injured. Here, the child was a licensee and could only sue for willful or wanton injuries. Although the homeowners did not breach *this* duty of care, fact questions remained regarding whether the homeowners undertook supervision. Even without compensation, a person who undertakes "the control and supervision of a child" has the duty to "use reasonable care to protect the child from injuries."[228] Thus, summary judgment was proper for the child as a licensee but not as to whether the neighbors assumed a higher standard of care.[229]

In contrast, a trespasser on a motorcycle could not recover when he died after hitting a dirt-encrusted wire. In Harrison v. Plant Improvement Co., Inc., the owners placed a "dirt-colored cable across the dirt trail" to "serve as a barrier for four wheelers and bikes."[230] Generally, a property owner must not willfully / recklessly injure plaintiff or "set a mantrap."[231] Courts consider the "knowledge of the owner of the existence of the dangerous condition coupled with a conscious indifference to the consequences, so that the intent to inflict injury is inferable."[232] Moreover, the duty to protect from a static or passive danger is less than the duty to protect from a active or hidden peril. The court explained that it is "willful or wanton not to exercise ordinary care to protect anticipated trespassers from dangerous activities or hidden perils on the premises. However, where the alleged negligence arises from static or passive conditions, the landowner owes the anticipated trespasser a duty not to injure him willfully or wantonly."[233] Here, the cable is a static condition and there was no evidence the owner intended to do the anticipated trespasser

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[227] 265 Ga. App. 484; 594 S.E.2d 701 (2004), cert. denied.
[228] Id. at 486.
[229] See also, Collins v. Glover, 273 Ga. App. 352, 615 S.E.2d 194 (2005), (Plaintiff / licensee was entitled to a jury trial to resolve factual issues concerning whether the defendant knew or should have know that a leaky faucet, combined with freezing temperatures, created an unreasonable risk of harm to the plaintiff / social guest.).
[230] 273 Ga. App. 884, 886, 616 S.E.2d 123 (2005), cert. denied.
[231] Id. at 886.
[232] Id.
[233] Id. at 887.

harm. This trespasser was not anticipated because they had never seen "any motorcycle tracks or motorcyclists" on the land.[234]

18. Plaintiff Departed from Designated Route

Plaintiff may be unable to recover where s/he voluntarily departs from the designated route of travel. Plaintiffs who "voluntarily depart" from the designated path or walkway "must exercise a heightened degree of care" because they "assume the risk of hazards found."[235]

In Chamblee v. Grayco,[236] Plaintiff fell when she stepped from a sidewalk onto a partially exposed drainage pipe. The sidewalk led from her apartment to the parking lot where her car was parked. According to the plaintiff, she carefully stepped off the path to supervise her son, fell on the pipe, slid down a small hill, and broke her ankle. Unlike plaintiff, the manager had actual knowledge of the pipe but did not think it a hazard. He explained that it was off the path and he never saw tenants walking there. Thus, Plaintiff assumed the risk of her injury by voluntarily departing from the sidewalk and steps. "Where an invitee voluntarily departs from the route designated and maintained…for the invitee's safety," the invitee has a heightened duty of care for the "increased risk resulting from that choice."[237]

In Williams v. Park Walker Apartments, the Court of Appeals discussed undesignated shortcuts.[238] Allowing liability would effectively "require the landlord to ensure that every possible route across his property is safe."[239] Thus, Plaintiff could not recover after taking a short cut across the grass.

However, courts recognize a notable exception when "the owner has notice that the unauthorized route is being regularly used improperly."[240] In Brad Bradford Realty, Inc. v. Callaway,[241] plaintiff and her son regularly used

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[234] Id. at 888. See also Gomez v. Julian LeCraw & Co., 269 Ga. App. 576, 604 S.E.2d 532 (2004), cert. denied, where a person who rented space in her cousin's apartment without the landlord's consent was unable to recover for her injuries because she was a trespasser.
[235] Brad Bradford Realty, Inc. v Callaway, 276 Ga. App. 648, 651, 624 S.E.2d 179 (2005).
[236] 266 Ga. App. 154, 596 S.E.2d 683 (2004).
[237] Id. at 156. See also Gaydos v. Grupe Real Estate Investors, 211 Ga. App. 811, 440 S.E.2d 545 (1994).
[238] 253 Ga. App. 429, 559 S.E.2d 169 (2002).
[239] Id. at 431.
[240] 276 Ga. App. 648, 650, 624 S.E.2d 179 (2005).
[241] Id.

a path through the bushes to the apartment patio door. The path was worn and there was a gap in the bushes. In fact, many tenants used their patio door as a shortcut. Although fully aware, the apartment complex did nothing to "stop or discourages the tenants."[242] Thus, Plaintiff could recover when she fell in a hole on this path.

19. Independent Contractors

In R&S Farms Inc. d/b/a Master Care Floor Serv. v. Butler,[243] the Court of Appeals granted summary judgment to an janitorial service when Plaintiff slipped on an egg white at a Kroger store. The Court held that the janitorial service company, an independent contractor, owed no duty to Butler under its janitorial contract with Kroger. The court reasons, "Nor did the evidence authorize a finding of malfeasance in the performance of the contract that would preclude a grant of summary judgment..."[244] See also Perkins v. Compass Group USA, Inc. [245] wherein the Court stated:

> Under Georgia law, . . . [l]andowners owe a duty of care to their invitees, as provided in O.C.G.A. § 51-3-1: "Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe." O.C.G.A. § 51-3-1. Because an owner/occupier's duties to keep the premises safe are derived from statute (O.C.G.A. § 51-3-1), they are non-delegable, even where a party contracts for another party to provide services. Johnson v. Kimberly Clark, 233 Ga. App 508, 510, 504 S.E.2d 536 (Ga. App. 1998) (internal citations omitted). Thus, the duties imposed on owners or occupiers of land are not applicable to independent contractors. Kelley v. Piggly Wiggly Southern, Inc., 230 Ga. App. 508, 509, 496 S.E.2d 732 (Ga. App. 1997) (internal citations omitted); see also Greene v. Piedmont Janitorial Servs., Inc., 220 Ga. App. 743, 744, 470 S.E.2d 270 (Ga. App. 1996) (O.C.G.A. § 51-3-1 does not impose any duty on independent contractor to inspect

[242] Id. at 651.
[243] 258 Ga. App. 784, 575 S.E.2d 644 (2002).
[244] Id. at 786. See also McCaskill, III v. Carillo, Sr., 263 Ga. App. 890, 589 S.E.2d 582 (2003), where an employee was not entitled to recover from the independent contractor/carpet installer when he tripped at his workplace.
[245] 2007 U.S. Dist. LEXIS 16516, 9-10 (N.D. Ga., Mar. 7, 2007)

the premises of the occupier for the safety of the occupier's invitees.)

In Brown v. All-Tech Investment Group, Inc.,[246] the Court of Appeals affirmed summary judgment in several tort suits arising out of a shooting rampage. On July 29, 1999, a customer opened fire at the Buckhead offices of two day trading firms. Defendants included the two day trading firms and the private security company. The Court held that the private security company did not assume a duty to protect appellants from criminal assault. See also CDP Event Servs. Inc. v. Atcheson,[247] in which the Court reversed the trial court's denial of the private security company's Motion for Summary Judgment, holding:

> As we have previously stated, [w]e recognize that whenever a premises owner contracts with a private security company the parties may *expect* the security services provided to benefit invitees who visit the property. As we have held, however, an injured invitee may not recover against the security company for negligent performance if the contract is silent as to the parties' *intent* to confer that benefit.
>
> Atcheson and HOB contend that the cases cited herein are factually distinguishable and therefore inapplicable. The appellees are correct that there are no Georgia cases with precisely the same facts as the instant case. They have failed, however, to cite any binding case that supports their argument that Atcheson was a third-party beneficiary of the security contract. And notwithstanding the factual distinctions of the cases cited herein, the law and analysis require that in order to confer third-party beneficiary status, the contract must show on its face that the parties to the contract clearly intended to confer such a benefit. (citations omitted)

Similarly, in Taylor v. Americasmart Real Estate, LLC. et al.,[248] the Court of Appeals affirmed summary judgment for a janitorial service, holding that the service was not liable for plaintiff's slip and fall on a foreign substance because it was neither the owner nor the occupier of the premises, and the invitee was not the janitor's invitee. Second, the janitor was merely an

[246] 265 Ga. App. 889, 595 S.E.2d 517 (2004).
[247] 289 Ga. App. 183, ___ S.E.2d ___ (2008).
[248] 287 Ga. App. 555, 651 S.E.2d 754 (2007).

independent contractor which agreed to provide certain cleaning services in the building where the invitee fell. Consequently, the janitor owed no independent duty to the invitee to inspect the premises for spills.

20. Negligent Security Cases: Equal or Superior Knowledge

Georgia law imposes an affirmative duty to "exercise ordinary care to keep its premises safe for invitees."[249] (Note that an action for negligent security may be limited to *invitees*.)[250] Thus, "an intervening criminal act by a third party generally insulates a proprietor from liability unless such criminal act was reasonably foreseeable."[251] Still, even if the criminal act was foreseeable, "the true ground of liability is the superior knowledge of the proprietor of the existence of a condition that may subject the invitee to an unreasonable risk of harm."[252]

Thus, a premises owner's liability in these cases stems from his "superior knowledge."[253] Defendant may prevail on summary judgment if it can demonstrate the plaintiff had either equal or superior knowledge regarding the perpetrator's danger. Summary judgment is appropriate where "plaintiff's knowledge of the risk is clear and palpable."[254]

In Snellgrove v. Hyatt Corp.,[255] the hotel was entitled to summary judgment for the second of two fights between plaintiff and his co-worker. The hotel broke up the first fight between the two earlier that night. Later, Plaintiff returned to the hotel—despite the fact that his co-worker issued a subsequent threat. The court recognized that plaintiff's knowledge of this danger was "clear and palpable": he knew that his co-worker wanted to fight, consciously returned to the hotel, failed to inform the hotel of the later challenge, and didn't seek hotel security protection.[256]

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[249] Snellgrove v. Hyatt Corp., 277 Ga. App. 119, 123, 625 S.E.2d 517 (2006).
[250] Barnes v. St. Stephen's Missionary Baptist Church, 260 Ga. App. 765, 767, 580 S.E.2d 687 (2003) ("Georgia decisions considering the liability of property owners for criminal acts by third parties uniformly limit their discussions to the claims of invitees.")
[251] Id.
[252] Id. at 124.
[253] Howell v. Three Rivers Security, 216 Ga. App. 890, 892, 456 S.E.2d 278, 280 (1995), cert. denied.
[254] Snellgrove v. Hyatt Corp., 277 Ga. App. 119, 124, 625 S.E.2d 517 (2006).
[255] Id.
[256] Id.

Thus, courts consider whether the victim and perpetrator know each other or have a history of troubled relations.[257] In Dolphin Realty v. Headley,[258] the Court of Appeals reversed a denial of summary judgment when the same assailant attacked plaintiff twice. The first attack occurred at night when the tenant left her apartment unlocked to do her laundry. When she returned to her apartment, she was sexually assaulted and robbed inside her apartment. The assailant advised her not to "go out" or do laundry after dark.[259]

The landlord had never conducted a general survey of crimes for the area where the complex was located, "nor was a lighting survey ever conducted of the apartment complex. There were no formal security manuals or polices in place for the complex and no security officer. The landlord did, however, send fliers informing other tenants of the incident and reminding that "[a]s you realize, no one can guarantee your safety…[Y]our security is the responsibility of the local law enforcement and yourself."[260]

The plaintiff remained at the complex because she "felt like it was still a good location" and "wasn't a bad crime area otherwise."[261] She stopped doing laundry after dark for a period following the attack but resumed the practice a year later. One night, she returned from doing laundry and heard footsteps as she closed her front door. The same man who had previously assaulted her pushed his way in. He assaulted and robbed her again.

Summary judgment for the landlord was appropriate. In the first attack, the landlord didn't owe a duty because "the only record of previous property crimes in the area was a computer printout used by [plaintiff]'s expert showing dates and addresses of various area crimes and numerous copies of crime reports in the area."[262] Prior to the incident, the landlord had no knowledge of similar crimes in the complex.

Moreover, the Court agreed that the landlord did not have *superior* knowledge concerning the second assault. A tenant cannot recover "when, as here, she has equal or superior knowledge of the risk and fails to exercise ordinary care for her own safety."[263]

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[257] See, e.g., Griffin v. AAA Autoclub South, Inc., 221 Ga. App. 1, 470 S.E.2d 474 (1996).
[258] 271 Ga. App. 479, 610 S.E.2d 99 (2005), cert. denied.
[259] Id. at 479.
[260] Id. at 480.
[261] Id.
[262] Id. at 482.
[263] Id. at 481. Brown v. All-Tech &c., 265 Ga. App. 889, 894, 595 S.E.2d 517 (2004); Niles v. Bd. of Regents &c. of Ga., 222 Ga. App. 59, 473 S.E.2d 173 (1996); see also Fallon v.

In Cook v. Micro Craft Inc.,[264] Plaintiffs were not entitled to recover from the decedent's employer, Micro Craft, Inc., because Plaintiffs had superior knowledge of the risk. In the Cook case, Jackson (the decedent's estranged husband) murdered decedent and injured decedent's aunt. Both victims "knew of Jackson's violent history and were terrified of him."[265] Despite this knowledge, just prior to the attack, "the decedent had several long phone conversations with him and told Jackson where she lived and worked. [Moreover, b]oth women knew that Jackson informed decedent he was coming over to kill her *that day*."[266] Fearing for their safety, the women fled to Micro Craft. The decedent should have known of her employer's sparse security; however, she made the conscious decision to go to the plant instead of to a police station or sheriff's office.

In contrast, Micro Craft had no knowledge of the looming threat. It had no notice of the decedent's conversations with Jackson. No one warned Micro Craft that the women were fleeing a potential killer. At most, decedent mentioned that her husband had "'a history of violence.'"[267] However, Micro Craft was unaware Jackson knew decedent's employer. It did not know Jackson's name, what he looked like, or what kind of car he drove. Still, once aware of the situation, it immediately reacted.

The Court of Appeals held that, even if an intervening criminal act was reasonably foreseeable, "the true ground of liability is the *superior knowledge* of the proprietor" as to the existence of an unreasonable risk of harm.[268] It reasoned,

> This was not a random stranger attack but rather grew out of a specific private relationship which had no connection with employment whatsoever. The place chosen by the boyfriend for the attack just happened to be the employer's parking lot. The employer did not create or allow to exist an environment

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Metropolitan Life Ins. Co., 238 Ga. App. 156, 518 S.E.2d 170 (1999) (physical precedent only); Post Properties v. Doe, 230 Ga. App. 34, 495 S.E.2d 573 (1997), cert. denied (physical precedent only).

[264] 262 Ga. App. 434, 585 S.E.2d 628 (2003), cert. denied.

[265] Id. at 439.

[266] Id.

[267] Id.

[268] Id. at 438.

which placed [plaintiff] at risk any more than if she had been at home or on the street.[269]

Likewise, in Davis v. Crum,[270] Plaintiff knew that the perpetrators in defendant's trailer park were violent. Plaintiff approached the group after they beat his cousin. One of the men, brandishing a stick, demanded Plaintiff's money. The men then beat Plaintiff unconscious. Since the plaintiff failed to avoid this known danger, summary judgment was properly granted to the trailer park owner.[271]

21. Negligent Security Cases: Foreseeability

An owner can be liable for failure to keep premises / ingresses reasonably safe through adequate security.[272] Although a landowner is not an insurer of safety,[273] s/he has a duty to protect against the foreseeable criminal acts of third parties.[274] A foreseeable consequence is "'"probable, according to ordinary and usual experience," those which, "because they happen so frequently[,]...may be expected to happen again."[275]

One can establish foreseeability by showing the proprietor has notice of substantially similar prior criminal acts.[276] Substantial similarity is based on similar "location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question."[277] This is usually a fact question that survives summary judgment. It is questionable whether a plaintiff can establish foreseeability solely through expert testimony. See, e.g., Carlock v. KMart Corp.,[278] (expert testimony not required to determine foreseeability of a shooting in a shopping center parking lot); Hadden v. ARE Properties, LLC,[279] (expert testimony insufficient to create a triable issue as to foreseeability).

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[269] Id. at 439. See also Griffin v. AAA Auto Club South, 221 Ga. App. 1, 470 S.E.2d 474 (1996); Britt v. Kelly & Picerne, 258 Ga. App. 843, 575 S.E.2d 732 (2002); Johnson v. Holiday Food, 238 Ga. App. 822, 520 SE2d 502 (1999).
[270] 263 Ga.App. 682, 588 S.E.2d 849 (2003).
[271] See also Fernandez v. Georgia Theatre Co., II, 261 Ga. App. 892, 583 S.E.2d (2003).
[272] O.C.G.A.§ 51-3-1.
[273] Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 492, 405 S.E.2d 474 (1991).
[274] Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 482 S.E.2d 339 (1997).
[275] Brown v. All-Tech Inv. Group, Inc., 265 Ga. App. 889, 894, 595 S.E.2d 517 (2004).
[276] Id. at 786.
[277] Id.
[278] 227 Ga. App. 356, 361, 489 SE2d 99 (1997)
[279] 280 Ga. App. 314, 633 S.E.2d 667 (2006)

In Mason v. Chateau Communities, Inc.,[280] the court held that a prior sexual assault put a trailer park owner on notice of this kind of danger.

In Baker v. Simon Property Group[281] defendant's summary judgment turned on foreseeability. Plaintiff Jason Baker sued the mall manager and security company after he was shot during a car jacking in the mall parking lot on Christmas Eve. Baker "heard a noise on his right side, and saw a man pointing a gun at him through the partially open front passenger's window of his car. The man said, 'Give it up playboy, you know what time it is,' and shot into the car's front windshield." [282] When Baker jumped out to surrender the car, the perpetrators shot him.

Baker argued that the shooting was foreseeable. He introduced an inadmissible / uncertified computer printout listing every mall-related crime for the previous 30 months. However, even if certified, Baker did not show that the mall *knew* about these crimes. "Thus, this evidence could not be used to support Baker's claim that his attack was foreseeable."[283] The admissible evidence showed that Defendants were aware of five thefts from *unoccupied* vehicles the year before. Although foreseeability is usually a fact question, the court held that—under these facts—the proof was deficient. It stated, "the prior property crimes in the mall's parking lot are insufficient to create a factual issue whether the defendants could reasonably anticipate that a carjacking and shooting resulting in personal injury might occur."[284]

The court held that plaintiff must establish foreseeability even if the defendant assumed a duty to provide security. It explained, "The fact that this particular crime was unforeseeable establishes that there was no duty to protect against this specific attack."[285] Any evidence of security deficiencies, "ignore[s] the fact that there was no duty to protect against this type of attack."[286] In other words, foreseeabilty is a prerequisite for recovery. "Undertaking measures to protect patrons does not heighten the standard of care; and taking some measures does not ordinarily constitute evidence that further measures might be required."[287]

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[280] 280 Ga. App. 106, 633 S.E.2d 426 (2006), cert. denied
[281] 273 Ga. App. 406, 614 S.E.2d 793 (2005).
[282] Id. at 406.
[283] Id. at 407.
[284] Id. at 408.
[285] Id. at 409.
[286] Id.
[287] Id.

Similarly, in Agnes Scott College Inc. v. Clark,[288] the Court of Appeals rejected Plaintiff's claim that her attack was foreseeable. This student sued the college for failing to keep its parking lot safe. During the daytime, the kidnapper adducted the student from the lot and raped her off-campus. Summary judgment was appropriate absent evidence that "any kidnappings, rapes, attacks, or other similar crimes occur[ed] in the parking lot prior to the incident involving the student…"[289]

Under Georgia law, "prior similar crimes must occur before a landowner can be held liable for injuries suffered in connection with a future crime on its premises."[290] The victim only produced city crime statistics and evidence that other students were afraid to walk in the lot at night. The school only had actual knowledge of break-ins to unoccupied cars in the area.

The Court of Appeals and trial court disagreed whether Plaintiff's evidence was probative. The trial court reasoned that "'carjackings were on the rise across the nation'…[Thus,] a jury question existed regarding whether Agnes Scott could have foreseen the daytime attack…"[291] The Court of Appeals disagreed citing Georgia Supreme Court precedent.[292] This court held that the attack was *not* foreseeable:

> as a matter of law, break-ins to unoccupied cars and other incidents that did not involve person-to-person violence or contact would not make the daytime abduction of Clark foreseeable. . . Nor would general crime statistics and student concerns about walking alone in a parking lot at *night* create an issue of fact regarding the foreseeability of a random attack on a student in broad daylight in the parking lot.[293]

See also Roberts v. Wal-Mart Stores Inc.[294] (not foreseeable that another customer would load one of the BB guns and leave it lying on the shelf so that an unsupervised 4-year-old would be able to access it and shoot someone.)

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[288] 273 Ga. App. 619, 616 S.E.2d 468 (2005), cert. denied.
[289] Id. at 619.
[290] Id. at 620.
[291] Id. at 621.
[292] See Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 268 Ga. 604, 606, 492 SE2d 865 (1997).
[293] Id. at 622-623.
[294] 287 Ga. App. 316, 651 S.E.2d 464 (2007).

22. Negligent Security Cases: Breach of Duty

In Brown v. All-Tech Investment Group, Inc.,[295] the Court of Appeals affirmed summary judgment in several tort suits arising out of a shooting rampage. On July 29, 1999, a customer opened fire at the Buckhead offices of two day trading firms. Defendants included the two day trading firms and the private security company. The trading firms were entitled to summary judgment because the appellants failed to prove that the shooting was a "reasonably foreseeable outcome of the trading firms' actions."[296] Moreover, the private security company did not assume a duty to protect appellants from criminal assault.

Georgia courts apply Restatement (2d) of Torts, § 324A under which "a premises owner which provides some form of security can be liable for negligent performance of the undertaking *only if* the type of danger the injured person actually encountered was foreseeable."[297] Because there were no "prior incidents sufficiently similar so as to alert" the security company to the risk, there was no basis for liability.[298]

Premises owners may not have a duty to passersby. In Barnes v. St. Stephen's Missionary Baptist Church,[299] the Court of Appeals affirmed summary judgment to the property owner of an abandoned church. While plaintiff was walking past the church, the first assailant hit her on the back of her head, paralyzing her. While she lay immobile, a second perpetrator emerged from the church and raped her.

Before the congregation relocated, it had sealed the ground floor windows and doors with concrete blocks, "except for one locked basement door on Central Avenue, at the opposite corner of the church from the location at which Barnes testified the assault occurred."[300] The plaintiff could not prove that anyone lived on the church property or that the building was used for criminal activity at the time of the attack. She also could not show that the doorway blocking was inadequate nor that the church was aware of any such inadequacy prior to the assault.

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[295] 265 Ga. App. 889, 595 S.E.2d 517 (2004).
[296] Id. at 893.
[297] Id. at 898.
[298] Id. at 899.
[299] 260 Ga. App. 765, 580 S.E.2d 587 (2003), cert. denied.
[300] Id. at 767.

The court held that summary judgment was proper because plaintiff failed to establish the church owed a duty of care. Barnes was only a passerby and member of the general public. Plaintiff had "no relationship with the church as an invitee, a tenant, a licensee, or even a trespasser."[301] Georgia law recognizes that "a landowner may have a duty towards those traveling a public way adjacent to the property in certain limited circumstances."[302] For example, landowners must protect from decaying trees falling on passersby. However, this exception does not include a duty to protect mere pedestrians from criminal acts. Otherwise,

> a contrary ruling would, in effect, impose a duty upon all property owners…to protect the general public from criminal activity committed on the property by third person…although defendants may have owed a duty to plaintiff against harm caused by the dilapidated condition of the buildings (e.g., injury caused by a falling brick or broken glass), that duty does not extend to the unforeseeable criminal activity of third person.[303]

Plaintiff could not recover because the criminal activity was unforeseeable and the causal relationship tenuous.

On a different note, a premises liability suit is based on the status of the *defendant*. In other words, only certain defendants can be sued in a premises liability suit. In Spivey v. Hembree,[304] the murderer's grandmother was not liable because she did not own the house where the murder occurred.

The grandmother was the previous owner's administratrix and the current owner's (her daughter's) financial guardian. Under these circumstances, the murderer paid rent to his grandmother who then deposited it into her daughter's account. She could not be liable because "she had no role in supervising…the residence. Nether did she live there nor had she ever had any ownership interest in the property."[305] Thus, she had no duty to keep the premises safe.

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[301] Id. at 767.
[302] Id. at 768.
[303] Id. at 769.
[304] 268 Ga. App. 485, 602 S.E.2d 246 (2004).
[305] Id. at 487.

In Brookview Holdings v. Suarez, [306] the property owner, on interlocutory appeal after the trial court denied its motion for summary judgment, asserted it was not liable for the murder of a tenant in the owner's trailer park. On appeal, the owner claimed it was entitled to summary judgment because it owed no duty to the tenant to provide security as it had no knowledge of any prior crimes, no evidence showed it caused the tenant's death, and the tenant had equal knowledge of the danger and failed to exercise care for his own safety. The Court of Appeals disagreed and found that because of the owner's contractual duty to provide security, the trial court did not err by denying summary judgment. It further found that the owner never informed the trailer park residents that the security had been discontinued. The Court noted that the foreseeability of the criminal act was irrelevant because the owner had a contractual duty to provide security, which it failed to do.

23. Negligent Security Cases: Proximate Cause

Proximate cause is usually a factual question for the jury. However, "'plain and indisputable cases may be decided by the court as a matter of law.'"[307] In these cases, "'the inquiry is whether the causal connection between the defendant's conduct and the injury is too remote for the law to countenance a recovery.'"[308] A third party's criminal act attenuates the causal connection.

In Brown v. All-Tech Investment Group, Inc., lack of proximate causation was so "plain, palpable and indisputable" that summary judgment was appropriate as a matter of law. [309] In this case, the court held that, ""[G]enerally, an independent, intervening criminal act of a third party…will be treated as the proximate cause of the injury superseding any negligence of the defendant"[310] The customer's gun fire was completely and reasonably unanticipated. Thus, any negligence by the premises owners was too remote to constitute the proximate cause of the shooting rampage.

In contrast, the plaintiff in James v. Flash Foods, Inc.[311] created a question of fact whether defendant's negligence caused the convenience store

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[306] 285 Ga. App. 90, 645 S.E.2d 559 (2007), cert. denied.
[307] Brown v. All-Tech Investment Group, Inc., 265 Ga. App. 889, 893, 595 S.E.2d 517 (2004), cert. denied.
[308] Id.
[309] 896
[310] Id. at 893.
[311] 267 Ga. App. 210, 598 S.E.2d 919 (2004), cert. denied.

armed robbery and shooting. Although robbed a month earlier, the store continued not to comply with its own safety policies, including having less than $50 in the store after dark and an unhindered view outside from the register. The plaintiff's expert testified that these were the "top two robbery deterrence factors."[312] Thus, causation was a question for the jury.

24. Negligent Security Cases: Negligent Hiring or Retention and Respondeat Superior

Employers may face serious liability exposure for criminal assaults perpetrated by their own employees. Liability depends upon notice that such misconduct may occur or failure to conduct a reasonable background check. A plaintiff must show that "given the employee's dangerous propensities, the victim's injuries should have been foreseen as the natural and probable consequences of hiring the employee."[313]

Note that the Georgia Supreme Court distinguishes premises liability and negligent hiring and retention. It reasons, unlike the premises owner without "control over the condition of surrounding properties or the illegal behavior of unknown assailants…, an employer has exclusive control over which specific individual gets hired for the job and thus has control over the access and opportunity that job may provide that individual to harm potential plaintiffs."[314]

In TGM Ashley Lakes v. Jennings,[315] an apartment complex employee strangled a young mother in her apartment. Evidence demonstrated both negligent hiring and retention. The leasing manager recommended the killer for employment, even though he knew about his prior criminal activities. Moreover, the complex did not follow hiring procedures by conducting a background check or requiring letters of reference. Finally, the complex gave the killer unhindered access to keys in violation of its key control policy and despite reports of *unforced* robberies.

Although liability does not attach if the employee acted "in a setting or under circumstances wholly unrelated to his employment," negligent hiring

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[312] Id. at 211. See also, Mason v. Chateau Communities, *infra*, "**25. Other Defenses**" courts seem generally unsympathetic towards defendants that do not follow their own safety protocol.
[313] TGM Ashley Lakes v. Jennings, 264 Ga. App. 456, 459, 590 S.E.2d 807 (2003).
[314] Id. at 864.
[315] Id.

and retention "can be based on a tort that occurred *outside* of the scope of employment."[316] The court expressly overruled precedence to the contrary.

The proper question is whether "in view of his known characteristics" the injury should have been anticipated.[317] The court held that plaintiffs need not present evidence "that the same severity of criminal attack must have previously occurred" if the danger that caused the injury was otherwise foreseeable.[318] In Jennings, the murder was "the natural, reasonable, probable result" of negligent hiring.[319]

Likewise, the employer is not liable for an employee's sexual misconduct if it is unforeseeable. In Munroe v. Universal Health Services, Inc.,[320] the Georgia Supreme Court held that the perpetrating employee was not foreseeably dangerous. In this case, a mental health assistant raped plaintiff / patient after incapacitating her with medication. Plaintiff could not recover for negligent hiring / retention because the health center had no reason to anticipate the perpetrating employee's propensity for sexual assaults. The health center's background check showed that he had no criminal record. Moreover, dishonest application information did not put the center on notice that he posed a risk of personal harm to others. "Thus, while the inaccurate or incomplete information provided by [the employee] may have rendered him an unsuitable employee for reasons unrelated to [plaintiff's] injuries," Plaintiff did not show that the defendant breached its duty to avoid hiring a *dangerous* employee.[321]

In Piedmont Hosp. Inc. v. Palladino,[322] the Supreme Court discussed claims for respondeat superior as opposed to negligent hiring and retention. In the Palladino case, a male nurse sexually assaulted a patient after he underwent surgery in his groin area. The nurse / perpetrator was responsible for providing post-surgical treatment. Specifically, the nurse "was authorized to enter Palladino's hospital room alone, check the groin area for any bleeding or complications, clean the area, and, if necessary, move Palladino's testicles in order to perform these tasks."[323] After the surgery, the patient allegedly awoke to the nurse rubbing his penis with both hands near his mouth. On the

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[316] Id. at 459.
[317] Id. at 460.
[318] Id. at 464-465.
[319] Id. at 464.
[320] 277 Ga. 861, 596 S.E.2d 604 (2004).
[321] Id. at 866.
[322] 276 Ga. 612, 580 S.E.2d 215 (2003).
[323] Id. at 613.

respondeat superior claim, the employer is vicariously responsible for the negligent or voluntary acts committed within the scope of his employment. The Supreme Court concluded that the nurse / employee's actions were purely personal and did nothing to further the employer's business. Thus, the hospital was not liable under a respondeat superior theory as a matter of law.

25. Other Defenses

A Condominium can limit its liability expressly. In Bradford Square Condominium Assoc. Inc. v. Miller,[324] the court recognized the "hybrid form" of a condominium in terms of the overarching association and its individual units. In this case, plaintiff's husband died during an armed robbery in the parking lot. However, the Condominium Association did not owe the unit owners a legal duty to provide security in the common areas. In Georgia, a condominium's responsibilities "are dependent upon those allocated" by the "declaration and bylaws."[325] These expressly provided:

> Security. The Association may from time to time, provide measures of security on the condominium property; however, the Association is not a provider of security and shall have no duty to provide any security on the condominium property. The obligation to provide security lies solely with each unit owner individually.
>
> The Association shall not be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken.[326]

Compare the court's reversal of summary judgment for a trailer park in Mason v. Chateau Comm.[327] In this case, Plaintiff owned her trailer and rented her lot from defendant Chateau. The assault occurred inside her trailer and the rental agreement provided that Chateau "was responsible for maintaining 'common areas and underground utilities.'"[328] Moreover, there were no formal provisions / assurances for security. However, the manager reassured Plaintiff the park was safe.

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[324] 258 Ga. App. 240, 573 S.E.2d 405 (2002), cert. denied.
[325] Id. at 244.
[326] Id. at 242.
[327] 280 Ga. App. 106, 633 S.E.2d 426 (2006), cert. denied
[328] Id. at 116 (dissenting argument).

The majority rejected Defendant's argument that it had relinquished the property to the plaintiff. Instead, Plaintiff's rape was foreseeable because a neighbor experienced a similar assault. Additionally, another neighbor requested Defendant run a report on the suspicious-looking perpetrator. Defendant neither investigated the prior assault nor provided additional security measures. The majority opinion highlighted Defendant's failure to follow its own policies. Although it had reports the perpetrator was living in one of the trailers in the park, "it did not investigate [the assailant] to determine whether he was a resident and did not enforce its own policies of allowing guests to stay no longer than 15 consecutive days."[329]

A homeowners association may similarly limit its liability. In Hayes v. Lakeside Village Owners Ass'n,[330] Plaintiff homeowner sued the homeowners association for injuries he sustained when a chair in a common area collapsed. The trial court granted the association's motion for summary judgment and found that the Plaintiff homeowner was bound by a restrictive covenant assigning them a duty to inspect common facilities and to use them at their own risk. The Court of Appeals affirmed the judgment.

In Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, the Georgia Supreme Court held that the Recreational Property Act (OCGA § 51-3-20 or "RPA"), "limits…the liability of an owner of land who has made property available without charge to the public for 'recreational purposes.'"[331] A balancing test determines whether a purpose is recreational. Whether the RPA limits the liability of "a certain property at a certain time" is a legal question.[332] However, the property's purpose or "the nature and extent of mixed uses" is a question of fact.[333] The fact finder must take the totality of the circumstances into account.

In the Hawthorne case, plaintiff sued the property owner for injuries arising out of the 1996 Centennial Olympic Park bombing. The Supreme Court held that there was a fact question whether ACOG "directly or indirectly invited or permitted without charge any person to use the property for *recreational* purpose" in light of evidence that it may have done so "to

[329] Id. at 114.
[330] 282 Ga. App. 866, 640 S.E.2d 373 (2006), cert. denied.
[331] 278 Ga. 116, 117, 598 S.E.2d 471 (2004).
[332] Id. at 117.
[333] Id.

derive, directly or indirectly, a financial benefit for pecuniary gain from business interests thereon."[334]

In Anderson v. Atlanta Comm. for the Olympic Games,[335] the Supreme Court clarified the meaning of a "recreational activity." The RPA does not provide an exclusive list; recreation "encompasses any recreational activity" including "any amusement, play or other form of relaxation which refreshes the mind or body." [336] Moreover, recreation does not have to be the exclusive purpose of the property. All "social and economic aspects of the activity" should be considered.[337]

In Georgia DOT v. Thompson,[338] the court held that the RPA applied to rest areas and barred a visitor's claim against the DOT.

26. Dram Shop Cases: No Recovery by the Consumer of Intoxicants

O.C.G.A. § 51-1-40 discusses the liability of alcohol-serving premises owners. An alcohol consumer cannot recover from the server / premises owner. Specifically, O.C.G.A. § 51-1-40(a) provides:

> the consumption of alcoholic beverages, rather than the sale or furnishing or serving of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person, except as otherwise provided in subsection (b) of this Code section.

Since proximate cause is a necessary element of Plaintiff's case, Georgia law specifically bars a consumer's action against the dram shop.

Public policy also bars such claims under O.C.G.A. § 51-1-40(b),[339] provides:

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[334] Id. at 118.
[335] 273 Ga. 113, 537 S.E.2d 345 (2000).
[336] Id. at 115.
[337] Id. at 117.
[338] 270 Ga. App. 265, 606 S.E.2d 323 (2004).
[339] See also, Leach v. Braswell, 804 F. Supp. 1551, 1554 (S.D. Ga. 1992), aff'd 8 F.3d 37 (11th Cir. 1993).

> Nothing contained in this Code section shall authorize the consumer of any alcoholic beverage to recover from the provider of such alcoholic beverage for injuries or damages suffered by the consumer.

This statute applies even to wrongful death suits. In Mowell v. Marks,[340] the Court of Appeals held that the this statute barred wrongful death claims asserted by the mother of a consumer.

Moreover, in Sutter v. Hutchings,[341] OCGA § 51-1-18(a)(which allows a minor's custodial parent to sue anyone who sells or furnishes alcohol to their child) only allowed the consumer's parent to recover general and special damages suffered directly; the parent could not recovery any damages the parent had to pay to a third party. Even if not explicitly barred, these damages are barred by public policy.[342] The parent's recovery depends upon the viability of the minor child's claim. If the child is barred from recovery on his personal injury claim because he is a consumer, then the parent cannot recover. Otherwise, the action is viewed by the courts as a "thinly veiled attempt to circumvent the prohibition against a consumer of alcohol recovering against a provider."[343]

However, O.C.G.A. § 51-1-18(b) allows a minor's custodial parent to sue anyone who sells or furnishes alcohol to their child. Under this cause of action, the consumer is not the plaintiff but the parent. Thus, the parent has this independent action, even where the consumer defense bars wrongful death recovery. In Eldridge v. Aronson,[344] the court recognized the parent could sue the host of a high school party. The host allegedly bought alcohol and allowed the high school teens to drink it. Under this cause of action, 'furnishing' means providing in any way."[345] Thus, summary judgment for the host was inappropriate.

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[340] 269 Ga. App. 147, 152, 603 S.E.2d 702, 706 (2004).
[341] 254 Ga. 194, 199, 327 S.E.2d 716, 720 (1985).
[342] See e.g., Leach v. Braswell, 804 F.Supp. 1551, 1554 (S.D. Ga. 1992), aff'd 8 F.3d 37 (11th Cir. 1993).
[343] Eldridge v. Aronson, 221 Ga. App. 662, 664, 472 S.E.2d 497, 499 (1996); Steedley v. Huntley's Jiffy Stores, 209 Ga. App. 23, 24, 432 S.E.2d 625 (1993) (minor and his parents barred from recovering damages for the minor's injuries suffered in a serious motor vehicle collision); Burch v. Uokuni Int'l, 192 Ga. App. 861, 862, 386 S.E.2d 889 (1989).
[344] 221 Ga. App. 662, 472 S.E.2d 497 (1996).
[345] Id. at 664.

27. Dram Shop Cases: Non Motor Vehicle Accident Cases or Where Consumer Not Driving

Under O.C.G.A. §51-1-40(b) "a person who willfully, knowingly, and unlawfully…furnishes…alcoholic beverages" to someone "noticeably" intoxicated, "knowing that such person will soon be driving a motor vehicle…may become liable for injury" when the alcohol proximately causes those injuries. However, consumption rather than furnishing of alcohol is the proximate cause as a matter of law when the plaintiff is not driving or the server doesn't know that he will be driving soon.[346] Moreover, the Georgia Supreme Court makes clear that "'nothing in that statute or any other…mandates that a provider of alcoholic beverages must prevent an intoxicated person from driving'"[347]

In Lumpkin v. Mellow Mushroom,[348] summary judgment was proper for a restaurant owner when an intoxicated consumer was in a car but *not* driving. In this case, the intoxicated minor fell from the passenger seat of a friend's jeep. However, recovery was barred under this statute.

Summary judgment is proper when plaintiff lacks evidence of noticeable intoxication or constructive knowledge of future driving.[349] In Sugarloaf Cafe, Inc. v. Willbanks, the Georgia Supreme Court recently held circumstantial evidence that the server did business in a "remote" location and that most customers drove to the business were *not* sufficient to show that the server "knew" the customer would soon be driving.[350] Moreover, in this case, the drinker had been driven to and from the restaurant by a co-worker.

28. Dram Shop Cases: No Duty to Determine Transportation

The Georgia Supreme Court maintains that there is "no affirmative duty" to determine how a consumer plans to "depart the establishment."[351] In Baxley v. Hakiel Indus., Inc.,[352] the plaintiff could not establish the bar had knowledge the consumer planned to drive. The Court held that plaintiff had

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[346] O.C.G.A. §51-1-40.
[347] Delta Airlines, Inc. v. Townsend, 279 Ga. 511, 513, 614 S.E.2d 745 (2005).
[348] 256 Ga. App. 83, 567 S.E.2d 728 (2002).
[349] Hodges v. Erickson, 264 Ga. App. 516, 591 S.E.2d 360 (2003), cert. denied.
[350] 279 Ga. 255, 612 S.E.2d 279 (2005).
[351] Sugarloaf Café, Inc. v. Willbanks, 279 Ga. App. 255, 256, 612 S.E.2d 279 (2005).
[352] Baxley v. Hakiel Indus., Inc., 280 Ga. App. 94, 633 S.E.2d 360 (2006), cert. granted on issue of spoliation and case reversed on that issue in Baxley v. Hakiel Indus., Inc., 282 Ga. 312, 647 S.E.2d 29 (2007).

the burden to "provide some evidence, either circumstantial or direct," that the providers knew the consumer would "soon drive away from their establishment *on this particular occasion*." It noted that the establishment was accessible for foot or taxi. Moreover, defendant "testified that they had no information suggesting" he would drive away.

29. Dram Shop: No Application to Airlines

In 2005, the Georgia Supreme Court expressly held that an airline that served a drunk passenger was not liable for his subsequent drunk driving accident. In Delta Airlines, Inc. v. Townsend, the court recognized that, to be liable, the "provider must know that the intoxicated person to whom the alcohol is furnished 'will soon be driving a motor vehicle.'"[353] Thus, "because the patrons of *land-based* establishments serving alcohol generally have direct and immediate access to their vehicles, liability should attach to an owner" who should have known a departing customer would be driving."[354] In contrast, the "proximate connection" between the air-based consumer and the act of driving "is much more remote and attenuated."[355] Proximate cause does not follow. Thus, the cause of action applied "only in the limited case of traditional land-based supplier."[356]

30. Dram Shop: Application of Spoliation Doctrine

The spoliation doctrine dictated a presumption against one of the defendants in plaintiff's dram shop suit, since its manager was aware of her customer's involvement in the accident at issue, yet allowed the employee responsible for replacing the surveillance videotape of the bar area to destroy the material. Thus, summary judgment for that defendant was reversed. Baxley v. Hakiel Indus. Inc.[357]

31. Dram Shop: No Punitive Damages

The Court of Appeals recently reversed the trial court for denying the bar's motion to dismiss the plaintiff's claim for punitive damages, because the punitive damages "statute makes clear, however, that 'such damages shall not

[353] Id. at 513.
[354] Id. (emphasis added).
[355] Id. at 514.
[356] Id. at 515.
[357] 282 Ga. 312, 647 S.E.2d 29 (2007).

be the liability of any defendant other than an active tort-feasor,' that is the defendant acting under the influence of alcohol."[358]

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[358] Capp v. Carlito's Mexican Bar & Grill #1 Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007).

UNITED STATES SUPREME COURT DECIDES THE CONSTITUTIONAL PARAMETERS OF HIGH SPEED POLICE PURSUITS

Philip W. Savrin

Introduction

On April 30, 2007, the United States Supreme Court handed down its decision in *Scott v. Harris*, 127 S.Ct. 1769 (2007), reversing the denial of qualified immunity to a police officer who had used force to terminate a high-speed vehicle pursuit, resulting in serious injury to the fleeing suspect. The author had the rare honor and privilege of representing the officer all the way from service of the complaint through interlocutory appeal and ultimately arguing the issues before the Supreme Court. This article will analyze the substance of the decision by the high court, and its implications for law enforcement and the legal community as a whole.

Facts of the Case

On the night of March 29, 2001, 19-year-old Victor Harris was driving home from work, even though his license had been suspended (and in fact he had already been arrested earlier that day on a bench warrant for failing to pay speeding tickets) when he crossed paths with Deputy Clinton Reynolds, who clocked his speed at 73 miles per hour in the 55 mile per hour zone. Reynolds flashed his blue lights to get the driver's attention on the two-lane winding road, but there was no response. Intending to give the driver a warning, the deputy switched on his lights and siren. Instead of pulling over, however, the driver increased to speeds of 100 miles per hour and began to weave into the oncoming lane of traffic to pass vehicles in his way.

Deputy Chuck Scott was about a mile away when he heard Reynolds put out a call for assistance. As Scott drove to the location of the pursuit, he observed Harris go through a red light and perform other reckless maneuvers in a calculated attempt to elude capture. When Harris turned into a strip shopping center, Scott pulled ahead of the chase to block the exit from the small parking lot. Although the two vehicles collided, Harris managed to escape back on to the road, where he again crossed the double line to avoid vehicles in his path and drove through another red light. When the cars reached a stretch without traffic, Scott received his supervisor's permission to

hit the fleeing suspect's car to get him to stop. Scott was successful, but the vehicle unfortunately flipped down an embankment and came to rest against a utility pole. Harris, who was not wearing his seat belt, was thrown about the car and was rendered a quadriplegic.

The record in the case included not only the testimonies of the witnesses but also videotapes taken from the police cruisers involved in the pursuit. On the videotapes, one can see Harris driving on the wrong side of a two-lane the road at night, racing through stoplights, colliding with a police car, and otherwise driving in an extremely hazardous manner. At the time force was used, however, no one was in Harris's direct line of travel.

Course of Litigation Prior to Supreme Court Review

Harris brought suit in the United States District Court for the Northern District of Georgia under 42 U.S.C. § 1983, claiming violations of federal and state law. The district judge denied qualified immunity to Scott on the Fourth Amendment claim, finding that a jury could conclude that Scott's use of force was unreasonable under clearly established law.

While the driving was no doubt reckless, the district judge noted that the Fourth Amendment precludes an officer from using unreasonable force, and that a jury could believe Harris was not likely to endanger anyone at the time of impact. That did not end the inquiry, however, because police officers have qualified immunity from being personally sued for damages unless their conduct violates clearly established law. This doctrine allows officers to put the needs of the public over their own personal interests.

In analyzing the immunity question, Judge Willis B. Hunt, Jr. reasoned that a jury would need to resolve whether Scott violated the clearly established prohibition on using disproportional force against a fleeing suspect. On interlocutory appeal, the Eleventh Circuit viewed the facts much in the same way as Judge Hunt. The Eleventh Circuit agreed with the district court that fact issues precluded the entry of judgment as a matter of law.

The appellate court based its decision primarily on *Tennessee v. Garner*, 471 U.S. 1 (1985), where the Supreme Court had ruled that a police officer may not use deadly forced to prevent the escape of an unarmed, non-dangerous felon. The Eleventh Circuit found that Scott's use of his vehicle constituted deadly force at a point in time when Harris did not pose an immediate threat of harm to the officers or any third parties. It further

concluded that a jury could find Harris did not menace any particular person on the roads. As explained by the Eleventh Circuit,

> [T]aking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. *Cf. Pace,* 283 F.3d at 1282 (officer had probable cause to believe that car had become a deadly weapon with which defendant was armed where suspect drove through residential neighborhood at 50 to 60 mph, swerved at oncoming police cars, nearly hit elderly motorist head-on when driving on wrong side of road, and accelerated towards police car roadblock forcing officer off of the road to avoid collision); *Cole v. Bone,* 993 F.2d 1328, 1331-34 (8th Cir.1993) (deadly force was reasonable to stop high-speed chase where truck forced more than one hundred cars off the road or out of the truck's way and endangered the lives of many other motorists during the pursuit, chase lasted 50 miles, and officers attempted to slow the vehicle using several types of roadblocks). Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.

Harris v. Coweta County, 433 F.3d 807, 815-16 (11th Cir. 2005) (footnote omitted). Further, qualified immunity was properly denied, the court found, because, under *Garner*, "deadly force cannot be employed in a situation that requires less-than-lethal force." *Id*. at 818 (quoting *Garner*, 471 U.S. at 8, 11-12).

Supreme Court Proceedings

Scott filed a petition for a writ of certiorari in the Supreme Court, arguing that he used reasonable force to end the pursuit because Harris had demonstrated that he would continue to be a menace on the roads if he was not stopped. In granting review, the Supreme Court agreed to consider whether Scott's use of force was "objectively reasonable" under the Fourth

Amendment standard, as well as whether the use of force was precluded by "clearly established" law, to overcome the qualified immunity defense.

In his brief, Scott advanced several points. First, he claimed that the law is unclear, at best, whether using a vehicle to stop another vehicle, even at high speeds, is "deadly force." *Garner* expressly stopped short of defining deadly force, which was undeniably used in that case where the officer fired a bullet in the suspect's head. In the wake of *Garner*, the circuit courts have used various tests to define the term, and the Eleventh Circuit had held in an en banc 1993 decision that a policemen's use of a vehicle to bump another vehicle is qualitatively different from a suspect's use of a vehicle to escape, and does not constitute deadly force. *Adams* v. *St. Lucie County Sheriff's Dept.*, 962 F. 2d 1563, 1577 (11th Cir. 1992) (Edmondson, J., dissenting), adopted by 998 F. 2d 923 (11th Cir. 1993) (en banc)). Scott further argued that although no one was in Harris's direct line of travel at the time contact was made, the force was justified because Harris had demonstrated that he would not stop his dangerous driving voluntarily, plus he was on a public road with vehicles in the vicinity. *Garner*, he argued, was distinguishable because it was limited to the situation where deadly force is used against a *non*-dangerous suspect. For public policy reasons as well, Scott asked the Supreme Court to adopt a test that would allow him to put the interests of protecting the safety of innocent persons over the interests of the suspect's safety.

In his response brief, Harris highlighted that his initial infraction was speeding, and that deadly force cannot be used against a fleeing suspect simply to prevent his escape. He stressed that other less intrusive uses of force could have been attempted, or the officers could have simply let him go and arrested him at a later time since they had his license plate number. At the very least, Harris maintained that a jury, and not the courts, should resolve whether Scott's use of force met the reasonableness test for Fourth Amendment purposes.

The Supreme Court heard oral argument on the case on February 26, 2007, a transcript of which is available at www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1631.pdf, and a decision authored by Justice Scalia was issued on April 30, 2007. In the written opinion, the videotapes of the chase played a front and center role in the decision to reverse the Eleventh Circuit's denial of qualified immunity. After reviewing the circuit court's rendition of facts, Justice Scalia wrote that "the videotape tells quite a different story." 127 S.Ct. at 1775.

> There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 1775-76.

In the summary judgment context, facts must be viewed in a light most favorable to the non-movant, which in this case would be Harris. At the same time, there must be a *genuine* issue of material facts:

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Id. at 1776. The Eleventh Circuit, therefore, "should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Id*. Based on those facts, the nature of the force used must be weighed against its need, in order to be justified by Fourth Amendment reasonableness. This balancing of interests also takes into account a party's "relative culpability" for putting lives at risk.

> The Constitution assuredly does not impose [an] invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

Id. at 1779.

In applying the constitutional test, the Court did not resolve whether Scott used deadly force, although it distinguished *Garner* as involving an unarmed suspect engaged in a foot chase.

> *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test, *Graham, supra,* at 388, 109 S.Ct. 1865, to the use of a particular type of force in a particular situation. . . . Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. "*Garner* had nothing to do with one car striking another or even with car chases in general .... A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563, 1577 (C.A.11 1992) (Edmondson, J., dissenting), adopted by 998 F.2d 923 (C.A.11 1993) (en banc) *(per curiam)*.

Because there was no evidence of a Constitutional violation, the majority ruled that there was no need to resolve whether a "clearly established" line was crossed.

Justice Ginsburg wrote a concurring opinion to stress that the reasonableness standard remained a flexible test, subject to the unique facts of each case. Justice Breyer wrote a separate concurring opinion (discussed in more detail below), suggesting that in the appropriate case, the Court should reconsider the need to resolve the question of a constitutional violation before moving to the qualified immunity "clearly established" inquiry. Justice Stevens dissented, claiming essentially that if federal judges could disagree on the reasonableness of a police officer's use of force, then a jury issue should exist. Justice Stevens did not address whether the evidence in the case could show a clearly established violation to overcome Scott's qualified immunity defense.

Analysis

Scott has two main implications, one for civil litigation generally and the other for law enforcement in particular. The case will certainly be relied on by the bench and bar alike for its pronouncements on summary judgment procedure. The prominence of the videotapes at both oral argument and in the ultimate decision cannot be understated. Indeed, the same chamber that has so far shunned cameras made a landmark foray into cyberspace by posting a hotlink to the video as part of its written opinion. The video evidence was so powerful that it allowed the Court to wipe the slate clean as far as the lower court's rendition of facts was concerned and to lay down a new variation to the evidentiary burdens in the summary judgment context. The pictorial proof played a part in the strong language of that standard, where one party's testimony is "blatantly contradicted" by other evidence. This standard arguably injects a credibility component to the evaluation of evidence presented at the summary judgment phase, and by extension to directed verdict motions as well.

For law enforcement purposes, it is critical to note that the opinion sets the parameters for *constitutional* reasonableness in the Fourth Amendment context. Agencies remain free to set policies and procedures that are more restrictive on police uses of force than the Constitution allows. For example, what might be a reasonable pursuit in the midst of the Mojave Desert might not be reasonable in an urban environment. The decision gives law enforcement chiefs the flexibility they need to fashion policies according to their local needs. In addition to allowing for flexible policies, the decision protects officers from civil liability for reasonable decisions made to disarm suspects based on the exigencies of the particular circumstances presented.

The decision may have yet another, less expected, outcome. Although qualified immunity was the basis for interlocutory appellate jurisdiction, the doctrine was mentioned mostly to explain the procedural context of the case. This was so because the question of whether Scott violated "clearly established" law was mooted by the conclusion that his conduct was reasonable. For his part, Justice Stevens contended that reasonable jurors could find a violation of the Fourth Amendment, yet he too did not mention qualified immunity or even address how or why the evidence could support a *clear* violation of law. Indeed, one might argue that if reasonable jurors could disagree even in hindsight, then qualified immunity should apply *a fortiori* to the case at hand.

The qualified immunity analysis is, however, addressed front and center in Justice Breyer's concurring opinion. Justice Breyer wrote specifically in response to an amicus brief from 28 States that asked the Court to reconsider the "fixed order of battle" in *Saucier v. Katz*, 533 U.S. 194 (2001) that requires courts to resolve whether there was a substantive constitutional violation before turning to the clearly established prong of the qualified immunity inquiry. This rule is based on the logic that the substantive law would not be established if courts are free to jump to the lack of clarity of the law. The primary counter-position advanced is that the immunity question is often raised before a complete factual record is developed, and may involve tricky applications of law that are unnecessary if the law was not clearly established in the first place.

From a practical perspective, the States argued, a substantive constitutional ruling might be effectively insulated from review: if the officer is granted immunity on the second prong because the law was not clearly established, the officer would not be an aggrieved party for purposes of appeal. In the same case, the plaintiff might not think an appeal worth the time and effort if the law was unclear. Even more, the constitutional analysis would be *dicta* but have potentially unanticipated applications to future decisions.

In his concurring opinion, Justice Breyer expressly stated that he would "accept the invitation" to revisit the *Saucier* analysis. In this particular case, however, he agreed that because Scott's conduct was constitutional, the invitation would need to be accepted another day. Previously, Justices Scalia and Ginsburg, as well as former Chief Justice Rehnquist, have called as well for a reconsideration of this procedural rule. *See Brosseau v. Haugen*, 543 U.S. 194, 200 (2004) (Breyer, J., concurring); *Bunting v. Mellen*, 541, U.S. 1019, 1022 (2004) (Scalia, J., dissenting). The reasoning of Justice Breyer's concurrence in *Scott* may influence more justices to join this view in an appropriate case yet to reach the Court.

Conclusion

The Supreme Court's decision has clarified the analysis of reasonableness for Fourth Amendment purposes, particularly in the context of a high-speed vehicle pursuit. In the process, the Court has enhanced the significance of videotape evidence and has defined the scope of the genuineness of issues of material facts for summary judgment purposes. The

decision has enormous significance to law enforcement agencies and litigators alike.

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INSURANCE LAW UPDATE 2007

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INSURANCE LAW UPDATE 2007
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INSURANCE LAW UPDATE 2007

This paper outlines insurance law in Georgia appellate courts decisions handed down during 2007, including, first party and third party liability insurance coverage, uninsured motorists coverage, bad faith and subrogation law. With one exception, this paper does not include federal decisions

interpreting or applying Georgia law and does not cover workers compensation law.

1. **Coverage for "Advertising Injury" under Commercial General Liability Policy:**

The typical commercial general liability insurance policy covers "those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'advertising injury' to which this insurance applies" (ISO CG 00)1 10 93, § I, ¶ B.1.a.). "Personal injury" is normally defined as,

> injury, other than "bodily injury," arising out of one or more of the following offenses:
>
> a. False arrest, detention or imprisonment;
>
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
>
> d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
>
> e. Oral or written publication of material that violates a person's right of privacy.

(ISO CG 00) 1 10 93, § IV, ¶ 14.).

"Advertising injury" is usually defined as,

> injury arising out of one or more of the following offenses:
>
> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

b. Oral or written publication of material that violates a person's right of privacy;

c. Misappropriation of advertising ideas or style of doing business; or

d. Infringement of copyright, title or slogan.

(ISO CG 00) 1 10 93, § IV, ¶ 1.).

In Shafe v. American States Ins. Co., 288 Ga. App. 315, 2007 Ga. App. LEXIS 1193 (Nov. 8, 2007), the insureds James C. Shafe, Sales & Management Training Institute of Atlanta, Inc. ("SMT") Career Training Concepts, Inc. ("CTC"), a successor corporation of SMT, which sold career guidance materials, argued that the insurer had a duty to defend under the part of the policy covering claims resulting from "advertising injury." Id. at 1, 4-6. The facts of the case showed that SMT entered into a written agreement with Jeannette Nicholson and Career Assessment Atlanta, Inc. (collectively "Nicholson") for the development of career assessment tools, including an "Interest Inventory," to be included in a SMT publication entitled "Future Focus." The agreement expressly provided that SMT was to retain ownership rights in all work created thereunder by Nicholson. SMT later reached an oral agreement with Nicholson whereby she would develop a different "Interest Inventory" for inclusion in a new publication entitled "Future Focus." A dispute later developed between the parties over compensation owed Nicholson for this work, with SMT (and later CMT) claiming that it was covered under the parties' earlier written agreement, and Nicholson claiming that the earlier written contract covered only the work created for the Career Direction publication. Nicholson sued Shafe, SMT and CTC (the "insureds") in federal district court alleging claims for copyright infringement and state and common law claims for breach of contract, deceptive trade practices and false association, unfair competition, fraud and misrepresentation, and unjust enrichment. The insureds submitted this claim to their insurer American States Insurance Company, which provided them with a defense of the same under the policy. The district court granted summary judgment to the insureds on Nicholson's federal copyright law infringement claim, finding that Future Focus represented a joint work between the insureds and Nicholson and that the parties each held a copyright in the same. Id. at 2-4.

Nicholson then filed suit in state court against the insureds (the "underlying action") seeking an accounting of profits received from Future Focus and an imposition of a constructive trust upon the same, and asserting claims of unjust enrichment, breach of fiduciary duty, common law fraud, and constructive fraud. The insureds tendered the claim to American States and requested a defense and indemnification under the policy. American States denied coverage, and brought an action for declaratory judgment. The trial court granted summary judgment to American States, finding no coverage for the claims alleged in the underlying action. The insureds then appealed. Id. at 4.

On appeal, the insureds contended that they were entitled to a defense of the underlying action under that part of the policy providing coverage for claims resulting from "personal and advertising injury." The policy defined personal and advertising injury as injury resulting from "[m]isappropriation of advertising ideas or style of doing business" or "arising out of ... [t]he use of another's advertising ideas in your 'advertisement.'" The policy defined "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." Id. at 5-6. After noting that the insurer's duty to defend is broader than the duty to indemnify and a duty to defend arises if "a liability covered by the policy is asserted" in the complaint, the court in Shafe found that the claims asserted in the underlying action did not arise out of advertising injury. Id. at 4-5 (citing Penn-America Ins. Co. v. Disabled American Veterans, 224 Ga. App. 557, 559, 481 S.E.2d 850 (1997)). Specifically, there was no allegation that the insureds misappropriated an idea or style of business of Nicholson because facts showed that Nicholson and the insureds co-owned Future Focus, the insureds have and continue to use, license, sell, and otherwise commercially exploit that publication, and that the insureds owe Nicholson a portion of the profits derived from their continued use of the same. Moreover, all of the claims asserted (for accounting and imposition of a constructive trust, unjust enrichment, breach of fiduciary duty, fraud, constructive fraud, and coversion) were stated in terms of one business partner forcing the other to account for and pay profits owned. Id. at 6.

The insureds finally argued that they were entitled to a defense based upon the proposition that where the "complaint on its face shows that there is no coverage, but the insured notifies the insurer ... of additional facts that would place the claim within the policy coverage, the insurer must consider

such facts when deciding whether it has an obligation to defend the claim." Id. at 6-7. In support thereof, they pointed to an affidavit of Shafe in which he asserted that (1) the Future Focus publication "is not sold as an individual product to customers"; (2) the insureds have not realized any "specific revenue" from the sale of that product and that they have derived a benefit therefrom only in using it as a "marketing and advertising tool"; and (3) in a demand letter, counsel for Nicholson alleged that the work was used as a part of "a multi-program marketing tool" and asserted a claim based on "the strategic marketing benefits realized by [the insureds] as a result of [Nicholson's] contributions." Shafe then concluded that, given these facts, Nicholson's claim is based on the theory that the insureds "misappropriated [Nicholson's] ideas and expressions in marketing and advertisements." Id. at 7.

The Shafe court, however, disagreed and found that the insureds' argument that Shafe's evaluation of and conclusions regarding the true nature offered in the underlying action represent "facts" beyond the scope of the pleadings that entitle them to coverage under the policy misconstrues the applicable law, which does not allow an insured to create coverage simply by "reinterpreting" the factual allegations made so as to come within the scope of the insurance contract. Rather, the rule requires that, if the complaint fails to allege facts that bring the claim within policy coverage, a duty to defend may nevertheless exist where the insured informs the insurer of additional facts related to the claim that would entitle him or her to a defense of the same under the policy. Id. at 8 (citing Yeomans, 274 Ga. App. at 745(1)(b)). According to the court in Shafe, the only additional facts alleged in Shafe's affidavit are that the insureds derived no specific profit from the sale of Future Focus, and that any benefits derived from that work resulted from the insureds use of the same in marketing their services. Id. at 8-9. The court concluded that those facts were not determinative of coverage because the insureds' argument based thereon fails to recognize that the mere use of another's material in their advertising does not invoke coverage; rather, there must be an allegation that the insureds' use of such material was wrongful, that is, that they were not otherwise entitled to use the same. Id. at 9.

2. Coverage for "Occurrences" and Intentional Acts under Commercial General Liability Policy:

For a "bodily injury" or "property damage" to be covered under a commercial general liability policy, the injury or damage must caused by an

"occurrence" and/or not be and intentional act of the insured (See, e.g., ISO CG 00 01 10 93, § I., ¶ 1.b and ISO CG 00 01 10 93, §§ I., ¶ 1.b.). "Occurrence" is normally defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (ISO CG 00 01 10 93, § V., ¶ 12). Such policies also contain an exclusion for Expected or Intended Injury, which is usually defined as "'[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured" and which sometimes contain an exception to such exclusion for "'bodily injury' resulting from the use of reasonable force to protect persons or property"[1] (ISO CG 00 01 10 93, § I., ¶ 2.a.).

In Cincinnati Ins. Co. v. Magnolia Estates, Inc., 286 Ga. App. 183, 648 S.E.2d 498 (Ga. App., June 27, 2007) (cert. applied for), the Georgia Court of Appeals addressed the question whether a repeated assault and battery of a resident of a personal care home by another resident constituted an "occurrence" and/or was excluded by the intentional acts exclusion of a commercial general liability policy and concluded that it did not under the facts of that case. Id. at 183-184. In Magnolia Estates, Defendant Leila Walker was allegedly struck by another resident in a personal care home owned by Defendant Magnolia Estates, Inc. Less than two months later, the same resident allegedly "attacked" Walker, knocking her to the ground and causing her to break several bones. Walker's guardians discovered that the

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1. Under the language of this provision, it would appear that an issue of fact on coverage could be created by the insured by claiming that an assault and battery was done in self defense since "'bodily injury' resulting from the use of reasonable force to protect persons or property" is expressly excepted from the normal intentional acts exclusion. However, in Allstate Ins. Co. v. Grayes, 216 Ga. App. 419, 454 S.E.2d 616 (1995), the court held that a shooting allegedly done by the insured in self defense was not a covered "occurrence" (which was defined in the policy as an accident) under a homeowners policy an exception to a intentional or criminal acts exclusion that excepted from the exclusion acts for the "preservation of life or property" had no legal significance because the acts did not constitute a covered "occurrence" in the first instance. Id. at 421; see also Scottsdale Ins. Co. v. Great American Assurance Co., 271 Ga. App. 695, 696-697, 610 S.E.2d 558 (2005) (applying Graves to find that an exception to the contractual liability exclusion in a commercial general liability policy had no legal significance because a breach of an indemnity contract action was not a covered "occurrence" in the first instance).

same resident had been involved in at least 14 "other accidents or incidents which endangered the health, safety and well-being of the other residents and employees." Id. at 184. Walker, through her next friends and guardians, filed suit against Magnolia Estate, alleging claims for negligence, premises liability, and breach of contract. Cincinnati Insurance Company, the commercial general liability insurer for Magnolia Estates, brought a complaint for declaratory judgment, asserting that the underlying occurrence–the attack upon Walker–was not accidental, but intentional, which Cincinnati contended excludes it from coverage. Id.

The insurance policy at issue provided, in relevant part, that Cincinnati must "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury.'" The policy further stated that it "applies to 'bodily injury' ... only if [such] 'bodily injury' ... is caused by an 'occurrence.'" An "occurrence" was defined as "an accident, including continuous and repeated exposure to substantially the same general harmful conditions." Finally, the policy contained an exclusion for Expected or Intended Injury, which was defined as '[b]odily injury' ... which may reasonably be expected to result from the intentional or criminal acts of the insured or which is in fact expected or intended by the insured, even if the injury or damage is of a different degree or type than actually expected or intended." Id.

Applying the rules of construction that insurance is a matter of contract and the parties are bound by its plain and unambiguous terms and that the contract must be considered as a whole and that each provision must given effect such that it harmonizes with the other provisions as well as Crook v. Ga. Mut. Ins. Co., 207 Ga. App. 614, 428 S.E.2d 802 (1993),[2] the court held that the attack against Walker by a fellow inmate occurred without Magnolia's foresight, expectation, or design and thus was properly characterized as

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2. In Crook, "the insured was sued by the parents of a child who died on the insured's property. The insurer argued that the policy did not provide coverage because the death, which was caused by the intentional act of the deceased, was not accidental. In rejecting this argument, [the court] found that an 'accident means an event which takes place without one's foresight or expectation or design[,]' [the court] found that the injury constituted an accident for purposes policy coverage." Magnolia Estates, 648 S.E.2d at 500 (citing and quoting Crook, 207 Ga. App. at 615).

accidental for purposes of coverage. Id. In so holding, the court noted that the intentional acts exclusion in the policy expressly limited itself to intentional acts of the insured and that if, as Cincinnati contended, no intentional act can ever constitute an accident for purposes of coverage, then this exclusion is rendered meaningless. Id.

3. Coverage for Assault and Battery under Commercial General Liability Policy:

In First Specialty Ins. Corp. v. Flowers, 284 Ga. App. 543, 644 S.E.2d 453 (March 27, 2007), the Court of Appeals construed an assault and battery exclusion in a commercial general liability policy to exclude from coverage a negligence claim against the insured arising out of an assault and battery by a third person on the insured's premises. In that case, the trial court denied an insurer's motion for summary judgment seeking a determination that the assault and battery exclusion contained in its commercial general liability policy barred coverage to its insured for damages claims arising from a shooting on the insurer's premises. Id at 544. The assault and battery exclusion provided:

> In consideration of the premium charged, it is hereby understood and agreed that this insurance does not apply to claims or "suits" for "bodily injury", "personal injury" or death caused by or arising directly or indirectly out of or from an assault or assault and battery of any nature whatsoever, whether or not committed by or at the direction of the Insured, his employees, patrons, or any causes whatsoever.

Id.

On appeal, the court found that the assault and battery exclusion at issue clearly applied to any claim or suit for bodily injury or death arising out of assault and battery committed on the insured's premises, regardless of who committed the assault and battery. Given its broad scope, the court concluded that the exclusion clearly barred the wrongful death claims asserted against the insured, which would not have arisen but for the alleged assault and battery committed on the insured's premises. The court also found that the inclusion of the phrase "whether or not" in the exclusion was significant and made clear that the exclusion was intended to apply to all instances of assault and battery occurring on the insured's premises. Id. at 545-546.

In ALEA London Limited v. Woodcock, 286 Ga. App. 572, 649 S.E.2d 740 (June 5, 2007), the Court of Appeals construed the language of a more limited assault and battery exclusion to find that the exclusion did not apply and thus coverage existed under a commercial general liability policy for a negligence claim against an insured bar owner based upon an assault and battery by a patron on the insured premises. Id. at 745-746. The injured patron was struck in the nose by a beer bottle thrown in the insured's bar. The injured patron contended that the insured was liable because it and its employee failed to prevent the bottle thrower's attack. The insurer claimed that it had no duty to defend or indemnify the insured because the incident fell within the policy's assault and battery exclusion. That exclusion provided:

> Exclusion a. ... Expected or intended injury. "Bodily Injury" or "Property Damage" expected or intended from the standpoint of the insured; or arising out of an assault or battery, provoked or unprovoked, or out of any act or omission in connection with prevention or suppression of an assault or battery, committed by any insured or an employee or agent of the insured.

Id. at 743 (emphasis added).

The trial court submitted the question of the construction of the jury, which the Court of Appeals held was in error as the construction and interpretation of a contract were matters of law for a trial court. Id. at 744-745. However, despite that procedural error, the appellate court held that the jury properly determined that coverage existed for the incident in question based upon the injured patron's testimony and the policy itself. In particular, the court held that the portion of the policy addressing assault and battery was not intended to exclude coverage for a bodily injury claim arising out of an assault and battery committed by a patron or out of any act or omission in connection with prevention or suppression thereof as any other interpretation would have rendered meaningless the phrase "committed by any insured or an employee or agent of the insured." Id. at 745-746 (emphasis added).

4. Coverage for "Volunteer Labor" under Commercial General Liability Policy:

In ALEA London Ltd. v. Lee, 286 Ga. App. 390, 649 S.E.2d 542 (July 6, 2007), the court construed whether a claim was excluded by a "volunteer labor" exclusion in a commercial general liability policy. In that case, the

insured contractor was hired by two homeowners to build a deck. On the second day of work, the insured asked the first homeowner to hold one end of a board so that the insured could nail it to the house with a nail gun and inadvertently shot the homeowner with the nail gun after the homeowner began to walk away to leave. The homeowners brought a negligence suit against the insured, after which the insurer brought a declaratory judgment action alleging that the claim was excluded by "volunteer labor" exclusion in the policy. That exclusion provided:

> This insurance does not apply to "bodily injury", "personal injury" or medical payments to any member, associate, affiliated member, or to any person or persons loaned to or volunteering services to you, whether or not paid by you, arising out of or in the course of work performed for you or on your behalf.

Id. at 391.

The insurer brought a motion for summary judgment, which was denied by the trial court, which the trial court concluded that the insurer had failed to prove that the homeowner was acting as a volunteer at the time he was injured. In so ruling, the trial court found that the phrase "volunteering services" in the exclusion was ambiguous and capable of more than one reasonable interpretation and thus construed the exclusion against the insurer. Applying the interpretation most favorable to the insured, the trial court found that the term "volunteer" is commonly a person who may share characteristics of an employee, but who gratuitously donates his labor to the employer, that the homeowner was not found to be a volunteer because he was performing the act for his own benefit, not for the insured's benefit and that even if the homeowner had been acting in the insured's behalf, he had stopped "volunteering" when he had dropped the board and was turning to leave when he was injured. Id. at 392.

On appeal, the Court of Appeals affirmed the trial court's ruling. The court looked to the definition of "volunteer" in Merriam-Webster's dictionary and Black's Law Dictionary and held that the homeowner's action did not fall under any of those definitions for that term, which required the person to act without legal concern or interest or without justification from legitimate personal interest. Id. at 393. The court found that the homeowner could not be said to have no legal concern or interest in the insured's work on his own

deck, and that he did not assist the insured without any justification from legitimate personal interest. Id. The first homeowner received a benefit by helping the insured complete the task for which he had hired him, which could even be considered a financial one because the insured was paid by the hour and the homeowner's assistance necessarily shortened the insured's labors. Id.

5. Coverage for Carbon Monoxide Poisoning under Commercial General Liability Policy:

In Auto-Owners Ins. Co. v. Reed, 286 Ga. App. 603, 649 S.E.2d 843 (July 16, 2007) (cert. applied for), the Court of Appeals was called upon to resolve whether a claim for carbon monoxide poisoning was excluded from coverage under a pollution exclusion of a commercial general liability policy. Id. at 603-604. In Reed, a tenant sued her the insured landlord claiming that she received carbon monoxide poisoning inside the home she rented as a result of the insured's failure to keep the premises in repair and free from defects. The insurer defended pursuant to a reservation of rights and filed a declaratory judgment action. Id. at 603-604. The policy provided:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies....
>
> 2. Exclusions.
>
> This insurance does not apply to:
>
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured....

> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Id. at 604.

The insurer argued that the damages the tenant was seeking were excluded under the unambiguous terms of the above pollution exclusion because the tenant's claim satisfied all of the following conditions: (1) she alleges that her damages arose from the discharge, dispersal, or release of carbon monoxide; (2) she alleges that the discharge, dispersal, or release of carbon monoxide occurred at property the insured owned; and (3) carbon monoxide is a pollutant as defined in the policy. The tenant and the insured conceded the first two conditions were satisfied, but argued below and on appeal that the breadth of the definition of "pollutants" renders the pollution exclusion ambiguous. Id. at 604-605. The Court of Appeals, analogizing carbon monoxide to asbestos fibers, which had already been held to be a pollutant, found that carbon monoxide was a "fume" and thus clearly an excluded "pollutant" under the terms of the policy. Id. at 845 (citing American States Ins. Co. v. Zippro Constr. Co., 216 Ga. App. 499, 455 S.E.2d 133 (1995)).

6. Coverage under "Locked Vehicle Warranty" under Commercial Automobile Policy:

In Certain Underwriters at Lloyd's of London v. Rucker Construction, Inc., 285 Ga. App. 844, 648 S.E.2d 170 (June 15, 2007), the Georgia Court of Appeals addressed whether a theft claim was excluded from coverage by a exclusion entitled a "Locked Vehicle Warranty." The exclusion provided:

> We will not pay for any loss or damage caused by, resulting from, contributed to or aggravated by theft, including attempted theft, from "any one vehicle" covered unless the covered property is contained in a fully enclosed and securely locked body or compartment and the theft results from forcible entry, evidenced by visible marks.

Id. at 172.

In that case, Jack Rucker, the owner and vice-president of Rucker Construction, left a bulldozer in a fenced pasture with the key in the ignition. During the night, three men stole the machine, drove it one quarter mile into a pond, and submerged it, causing extensive damage. Rucker Construction made a claim against its policy with Lloyd's of London, which denied the claim. Rucker's Construction thereupon filed a breach of contract and bad faith claim against Lloyd's, which moved for summary judgment based upon the "Locked Vehicle Warranty" in the policy alleging that Rucker Construction failed to secure the bulldozer "in a fully enclosed and secure locked body or compartment" and that there were no visible marks of forced entry, given that the key was left in the bulldozer. In opposing the motion, Rucker Construction argued that the "warranty" was ambiguous because it excluded coverage due to theft "from 'any one vehicle' covered," but did not exclude coverage due to theft of a vehicle, and because a bulldozer was not defined as a vehicle in the policy." Id. The trial court denied Lloyd's motion for summary judgment, but certified its order for immediate review. After the Court of Appeals denied Lloyd's application for interlocutory review, the case proceeded to trial resulting in a verdict for Rucker Construction on both the breach of contract and bad faith claims. Lloyd's moved for a directed verdict and judgment notwithstanding the verdict on the same grounds as its prior summary judgment motion, which motions were denied by the trial court and the denials subsequently appealed by Lloyd's. Id.

On appeal, the Court of Appeals affirmed the trial court's denial of the motions of Lloyd's for directed verdict and judgment notwithstanding the verdict. Id. The court agreed with Rucker Construction that the "warranty" was ambiguous because it states, in part, that the insurer will not pay for any damage caused by theft "from 'any one vehicle' covered ... unless the covered property is contained in a fully enclosed and securely locked body or compartment" and applied the rule of construction that ambiguities in insurance policies are to be construed against the insurer Id. at 174-175 (emphasis in original). The policy described the "property covered" as the "contractor's equipment" listed on the "equipment schedule." The bulldozer was listed on the schedule and thus was "covered property." "Vehicle" was not defined in the policy. However, "self-propelled vehicles designed and used to carry mounted equipment" and "vehicles designed for highway use" are excluded from the definition of "contractor's equipment." The court concluded that under the policy, it appeared that "vehicles" were not "covered property" and that the "warranty," excluding coverage for damage caused by theft "fron 'any one vehicle' covered ... unless the covered property is

contained" in a locked body was ambiguous, because the policy defines equipment and vehicles differently. Id. at 175 (emphasis in original). In short, the court found that a reasonable insured could understand the terms "theft from a vehicle" in the "warranty" to mean theft of the vehicles component parts and not of the vehicle itself and noted that if Lloyd's had intended in the "warranty" to exclude theft of the bulldozer, rather than theft from the bulldozer, it could have easily and unambiguously done so. The court, therefore, found that there was evidence to support the jury's finding that the bulldozer was contractor's equipment not covered by the warranty." Id.

7. Coverage Election by Insured under Automobile Insurance Policy:

In Simulton v. AIU Ins. Co., 284 Ga. App. 152, 643 S.E.2d 553 (March 13, 2007), the insurer filed a declaratory judgment action seeking a ruling that it had no duty to defend or indemnify its insured under a standard form automobile liability insurance policy that provided separate coverages to separate vehicles listed on the declarations page. The policy at issue insured six different vehicles, including a Camry involved in an accident giving rise to a personal injury claim against the insured. The Declarations Page reflected that, unlike the other cars insured under the policy, "no coverage" was purchased for the Camry for liability, medical payments or uninsured motorists coverage. Rather, the Camry was covered only under the portion of the policy entitled "Coverage for Damage to Your Auto." The insured argued that policy issued by the insurer was ambiguous and thus should be construed against the insurer to provide liability coverage because the standard form policy attached to the Declarations Page contained a liability insurance agreement. The trial and appellate courts disagreed. Id. at 152-153, 154-155.

On appeal, the court found that to adopt the insured's position would require it to disregard the long-accepted practice of allowing insurers to issue standard form policies, containing multiple coverage provisions, even though not all coverages have been purchased by an insured. Id. at 154. The court further found that the Declarations Page properly represents the means by which an insurer tailors its standard form policy to allow the insureds to purchase only the types of coverage, and the amount of such coverage, that they desire and that the Declarations Page unequivocally showed that no liability coverage was purchased for the Camry. In so holding, the court rejected the insured's argument that unless liability coverage is found for the

Camry, it would allow the insurer to forego the state statutory requirements set forth in O.C.G.A. § 33-34-3(a)(1) that any automobile liability insurance policy issued in the state provide certain minimum limits of liability for the same. Id. at 154-155. The court noted that the statutory minimum limits of liability apply only to automobile liability policies that the coverage elected by the insured for the Camry was not liability coverage, that the insured had cited no authority for the proposition that insurers must require their insureds to elect liability coverage, and that there are circumstances where an insured would want to insure only against physical damage to the vehicle, such as where a soldier garages his car while deployed overseas or where the insured holds a security interest in the vehicle of another. Id. at 155 n. 2.

Similarly, in Cuyler v. Allstate Ins. Co., 284 Ga. App. 409, 643 S.E.2d 783 (March 7, 2007), cert. denied, 2007 Ga. LEXIS 510 (Ga., June 25, 2007), the court held that an insured was not entitled to coverage for his medical payments, pain and suffering, lost income, and damage to his vehicle resulting from a collision with another vehicle. In that case, the insured was given the option to elect medical payments and collision damage coverage, but only elected liability, uninsured motorist, auto comprehensive and rental car reimbursement coverage under the policy. Id. at 411. The policy indicated that "[t]he coverages of this policy apply only when a specific premium is indicated for them on the declarations page." The declarations page for the policy at issue did not indicate that premiums had been paid for the coverages sought by the insured. Id.at 411-412. The court, therefore, held that unambiguous terms of the policy indicated that the insured was not entitled to the coverages sought. Id. at 412.

8. Coverage for "Actual Cash Value" of Property Loss under Automobile Policy:

In Dowdell v. Volvo Commercial Finance, LLC, 286 Ga. App. 659, 649 S.E.2d 750 (June 27, 2007), the Court of Appeals reaffirmed that the physical damage provisions of an automobile insurance policy provides that the most the insurance company would pay for a loss was the lesser of the actual cash value of the damaged property at the time of the loss or the cost to repair or replace the property, the insurer satisfies that obligation by payment the pre-loss case value (i.e., fair market value) of the property. Id. at 659-660.

9. Coverage for Damage under "Vermin" Exclusion of Warehouse Owner's Liability Insurance Policy:

In Ace Am. Ins. Co. v. Truitt Bros., Inc., 2007 Ga. App. LEXIS 1295 (Ga. App., December 7, 2007), the Georgia Court of Appeals addressed whether damage to a corporation's food products damaged by a rat infestation were covered under an exception to a "vermin" exclusion in a warehouse owner's insurance policy and found that it was. Id. at 1-2. In Truit Brothers, Truitt stored food products in a warehouse owned by Southland Bonded Warehouse, Inc., which were damaged by a rat infestation resulting from Southland's negligence. Truitt sued Southland and obtained a default judgment. In its complaint, Truitt alleged that the rat infestation resulted from unclean conditions in a warehouse and poor sanitation practices involving Southland's "pallet exchange program." Ace, as Southland's liability carrier, denied coverage for Truitt's judgment against Southland. Truitt then initiated an action against Ace to obtain coverage under the policy, and both parties moved for summary judgment. The policy provided:

> A. Coverage
>
> We will pay for loss to Covered Property from any one of the Covered Causes of Loss.
>
> 1. Covered Property
>
> a. WAREHOUSEMAN LEGAL LIABILITY
>
> Covered Property means the property of others in your custody as a warehouseman accepted by you under written contract or receipt.
>
> 3. Covered Causes of Loss
>
> ...
>
> a. WAREHOUSEMAN LEGAL LIABILITY
>
> We will pay for loss caused by risks of direct physical loss to Covered Property, except those causes of loss listed in the Exclusions, that you become legally

obligated to pay, as a result of your negligence, while Covered Property is in your custody.

C. EXCLUSIONS

1. We will not pay for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. ...

g. Wear and tear, insects, vermin, deterioration, loss of weight, contamination, evaporation, shrinkage, changes in temperature, dryness, wetness, dampness, spotting, discoloring, molding, rusting, frosting, rotting, souring, steaming, change in flavor, leakage, breakage, marring or scratching unless caused by a Covered Cause of Loss not excluded elsewhere in this form

Id. at 2 (emphasis in original).

Based upon its conclusion that the above policy language was ambiguous, the trial court granted Truitt's motion for summary judgment and denied Ace's cross-motion for summary judgment.

On appeal, Ace argued that the trial court erred in concluding that the policy language was ambiguous. The Court of Appeals found that the policy language was unambiguous and that it provided coverage for the event at issue. Id. at 3. In so ruling, the court noted:

> The exclusion provides that loss caused by vermin is excluded, "unless caused by a Covered Cause of Loss not excluded elsewhere in this form." The effect of the exception to the vermin exclusion is that losses caused by vermin are excluded only if the vermin infestation was, in turn, caused by a different exclusion in the policy. For example, if the vermin resulted from a flood sweeping them into the warehouse, the damage caused by the vermin would not be covered under the policy

> because the policy contained a separate flood exclusion. If, however, the vermin were caused by something not excluded elsewhere in the policy, the vermin exclusion would not apply. In contrast, the same clause excluding vermin also excludes damage caused by wetness. If wetness is caused by a flood, the damage caused by wetness is excluded, because flood losses are excluded in the policy in a separate provision of the policy. If, however, the wetness was caused by sprinklers turning on as a result of fire, the exclusion would not apply.

Id. at 4-5.

The court further noted that Ace pointed to no evidence that a risk excluded in a separate provision of the policy caused the rat infestation and that the record, instead, showed that the infestation resulted from unclean conditions and Southland's pallet exchange practices. Because those were covered causes of loss that were not excluded elsewhere in the policy, the court found that they fell within the exception of the vermin exclusion and thus that the exclusion did not apply. Coverage was therefore found to apply. Id. at 5.

10. Coverage for Insured's Failure to Procure or Continue Insurance under Non-Profit Liability Insurance Policy:

In Fireman's Fund Ins. Co. v. University of Georgia Athletic Ass'n, Inc., 2007 Ga. App. LEXIS 1203 (Ga. App., Nov. 9, 2007), the court construed the scope of a "failure to effect and maintain insurance" exclusion in a Non-Profit Organization Liability Insurance Policy issued by Fireman's Fund Insurance Company to the University of Georgia Athletic Association. In that case, Georgia football player Decory Bryant suffered a serious spinal injury on October 25, 2003 while playing for Georgia and, as a result, was disabled for life from playing any contact sports. On October 21, 2003, Bryant told the Association that he wanted coverage under the Association's disability insurance program and was told that the papers for him to sign to obtain coverage would be in his locker by the end of the next day. On October 23, 2003, the Association requested quotes for $500,000 disability coverage on Bryant, and on the next day the Association told its agent that it wanted to bind coverage with Lloyd's of London on Bryant, but failed to include a coverage request form signed by Bryant, as required to bind coverage. The Association did not present Bryant with a coverage request form to sign until October 29, 2003, at which time the Association was informed that in absence

of proof that Bryant had reviewed the quote and signed a coverage request form prior to his injury, Lloyd's of London refused to backdate the coverage to October 23, 2003.

Bryant thereupon filed an action against the Association and its agent who was responsible for administering the Association's disability insurance program to athletes asserting claims based upon breach of fiduciary duties, breach of contract, and negligence for damages attributable to his lack of disability insurance he requested and seeking compensatory damages, punitive damages, and attorneys fees. After Fireman's Fund refused to defend the Association and its agent, the Association filed a third-party action seeking a determination that Bryant's claim was covered by the Association's Non-Profit Organization Liability Policy. The policy provided in pertinent part that Fireman's Fund would "pay on behalf of the Insured all Loss for which the Insured shall be legally obligated to pay resulting from a Claim that is made against the Insured for a Wrongful Act...." "Wrongful Act" was defined as "any actual or alleged negligent act, error or omission, misleading statement, or breach of duty committed by the Insured in the performance of duties on behalf of" the Association. Id. at 6-8. Among other exclusions, the policy excluded coverage for any claim "[a]lleging, based upon or attributable to, arising out of, in consequence of or in any way related to the Insured's failure to effect or maintain insurance."
The policy required Fireman's Fund to defend the insured, "even if the any of the allegations are groundless, false or fraudulent." Id. at 11. The policy also excluded coverage for any claim "[a]lleging, based upon or attributable to, arising out of, in consequence of or in any way related to any Bodily Injury, provided, however, this exclusion shall not apply to an Employment Related Practices Claim for emotional distress, mental anguish or humiliation." Id. at 10-11. Fireman's Fund filed a motion to dismiss the Association's third-party complaint for failure to state a claim, and the Association filed a motion for summary judgment. The trial court concluded that neither the "failure to effect or maintain insurance" exclusion nor a "bodily injury" exclusion unambiguously excluded coverage for Bryant's claim under the Association's policy. Id.

On appeal, Fireman's Fund contended that the term "failure to effect ... insurance" was unambiguous and means the failure to accomplish, to produce as a result, to procure, or to place insurance and that Bryant's claim is barred by the "failure to effect and maintain insurance" exclusion was not covered because it arose out of the Association's and its agent's failure to procure

insurance for Bryant after agreeing to do so and that, alternatively, the "bodily injury" exclusion excluded coverage for Bryant's claim. Id. at 11, 18-19. The Association contended that the quoted language was ambiguous and that, construing the exclusion against Fireman's Fund as the drafter (that is, narrowly and in favor of coverage), Bryant's claim does not fall within the exclusion. Id. at 12-13, 19. The court agreed with the Association that the exclusion was ambiguous and should be construed in favor of the Association because one could reasonably construe the exclusion in a more limited fashion to exclude an insured's failure to obtain and maintain other kinds of insurance that a non-profit organization would normally have, such as property hazard and premises liability coverage, rather than disability insurance, which the court found was not shown by Fireman's Fund to be a type of coverage that such an organization normally would have. The court pointed out that such a construction was consistent with the purpose of a similar exclusion typically found in directors and officers insurance liability policies that is intended to prevent such policies from being substituted for the corporation's normal liability and property insurance coverage. Id. at 14-16. The court finally ruled that the "bodily injury exclusion did not apply because the nexus between Bryant's bodily injury and his claims was too attenuated to bring his claims within the ambit of the exclusion. In short, no conduct of the insured was causally related to Bryant's bodily injury. Id. at 18-23. There court, therefore, found that Fireman's Fund had a duty to defend the Association and its agent. Id. at 23.

11. Coverage of Indemnity Agreement as Waiver of Municipal Immunity under Georgia Interlocal Risk Management ("GIRMA") Policy:

Pursuant to O.C.G.A. § 36-33-1, a municipality waives sovereign immunity to the extent that it purchases liability insurance covering occurrences to which sovereign immunity would otherwise apply. Id. § 36-33-1 (2007). In a case of first impression (in which the author has been involved since 1997 as counsel for ARCO, Inc.), the Eleventh Circuit Court of Appeals in CSX Transportation, Inc. and National Railroad Passenger Corporation v. Garden City, GA and ARCO, Inc., 2007 U.S. App. LEXIS 28793 (11th Cir., December 10, 2007) ("CSX IX"), interpreted two prior Georgia Supreme Court's decisions on certified questions in CSX Transportation, Inc. and National Railroad Passenger Corporation v. Garden City, GA and ARCO, Inc., 277 Ga. 248, 588 S.E.2d 688 (2003) ("CSX IV"), and CSX Transportation, Inc. and National Railroad Passenger Corporation v. Garden City, GA and

ARCO, Inc. 279 Ga. 655, 619 S.E.2d 597 (2005) ("CSX VII"), addressed whether a municipality could expressly indemnify a third party against the torts of others and whether the purchase of insurance by the municipality to cover the municipality's indemnity obligations resulted in a waiver of the municipality's sovereign immunity to the extent of such insurance under O.C.G.A. § 36-33-1 and answered those questions in the negative. CSX IX, supra.

In 1996, Garden City, GA entered into a series of agreements with CSX to utilize the railroad right-of-way to install water and sewer lines. The agreements required Garden City to indemnify and hold harmless CSX or its subsidiaries or its affiliates for all liabilities CSX incurred in connection with the project and for which CSX was not the sole cause. The agreements also required Garden City to maintain insurance covering the indemnity obligations Garden City had assumed. Garden City employed ARCO as general contractor for its pipeline installation contract. ARCO agreed to indemnify Garden City for all liabilities Garden City incurred in connection with the project for which the City was not the sole cause. In October 1997, an Amtrak passenger train collided with a tractor trailer operated by a subcontractor of Garden City and ARCO causing CSX and Amtrak to incur substantial property damage claims and third party passenger and crew personal injury claims. CSX sought indemnification from Garden City in accordance with the indemnity provisions of the license agreements, and Amtrak sought indemnification from Garden City under the indemnity provisions of the license agreements as an alleged affiliate of CSX. Garden City sought indemnification from ARCO in accordance with the indemnity provisions of the general contract. Garden City refused to indemnify CSX and Amtrak, and ARCO refused to indemnify Garden City and contended that the City had no duty to indemnify CSX and Amtrak. CSX and Amtrak then sued Garden City for indemnification only, and Garden City sued ARCO for indemnification only. No tort causes of action were alleged by CSX or Amtrak.

The U.S. District Court for the Southern District of Georgia granted summary judgment to Garden City and partial summary judgment to ARCO, finding that the indemnification provisions constituted an impermissible waiver of Garden City's sovereign immunity in the absence of any evidence that Garden City had liability insurance to cover the indemnity claim. The Eleventh Circuit took the unusual step of allowing CSX and Amtrak to supplement the record on appeal with a GIRMA liability insurance policy in which Garden City was a participant and vacated the entry of summary

judgment and remanded the case to the District Court for its consideration of the effect of the City's participation in the GIRMA insurance fund. CSX Transportation, Inc. and National Railroad Passenger Corporation v. Garden City, GA and ARCO, Inc., 235 F.3d 1325 (11th Cir. 2000) ("CSX I"). On remand, the District Court again granted summary judgment to Garden City and partial summary judgment to ARCO, finding that the indemnity provisions of the license agreements between CSX and Garden City were void as ultra vires and that O.C.G.A. § 36-33-1(a) did not authorize the City to waive its immunity by entering into an indemnity contract. CSX Transportation, Inc. and National Railroad Passenger Corporation v. Garden City, GA and ARCO, Inc., 196 F. Supp.2d 1288 (S.D. Ga. 2002) ("CSX II").

CSX again appealed to the Eleventh Circuit, which then certified two questions to the Georgia Supreme Court:

> 1. May a Georgia municipality contractually indemnify a private party for any and all loss, damage, and liability arising in connection with a public works project involving the private party's land?
>
> 2. If not, is there any loss, damage, or liability arising in connection with a public works project involving a private party's land for which a Georgia municipality may contractually indemnify a private party?

CSX Transportation, Inc. and National Railroad Passenger Corporation v. Garden City, GA and ARCO, Inc., 325 F.3d 1236 (11th Cir. 2003) ("CSX III").

The Georgia Supreme Court answered both certified questions in the negative, finding that the indemnity agreements were void as ultra vires because they were beyond the power of Garden City to enter. CSX IV, 277 Ga. at 250-251. In so doing, the Georgia Supreme Court noted that,

> if the facts behind CSX's cause of action against the City fall within the scope of the coverage provided by the GIRMA policy and sovereign immunity would otherwise apply to that cause of action, the City's sovereign immunity is waived to the extent of such liability coverage.

CSX IV, 277 Ga. at 251.

Based upon CSX IV, the Eleventh Circuit concluded that,

> Georgia municipalities may never waive their sovereign immunity by, for example, contracting to indemnify third parties, without (1) express legislative authority or (2) satisfying the requirements of O.C.G.A. § 36-33-1(a).

CSX Transportation, Inc. and National Railroad Passenger Corporation v. Garden City, GA and ARCO, Inc., 355 F.3d 1295, 1297 (11th Cir. 2004) ("CSX V").

The Eleventh Circuit found that "while the indemnification agreement between the City and CSX was correctly determined by the district court to be void as ultra vires, it must again remand the case to the district court for consideration whether, pursuant to O.C.G.A. § 36-33-1(a), Garden City waived its sovereign immunity as to CSX's cause of action by purchasing GIRMA insurance." Id. It further determined that on remand,

> the district court must scrutinize the GIRMA policy and consider if the facts behind CSX's cause of action against the City fall within the scope of coverage provided by the GIRMA policy and sovereign immunity would otherwise apply to that cause of action to determine whether the City's sovereign immunity was waived to the extent of such liability coverage.

Id.

The Eleventh Circuit therefore affirmed in part and remanded in part the decision of the District Court for further proceedings consistent with its opinion. Id.

Instead of ruling on the issues framed by the Eleventh Circuit on remand, the District Court certified five additional questions to the Georgia Supreme Court. CSX Transportation, Inc. and National Railroad Passenger Corporation v. Garden City, GA and ARCO, Inc., 391 F. Supp.2d 1234, 1245-46 (S.D. Ga. 2005 ("CSX VI"). The Georgia Supreme Court declined the certified questions, but took the "opportunity [in a footnote] to reiterate [their] holding in CSX IV, that the indemnification agreement between the City and

CSX is void as an ultra vires contract. CSX VII, 279 Ga. at 658 n. 4. The District court then granted Garden City summary judgment and ARCO partial summary judgment for the third time. CSX Transportation, Inc. and National Railroad Passenger Corporation v. Garden City, GA and ARCO, Inc., 418 F.Supp.2d 1366, 1378 (S.D. Ga. 2006) ("CSX VIII"). The District Court found that in the latest round of briefs, CSX and Amtrak relied on a sovereign immunity tort theory of liability, while CSX and Amtrak "pled and proceeded on only a contract claim that the City must pay CSX for damages the City, if not others, tortiously caused." CSX VIII, 418 F. Supp.2d at 1375-76. In a prior opinion, the District Court recognized that "CSX does not allege that the City breached any tort duty, or any other private right other than the breach of the CSX-City indemnification agreement." CSX VI, 391 F. Supp.2d at 1238. The District Court further noted that CSX and Amtrak never attempted to invoke Federal Rule of Civil Procedure 15(a) to amend its claim, "nor would such be granted at this late hour." CSX VII, 418 F.Supp.2d at 1376. The District Court found that CSX and Amtrak were pursuing a "legally inconsistent" theory, which "therefore fails as a matter of law." Id. Alternatively, the District Court found that it is impossible for CSX and Amtrak to recover damages under the contract because the Georgia Supreme Court twice declared the indemnification agreement between CSX and Garden City to be void, which moots the insurance coverage issues on remand. Id.

CSX and Amtrak then appealed again to the Eleventh Circuit, which affirmed the District Court. CSX IX at 9-12. In so ruling, the Eleventh Circuit held that the District Court correctly determined that, in the latest stage of this case, CSX and Amtrak abandoned their contract theory of liability and embraced a tort theory that it had never pled before. CSX and Amtrak were now arguing that Garden City were liable for damages caused by a train collision because Garden City had waived its sovereign immunity from certain torts through its purchase of liability insurance. Id. at 10. The Eleventh Circuit further found that even though CSX and Amtrak contend that Garden City assumed liability for such damages under its contract with CSX, the Georgia Supreme Court's opinion establishes that Garden City exposed itself to tort liability by purchasing GIRMA insurance, not by entering into a contract with CSX. Id. at 10-11 (citing CSX IV, 277 Ga. at 250). The Eleventh Circuit determined that the District Court was correct that the contract has no bearing on this claim because CSX and Amtrak have transformed their contract claim into a tort claim and that CSX and Amtrak cannot use the insurance provision of its contract to bootstrap an unpled tort claim into this case. Id. at 11. The Eleventh Circuit concluded by holding that

because the District Court correctly found that CSX and Amtrak abandoned their contract claim against Garden City, and CSX never moved to amend its pleadings under Federal Rule of Civil Procedure 15(a) to assert a claim sounding in tort, the District Court's grant of summary judgment to Garden City must be affirmed. Id.

12. UM Coverage for Injury Caused by Acts of Unknown Uninsured Motorist:

In Hohman v. State Farm Fire & Cas. Auto. Ins. Co., 283 Ga. App. 430, 641 S.E.2d 650 (February 5, 2007), cert. denied, 2007 Ga. LEXIS 377 (Ga., May 14, 2007), an insured sought the review of the grant of summary judgment to an insurer on the insured's uninsured motorist claim pursuant to O.C.G.A. § 33-7-11, arising from a motor vehicle accident in which the insured was involved. The insured swerved her vehicle to avoid a vehicle in front of her, which caused her to lose control of her vehicle. She crossed the median of the road and struck two other vehicles. She filed a John Doe complaint against an unknown defendant and served her insurer. The complaint alleged that due to the negligence of John Doe, a ladder in the highway caused the first driver to swerve into her path, which set off a chain of events that resulted in her collision and her injuries. The insurer contended that the claim was fatally defective under O.C.G.A. § 33-7-11(b)(2) because there was no evidence, as required by the statute, of physical contact between the vehicle the insured occupied and the vehicle of the unknown party, or corroboration from an eyewitness (other than the insured claimant) of how accident occurred (i.e., that the unknown vehicle was involved). Id. at 430-431. The Court of Appeals agreed, finding that although there was an eyewitness to support the allegation that there was a ladder in the highway, no one, including the insured, was able to testify that the ladder had been negligently secured to a vehicle and that it fell from the unknown vehicle. Id. at 431-433.

13. UM Coverage Where Liability Coverage Exhausted by Payments to the Plaintiff and Others:

As a general rule, an insured may recover under the uninsured motorist provisions of his or her policy for damages sustained in an accident caused by an uninsured motorist. Under O.C.G.A. § 33-7-11(b)(1)(D), a motor vehicle is "uninsured" if bodily injury and property damage liability insurance exists, "but the insurance company writing the insurance has legally denied coverage

under its policy." Id. In Knight v. Ga. Farm Bureau Mut. Ins. Co., 184 Ga. App. 312, 361 S.E.2d 190 (1987), the Georgia Court of Appeals held that "as a matter of law, denial of coverage by a liability carrier resulting from exhaustion of the available coverage by payment of other valid claims constitutes a 'legal denial of coverage' under O.C.G.A. § 33-7-11(b)(1)(D)(iii)." Id. at 314(1). In Young v. Maryland Cas. Co., 228 Ga. App. 388, 491 S.E.2d 839 (1997), the court limited Knight to cases "where one of several claimants exhaust the available coverage before other claimants get paid." Young, 228 Ga. App. at 390(1).

In Phillips v. Government Employees Ins. Co., 2007 Ga. App. Lexis 1234 (November 20, 2007), the court further limited Knight in cases where the liability policy limits are exhausted as a result of a payment made to the plaintiff. In Phillips, the Plaintiff was severely injured when the SUV she was driving was struck by a truck being driven by Kevin Dion Brown. At the time of the accident, Brown was insured under a motor vehicle liability insurance policy issued by Progressive Preferred Insurance Company, which carried a combined single limit of $750,000 for bodily injury and/or property damage. The Plaintiff, whose damages exceeded $750,000, had been issued uninsured motorists coverage by GEICO with limits of $300,000. Progressive paid the Plaintiff $450,000 in consideration of her executing a limited release, and it paid the remaining $300,000 available under the policy in settlement and compromise of other claims filed against Brown arising out of the underlying accident. After Phillips received $450,000 from Brown's motor vehicle liability insurance carrier, she filed a lawsuit against Brown and sought to recover an additional $300,000 from GEICO on the theory that her recovery of $450,000 from Progressive had left her underinsured by the $300,000 paid by Progressive to settle the claims of others. In short, Plaintiff claimed that, by paying the remaining liability limits of $300,000 to others, Progressive had legally denied coverage under its policy and left her "uninsured" pursuant to O.C.G.A. § 33-7-11(b)(1)(D) in that amount. Id. at 2. The Court of Appeals disagreed and held, as a matter of law, that a claim is not considered "denied" under O.C.G.A. § 33-7-11(b)(1)(D) where a policy has been exhausted as a result of a payment to the plaintiff. In so holding, the court reasoned that to allow such a construction defies both the meaning and intent of the uninsured motorist statute because "it would allow *every* plaintiff who receives policy limits from the liability carrier to then pursue an uninsured motorist claim as the subject vehicle would then be uninsured. Id. at 6-7 (citing Young, 228 Ga. App. At 390(1)) (emphasis in original). However, the court in Phillips expressly noted that even where a claim is not considered

"denied" under O.C.G.A. § 33-7-11(b)(1)(D)(iii), a subject vehicle may still be found to be "uninsured" under alternate scenarios listed in O.C.G.A. § 33-7-11(b)(1)(D), such as where a liability insurance policy has been exhausted as a result of payments to a plaintiff and others, and the plaintiff's payment is less than the limits of the uninsured motorist coverage. Id. at 6 n. 3 (citing O.C.G.A. § 33-7-11(b)(1)(D)(ii). The court in Phillips explained that collection under that theory was unavailable to the Plaintiff in that case because the payment made to her by Progressive was greater than the amount of her uninsured motorist coverage. Id. at 6 n. 3.

14. UM Coverage Where Insured Settles for less than Liability Policy Limits:

In Georgia, a plaintiff is statutorily entitled to obtain a limited release from a tortfeasor and his or her insurer where an accident is covered by two or more insurance carriers and then pursue other available insurance. See, e.g., O.C.G.A. § 34-24-41.1 (2007).[3]

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3. Section 34-24-41.1 provides in pertinent part:

> (a) In any instance where a claim arising out of a motor vehicle accident is covered by two or more insurance carriers, one such carrier may tender, and the claimant may accept, the limits of such policy; and, in the event of multiple claimants, the settling carrier may tender, and the claimants may accept, the limits of the policy pursuant to a written agreement between or among the claimants. Such claimant or claimants may execute a limited release applicable to the settling carrier and its insured based on injuries to such claimants including, without limitation, claims for loss of consortium or loss of services asserted by any person.
>
> (b) The limited release provided for in subsection (a) of this Code section shall:
>
> (1) Release the settling carrier from all liability from any claims of the claimant or claimants based on injuries to such claimant or claimants; and
>
> (2) Release the insured tort-feasor covered by the policy of the settling carrier from all personal liability from any and

In Holland v. Cotton States Mut. Ins. Co., 285 Ga. App. 365, 646 S.E.2d 477 (2007); cert. denied, 2007 Ga. LEXIS 619 (Ga., Sept. 10, 2007), the Georgia Court of Appeals addressed the question whether an UM/UIM insured taking a limited release under O.C.G.A. § 33-24-41.1 must exhaust the available liability limits before seeking UM/UIM coverage from his or her own insurer and answered that question in the positive. Id. at 365-366. In that case, the Plaintiff Holland was involved in an automobile accident with Defendant Wilmer Moran. She reached a settlement with Moran's insurance carrier, GEICO General Insurance Company for $24,000, which was $1,000 less than the policy's limit. As a part of the settlement, Holland signed a document entitled "Limited Release Pursuant to O.C.G.A. § 33-24-41.1", which among other things, referred to Moran as a "Limited Releasee" and sought to release her of liability "except to the extent other insurance coverage

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> all claims arising from the occurrence on which the claim is based except to the extent other insurance coverage is available which covers such claim or claims.
>
> * * *
>
> (d) The limited release of the settling carrier provided for in subsection (a) of this Code section shall not:
>
> (1) Bar a claimant's recovery against any other tort-feasor or under any other policy of insurance or release any other insurance carrier providing applicable coverage unless specifically provided for in such release;
>
> (2) Be admissible in evidence before the trier of fact in the trial of a tort action, but the amount paid thereunder shall be admissible as provided by law as evidence of the offset against the liability of an uninsured motorist carrier and as evidence of the offset against any verdict of the trier of fact;
>
> (3) Affect any duty the settling carrier owes to its insured under its policy including, without limitation, the duty to defend a subrogation claim brought against its insured; or
>
> (4) Release the tort-feasor from personal liability to the extent that there is other insurance in effect which covers the said claim or claims, but only to the extent of such other insurance.

Id.

is available which covers the claim or claims of [Holland] against the Limited Releasee (including, but not limited to, certain uninsured/underinsured motorist insurance coverage provided by Cotton States Mutual Insurance Company." The document expressly referenced the $24,000 settlement. After Moran settled with Holland, she sought to recover UIM benefits from Cottons States, which moved for and was granted summary judgment by the trial court. Id. at 365.

On appeal, Holland contended that the trial court should not have granted summary judgment to Cotton States because, under O.C.G.A. § 33-24-41.1, the release allows her to pursue her UIM claim against Cotton States. The Court of Appeals disagreed, finding that exhausting available liability coverage is a "condition precedent to [a] UM claim, id. at 366 (citing Daniels v. Johnson, 270 Ga. 289, 290, 509 S.E.2d 41 (1998), and that in O.C.G.A. § 33-24-41.1, "the legislature carefully preserved the exhaustion requirement by providing that a limited release under one policy will not compromise the claim under other policies when the settlement is for 'the *limits* of such policy.'" Id. (citing Daniels, 270 Ga. at 290 (quoting O.C.G.A. § 33-24-41.1) (emphasis supplied).

15. UM Coverage for Workers Compensation and Social Security Payments:

Until recently, an uninsured motorist carrier could include a policy provision that provides for a set-off for workers compensation benefits to which the insured is entitled so long as the set-off provision would not hinder the insured's ability to recover all sums to which the insured is legally entitled to recover (i.e., the insured's actual damages did not exceed the policy limits). In Northbrook Property & Casualty Ins. Co. v. Merchant, 215 Ga. App. 273, 450 S.E.2d 425 (1994), the policy provided that "any amount paid under this insurance for medical expenses, work loss or 'survivor's loss' will be reduced by the amount of benefits an 'insured' is entitled to receive for the same elements of loss under any workers' compensation law." The court concluded that this limitation on the UM carrier's liability was not precluded by statute or contrary to public policy and, therefore, was enforceable. Id. at 276(2). In Hudson v. Whited, 250 Ga. App. 451, 552 S.E.2d 447 (2001), the Court of

Appeals reaffirmed that such a set-off provision is not against public policy of this state and is enforceable, but only if the provision would not operate to reduce the UM carrier's liability where the insured's actual damages exceed the policy limits. Id. at 453-454.

However, in Dees v. Logan, 2007 Ga. Lexis 859 (Ga., Nov. 21, 2007), the Georgia Supreme Court held that a UM carrier was not entitled to set off sums the insured had received from workers' compensation and Social Security, and a pretrial settlement with the defendant's liability carrier, regardless whether the insured's actual damages exceed policy limits. In so holding, the court first noted that Georgia's uninsured motorist statute expressly allows an uninsured motorist carrier can set off benefits which its insured may have received to compensate for only property loss:

> The endorsement or provisions of the policy providing the coverage required by this Code section may contain provisions which exclude any liability of the insurer for injury or destruction of property of the insured for which he has been compensated by other property or physical damage insurance.

Id. (citing and quoting O.C.G.A. § 33-7-11(I)).

Applying rules of statutory construction, the court then concluded that the legislature did not intend to authorize an insurer to set off benefits received for personal injury because when a statute expressly mentions one of many things, the omitted things must be regarded as having been deliberately excluded. Id. (citing Alexander Properties Group v. Doe, 280 Ga. 306, 309, 626 S.E.2d 497 (2006); C. Brown Trucking v. Rushing, 235 Ga. 676, 677, 595 S.E.2d 346 (2004)). In so holding, the Georgia Supreme Court expressly rejected arguments by State Farm that the legislature necessarily acquiesced in the Court of Appeals' interpretation in Northbrook of O.C.G.A. § 33-7-11 and that, therefore, stare decisis requires it to affirm the judgment of the appellate court allowing the set offs and that disallowing the set offs would result in a double recovery for the insured.

16. UM Coverage for the Use of Motor Vehicle by an Insured to Carry Persons or Property for a Fee:

In Wagner v. Nationwide Mut. Fire Ins. Co., 288 Ga. App. 132, 2007 Ga. App. LEXIS 1157 (Oct. 30, 2007), the court addressed whether the trial

court erred in granting summary judgment to a UM insurer based upon an exclusion in its UM coverage for the use of any motor vehicle by an insured to carry persons or property for a fee and found that it did so err on public policy grounds. Id. at 132-134. In so ruling, the court reasoned that such an exclusion was contrary to O.C.G.A. § 33-7-11 remedial purpose and requirements that a UM insurer pay all sums which the UM insured is legally obligated to recover as damages from the owner or operator of an uninsured motor vehicle. The court also noted that the case law is replete with examples of invalid exclusions in UM policies being struck down because they conflicted with the remedial purpose of UM coverage. Id.

17. Subrogation for First Party Insurance Payments for Property Damage Where Insured Recovered a Prior Judgment from the Same Party Arising out of Same Collision:

Under the Collision coverage provisions of commercial general liability and automobile liability policies, an insured to seek from its own insurer first party insurance payments for property damage caused by a third party tortfeasor and under the subrogation provisions of the policy an insurer may seek reimbursement for the third party tortfeasor. Depending upon the language of the subrogation provision or loan receipt agreement, an insurer may bring suit against the third party tortfeasor for reimbursement of the first party payments and/or deductible in the name of the insurer or the insured. Under certain circumstances, an insured may make a partial assignment of its claims to its insurer and retain the right to sue in its own name for its loss in excess of that paid by the insurer. See, e.g., Webb v. State Auto. Ins. Co., 187 Ga. App. 425, 370 S.E.2d 492 (1988). In the case of a partial assignment, res judicata would not bar the insured's claim as the insurer would not have had the right to assert the insured's claim in its own action. Imperiale v. Pollard, 187 Ga. App. 427, 370 S.E.2d 494 (1988).

In Sanders v. Trinity Universal Ins. Co., 647 S.E.2d 388 (Ga. App., June 6, 2007), the Georgia Court of Appeals addressed the issue whether an insurer may recover first party coverage payments for property damage under the insured's collision coverage caused by a third party tortfeasor where the insured had previously recovered a judgment from the same tortfeasor for other property damages arising out of the same collision and answered that question in the negative. Id. at 390-392. In Sanders, Jeanne Ravan's automobile and horse trailer were damaged in a collision caused by the alleged negligent driving of Barbara Sanders and John Sweet. Ravan, acting pro se,

sued Sanders in the Magistrate Court seeking to recover $4,023.20 for damage to her horse trailer and the cost of renting a horse trailer while hers was disabled. Judgment was entered in Ravan's favor against Sanders. Subsequent thereto, Trinity Universal Insurance Company filed a complaint in its own name against both Sanders and Sweet seeking to recover for property damage to Ravan's vehicle for which it had paid $16,738. Sanders moved to dismiss the action, among other reasons, because the action was barred by res judicata because there was a judgment on the merits in the earlier litigation in magistrate court. The trial court denied Sanders' motion, and Sanders appealed. Id. at 390-391.

On appeal, the Court of Appeals reversed the trial court's denial of Sanders' motion to dismiss based upon res judicata. In so ruling, the court noted that "according to the doctrine of res judicata, 'a judgment on the merits is conclusive as to all matters that were or could have been put into controversy between identical parties or their privies in another cause of action.'" Id. at 391 (citing and quoting Suggs v. Hale, 278 Ga. App. 358(1), 629 S.E.2d 11 (2006)). The court further noted that "[r]es judicata requires three element: adjudication by a court of competent jurisdiction in the first action; identity of parties and subject matter in both actions; and the party against whom res judicata is raised must have had a full and fair opportunity to litigate in the first action." Id. (citing Suggs, 278 Ga. at 358-359). The finally noted that under Georgia law, privies are "all persons who are represented by the parties and claim under them ... the term privity denoting mutual or successive relationship to the same rights of property." Id. (citing and quoting Dalton Paving & Constr. v. South Green Constr. Of Ga., 284 Ga. App. 506, 643 S.E.2d 754 (2007)). In Sanders, Trinity was seeking to recover money it paid to its insured, Ravan, for damage to her vehicle. The court found that Trinity was in privity to its insured, Ravan, "'[because it] stands in the shoes of its insured ... [and] can have no greater right of recovery than [its insured]." Id. at 391-392 (quoting Travelers Ins. Co. v. Commercial Union Ins. Co., 176 Ga. App. 305, 308, 355 S.E.2d 681 (1985) and citing Cross v. Tokio Marine & Fire Ins. Co., 254 Ga. App. 739, 743(1), 563 S.E.2d 437 (2002) (physical precedent only). As pointed out by the court "[a]lthough Ravan sought to recover only a portion of her alleged damages in magistrate court, 'it is only where the merits were not and could not have been determined under a proper presentation and management of the case that res judicata is not a viable defense'" and "there was a full opportunity to litigate because Ravan could have asserted all her claims in one action." Id. (citing and quoting Green v. Bd. of Directors of Park Cliff, 279 Ga. App. 567, 569(2),

631 S.E.2d 769 (2002)). In so holding, the court distinguished the situation where an insured makes a partial assignment of its claims to its insurer and retains the right to sue in its own name for its loss in excess of that paid by the insurer, noting that res judicata would not bar the insured's claim in such an instance, as the insurer would not have the right to assert the insured's claim in its action. Id. n. 15 (citing and distinguishing Webb and Imperiale, supra).

18. Subrogation for Third Party Insurance Payments:

O.C.G.A. § 33-7-12 sets forth the effect of a provision in policy permitting insurer to settle or compromise claims as follows:

> (a) Any provision in a liability policy of insurance which provides that the insurer shall have the right to compromise or settle claims of third persons against the insured without the consent of the insured shall be deemed to create, as between the insurer and the insured, the relationship of an independent contractor so that the insured shall not be precluded from asserting a claim or cause of action against third persons, notwithstanding the settlement by the insurer of such claims of third persons, unless the insured shall previously have consented in writing to relinquish his claim or cause of action against third persons, provided in all cases where the insurer shall settle the claims of third persons against the insured without written consent that it shall be the duty of the insurer to inform the third persons in writing of the lack of consent of the insured and that the insured is not thereby precluded from the further assertion of claims against the third persons before taking from the third persons any release, covenant not to sue, or other settlement; and upon the failure of the insurer to give the notice to the third persons of the lack of consent of the insured, the release, covenant not to sue, or other settlement shall be of no effect, null, and void.
>
> (b) If such third persons execute a release, covenant not to sue, or other instrument in settlement of their claims after such notice of the lack of consent of the insured, the same shall be deemed and construed as a bar to the further assertion by such third persons of such claims against all persons whomsoever; and such third persons shall not plead such

release, covenant not to sue, or settlement in bar of any action or claim asserted by such insured.

Id. §33-7-12 (2007).

In a little known case named Carden v. Burkhalter, 214 Ga. App. 487, 448 S.E.2d 251 (1994), the Court of Appeals construed O.C.G.A.§ 33-7-12 to mean that an insurer who makes settlement payments pursuant to that statute O.C.G.A.§ 33-7-12 without the insured's written consent has no right of subrogation against any other party for the payments made. In Carden, Windell Carden was involved in a motor vehicle accident with Defendant Ricky Barnes and a vehicle owned by Georgia Power Company and operated by its driver Lenwood Burckhalter, which resulted in injuries to Ricky Barnes. Carden's insurer, Georgia Farm Bureau Insurance Company, issued checks to cover property damage caused to Georgia Power's vehicle without the written consent of Carden. Later, Georgia Farm Bureau paid $25,000.00 to Barnes for personal injury and this payment was made without the Carden's knowledge or consent.

Carden subsequently brought a contribution suit against Georgia Power and Burckhalter alleging that those parties were jointly and severally liable for a contribution of one half of the $25,000 paid by Georgia Farm Bureau to Barnes. At trial, Carden filed a motion in limine to exclude evidence of Georgia Farm Bureau's payment of Georgia Power's property damage claim. Carden argued that because Georgia Farm Bureau paid the property damage claim pursuant to O.C.G.A.§ 33-7-12, the payment of the claim does not preclude his claim for contribution and the trial court denied appellant's motion in limine. Georgia Power and Burckhalter moved to dismiss the claim based upon accord and satisfaction contending that Georgia Farm Bureau's payment amounted to an admission of fault on the part of Carden. After hearing evidence, the trial court dismissed the action in its entirety. Id. at 487-88.

On appeal, the Georgia Court of Appeals in Carden court affirmed the trial court's ruling dismissing the claim, although not for the reasons set out by the trial court. Id. at 489. Carden argued that because Georgia Farm Bureau paid the property damage claim pursuant to O.C.G.A.§ 33-7-12, the payment of the claim does not preclude his claim for contribution. Id. at 488. The court, however, held that Carden had no right of contribution for settlement payment to Barnes because he made no payment to settle the claim and that

his insurer Georgia Farm Bureau had no right of subrogation for those payments because it did not make any payment to Barnes as Carden's insurer or his agent under the policy, but instead only acted as an independent contractor. Id. at 489. In so holding, the court noted that Georgia Farm Bureau's policy with appellant allowed it to settle claims without appellant's consent, but that O.C.G.A.§ 33-7-12 governed the effect of such a settlement creating the relationship of an independent contractor between the insurer and insured. Id. Therefore, based upon the designation found in O.C.G.A.§ 33-7-12, the court held that any payments made by Georgia Farm Bureau without appellant's consent and written authorization established as a matter of law that such payments were not made as appellant's insurer under the policy of insurance. Id. The court noted that Georgia Farm was estopped from arguing that it made payments pursuant to the Carden policy when the language of the release explicitly stated that it was acting as an independent contractor and not as an agent of the appellant. Id. The Carden court also held that, even though the suit in that case was brought in the name of Georgia Farm Bureau's insured, it was in effect a subrogation claim of Georgia Farm Bureau, which was barred by operation of O.C.G.A. § 33-7-12 because the insured had made none of the settlement payments. Id.

In a case where the author represented one of the defendants, the Georgia Court of Appeals and the Georgia Supreme Court on application for certiorari had the opportunity to revisit Carden in BBL McCarthy LLC v. Baldwin Paving Co., 285 Ga. App. 494, 646 S.E.2d 682 (2007), cert. denied, 2007 Ga. LEXIS 633 (Ga., Sept. 10, 2007), and rather than overrule or limit Carden, decided to reaffirm and expand the holding of that decision to cover subrogation claims based upon express and implied indemnity as well as contribution. 286 Ga. App. at 500-502; 2007 Ga. Lexis 663. In BBL McCarthy, St. Paul Mercury Insurance Company ("St. Paul") and BBL McCarthy LLC ("BBL"), Individually and as Subrogees for Medlock Bridge One, LP ("Medlock") and Pitcairn Properties, Inc. ("Pitcairn") sought to recover $4,440,000 in indemnity payments from Selective Insurance Company of South Carolina ("Selective") and its named insured, Magnum Development, LC ("Magnum") and Transportation Insurance Company ("Transportation") and National Fire Insurance Company of Pittsburgh ("National") and their named insured, Baldwin Paving Company ("Baldwin"). The indemnity payments were made by St. Paul to settle four wrongful death suits ("Brotherton, Fields, McDonald and Cardarelli suits") and one personal injury suit ("Cardarelli suit") arising out of an automobile accident wherein a SUV operated by Siragusa and occupied by Brotherton, Fields and McDonalds

allegedly lost control due to excess water accumulation on the road and crossed the median and struck a vehicle operated by Cardarelli. BBL did not contribute any monies to the settlements. The plaintiffs in the underlying suits alleged that excess water accumulation was caused by the negligent construction of a deceleration lane by general contractor BBL and subcontractors Magnum and Baldwin and by the negligent supervision of Magnum and Baldwin by BBL and owners Medlock and Pitcairn. At the time of the accident, Magnum and Baldwin had agreed to indemnify BBL, Medlock and Pitcairn and Selective, Transportation and National agreed to insure BBL, Medlock and Pitcairn as additional insureds for loss arising out of the performance of the subcontractors' work. The releases taken by St. Paul for each of the suits other than the Siragusa suit (which settled collectively for $4,025,000) expressly indicated that they were taken without the knowledge and consent of BBL, Medlock and Pitcairn and thus contained the notice to claimants language of O.C.G.A.§ 33-7-12. The release in the Siragusa suit (which was settled by St. Paul for $415,000) did not expressly indicate that it was settled without the knowledge and consent of BBL, Medlock and Pitcairn. Id. at 495-497.

When the Defendants refused to indemnify St. Paul and BBL for the $4,440,000 paid by St. Paul to settle the foregoing suits, St. Paul and BBL sued to recover the settlement payments under theories of express indemnity, implied indemnity, contribution, and that BBL, Medlock and Pitcairn were additional named insureds under Selective, Transportation and Nationals' policies. Defendants argued, among other things, that pursuant to O.C.G.A.§ 33-7-12 as construed and applied by Carden, St. Paul was not entitled to be subrogated to $4,025,000 of the settlement payments made by St.Paul because all of the releases except for the Siragusa release indicated that they were taken without the knowledge and consent of BBL, Medlock and Pitcairn and that the payments were made by St. Paul as an independent contractor and not as the agent or insurer of BBL, Medlock or Pitcairn. Defendants further argued based upon the same authorities that BBL could not recover any of the settlement payments because it did not itself contribute any monies to the settlement. The trial court granted the Defendants summary judgment on other grounds. Upon appeal the Georgia Court of Appeals applied and extended Carden to hold, as a matter of law, that St. Paul and BBL were not entitled to recover the settlement monies paid by St. Paul to settle the underlying tort suits other than those paid to settle the Siragusa suit. BBL McCarthy, 285 Ga. App. at 500-503. The Georgia Supreme Court thereafter denied St. Paul and BBLs' petition for certiorari on this issue. 2007 Ga.

LEXIS 633. Although not expressly set forth in the opinions, both courts upheld the application of Carden even though St. Paul and BBL offered evidence and argument that a loan receipt was taken by St. Paul for settlement payments made on behalf of BBL and thus that BBL was the real party in interest in seeking the recover of those payments. As a result, St. Paul and BBLs' indemnification claim was reduced by $4,025,000 to $415,000.

19. Election of Coverage as an Additional Insured:

Up until the Court of Appeals and Supreme Courts' decisions in BBL-McCarthy, Georgia law appeared clear that, except in cases where the defense of the named insured is entirely dependent on the defense of the additional insured such as under the doctrine of respondeat superior or where mandatory automobile liability insurance coverage is at issue, an additional insured is required to elect coverage under a liability insurance policy by complying with the notice conditions precedent to coverage before coverage will attach, regardless whether the insurer was in fact informed or not or whether the action was prejudiced or not. Compare Adwater v. Georgia Ins. Co., 170 Ga. App. 29, 31, 316 S.E.2d 2 (1984); Mattison v. Travelers Indem. Co., 167 Ga. App. 521, 524-525, 307 S.E.2d 39 (1983); Southeastern States, Inc. v. General Fire & Cas. Co., 151 Ga. App. 487, 488-490, 260 S.E.2d 399 (1979); Wolverine Insurance Company v. Sorrough, 122 Ga. App. 556, 557-558, 559-563, 177 S.E.2d 819 (1970); Ballew v. State Farm Mutual Auto Insurance Company, 122 Ga. App. 417, 417-420, 177 S.E.2d 172 (1970) with Leventhal v. American Bankers Ins. Co. of Fla., 159 Ga. App. 104, 105-108, 283 S.E.2d 3 (1980) ("rule of election" does not apply where defense of named insured and additional insured are symbiotic such as in the case of liability based upon respondeat superior) and Cotton States Mut. Ins. Co. v. Starnes, 260 Ga. 235, 235-238, 392 S.E.2d 3 (1990) (rule of election does not apply to the extent of mandatory automobile liability insurance coverage for public policy reasons); but see State Farm Mut. Ins. Co. v. Herrick, 166 Ga. App. 90, 303 S.E.2d 304 (1983) (physical precedent only under Court of Appeals Rule 33 (holding that there was a question of fact whether additional insured impliedly elected coverage where there was evidence that the insurer took the statement of the additional insured, sought the cooperation of and communicated with the additional insured in the investigation of the underlying claims, and attempted settled claims on behalf of the additional insured). As noted by the court in Sorrough, the reason that a showing of prejudice is not required is because the notice provisions were made a condition precedent to coverage under the policy. Id. at 562. Furthermore, the Sorrough court noted that, in finding that

a showing of prejudice under such circumstances is not required, it was adopting the majority rule in this country. 177 Ga. App. at 562 (citations omitted).

Prior to the courts decisions in BBL McCarthy, it was also seemed clear that, except in cases where mandatory automobile insurance coverage is at issue, an insurer is not required to show that it was prejudiced before it was relieved of coverage due to a named insured's breach of notice provisions in an insurance policy that had been made conditions precedent to coverage. Compare Granite State Ins. Co. v. Nord Bitumi U.S., Inc., 262 Ga. 502, 504, 422 S.E.2d 191 (1992) (citing Diggs v. Southern General Insurance Company, 172 Ga. App. 37, 321 S.E.2d 792 (1984)); Golder v. United States Automobile Association, 177 Ga. App. 194, 195, 338 S.E.2d 771 (1985) (citing Diggs, 172 Ga. App. at 38); Atlanta Intl. Properties v. Ga. Underwriting Ass'n, 149 Ga. App. 701, 702, 256 S.E.2d 472 (1979); Diggs, 172 Ga. App. at 38; Bates v. Hoyoke Mut. Ins. Co. In Salem, 171 Ga. App. 164, 165, 318 S.E.2d 777 (1984), aff'd 253 Ga. 474, 324 S.E.2d 474 (1985); Richmond v. Georgia Farm Bureau Mut. Ins. Co., 140 Ga. App. 215(3), 222, 231 S.E.2d 245 (1976); Bituminous Cas. Corp. v. J. B. Forrest & Sons, Inc., 132 Ga. App. 714(3), 720, 209 S.E.2d 6 (1974) (decision by full panel) with O.C.G.A. § 33-7-15 (enacted in 1984); Canal Indem. Co. v. Greene, 265 Ga. App. 67, 593 S.E.2d 41 (2003); Gregory v. Allstate Ins. Co., 214 Ga. App. 696, 134 Ga. App. 461 (1975); but see See, e.g., O.C.G.A. § 33-7-15 (2007) (allowing a third party to place an automobile insurance company on notice of suit and requiring prejudice to deny coverage).

The BBL McCarthy opinions have created some uncertainty about the current parameters of the "rule of election." In that case, there was evidence of any written notice of the occurrence being given by BBL, Medlock or Pitcairn as additional insureds to Selective other than a letter written by an agent of BBL to Magnum, Selective's named insured, notifying Magnum of the accident and requesting that Magnum notify its insurance carrier of the accident. There was no evidence that Medlock or Pitcairn gave notice of the occurrence. There was also no evidence that BBL, Medlock or Pitcairn ever tendered coverage in writing to Selective and/or forwarded suit papers to Selection other than a letter three years after suit was filed threatening a bad faith suit if Selective did not contribute its limits to a mutual settlement of the underlying tort actions. Nevertheless, as noted above, there was evidence in the record that the plaintiffs sued BBL, Medlock and Pitcairn for negligent supervision of the construction work by Magnum, Selective's insured, and

Baldwin, Transportation and Nationals' insured. After finding that the plaintiff's negligent supervision claim against BBL, Medlock and Pitcairn "arose out of" the negligence claim against Magnum and Baldwin, the Court of Appeals, citing Leventhal, found that there was an issue of fact whether BBL, Medlock and Pitcairn properly elected coverage Court of Appeals because the defendant insurers had failed to offer evidence that they were prejudiced by the failure of BBL, Medlock and Pitcairn timely elected coverage as an additional insured under the defendant insurers' policies. The Georgia Supreme Court denied the defendant insurers' petition for certiorari on this issue.

20. Satisfaction of Notice of Occurrence Condition Precedent to Coverage under Liability Policy:

In Kay-Lex Company v. Essex Ins. Co., 286 Ga. App. 484, 649 S.E.2d 602 (July 10, 2007), the court addressed the questions whether notice of an accident to an independent insurance agent of the insured but not the insurer on the date of the accident and notice to the insurer 12 months after an accident satisfied, as a matter of law, the notice of occurrence provisions of a commercial general liability policy and concluded that it did not. Id. at 490-491. In so holding, the court found that the insurer's notice of occurrence provision was made a condition precedent to coverage under the policy, that the provision required notice of the accident to be given to the insurer, that the insured's independent insurance agent was not an agent of the insurer, and that an unexcused delay of 12 months in reporting the accident directly to insurer was unreasonable as a matter of law. Id. (citations omitted). The court also held that the insurer's reservation of rights letter was not deficient because it did not specifically set out late notice as a defense reserved under the policy. As noted by the court, an insurance company is not required to "list each and every basis for contesting coverage in the reservation-of-rights letter before the company [can] raise such in the declaratory judgment action. Id. at 491 (citations omitted).

21. Contractual Time Limitation on Bringing Suit to Recover under a Homeowner's Policy:

In Ga. Farm Bureau Mut. Ins. Co. v. Pawlowski, 284 Ga. App. 183, 643 S.E.2d 239 (February 14, 2007), the insureds brought suit against their insurer under a homeowner's policy, claiming that the insurer's failure to repair water damage had allowed the growth of toxic mold. The policy

contained a provision that stated that an action against the insurer had to be started within one year after the date of loss. The insurer had offered a settlement within the one year period of the date of loss, which was rejected by the insurer, and the insureds did not initiate a suit on the policy within the one year period after the loss. The trial court denied the insurer's motion for summary judgment, and an appeal followed. Id. at 183-184.

On appeal, the insureds argued that the insurer had waived the limitation period by fraudulently inducing them to believe that it did not intend to enforce it. The record showed only that the insurer had investigated the claim and offered a settlement that the insureds rejected as insufficient. The Court of Appeals found that an offer of settlement, which was rejected, was not the kind of conduct designed to lull a claimant into a false sense of security. Id. at 184-185. In so ruling, the court distinguished Auto-Owners Ins. Co. v. Ogden, 275 Ga. 565, 569 S.E.2d 833 (2002), which held that if an insurer never denies liability, but continually discussed the loss with its insured with a view towards negotiation and settlement without the intervention of a suit, an issue of fact can be created whether the insurer lulled the insured into a belief that the contractual limitation clause in the policy was waived. Id. at 184-185. As noted by the court, in Ogden, the dispute was whether the insurer could rely on the contractual limitation to avoid paying an amount it had already conceded that it owed. In the case at hand, the insurer had not conceded that it owned the insureds anything more than the approximately $7,000 that it offered and they had rejected and that the insurer's failure to act on a environmental consulting firm's recommendations that the home contained elevated levels of toxic substances, that the insureds be relocated, and that the insurer complete "appropriate remedial measures" amounts to an implicit denial of liability for any damages amounting to toxic mold. Id. at 85. The court also rejected the insureds' argument that the limitation did not apply because their injuries were ongoing because the insureds offered no competent evidence of any such injury, noting that even if a letter from a consulting group was not inadmissible hearsay, its vague language did not tend to establish that any mold had harmed the insureds. Id. at 185-186. The court finally rejected the insureds' res ipsa loquitur arguments because there was no evidence of the existence of toxic mold, and the insured had presented no evidence to support the requirements of the doctrine that the injury (1) was caused by an agency or instrumentality within the defendant's exclusive control, (2) ordinarily does not occur in the absence of someone's negligence, and (3) was not due to any voluntary action or contribution on his part. Id. at 186 (citation omitted).

22. Bad Faith Failure to Pay a Claim under O.C.G.A. §§ 33-4-6 and 33-4-7:

O.C.G.A. § 33-4-6(a) provides that an insurer owes a bad faith penalty of up to 50% of the liability of the insurer for the loss or $5,000, whichever is greater, and reasonable attorneys fees "[i]n the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that such refusal was made in bad faith..." Id. § 33-4-6(a) (2007). In allowing a statutory penalty where the insurer acts in bad faith, O.C.G.A. § 33-4-6(a) provides for punitive damages and, as such, it is an exception to the rule set forth in O.C.G.A. § 33-4-6 disallowing exemplary damages in contract cases. Copeland v. Dunehoo, 36 Ga. App. 817, 138 S.E. 267 (1927); Kilgore v. National Life & Accident Ins. Co., 110 Ga. App. 280, 138 S.E.2d 397 (1964). The provisions of O.C.G.A. § 33-4-6 provide the exclusive remedy for bad faith to pay a first party insurance claim, and the insured does not have a cause of action in tort. Tate v. Aetna Cas. & Sur. Co., 149 Ga. App. 123, 253 S.E.2d 775 (1979). Since the statute imposes a penalty, its requirements are strictly construed. Howell v. Southern Heritage Ins. Co., 214 Ga. App. 536, 537(1), 448 S.E.2d 275 (1994). Consequently, a proper demand is essential to recovery. Hanover Ins. Co. v. Hallford, 127 Ga. App. 322, 323(1)(a), 193 S.E.2d 235 (1972). Moreover, where, as a matter of law, an insurer had reasonable grounds to contest claim, then insurer could not have been held liable, under this section, either for the imposition of bad faith penalties or for attorney fees. Rice v. State Farm Fire & Cas. Co., 208 Ga. App. 166, 430 S.E.2d 75 (1993).

In 2001, the Georgia General Assembly enacted O.C.G.A. § 33-4-7, which places an affirmative duty on insurers to fairly and promptly adjust property losses covered by a motor vehicle liability policy and provides for that an insurer owes a bad faith penalty of up to 50% of the liability of the insured for the loss or $5,000, whichever is greater, and reasonable attorneys fees in the event the insurer breaches this duty 60 days of receipt of a demand by the claimant, thereby compelling the claimant to institute or continue a suit to recover on the claim and the claimant ultimately recovers an amount equal to or in excess of the claimant's demand Id. § 33-4-7 (2007). There is very little case law construing O.C.G.A. § 33-4-7. However, it is reasonable to assume that much of the case law construing the requirements of O.C.G.A. §

33-4-6 will apply to O.C.G.A. § 33-4-7 because the latter provision is largely patterned on the prior statute.

A. "Demand for Payment" under O.C.G.A. § 33-4-6:

In BayRock Mortg. Corp. v. Chicago Title Ins. Co., 286 Ga. App. 18, 648 S.E.2d 433 (June 20, 2007) (cert. applied for), the court addressed the question whether the submission of a claim under a policy that did not notify the insurer that it was facing a bad faith claim for failure to pay a specific claim constituted a "demand for payment" under O.C.G.A. § 33-4-6(a) and found that it did not. Id. at 434-436. In BayRock, Chicago Title Insurance Company issued a title insurance policy to BayRock Mortgage Corporation in connection with a refinance mortgage loan that BayRock provided on a residential property owned by Delondo Poole in Kennesaw. The United States thereafter secured a foreclosure lien on Poole' property upon a successful prosecution against Poole for drug trafficking. Poole then defaulted on his mortgage payment, and BayRock submitted a claim for coverage under the title insurance policy with Chicago Title. There was nothing in the claim submission that indicated that BayRock intended to pursue a bad faith claim pursuant to O.C.G.A. § 33-4-6(a) if Chicago Title refused to pay the claim within 60 days of submission. When Chicago Title failed to pay the claim within 60 days, BayRock sued Chicago Title, alleging bad faith refusal to pay a claim under O.C.G.A. § § 33-4-6. Id. at 434-435.

Based upon the foregoing facts, the court in BayRock held that BayRock was not entitled to pursue a bad faith claim under O.C.G.A. § 33-4-6. Id. at 436. In so ruling, the court noted that a proper "demand for payment" requires that the language of the demand must be sufficient to alert "the insurer that it is facing a bad faith claim for a specific refusal to pay so that it may decide whether to pay the claim." Id. at 435 (citing and quoting Arrow Exterminators v. Zurich American Ins. Co., 136 F. Supp.2d 1340, 1356 (N.D. Ga. 2001); also citing Cagle v. State Farm Fire Co., 236 Ga. App. 726, 727, 512 S.E.2d 717 (1999) (letter demanding payment and stating that bad penalties and attorneys fees would be sought for nonpayment within 60 days) and Cotton States Mut. Ins. Co. v. Clark, 114 Ga. App. 439, 447, 151 S.E.2d 780 (1966) (court action threatened verbally when insurer refused to pay loss).

B. Application of O.C.G.A. § 33-4-6 to a Closing Protection Letter Agreement:

In Lawyers Title Ins. Corp. v. New Freedom Mortgage Corporation, 2007 Ga. App. LEXIS 1270 (Ga. App., Nov. 29, 2007), the court addressed the issue whether O.C.G.A. § 33-4-6 applied to a closing protection letter ("CPL") agreement and found that it did not. Id. at 13-15. In that decision, the parties had entered into a CPL whereby the title insurer agreed to indemnify the mortgage lender under certain circumstances for actual losses incurred by the mortgage lender in connection with residential real estate closing conducted by an agent authorized to issue title insurance on behalf of the title insurer. The suit arose from a fraudulent transaction involving a straw buyer and an inflated insurance appraisal wherein an employee for the mortgage lender was involved. The CPL was found by the trial court not to exclude coverage for the mortgage lender's own negligence and bad faith penalties pursuant to O.C.G.A. § 33-4-6 were denied because the trial court found that the CPL was not an insurance agreement to which the statute applied. On appeal, the Georgia Court of Appeals agreed with the trial court that O.C.G.A. § 33-4-6 only applies to losses covered by a policy of insurance and that a CPL is not a policy of insurance so as to authorize the penalties set forth in such statute. Id. at 13-15. As pointed out by the court, "[i]nsurance is a contract whereby one party agrees to assume certain risks for another in consideration for the payment of premiums and to pay the insured party a specified amount on the happening of a particular contingency." [Cit.] A necessary element of insurance is distribution of the risk" Id. at 15 (quoting Ponder v. Fulton-Dekalb Hospital Authority, 256 Ga. 833, 835-836(2), 353 S.E.2d 515 (1987). The court found that the CPL did not constitute a policy of insurance because under that agreement, no second party assumed the risk and significantly no distribution of risk is accomplished. Id.

C. Bad Faith Penalty under O.C.G.A. § 33-4-6:

In Atlantic Title Ins. Co. v. Aegis Funding Corp., 287 Ga. App. 392, 651 S.E.2d 507 (Aug. 31, 2007) (cert. applied for), the court ruled that the trial court properly found that a title insurer was liable for bad faith penalties of 50% of the claims under O.C.G.A. § 33-4-6 for the failure to pay the claims of lenders arising out of the failure of the lenders' attorney to pay off pre-existing liens encumbering the relevant properties at closing. Id. at 396. The title insurance policies insured that the lenders obtained a first priority security interest in the properties closed as collateral for their loans. When the lenders discovered that the closing attorney did not pay off pre-existing liens encumbering the relevant closings, the lenders made demands upon the title insurer for payments under the policies. Rather than pay the claims, the title

insurer brought suit against the lenders claiming that it had a right to investigate the facts underlying each claim before paying them. The lenders in turn counterclaimed seeking bad faith penalties and moved for summary judgment. The title insurer at first claimed there was an issue of fact whether the closing attorney paid off the pre-existing liens, but later conceded that it was liable to the lenders for the face amounts of the policies and tendered the sums into the court registry. The tender, however, did not occur until over one year after the last counterclaim seeking bad faith penalties had been filed. The trial court found that the policies clearly provided coverage for the title defects of which the title insurer had been informed and therefore, as a matter of law, the title insurer had acted in bad faith in delaying the payment. However, the trial court ruled that the lenders' claims for attorneys fees presented material issues of fact for jury trial, and therefore denied the lenders motion for summary judgment on this issue. Id. at 393-395.

On appeal, the court upheld the trial court, finding that there was no reasonable grounds for the title insurer to delay payment under O.C.G.A. § 33-4-6. Id. at 396. In so holding, the Court of Appeals expressly affirmed the trial court's award, as a matter of law, of 50% bad faith penalties and rejected the title insurer's argument that a jury must decide the percentages for which it is liable for a bad faith penalty, noting that the statute clearly provides for a payment of either 50 percent of the amount of the loss ... or $5,000, whichever is greater." Id. (citation omitted).

D. Application of O.C.G.A. § 33-4-7 to Personal Injury Claims:

In Mills v. Allstate Ins. Co., 2007 Ga. App. LEXIS 1184 (Ga. App., Nov. 6, 2007), the court concluded that O.C.G.A. § 33-4-7 applied only to an insurer's bad faith in responding to claims for property damage and did not apply to an insurer's bad faith in responding to personal injury claims. Id. at 1-2, 4-5. The court based its decision upon the plain terms of O.C.G.A. § 33-4-7, which states that it applies only to an insurer's bad faith in responding to property damage claims. Id. at 2, 4-5.

23. Negligent Adjustment of Claims by Insurer:

In GuideOne Mut. Ins. Co. v. Hunter, 286 Ga. App. 852, 650 S.E.2d 424 (July 30, 2007), the insured under a homeowners insurance policy claimed that, and the trial court found that there were genuine issues of material fact whether, the insurer's claims adjuster was negligent in failing to recommend

remediation to the insured to stop roof leaks, in failing to warn the insured of the danger of mold, and in failing to have the property evaluated for mold damage. In so ruling, the trial court concluded that the insurer could be hold liable to the insured under Section 324A of the Restatement (Second) of Torts, as adopted in Huggins v. Aetna Cas. & Surety Co., 245 Ga. 248, 249 264 S.E.2d 191 (1980), which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owned by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

286 Ga. App. at 854 (quoting § 324A, Restatement (Second) of Torts).

On appeal, the court found that although the insured was relying on the adjuster and the insurer to advise him on the necessary extent of repairs, the policy did not impose such a duty on the insurer, and there was no evidence that the insured informed the insurer either of his expectation in that regard nor did the insurer or adjuster undertake such a duty. Further, the evidence did not show that the insurer, through its adjuster, undertook to do anything more than inspect the property in discharge of its obligation to pay the damages claim, or defray the repair and replacement costs. The Court of Appeals, therefore, found that the insurer was entitled to judgment as a matter of law. Id.

24. Cancellation of Coverage for Misrepresentation in the Application:

In T. J. Blake Trucking, Inc. v. Alea London, Ltd., 284 Ga. App. 384, 643 S.E.2d 762 (February 28, 2007), cert, denied, 2007 Ga. LEXIS 505 (Ga., June 26, 2007), the insured filed a breach of contract claim against its insurer for property damages sustained by a dump truck insured by a policy issued by the insurer, and the insurer defended on the grounds that the policy was void

due to misrepresentation in the application under O.C.G.A. § 33-24-7[4]. The insured's president filled out an application for a property loss/physical damage insurance policy for two dump trucks and responded "no" to questions whether the insured had had any accidents or theft losses in the previous five years. It was undisputed that there had been accidents and a theft loss in the previous five years. After one of the dump trucks was involved in an accident, the insured made a property damage claim, which was denied by the insurer. The trial court granted the insurer's motion for summary judgment, and the insured appealed. Id. at 385.

On appeal, the insured argued that the trial court erred in accepting the affidavit of the president of the insurance company, who was not qualified as an expert witness, in which he stated that he would not have written the policy as issued had he known of the prior accidents and losses. The insured also claimed that the application never became a part of the policy and therefore the insurer could not cancel the contract based upon the language in the application and that the misrepresentation was not "material" as required by O.C.G.A. § 33-24-7. The Court of Appeals disagreed, and held that the affidavit of a person in charge of making decisions whether and to what extent coverage will be provided was sufficient, that the statutory provision at issue did not require the application to attached to the policy for any misrepresentation therein to be relied upon by the insurer to cancel coverage,

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4. O.C.G.A. § 33-24-7 (b) provides that,

> "[m]isrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless: (1) [f]raudulent; (2) [m]aterial either to the acceptance of the risk or to the hazard assumed by the insurer; or (3) [t]he insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

Id. § 33-24-7 (2007).

and that the misrepresentation was "material" under the statute based upon the uncontroverted affidavit testimony of the insurer's president that had the questions been answered truthfully, he would have been unable to write the policy. Id. at 385-386.

In White v. Am. Faily Life Assur. Co., 284 Ga. App. 58, 643 S.E.2d 298 (March 7, 2007), the insureds, a husband and wife, filed an action against an insurer for breach of contract of the insurer rescinded the insureds' health insurance policy based upon an alleged misrepresentation in their application that the husband had not been diagnosed with or treated for kidney disease, when the husband, prior to filling out the application, had been diagnosed with impaired kidney function resulting from diabetes and the husband was taking medication to prevent further loss of kidney function. After a jury returned a verdict for the insurer, the insureds appealed, arguing that it was error to give a jury instruction stating that even a misrepresentation made in good faith would void the policy under O.C.G.A. § 33-24-7 and that they believed that the treatment was related only to diabetes and were unaware of any kidney problems when they completed the application. Id. at 58-60.

On appeal, the court held that the jury instruction was proper because under O.C.G.A. § 33-24-7(b)2) and (3), an insurer did not have to show that a representation by an insured was fraudulent, only that it was material and false, even where the application contained a declaration that the statements therein were complete and true to the best of the applicant's knowledge an belief. Id. at 61-62. The court finally found that the policy was void under the foregoing statute even though the policy generally covered preexisting conditions that resulted in specified events occurring 30 days after issuance of the policy because the specific preexisting conditions listed in the application were a discrete subset that was expressly excluded from coverage. Id. at 62-63.

In Marchant v. Travelers Indemn. Co. of Illinois, 286 Ga. 370, 650 S.E.2d 316 (July 6, 2007), the court addressed the question whether coverage could be denied under O.C.G.A. § 33-24-7 based upon a representation in the application, which was true when made, but subsequently became false, materially changed the insurer's risk, and was not corrected by the insured until after a loss had occurred under the policy and decided that coverage could be denied under these circumstances. The insured in Marchant filled out an application for insurance in 1994 that represented that his business consisted of "carpentry, interior trim-new construction." In 1995, the insured

acquired a custom home builders license and started to work as a general contractor for the construction of high-end custom homes. Prior to 1995, the insured had never constructed new homes. In early 2001, the insured was sent a renewal form questionnaire on which he indicated that there had been no change in the nature of his business. The insurer did not discover that the insured was engaged in contracting work until a June 2001 audit. In August 2002, a couple sued the insured for defective work completed prior to April 2001 and the insured sought coverage under the policy. The insurer defended under a reservation of rights and filed a declaratory judgment action. The trial court granted summary judgment to an insurer, and against an insured, on the grounds that the insured made a misrepresentation on his application for insurance which was material to the insurer's acceptance of the risk and which, therefore, barred his insurance coverage. Id. at 370-373.

On appeal, the insured contended that (1) the trial court erred in finding that a questionnaire was equivalent to an application; (2) the trial court erred in finding that questionnaire nullified coverage under a policy existed before the questionnaire; and (3) there was a factual issue for jury determination whether there was a misrepresentation in the questionnaire. The Court of Appeals disagreed, finding that when the insured filled out the application in early 1994, he represented that his business operation consisted of "carpentry, interior trim-new construction," that he did not tell any insurance representative when the nature of his business changed to general contracting in 1995, and that, as a result, he misrepresented from the nature of his business, which was material to the insurer's risk, from 1995 through 2001 when the policy was cancelled. The court found that it was immaterial whether the misrepresentation occurred during the initial application period or when the questionnaire was subsequently filled out. Rather, it was material that the increased risks were misrepresented from 1995 through 2001 (apparently due to the insured's failure to correct his statements in the application and questionnaire). Id. at 373-375.

25. Cancellation of a Commercial Motor Carrier Policy:

In Thompson v. General Security Ins. Co., 286 Ga. App. 583, 649 S.E.2d 736 (May 31, 2007), in companion cases, the appellant driver filed a personal injury suit against a motor carrier, an insurer, and other parties, and appellants, parents of a passenger in the driver's car, filed a wrongful death suit. The Chatham State Court granted summary judgment to the insurer on the ground that it had cancelled the motor carrier's policy before the accident

based upon evidence from the insurer that a Form K cancelling the certificate of insurance had been stamped received by the Georgia Public Service Commission ("PSC") and returned to it prior to the loss, even though the PSC had no record of filing of the Form K. On appeal, the Court of Appeals affirmed the trial court. Under the Motor Carrier Act of 1931, O.C.G.A. § 46-7-1 et seq., a carrier has to obtain a certificate from the PSC. Under PSC rules, to obtain such a certificate, a carrier must file a bond, with adequate security, for the protection of passengers, cargo, and the public against injuries caused by a carrier's negligence or file a certificate of insurance (Form E) in lieu of such bond. An insurer could cancel a certificate of insurance by filing a Form K with the PSC and such cancellation is effective 30 days after written notice of cancellation is received in the PSC's office. Id. at 583-585

In Thompson, the insurer produced a Form K that had been date-stamped May 14, 2001, but the PSC file and computer records did not contain a Form K. A Form E had been entered for the insurer on May 25, 2001. A PSC employee testified that she might have mistakenly entered the Form K as a Form E with the wrong policy number. Two PSC employees further testified that the stamp on the Form K appeared to be authentic. A forensics expert concluded that the stamp on the Form K of the insurer was the same stamp that the PSC had used on other forms. Based upon the foregoing evidence, and finding that the appellants had failed to point to any specific evidence that the Form K was not received or that the stamp thereon was inauthentic, the Court of Appeals upheld the trial court. That the form was processed incorrectly, or not at all, did not affect the outcome. Id. at 585-587.

26. Right of Excess Insurer to Seek a Declaratory Judgment against a Primary Insurer:

In State Farm Auto Ins. Co. v. Metro. Prop. Cas. Ins. Co., 284 Ga. App. 430, 643 S.E.2d 895 (March 22, 2007), an insurer brought a declaratory judgment action pursuant to O.C.G.A. § 9-4-2 against a second insurer and its insured, the decedent's estate, contending that the second insurer had a duty to defend the decedent's estate against a lawsuit. The trial court agreed and entered a declaratory judgment that the second insurer's policy afforded coverage to a decedent and that the second insurer therefore had to defend the decedent's estate against the lawsuit. Id. at 430-432. On appeal, the first insurer argued that the declaratory judgment action was not authorized. The court agreed, finding that in order to be entitled to a declaratory judgment, a plaintiff must show facts or circumstances whereby it was in a position of

uncertainty or insecurity because of a dispute and of having to take some future action which was properly incident to its alleged right, and which future action without direction from the court might reasonably jeopardize its interest. The court found that the first insurer had not and could not make such a showing because the first insurer conceded that it was obligated to defend the personal injury action against the decedent's estate pursuant to a policy it had issued to its own insured. Moreover, the question the first insurer posed concerning its duty to negotiate a settlement demand that exceeded its policy limits failed to demonstrate sufficient uncertainty or insecurity to authorize a declaratory judgment because an insurance company faced with a demand involving multiple insurers could create a safe harbor from liability for an insured's bad faith claim by meeting the portion of the demand over which it had control. Id. at 433-434.

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***Axson Timber Co. v. Wilson*: Clarifying the Scope of the "Premises" Requirement in Statutory Employer Claims**

Matthew D. Walker

In order to ensure that employees of subcontractors in construction and other industries are covered by workers' compensation insurance, O.C.G.A. § 34-9-8 provides that, in certain situations, a "principal, intermediate, or subcontractor" may be liable for workers' compensation benefits to an employee of its subcontractor. In this way, principal contractors are encouraged to require their subcontractors to carry workers' compensation insurance and cannot avoid liability if those subcontractors fail to do so. Because the principal contractor would not otherwise be liable to the subcontractor's employee for workers' compensation were it not for this statute, the principal contractor is said to become the "statutory employer" of the employee.

Four elements must be in place for this "statutory employer" provision to apply. First, the defendant "principal, intermediate, or subcontractor" must itself be subject to the Workers' Compensation Act. Second, there must be a true "contractor/subcontractor" relationship between the employee's immediate employer and the defendant. Third, the injured employee must meet the legal definition of an "employee," rather than an independent contractor. Fourth, the subcontractor employee's injury must occur "on, in or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under his control or management." O.C.G.A § 34-9-8(d). The Georgia Court of Appeals recently addressed the scope of this "premises" requirement in *Axon Timber Co. v. Wilson*.

Axson Timber Company obtained the right to cut timber on land in Florida and Georgia. Axson subcontracted the actual cutting of the timber to a separate company, Rice Timber Company, who in turn subcontracted to White Trucking Company the job of delivering the timber to customers. The claimant, Kenneth Wilson, was employed driving trucks for White Trucking. He injured his back as he was getting out of a truck at a customer's delivery site, a mill in Florida. Because White Trucking did not have workers' compensation coverage, Wilson attempted to obtain benefits from both Axson Timber and Rice Timber under O.C.G.A § 34-9-8.

At a hearing in front of the administrative law judge, Axson and Rice argued that because the claimant was injured at a delivery site, he was not injured "on, in or about the premises" on which Axson or Rice had undertaken

to execute work or otherwise controlled or managed. However, the ALJ found that the customer's property was a site where Axon and Rice had undertaken to execute work. Therefore, because the other three elements were met, Axson and Rice were "statutory employers" of Wilson and were required to provide workers' compensation benefits to him.

In finding that O.C.G.A. § 34-9-8's "premises" requirement had been satisfied, the ALJ relied on *Americal Mut. Liability Ins. Co. v. Fuller*, 123 Ga. App. 585 (1971). In that case, a trucking company subcontracted interstate shipments to a separate trucking company. An employee of the subcontractor was injured when he fell from his truck on a highway in South Carolina. The Court of Appeals held that the highways were the "premises" where the principal trucking company had undertaken to execute work. Therefore, the principal trucking company was liable to the injured employee for workers' compensation benefits as a "statutory employer."

The ALJ's decision in *Axson Timber* was affirmed by the Appellate Division and Superior Court of Lowndes County. The Georgia Court of Appeals, however, reversed the decision on the grounds that Axson and Rice did not qualify as "statutory employer." Specifically, the Court noted that "[a]lthough *Fuller* could be extended to cover the facts in the present case, this Court has already refused to do so." To support that statement, the Court referenced its decision in *Gramling v. Sunshine Biscuits*, 162 Ga. App. 863 (1982).

In *Gramling*, Sunshine Biscuits hired a subcontractor, Bennett Motor Express, to deliver to its customers. Gramling, an employee of Bennett Motor Express, was injured while delivering goods at the customer's location. When Gramling brought a tort suit against Sunshine Biscuits, Sunshine defended on that grounds that it *was* a "statutory employer," and therefore Gramling's tort suit was barred by the exclusive remedy provision of O.C.G.A. § 34-9-11. (That doctrine establishes that where an employee is protected by the rights and remedies of the Workers' Compensation Act, that employee is precluded from pursuing a civil liability claim against the employer, such as a negligence claim, for injuries sustained on the job.) The Court, however, ruled that Sunshine was not a "statutory employer," deciding not to "extend the word 'premises' to include the premises of the shipper's customer to which the goods were delivered." Id. at 864. The Court noted specifically that it did not appear that the legislature intended the "shipper/carrier relationship" to fall under the "statutory employer" definition.

In *Axson Timber*, the Court acknowledged that while the issue in *Gramling* was tort immunity, "the quid pro quo for the statutory employer's potential liability is immunity from tort." In other words, the holding of

Gramling – that a customer's delivery location is not a "premises" under O.C.G.A. 34-9-8 – is applicable whether the principal contractor is arguing that it *is* a "statutory employer" in order to avoid tort liability (as in *Gramling*) or arguing that it is *not* a "statutory employer" in order to avoid liability for workers' compensation benefits (as in *Axson Timber*). Furthermore, the Court noted that, as a policy matter, imposing workers' compensation liability on a principal contractor for an injury occurring on premises over which that employer had no control "would render the [principal contractor] an insurer, which was not the intent of the Workers' Compensation Act." The Court therefore ruled that neither Axson nor Rice were Wilson's statutory employers, and were not liable for workers' compensation benefits.

In short, the Court of Appeals' holding in *Axson Timber* was a policy decision. In fact, the Court acknowledged this by stating that "*Fuller* could be extended to cover the facts in the present case." The Court could have accepted a broader reading of the "premises" requirement, thereby expanding the definition of the "statutory employer" and exposing contractors to additional liability for workers' compensation benefits. Instead, the Court's narrow interpretation of the "premises" requirement emphasizes the need for a connection between the defendant and the injury, and allows principal contractors a clearer understanding of when they might be liable for workers' compensation benefits when subcontracting out work.

Of course, it is important to note that rulings like these can be a "double-edged sword" for potential statutory employers. While O.C.G.A. § 34-9-8 exposes employers to liability for workers' compensation benefits for workers who otherwise would not even be considered their employees, the exclusive remedy doctrine also serves to eliminate the potential for tort liability, which could be considerably more costly for those employers. Therefore, as was the case in *Gramling*, there may be situations where the employer would prefer a broader definition of "premises," in order to avoid a tort suit. However, presumably the risk of tort liability will be limited in most cases where the facts are similar to *Axson Timber*, i.e., the principal contractor has no control over the premises where the injury occurs.

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SB3: Three Years Later

*By Andrew M. Wilkes**

Introduction

It has been more than three years since the Georgia General Assembly enacted Senate Bill 3 ("SB3").[1] While some of the provisions have already been dismantled and cast aside by the appellate courts [2], other provisions have yet to be challenged or examined by the appellate courts. Many of the statutes did not apply retroactively, and the issues addressed in these statutes should be ripe for further appellate review and guidance. Nonetheless, there remain more questions than answers, especially with regard to the more controversial aspects of SB3. Practitioners should expect continued development in case law based upon causes of action that occurred subsequent to February 15, 2005.

This survey will address the reported case law that has resulted in response to the enactment of the specific sections of SB3. For those statutes that have received limited, or no, examination by the appellate courts, the author will address potential issues in which practitioners should expect (or hope for) further clarification.

Venue and Forum Non Conveniens

O.C.G.A § 9-10-31

O.C.G.A. § 9-10-31(c) provided that, "In any action involving a medical malpractice claim . . . , a nonresident defendant may require that the case be transferred to the county of that defendant's residence if the tortious act upon which the medical malpractice claim is based occurred in the county of that defendant's residence." Under subsection (c), the power to transfer venue existed in the defendant, rather than the court. O.C.G.A. § 9-11-31(c) was quickly challenged and found to be unconstitutional. In EHCA Cartersville, LLC v. Turner,[3] the Supreme Court examined whether O.C.G.A. § 9-10-31(c) could be reconciled with the joint tortfeasor provisions existing under the Georgia Constitution.[4] The Supreme Court concluded that

subsection (c) was unconstitutional and was not a proper exercise of the legislature's authority. [5] The defect in subsection (c) was the legislature's placement of the power to change venue in the nonresident defendant, rather than the trial court.[6] Following the Supreme Court's decision in EHCA Cartersville, several trial courts that had transferred cases pursuant to O.C.G.A. § 9-10-31(c) granted motions transferring cases back to the original venue chosen by plaintiffs.[7]

Subsection (d) of O.C.G.A. § 9-10-31 revitalized the rule of "vanishing venue" whereby a nonresident defendant may require that the case be transferred to a county and court in which venue would otherwise be proper if all resident defendants are discharged from liability before or upon return of a verdict. [8] Venue "vanishes" even if the plaintiff obtained a verdict and judgment against the nonresident defendant.

O.C.G.A. § 9-10-31.1

A new feature of Georgia statutory law enacted as part of SB3 was the codification of the doctrine of forum non conveniens.[9] The doctrine of forum non conveniens provides that a trial court may refuse to hear a case if it would more properly be tried before a different court.[10] The venue transfer powers found in O.C.G.A. § 9-10-31.1 have already withstood appellate scrutiny.[11] The Supreme Court in EHCA Cartersville, LLC v. Turner held, "because O.C.G.A. § 9-10-31.1(a) vests the power to change venue in the court, and not in a defendant, as does O.C.G.A. § 9-10-31(c), we conclude that O.C.G.A. § 9-10-31.1(a) is a proper exercise of authority under Art. VI, Sec. II, Par. VIII of the Constitution, and thus does not violate Art. VI, Sec. II, Par. IV of the Constitution."[12] Trial courts across Georgia have applied the doctrine of forum non conveniens since its inception.[13]

O.C.G.A. § 9-10-31.1 designates specific factors that *shall* be examined and addressed by the trial courts when applying the doctrine of forum non conveniens under either a motion to dismiss or a motion to transfer.[14] Upon a

motion to transfer or dismiss under this statute, the trial court must make specific findings either in writing or orally on the record demonstrating that the court has considered all seven of the factors set forth in O.C.G.A. § 9-10-31.1(a).[15] If a trial court fails to specify that it considered the seven factors, the order may be vacated and remanded with direction to make these findings.[16] A trial court's decision under this doctrine will be reviewed under an abuse of discretion standard.[17] Unlike O.C.G.A. § 9-10-31(c), the forum non conveniens statute is not limited solely to actions involving a claim for medical malpractice.[18] Georgia's forum non conveniens statute can be applied retroactively.[19]

SB3 and The Civil Practice Act

O.C.G.A. § 9-11-9.1: Expert Affidavits

O.C.G.A. § 9-11-9.1 provides that a Complaint must be accompanied by an expert affidavit in all matters alleging professional malpractice.[20] There were two notable amendments to O.C.G.A. § 9-11-9.1 under SB3: (1) the 45-day grace period to file an expert affidavit was abolished[21]; and (2) defendants have until the close of discovery to file a motion to dismiss premised upon a defective affidavit.[22]

In Scott v. Martin,[23] the Court of Appeals upheld the amendments to O.C.G.A. § 9-11-9.1(b). Prior to the amendment of subsection (b), plaintiffs, under certain circumstances set out in the statute, were allowed a 45 day grace period in which to supplement their medical malpractice complaint with the affidavit of an expert.[24] The amended statute provided no exception to the expert witness affidavit requirement, thereby revoking the 45 day

grace period in which to supplement the Complaint.

In Rockdale Health Sys. v. Holder,[25] the Georgia Court of Appeals held that the retroactive application of the 2005 amendments to O.C.G.A. § 9-11-9.1 was unconstitutional.

In Tenet Healthcare Corp. v. Gilbert[26], the trial court properly denied dismissal of a plaintiff's medical malpractice action against various medical providers based upon a section 9-11-9.1 challenge to the plaintiff's expert witness affidavit on the grounds that the physician affiant was no longer licensed to practice medicine due to revocation of his license due to substance abuse issues.

There have been several reported opinions addressing issues related to the application of the new requirements imposed by O.C.G.A. § 24-9-67.1 as they relate to the expert affidavit requirements found in O.C.G.A. § 9-11-9.1.[27] These cases will be further discussed below.

O.C.G.A. § 9-11-9.2: Medical Authorizations & Ex Parte Communications

O.C.G.A. § 9-11-9.2 was the subject of immediate debate and legal sparring when it became effective on February 15, 2005. This statute provided that "in any action for damages alleging medical malpractice . . . contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form. Failure to provide such authorization under the statute subjected the plaintiff to dismissal." [28] The medical authorization was to "include the defendant's attorney's

right to discuss the care and treatment of the plaintiff or, where applicable, the plaintiff's decedent with all of the plaintiff's or decedent's treating physicians."[29] The language specifically providing for defendant's right to ex parte the injured party's physicians was codified in response to the provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") that limited the disclosure of protected health information.[30] At the heart of the issue was whether HIPAA prevented counsel for defendants from meeting with the plaintiff's treating physicians outside the presence of plaintiff's counsel. Prior to HIPAA, Orr v. Sievert[31] was often identified as authority for allowing these ex parte meetings that had become part and parcel of discovery in medical malpractice cases. Following the enactment of HIPAA, many members of the plaintiff's bar took the position that these ex parte meetings were prohibited and any state law indicating otherwise was preempted.

In the first appellate opinion to address whether HIPAA preempted the medical record release requirements of O.C.G.A. § 9-11-9.2, the Court of Appeals in Northlake Medical Center, LLC v. Queen, held that HIPAA preempted O.C.G.A. § 9-11-9.2.[32] Specifically, the court concluded that the statute was preempted by HIPAA because (1) the statute did not require a description of the information to be used or disclosed that specifically identified the information in a meaningful fashion; (2) the statute did not provide for an expiration date or event that related to the individual or the purpose of the use or disclosure; and (3) the statute did not contain notice of a right to revoke the authorization.[33]

These issues were subsequently examined by the

Georgia Supreme Court in Allen v. Wright.[34] In Allen, the Supreme Court held that O.C.G.A. § 9-11-9.2 did not comply with HIPAA and was preempted by federal law. [35] The opinion provided detailed analysis of the deficiencies in O.C.G.A. § 9-11-9.2, including the precise elements that were lacking and necessary in order to be in compliance with HIPAA.[36] The opinion in Allen lead many to believe the legislature would clarify the provisions of O.C.G.A. § 9-11-9.2(b) and bring the statute into compliance with HIPAA. To date, the statute has not been amended and defendant's should obtain authorizations for medical records through traditional means. The appellate courts have applied the holdings on Northlake Medical Center and Allen to several subsequent cases involving the application of O.C.G.A. § 9-11-9.2.[37]

However, the Georgia Court of Appeals recently found that HIPAA does not create a complete bar to ex parte communications between defense counsel and a plaintiff's prior treating physicians.[38] In Austin v. Moreland,[39] the Court of Appeals held that O.C.G.A. § 9-11-34 provides more stringent requirements than required by HIPAA. The court further held that HIPAA does not preclude ex parte communications between defense counsel and a plaintiff's prior treating physicians, provided these ex parte meetings do not authorize the disclosure of protected health information except pursuant to the HIPAA privacy rule. [40]

O.C.G.A. § 9-11-68: Written Offers to Settle

The "offer of judgment" or "offer of settlement" rule was enacted by the legislature and is loosely patterned after Rule 68 of the Federal Rules of Civil Procedure. In

packaging this rule with other tort reform legislation in SB3, the General Assembly provided that it is only applicable to tort cases, rather than all civil cases.[41] The statute applies to both plaintiffs and defendants.

Under O.C.G.A. § 9-11-68, the statute compelled payment of the offering party's attorney fees and expenses, incurred after rejection of the offer, if the monetary award received by the offeree was not 25 percent more favorable than the offer of judgment.[42] Critics of the statute were quick to point out the problems with application of the statute, including the fact that the statute could subject a prevailing party to attorney's fees and expenses.[43] In response to these concerns, the General Assembly amended O.C.G.A. § 9-11-68 during the 2006 term. The amended statute provides:

> (b) (1) If a defendant makes an offer of settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the defendant or on the defendant's behalf from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement.
>
> (2) If a plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement, the plaintiff shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the plaintiff or on the plaintiff's behalf from the date of the rejection of the offer of settlement through the entry of judgment.[44]

Any offer under the statute must remain open for 30 days unless sooner rejected by offeree.[45] The trial court maintains the power to disallow an award under the statute if the offer is determined not to be made in good faith.[46] Practitioners should also note that a prevailing party is only entitled to attorneys fees "from the date of the rejection of the offer of settlement through the entry of judgment." [47]

In McKesson Corp. v. Green,[48] plaintiffs voluntarily dismissed their action against defendants following several adverse rulings from the trial court. Defendant objected to the voluntary dismissal and moved to recover attorney fees under OCGA § 9-11-68 (b) (1). The trial court denied defendant's request and the matter was appealed. The Court of Appeals noted that section 9-11-68(d) "provides that a defendant whose settlement offer is rejected shall recover attorney fees and expenses of litigation 'if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement.' The trial court in this case entered no final judgment within the meaning of the statute, and therefore did not err in denying this motion. A right to dismiss voluntarily without prejudice would be meaningless if doing so would trigger the payment of the defendant's attorney fees. Without explicit language establishing that the legislature intended to excise a plaintiff's right to dismiss in this manner, this court will not engraft such an intention into the statute."[49]

In Fowler Properties v. Dowland,[50] the Georgia Supreme Court held that O.C.G.A. § 9-11-68 affected substantive, rather than procedural, rights and, therefore,

would not be applied retroactively notwithstanding SB3's intent that the statute apply to causes of action pending on its effective date.[51]

There is a paucity of reported decisions addressing the various issues that can and will arise upon application of the statute. The absence of case law might suggest that many practitioners are wary of utilizing the statute for fear that the opposing party will respond in kind and create a situation where the loser bears all costs of litigation.

SB3 and Evidence

O.C.G.A. § 24-9-67.1: Daubert

By enacting O.C.G.A. § 24-9-67.1, the General Assembly attempted to bring Georgia's statutes addressing the admissibility of expert witnesses into compliance with Daubert v. Merrell Dow Pharmaceuticals, Inc.[52] Unlike some of the other statutes enacted by SB3, this statute applies to all civil actions, not only actions for medical malpractice.[53] O.C.G.A § 24-9-67.1 bestowed the trial court with the power to exclude an expert prior to trial. Prior to O.C.G.A. § 24-9-67.1, there were few, if any, instances when the jury would not be allowed to consider the testimony of an expert.

Several appellate opinions have issued addressing the applicability of section 24-9-67.1. In Cotten v. Phillips,[54] the court of appeals held that O.C.G.A. § 24-9-67.1 does not require expert witnesses in medical malpractice cases to practice in the same specialty as the doctor against whom they are testifying.[55] Several additional cases have issued citing Cotten for the proposition that an expert does not have to practice in the same specialty to provide opinions pursuant to O.C.G.A. §

24-9-67.1.[56]

Since the enactment of O.C.G.A. § 24-9-67.1, trial courts have not been hesitant to disallow expert testimony.[57] The appellate court will review a trial court's determination of expert competency under an abuse of discretion standard.[58] The failure of an expert affidavit to clearly establish the prerequisites of the statute can result in the expert being prevented from testifying. In many cases, striking an expert will also result in the dismissal of the case.[59] However, not all trial court's have applied the statute so strictly.[60]

It is also worth noting that the Supreme Court has held that like O.C.G.A. § 9-11-9.1, O.C.G.A. § 24-9-67.1 may be applied retroactively because it does not affect an appellant's substantive right of action, change the standard of care to be applied, or change the measure of recovery. [61]

The Supreme Court of Georgia recently rejected a challenge to O.C.G.A. § 24-9-67.1 in the case of Mason v. Home Depot.[62] In Mason, the trial court applied O.C.G.A. § 24-9-67.1 to exclude the testimony of two of the plaintiffs' expert witnesses.[63] The trial court certified the matter for immediate review. The Supreme Court held that the statute was not unconstitutional on equal protection grounds, notwithstanding that it only applies in civil cases.[64] The statute withstood further scrutiny notwithstanding that the Supreme Court agreed that subsection (b)(1) and subsection (a) provided inconsistent results as to what information an expert could rely upon. [65]

This issue of 2008 GDLA Journal already contains a paper addressing the more technical aspects and practical application of O.C.G.A. § 24-9-67.1.

SB3 and Title 51: Torts

O.C.G.A. § 51-1-29.5: Emergency Medical Care

O.C.G.A. § 51-1-29.5 was, and is, one of the more controversial portions of the tort reform package.[66] Section 51-1-29.5 raises the burden of proof necessary to find liability against "emergency medical providers" providing "emergency medical care." Specifically, subsection (c) provides, "[i]n any action involving a health care liability arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, no physician or health care provider shall be held liable unless it is proven by clear and convincing evidence that a physician or health care provider's actions showed gross negligence."[67] Hence, the burden of proof in cases involving the administration of emergency medical care is "clear and convincing" evidence, rather than "preponderance of the evidence."[68] Not only is the burden of proof raised, the movant must prove by clear and convincing evidence that "gross negligence," rather than professional negligence, occurred.[69]

The application of the statute is not limited to emergency medicine physicians or OB/GYNs. "Emergency medical services provider" means any person providing medical care.[70] The definition of "emergency medical care" is provided in subsection (a)(5) and includes "bona fide emergency services provided after the onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence thereof would result in placing the patient's health in serious jeopardy. . ."[71] Hence, not all treatment rendered in an emergency room, obstetrical unit, or surgical suite would be encompassed in the definition of

"emergency medical care."

O.C.G.A. § 51-1-29-5 applies only to causes of action arising on or after the effective date of SB3.[72] Most likely as a result of the legislature's decision that the statute would not apply retrospectively, there have been no reported decisions addressing the application of the statute. However, some of these provisions are currently being challenged in Fulton County Superior Court under equal protection, due process, jury trial right and separation of powers grounds.[73]

O.C.G.A. § 51-2-5.1: Hospital Liability and Agency

The enactment of O.C.G.A. § 51-2-5.1 provided clarity regarding hospital liability for the actions of its agents or employees. Subsection (c) of the statute identified the notice necessary to inform the public in order to avoid liability for the actions of independent contractors.[74] Subsections (f) and (g) identify the factors that will be examined when a question exists as to whether a health care professional was an actual agent or employee, or an independent contractor.[75] There have been no reported cases addressing the provisions of O.C.G.A. § 51-2-5.1.

Joint and Several Liability

It was widely believed that the amendments to Title 51, Chapter 12, Sections 31 and 33 were intended to abolish joint and several liability. However, the effect of SB3 on joint and several tort liability is not clear.

O.C.G.A. § 51-12-31–No fault assessed against plaintiff

As amended by SB3, O.C.G.A. § 51-12-31 provides "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." Under the old provision, section 31 provided, "where an action is brought jointly against several trespassers, the plaintiff may recover damages for the greatest injury done by any of the defendants against all of them." The import of the new language is not clear. A plaintiff is still allowed to recover damages against *any one or any several* defendants liable for the injury. The jury *may* specify the particular damages to be recovered of each defendant, and "[j]udgment in a case must be entered severally." Notwithstanding what many believed to be the legislative intent of the amendment, the consensus among most who have reviewed the statute is that it did not abolish joint and several liability.

O.C.G.A. § 51-12-32– Contribution

It is of note that no changes were made to O.C.G.A. § 51-12-32. Section 32 authorizes contribution among joint tortfeasors. Some would argue that the continued existence of the contribution statute is further evidence that joint and several liability was not intended to be abolished under O.C.G.A. § 51-12-31.

O.C.G.A. § 51-12-33– Fault assessed against plaintiff

The amendments to O.C.G.A. § 51-12-33 do not provide the practitioner with any additional clarity related to the legislative intent. If anything, the amendment further complicates the current state of joint and several liability in Georgia. Section 33(a) and (b) provide that if "the plaintiff is to some degree responsible for the injury or damages claimed," the liability of the other tortfeasors "shall not be a joint liability among the persons liable.[76]" Unlike O.C.G.A. § 51-12-31, O.C.G.A. § 51-12-33 seems to apply only in cases where fault is assessed against the plaintiff.

O.C.G.A. § 51-12-33(b) provides that the damages apportioned by the trier of fact shall be apportioned among the liable parties. It would seem that a plaintiff who is not found to be at fault can recover his full damages against any of the liable defendants. However, if a plaintiff is found "to be some degree responsible for the injury," the trier of fact will be asked to apportion damages between the plaintiff and the liable parties and nonparties. Once the trier of fact assesses the percentage of fault, the damages "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." It is not clear why there is a disparity in treatment between those plaintiffs who are found to be partially at fault versus those who are found not to be at all at fault for their injuries.

However, subsection (b) also states "the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among" the liable parties.[77] The phrase "if any" is confusing. If the trier of fact concludes that the plaintiff is not at fault, would the correct analysis then fall under O.C.G.A. § 51-12-31?

Subsections (c) and (d) allow for the trier of fact, in assessing percentages of fault, to consider the liability of nonparties after providing prior notice.[78] The trier of fact shall be allowed to consider the liability of the nonparty under two circumstances: (1) if the plaintiff entered into a settlement agreement with the nonparty; or (2) if a defending party gives notice by pleading not later than 120 days prior to the date of trial. A strict reading of this subsection provides odd results. According to subsection (d)(1), negligence of a nonparty *shall* be considered if the plaintiff entered into a settlement agreement with the

nonparty.

The statute is silent as to the level of proof necessary to prove that a nonparty is at fault. Is expert testimony necessary before the trier of fact can consider the liability of a nonparty? What defenses can be asserted on behalf of the nonparty? The questions surrounding this are endless.

Subsection (f) provides that assessments of fault of nonparties shall not be introduced as evidence of liability in any action against the nonparty.[79]

There has been virtually no case law generated on these issues.[80]

O.C.G.A. § 51-13-1: Noneconomic Damages Cap

With the enactment of O.C.G.A. § 51-13-1, the General Assembly capped the amount of noneconomic damages recoverable in actions for medical malpractice. The statute provides that the total amount recoverable against health care providers by a claimant for noneconomic damages is $350,000, no matter how many providers are liable.[81] The total amount recoverable by a claimant for noneconomic damages against a single medical facility is $350,000.[82] In no event may a claimant recover more than $700,000 for noneconomic damages against multiple medical facilities.[83] The aggregate amount of noneconomic damages recoverable under any medical malpractice action shall not exceed $1,050,000.[84] Subsection (f) provides that the trial court may issue an order providing for periodic payments for any future damages awarded equaling or exceeding $350,000.[85]

There have been no reported cases addressing the application of the caps or the application of periodic payments. Unlike many of the other provisions of SB3,

O.C.G.A.§ 51-13-1 applied only with respect to causes of action arising on or after the effective date of the Act.[86] Hence, it is not surprising that there is an absence of case law. However, we may receive some appellant guidance on these issues as some of these provisions are currently being challenged in Fulton County Superior Court under equal protection, due process, jury trial right and separation of powers grounds.[87]

Reporting Requirements and the Composite State Board

Among the less discussed changes imposed by Senate Bill 3 are those relating to reporting requirements to the Composite State Board of Medical Examiners. While these amendments have avoided the headlines addressing the damages caps and ex parte communications, the changes have had an immediate effect on the settlement of cases. These changes have not been ignored by practicing physicians who must now include the reporting implications among their list of factors to weigh when considering whether or not to settle a lawsuit. While the intent of the General Assembly was to provide more transparency to the public, the law of unintended consequences resulted in some physicians less willing to agree to settle cases they otherwise would have consented to settle. The amendments to the previous law now require that all settlements be reported, and identify situations when the Composite State Board shall conduct investigations.[88]

O.C.G.A. § 33-3-27 was amended to require that the insurer providing medical malpractice coverage shall notify the Composite State Board when it pays any judgment or settlement on behalf of a physician.[89] Under the previous

law, the insurer reported only when the judgment or settlement amount exceeded $10,000.

Senate Bill 3 amended O.C.G.A. § 43-34-37 and specified the circumstances when the Composite State Board may investigate the physician's fitness to practice medicine. [90] Subsection (i) of the statute provides:

> The board shall investigate a licensee's or permit holder's fitness to practice medicine if the board has received notification, pursuant to Code Section 33-3-27, regarding that licensee or permit holder of a medical malpractice judgment or settlement in excess of $100,000 or a notification pursuant to Code Section 33-3-27 that there have been two or more previous judgments against or settlements with the licensee or permit holder relating to the practice of medicine involving an action for medical malpractice. Every licensee or permit holder shall notify the board of any settlement or judgment involving the licensee or permit holder involving an action for medical malpractice.[91]

Hence, any judgment or settlement in excess of $100,000 triggers the "investigation" requirement of the statute. The "investigation" often results in the physician appearing before the Composite State Board in Atlanta. Prior to the amendment, the physician was only required to notify the board of settlements or judgments in excess of $20,000.

Subsection (j) also requires that the Composite State Board shall conduct an assessment of a physician's fitness to practice medicine "if it has disciplined the licensee three

times in the last ten years as a result of an action for medical malpractice." O.C.G.A. § 43-34-37(j). This assessment includes conducting an on-site visit to the physician's current practice location.

Although not part of SB3, the practitioner should also be aware of the requirements found in O.C.G.A § 43-34A-3, also known as the "Patient Right to Know Act."[92] Under this act, physicians are required to submit statutorily prescribed information to the Composite State Board of Medical Examiner as provided by the statute.

Conclusion

The provisions of Senate Bill 3 continue to be tested in the trial and appellate courts of this state. While some of the statutes enacted within Senate Bill 3 have been ruled unconstitutional or amended by the legislature, several of the key provisions of the statute remain to be tested and practitioners should expect to receive additional appellate guidance addressing the propriety of these provisions in the near future.

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1. Ga. L. 2005, p.1, SB3.

2. See e.g., Allen v. Wright, 282 Ga. 9, 644 S.E.2d 814 (2007)(finding that O.C.G.A. § 9-11-9.2 is preempted by HIPAA); EHCA Cartersville, LLC v. Turner, 280 Ga. 333, 626 S.E.2d 482 (2006)(holding O.C.G.A. § 9-10-31(c) unconstitutional).

3 .280 Ga. 333, 626 S.E.2d 482 (2006).

4.GA. Const. Art. VI, section 2, para. 4.

5. 280 Ga. at 336, 626 S.E.2d at 485.

6. Id.; compare Hewett v. Raytheon Aircraft Co., 273 Ga. App. 242, 614 S.E.2d 875 (2005)(upholding O.C.G.A. § 9-10-31.1 under similar legal analysis).

7. See e.g., The Hosp. Auth. Of Gwinnett County v. Rapson, 283 Ga. App. 297, 641 S.E.2d 286 (2007); Woodruff v. Gould, 280 Ga. 757, 632 S.E.2d 662 (2006); Northside Hospital-Cherokee, Inc. v. Mayes, 280 Ga. 278, 627 S.E.2d 2 (2006).

8. O.C.G.A. § 9-10-31(d).

9. O.C.G.A. § 9-10-31.1.

10 .Id.

11. EHCA Cartersville, 280 Ga. at 337, 626 S.E.2d at 486.

12. Id.

13. See e.g., Hawthorn Suites Golf Resorts, LLC v. Feneck, 282 Ga. 554, 651 S.E.2d 664 (2007).

14. Hewett v. Raytheon Aircraft Co., 273 Ga. App. 242, 614 S.E.2d 875 (2005)(before dismissing a case on the ground of forum non conveniens, a trial court must make specific findings either in writing or orally on the record demonstrating that the court has considered all seven of the factors set forth in O.C.G.A. § 9-10-31.1(a). Id. at 248-49.);see also Kennestone Hosp. v. Lamb, 288 Ga. App. 289, 289, 653 S.E.2d 858, 859 (2007)(the Georgia doctrine of forum non conveniens does not distinguish between a motion to dismiss and a motion to transfer venue).

15. Id.

16. Id.

17. Blackmon v. Tenet Healthsystem Spalding, Inc., 288 Ga. App. 137, 148, 653 S.E.2d 333, 343 (2007)(trial court denied motion to transfer venue)(citing R.J. Taylor Mem. Hosp. v. Beck, 280 Ga. 660, 662, 631 S.E.2d 684 (2006)(trial court denied motion to transfer venue)).

18. See e.g., Hewett v. Raytheon Aircraft Co., 273 Ga. App. 242, 614 S.E.2d 875 (2005).

19. Kennestone Hosp., 288 Ga. App. at 289, 653 S.E.2d at 859(citing EHCA Cartersville, LLC v. Turner, 280 Ga. 333, 626 S.E.2d 482 (2006)).

20. O.C.G.A. § 9-11-9.1(a)(2005).

21. O.C.G.A. § 9-11-9.1(b)(2005); but see O.C.G.A. § 9-11-9.1(2007).

22. O.C.G.A. § 9-11-9.1(e).

23. 280 Ga. App. 311, 633 S.E.2d 665 (2006).

24. O.C.G.A. § 9-11-9.1(b)(1993 and Supp. 2004).

25. 280 Ga. App. 298, 640 S.E.2d 52 (2006)(The Supreme Court of Georgia has made clear that applying the amendment retroactively under circumstances like those present here would be unconstitutional for doing manifest injustice).

26. 277 Ga. App. 895, 627 S.E.2d 821 (2006).

27. Cogland v. The Hosp. Auth. Of the City of Bainbridge, 2008 Ga. App. Lexis 75, *6(It follows that the trial court did not err when it found that the 2004 affidavit was insufficient under O.C.G.A. §§ 24-9-67.1 and 9-11-9.1, and thus when it granted the defendants' motions to dismiss the Coglands' complaint); see Spacht v. Troyer, 288 Ga. App. 898, 655 S.E.2d 656 (2007) (affirming grant of motion to dismiss where affidavit failed to mention whether expert was employed at time claim arose and "in the five years prior to that"); compare Tenet Healthcare v. Gilbert, 277 Ga. App. 895, 627 S.E.2d 821(2006) (affirming denial of motion to dismiss when, assuming that O.C.G.A. § 24-9-67.1 (c) applied, plaintiff's medical expert was licensed to practice at the time the alleged negligence occurred and "met the other portions of the 2005 enactment designed to upgrade the requirements for expert medical malpractice affidavits").

28. O.C.G.A. § 9-11-9.2(a).

29. O.C.G.A. § 9-11-9.2(b).

30. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

31. Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982)(finding that the placing of one's medical condition at issue in litigation acted as an automatic waiver of a patients right to privacy in his medical records related to that condition).

32. 280 Ga. App. 510, 634 S.E.2d 486 (2006).

33. Id. at 513, 634 S.E.2d at 490.

34. 282 Ga. 9, 644 S.E.2d 814 (2007).

35. Id. at 12, 644 S.E.2d at 816-17.

36. Id. at 10-14, 644 S.E.2d at 815-18.

37. See Griffin v. Burden, 281 Ga. App. 496, 636 S.E.2d 686 (2006); Crisp Regional Hosp. v. Sanders, 281 Ga. App. 393, 636 S.E.2d 123 (2006).

38. Austin v. Moreland, 288 Ga. App. 270, 653 S.E.2d 347 (2007).

39. Id. at 274, 653 S.E.2d at 351.

40. Id. at 275, 653 S.E.2d at 351.

41. See O.C.G.A. § 9-11-68(a)(2006) ("a written offer,

denominated as an offer under this Code section, to settle a *tort claim*")(italics added).

42. See O.C.G.A. § 9-11-68 (2005)(the former provisions which read: "When the complaint sets forth a tort claim for money, if the offeree rejects or does not accept the offer and the judgment finally obtained by the offeree was not at least 25 percent more favorable than the last offer, the offeree shall pay the offeror's reasonable attorney's fees and costs incurred after the rejection of the last offer.").

43. Muenster v. Suh, No. 03-A-01873- 4 (Gwinnett County Super. Ct., Sept. 22, 2005) (unreported opinion)(In September of 2005, a Gwinnett County Superior Court judge struck down Georgia's newly created offer of judgment provision on three separate constitutional grounds. The trial court judge held in Muenster v. Suh that the statute runs afoul of Georgia's constitutional protections ensuring access to courts, constitutes an impermissible "special law," and violates a constitutional prohibition on "retroactive laws." The defendants in this case made an offer of judgment to settle for $ 6,300-an offer made just nine short days after the statute went into effect and plaintiffs, after rejecting the offer, received a jury verdict of only $ 2,859.93. Although counsel for plaintiff in this case was not able to effectively convince a jury that the claim had a value that exceeded the nominal amount awarded, plaintiff's counsel was nonetheless successful convincing the trial court that defendants subsequent motion to recover attorney fees was improper. The judge denied defendants' subsequent motion for attorney's fees and costs under the new statute and held the statute itself in violation of

Georgia's Constitution.)(a more in depth examination of this unreported opinion can be found in Note, "The Swift, Silent Sword Hiding in the (Defense) Attorney's Arsenal: The Inefficacy of Georgia's New Offer of Judgment Statute as Procedural Tort Reform,
Merritt McAlister, 40 Ga. L. Rev. 995, 1026-34)

44. O.C.G.A. § 9-11-68(b)(1) & (2)(2006).

45. O.C.G.A. § 9-11-68(c)(2006).

46. O.C.G.A. § 9-11-68(d)(2).

47. O.C.G.A. § 9-11-68(b)(1).

48. 286 Ga. App. 110,116, 648 S.E.2d 457, 462 (2007)(voluntary dismissal of a complaint will not subject an offeree to fees under O.C.G.A.§ 9-11-68).

49. Id.

50. 282 Ga. 76, 646 S.E.2d 197 (2007).

51. Id. at 78-79, 646 S.E.2d at 200.

52. 509 U.S. 579 (1993).

53. See generally O.C.G.A. § 24-9-67.1(2005).

54. 280 Ga. App. 280, 633 S.E.2d 655 (2006).

55. Id. at 285, 633 S.E.2d at 659 (Had the legislature intended to require that plaintiff's experts and defendant doctors share the same specialty, that language would not

be required. The language contemplates that the expert may very well have a different area of practice than the defendant doctor. Under the statute, it is the expert's qualifications, rather than the defendant doctor's specialty or area of practice, that controls whether the trial court should allow the expert's testimony. Id. at 285, 633 S.E.2d at 659).

56. See MCG Health v. Barton, 285 Ga. App. 577, 647 S.E.2d 81 (2207); Mays v. Ellis, 283 Ga. App. 195, 641 S.E.2d 201 (2007); Abramson v. Williams, 281 Ga. App. 617, 636 S.E.2d 765 (2006).

57. See Cogland v. The Hosp. Auth. Of the City of Bainbridge, 2008 Ga. App. Lexis 75, *6(affirming trial court's dismissal where expert's affidavit contained nothing concerning experts's recent or continuing experience as an orthopedist in violation of O.C.G.A. § 24-9-67.1(c)(2)(A)); Spacht v. Troyer, 288 Ga. App. 898, 655 S.E.2d 656 (2007)(affirming grant of motion to dismiss where affidavit failed to mention whether expert was employed at time claim arose and "in the five years prior to that"); Nathans v. Diamond, 282 Ga. 804, 654 S.E.2d 121(2007)(the Supreme Court upheld the trial court's dismissal after applying O.C.G.A. § 24-9-67.1 and concluding that a plaintiff's expert witness was not qualified to give an opinion).

58. Cotten, 280 Ga. App. at 287, 633 S.E.2d at 660; see also Airasian v. Shaak, 2008 Ga. App. LEXIS 139, *4,5.

59. See Cogland v. The Hosp. Auth. Of the City of Bainbridge, 2008 Ga. App. Lexis 75, *6(affirming trial court's dismissal where expert's affidavit contained nothing

concerning experts's recent or continuing experience as an orthopedist in violation of O.C.G.A. § 24-9-67.1(c)(2)(A)); Spacht v. Troyer, 288 Ga. App. 898, 655 S.E.2d 656 (2007)(affirming grant of motion to dismiss where affidavit failed to mention whether expert was employed at time claim arose and "in the five years prior to that"); Nathans v. Diamond, 282 Ga. 804, 654 S.E.2d 121(2007)(the Supreme Court upheld the trial court's dismissal after applying O.C.G.A. § 24-9-67.1 and concluding that a plaintiff's expert witness was not qualified to give an opinion).

60. See Tenet Healthcare v. Gilbert, 277 Ga. App. 895, 627 S.E.2d 821 (2006)(the Court of Appeals affirmed the denial of the motion to dismiss when plaintiff's medical expert was licensed to practice *at the time the alleged negligence occurred* and met the other portions of the 2005 enactment).

61. Ga. L. 2005, SB3, Section 15(b)(2005); Nathans v. Diamond, 282 Ga. App. 804, 654 S.E.2d 121 (2007).

62. Mason v. Home Depot, 2008 Ga. LEXIS 249.

63. Id., at *2.

64. Id., at *9.

65. Id., at *10,11.

66. See generally O.C.G.A. § 51-1-29.5.

67. O.C.G.A. § 51-1-29.5(b).

68. O.C.G.A. § 51-1-29.5(c).

69. Id.

70. O.C.G.A. § 51-1-29.5(a)(6).

71. O.C.G.A. § 51-1-29.5(a)(5).

72. Ga. L. 2005, § 15(b)/SB3.

73. See article by Alyson M Palmer, Daily Report, Tuesday March 11, 2008, "Tort Law Survives Major Test."

74. O.C.G.A. § 51-2-5.1(c).

75. O.C.G.A. § 51-2-5.1(f)-(g).

76. O.C.G.A. § 51-12-33(a) and (b).

77. O.C.G.A. § 51-12-33(b).

78. O.C.G.A. § 51-12-33(c) and (d).

79. O.C.G.A. § 51-12-33(f).

80. Turner v. New Horizons Cmty. Serv. Bd., 287 Ga. App. 329, 651 S.E.2d 473 (2007)(the 2005 amendment to O.C.G.A. § 51-12-33(a), providing that a judge shall reduce the amount of damages otherwise awarded to a plaintiff in proportion to his or her percentage of fault, shows legislative approval of a procedure under which the trial court reduces the jury's damage award in proportion to the degree of fault the jury attributes to the plaintiff).

81. O.C.G.A. § 51-13-1(b).

82. O.C.G.A. § 51-13-1(c).

83. O.C.G.A. § 51-13-1(d).

84. O.C.G.A. § 51-13-1(e).

85. O.C.G.A. § 51-13-1(f).

86. Ga. L. 2005, § 14/SB 3.

87. See article by Alyson M Palmer, Daily Report, Tuesday March 11, 2008, "Tort Law Survives Major Test."

88. O.C.G.A. §§ 33-3-27, 43-34-27.

89. O.C.G.A. § 33-3-27(b).

90. O.C.G.A. § 43-34-27.

91. O.C.G.A. § 43-34-27(i).

92. O.C.G.A § 43-34A-3.

Strategies For Obtaining Summary Judgment For Negligent Entrustment, Negligent Hiring, And Similar Claims: Defeating Plaintiffs' Attempts To Turn Simple Negligence Cases Into Inflammatory Character Trials

Christopher M. Ziegler

Overview

This article discusses strategies for defending individuals and their employers in claims arising out of motor vehicle accidents. Often, plaintiffs will sue not only the employee driver under negligence theories, but also the employing company under independent claims such as negligent hiring, negligent entrustment, negligent retention, negligent training or negligent supervision.

While every case is different, the law is clear that all claims against the employer for negligent hiring, entrustment and the like are rendered moot as soon as the employer admits respondeat superior. The law is also clear, that evidence of a driver's past driving history, as well as other evidence regarding his character, is irrelevant to the issue of negligence in the case at hand.

However, such evidence is necessary and relevant in asserting that the employer was negligent in hiring the employee or entrusting a vehicle to him. In those claims, evidence that the driver had a poor driving record or a history of reckless driving would be relevant to the issue of whether the employer should have hired or retained the employee, or entrusted a vehicle to him. Other unsavory character evidence might also be relevant. Thus, if the employer knew that the employee was a user of illegal or illicit drugs, such evidence might be relevant to the issue of the employer's negligence in allowing that employee to operate company vehicles.

By eliminating the "negligent" claims against the employer, i.e. negligent hiring, entrustment, etc., the inflammatory evidence supporting those claims becomes irrelevant, and jurors should never hear that the driver had prior speeding tickets or was involved in prior accidents or had two arrests or convictions for possession of marijuana, for example.

For every good defense strategy, there is an argument to get around it. As such, where the plaintiff asserts viable claims against the employer for punitive damages based on negligent hiring, entrustment, retention, etc., then

the negative character evidence becomes admissible after all in order to prove the punitive damages claim. Accordingly, eliminating claims for punitive damages becomes equally important in defending these cases.

As such, obtaining summary judgment for these independent claims against the employer becomes very important for the defense of these cases. Not only is it desirable to eliminate as many claims as possible against your client, but also doing so results in the possible elimination of negative character evidence that plaintiffs' counsel would otherwise use to inflame the jury.

This article, therefore, also discusses strategies for eliminating punitive damages claims, including a discussion of case law relating to admissibility of character evidence.

I now discuss a hypothetical accident situation.

The Accident

Another Wednesday in another January. Emily Martin, soon to be called "plaintiff," was driving to work in her Toyota Camry in a typical morning commute. The road was a four lane, divided highway with a center turn lane with gas stations and fast food restaurants firmly planted on both the northbound and southbound sides of the road.

Emily was well-aware of the road construction that had been taking place for over a year now, and while the work often caused delays, traffic was moving along at the speed limit on this Wednesday. As Emily sipped her morning coffee and listened to the radio, a large pick-up truck, with bold lettering on the side prominently revealing the name of the road construction company you will soon be defending, suddenly turned in front of her, allowing virtually no time to react. The two vehicles met in violent fashion, and while it was not clear whether the Camry struck the truck or the truck struck the Camry, it seems apparent that the construction company employee was, to a large degree, if not entirely, at fault.

You represent Acme Road Construction Company ("Acme") and its employee, Jason the driver. Accident reconstruction experts will tell you that accidents like the one described above happen a thousand times each day. For whatever reason, drivers become distracted, focus on tasks like tuning the radio, or they simply lose attention as they think about other things. Drivers

will often testify, "I just didn't see her car. I was paying attention and thought I had time to make the turn. I don't know why I didn't see her."

It seems likely that Jason was negligent in this accident. He seems to have simply turned in front of Emily. There is also some evidence to suggest that Emily was not paying attention and was possibly driving slightly faster than the posted speed limit. Looking only at the accident itself, you believe that jurors will most likely assign blame on Jason, but you do have some arguments against Emily. You know, however, that this case is going to be about much more than the accident itself.

Assuming that Jason was negligent to some degree, most people would think of Jason's action in the above scenario as a classic case of negligence. Accidents happen, and Jason was negligent. He had no intention of hurting anyone or of getting into an accident. He just made a mistake. Defense lawyers, get ready. A lawsuit is coming and you know the Complaint is going to contain numerous allegations against both Jason the driver and Acme Road Construction Company.

The Complaint

Your client faxes over the Complaint, which contains numerous counts. As for Jason the driver, the Complaint accuses him of negligence. It also accuses him of wanton and willful conduct and asks for punitive damages. As for Acme, the Complaint contains counts for negligent hiring, negligent retention, negligent entrustment, negligent training and negligent supervision. Predictably, the Complaint seeks punitive damages against Acme for its reckless, willful and wanton conduct.

The Investigation and Discovery

Through discovery and investigation, you learn that Jason has a checkered past, to say the least. His driving record is not good. Three moving violations in the past three years, including speeding tickets and running a stop sign. He also pled guilty to DUI only four months before Acme hired him. His job at Acme required him to drive Acme vehicles regularly. You start to wonder why Acme allowed this guy to drive. You know that plaintiff's counsel will jump all over this evidence.

As you learn more about Jason, you find out that he was fired from his prior job for coming to work "high" on drugs and stealing company

equipment. You learn that his co-workers at the prior employer, also a construction company, were well-aware of his drug problem. It turns out that Jason has an unfortunate addiction to certain prescription medications. On the other hand, no one at Acme was aware of this evidence.

Acme tells you that they performed no background check on Jason. Acme failed to investigate Jason's driving history and had no knowledge of his poor driving record or that his personal habits included regular use of drugs and illicit use of prescription medications. Your contact at Acme tells you that if he had known of Jason's record, Acme would not have allowed him to drive company vehicles.

Despite Jason's interesting record and history, no one who saw or spoke with him believes that Jason was impaired at the time of the accident. Importantly, the investigating police officer was not at all suspicious that Jason was intoxicated or impaired and never even considered requiring Jason to submit to a drug or alcohol screen. The officer tells you he had no probable cause to do so because nothing about Jason raised the issue in his mind.

Other witnesses at the scene tell you essentially the same thing, i.e. that Jason was upset but in no way appeared impaired or intoxicated. While Jason appears to be a user of recreational drugs, it seems that he was not "high" or impaired at the time of the accident. As noted above, plaintiff's own accident reconstruction expert testified that this type of accident happens all the time with no intoxication or drug impairment. Jason's girlfriend tells you that they spent the previous day and night together and that Jason had consumed no drugs or alcohol of any kind.

Inflammatory Evidence

The truth of the matter is that there is no evidence that Jason was impaired at the time of the accident. There is no evidence that alcohol or drugs played any part whatsoever in this accident. But let's be honest now. No good plaintiff's lawyer could accept the lack of evidence of impairment and walk away from the treasure trove of bad character evidence at his finger-tips. The pursuit of justice is, after all, all about maximizing the dollar value of a case, and what could drive up the value of a case like this one more than a drug-addicted driver with a driving history checkered with moving violations, and a construction company that would hire him and give him a pick-up truck to drive without so much as pulling an MVR? Things could get ugly fast in this case.

Discovery is almost over. The evidence does not look good.

But …….. things might not be quite as bleak as you think. Maybe, just maybe, you can keep the trial of this case limited to what it really is - an automobile accident likely caused by Jason's negligence. A case where one driver made a mistake - nothing more. If you can keep Jason's character out of the case, the jury will never hear about his driving record and frequent drug use. Fortunately, the law in Georgia provides you with a glimmer of hope.

Knocking Out The Inflammatory Evidence - Admit Respondeat Superior

Research suggests, not surprisingly, that jurors will likely want to punish Acme for hiring a guy like Jason and allowing him to drive a company vehicle. If they hear about his driving record and history of drug use, jurors will almost certainly find him completely at fault for the accident and will likely award punitive damages as well. But should jurors ever hear this evidence?

Importantly, the law is clear that evidence of a driver's past driving record is irrelevant to the issue of his negligence in a particular instance and is prejudicial and inadmissible. See, e.g., Thomason v. Harper Childre Chevrolet, 162 Ga.App. 441, 289 S.E.2d 773 (1982). It may be worthwhile to review some law on this issue. In the case against Acme, you will be filing motions in limine to exclude evidence, so the following brief discussion may be useful.

"Evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly. Irrelevant matter should be excluded." O.C.G.A. § 24-2-1. "In an action arising out of an automobile collision, the issue is the negligence or non-negligence of the operator **at the time and place of the event, and each such transaction is to be ascertained by its own circumstances and not by the reputation or character of the parties.**" ' (emphasis added). Gillem v. Metropolitan Atlanta Rapid Transit Authority, 160 Ga.App. 393, 287 S.E.2d 264 (1981).

A party's conduct on the occasion at issue in the case may be proved **only** by the facts of that event and not by evidence of the party's prior acts or general character for carelessness or recklessness. Feinberg v. Durga, 189 Ga.App. 733, 735(3), 377 S.E.2d 33 (1988). Such evidence is not probative of

the issue at hand and may prejudice the jury against that party as to the question of liability in the particular case. Whorton v. Boatwright, 233 Ga.App. 369, 370, 504 S.E.2d 216 (1998); Whidby v. Columbine Carrier, 182 Ga.App. 638, 639(1), 356 S.E.2d 709 (1987), overruled on other grounds, Pender v. Witcher, 194 Ga.App. 72, 389 S.E.2d 560 (1989). One party is not permitted to influence the jury to find against the other party on account of some act which he may have committed on another occasion, in a different situation and with other parties. Leo v. Williams, 207 Ga.App. 321, 322, 428 S.E.2d 108 (1993). (emphasis added).

Thus, as a general rule, the jury should never hear about Jason's driving record or his criminal or drug-related conduct. Jason's character and conduct at other times should be considered irrelevant to the accident in this case. But we cannot ignore that such evidence may be admissible under O.C.G.A. § 24-2-2 where "the nature of the action involves such character and renders necessary or proper the investigation of such conduct."

Thus, if viable claims against the employer exist for negligent hiring, retention and entrustment, the evidence necessary to prove those claims would include Jason's driving history and possibly a good deal of his negative character evidence.

The first battle in the war to defeat plaintiff's attack of character evidence is for Acme to admit that Jason was acting in the course and scope of his employment at the time of the accident and that, accordingly, Acme is vicariously responsible for his actions.

Georgia law is very clear that **where an employer admits the agency of the employee driver, the liability link for any proven negligence of the driver is established as to the employer, rendering proof of negligent hiring, negligent retention, negligent supervision and negligent entrustment unnecessary and irrelevant**. Thomason v. Harper Childre Chevrolet, Inc, 162 Ga. App. 441, 442-43, 289 S.E.2d 773 (1982); Bartja v. National Union Fire Insurance Company of Pittsburgh, PA, 218 Ga.App. 815, 463 S.E.2d. 358 (1996), cert. denied.

As stated in Thomason, "[P]laintiffs are free to choose their basis of relating the acts of the driver to the non-driver defendant and may plead and pursue all until such time as the non-driver defendant admits legal responsibility for the performance of the driver in the occurrence giving rise to the litigation." 162 Ga.App. at 443 (emphasis added).

It seems clear that the employer's admission of respondeat superior effectively deals a death blow to all types of "negligent" claims (i.e. negligent hiring, negligent entrustment, etc.) asserted against the employer to the extent that such claims relate to the employer's dealings with the employee. In other words, claims for negligent entrustment, negligent hiring and negligent retention are eliminated. Likewise, claims for negligent supervision or negligent training are also eliminated. It should follow that any type of claim against the employer that relates to its independent negligence in regard to its dealings with the employee should be eliminated.

For example, in Bartja, supra, the plaintiff asserted claims of (1) negligent entrustment, (2) negligent hiring, (3) negligent retention and (4) negligent supervision against the employer of a truck driver who caused an accident. The employer admitted respondeat superior. As was held, " [t]he trial court did not err in granting summary judgment on the negligent entrustment, hiring, retention and supervision claims because [the employer] admitted liability under respondeat superior for [the driver's] negligence, if any." Bartja at 817.

On the other hand, if the plaintiff asserts independent claims against the employer based on the employer's own conduct unrelated to its dealings with the employee, it seems to follow that those claims would survive. For example, if the employer negligently maintained the brakes on the truck, and brake failure caused or contributed to the accident, then this article should not be read as suggesting that negligence claims against the employer based on the employer's negligence in maintaining the brakes would be eliminated by admitting respondeat superior.

That type of independent negligence on the part of the employer is not eliminated by admitting respondeat superior, in my view. As another example, in road construction cases, the contractor may have a duty to place traffic control devices like cones and signs properly. If the employer/contractor fails to do so in a safe and appropriate manner, and such failure contributes to the accident, I do not believe that cases like Thomason and Bartja can be relied on to defeat those independent claims against the contractor/ employer.

However, the hypothetical case presented above involving Jason and Acme presents a classic situation for which the rule eliminating claims for negligent hiring, etc. exists. Plaintiffs' counsel will often attempt to prejudice

defendants with irrelevant and unrelated character evidence in hopes of inflaming jurors and inflating the damages. Allegations of negligent hiring and retention provide the path for plaintiffs to do so. Admitting respondeat superior puts a road block in that path.

Thus, Georgia Courts have established the above-referenced rule as a solution to the problem resulting from the need to protect the employee driver from prejudicial evidence of his prior driving record and general character for recklessness in driving while at the same time admitting into evidence the proof necessary for a negligent entrustment case to proceed. Bartja at 817. In the real world, the prejudicial evidence is equally harmful to the employer.

Thus, where the employer admits respondeat superior, thereby establishing the liability link to the employer for the employee's negligence, plaintiff's claims for negligent entrustment, hiring, retention and supervision become irrelevant, rendering proof of said causes of action irrelevant. Bartja

The rule makes sense because, as noted, every plaintiff can assert claims for negligent hiring, negligent retention, negligent supervision and negligent entrustment in an effort to put the defendant's driving record, as well as any other negative personal history, before the jury, thereby prejudicing the defendants. The law has long recognized that these matters are irrelevant to the driver's conduct at the time of the accident, and the well-developed rule is a sound one.

In our hypothetical case, because you admit for Acme that its employee Jason was acting in the course and scope of his employment at the time of the subject accident, the above cited rule applies to foreclose plaintiff's causes of action for negligent entrustment, negligent hiring negligent training, negligent retention and negligent supervision. Summary judgment for Acme is, therefore, required for these causes of action.

But wait! You know these matters are never so simple and straightforward. Plaintiff's counsel has asserted claims for punitive damages. These claims have the potential to defeat your well-planned motion for summary judgment.

Defeating The Claims For Punitive Damages

There is an exception to the above-stated rule which applies where a plaintiff has a valid claim for punitive damages against the employer

defendant based on its independent negligence in hiring and retaining or entrusting the vehicle to the employee. Durben v. American Materials, Inc., 232 Ga.App.. 750, 503 S.E. 2d. 618 (1998). As stated in Durben, "Accordingly, the question to be resolved is whether [plaintiff] has a valid basis for punitive damages on her negligent entrustment, hiring and retention claims." Durben, supra, at 751.

Do the facts of your case support punitive damages? Obviously, this issue is fact-driven and the end-result will vary from case to case. I discuss some guiding principles and case law.

For the plaintiff to recover punitive damages against Acme, she is required to show that Acme's conduct was either intentionally directed to cause her harm or was so outrageous or deliberately indifferent as to be considered as having been intended. There must be evidence of conduct of aggravation or outrage, such as spite or malice or fraud. O.C.G.A. §51-12-5.1(b). Even gross negligence does not support a claim for punitive damages.

O.C.G.A. §51-12-5.1(b) provides that punitive damages may be awarded only in cases where it is proven by "clear and convincing evidence that the Defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression or that entire want care which would raise the presumption of conscious indifference to the consequences." Something more than the mere commission of a tort is required to support an award punitive damages. There must be circumstances of aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the Defendant or such a conscious and deliberate disregard of the interest of others that the conduct may be called willful or wanton. Mere negligence is not enough, even if the negligence is so extreme in degree as to be characterized as "gross." Banks v. ICI Americas, Inc., 266 Ga. 607, 610, 469 S.E.2d 171 (1996); Colonial Pipe Line Company v. Brown, 258 Ga. 115, 118, 365 S.E.2d 827 (1988).

Actual Knowledge Of Numerous And Serious Violations Is Required

Plaintiff's claims for punitive damages must meet a higher threshold. First, as noted, the evidence must be clear and convincing. Secondly, actual, not constructive knowledge, is required. Punitive damages are allowed in claims for negligent hiring or retention only when the plaintiff shows that the "employer had **actual** knowledge of **numerous and serious** violations on its driver's record, or, at the very least, when the employer has flouted a legal

duty to check a record of such violations." Western Industries, Inc. v. Poole, 280 Ga.App. 378, 634 S.E.2d 118 (2006).

Similarly, in a negligent entrustment claim, even where punitive damages are ***not*** being sought, plaintiff must show that the employer had knowledge of a "**pattern**" of reckless driving behavior. Thomason v. Harper Childre Chevrolet, Inc., 162 Ga.App. 441, 444, 289 S.E. 2d 773 (1982).

When you first learned that Acme performed no background check on Jason and did nothing to investigate his driving record, you wondered how this company could have been so remiss in its due diligence in investigating its employees prior to offering them jobs. Now, you actually kind of like the way this situation has played out. The fact of the matter is that Acme's ignorance is its defense. Without actual knowledge of Jason's poor record, there is no basis to assign punitive damages against Acme for being negligent in hiring or retaining Jason, or in entrusting a vehicle to him.

Make no mistake, I am not suggesting that it is good practice for a company to not investigate employee driving records or other background information before offering employment or entrusting a vehicle, but the law does protect the ignorant employer from punitive damages, unless, as noted, the employer flouted a legal duty to make such inquiries. Western Industries, Inc. v. Poole, supra.

Federal and state regulations concerning operators of commercial vehicles do require such background checks. If Jason was a commercial driver, Acme could be in some trouble here. But, as a general rule, "[G]eorgia law does not impose a duty upon the owner of an automobile to make an investigation of competency of one who drives the automobile to discover his driving record…." Smith v. Tommy Roberts Trucking Co., 209 Ga.App. 826, 435 S.E.2d 54 (1993).

As such, assuming Jason was not driving a commercial vehicle, which in itself is a term if art defined under federal and state regulations, it does not appear that Acme flouted a legal duty to investigate Jason's driving record. Assuming that Acme was, in fact ignorant of Jason's background and history, Acme should avoid punitive damages, and summary judgment should be granted to Acme. In this scenario, jurors should never hear any evidence about Jason's speeding tickets, DUI or drug use. (Shortly, I will address the reasons that his regular, on-going recreational use of drugs should not lead to any inference that he was impaired at the time of the accident.)

Assuming, however, that Acme was aware of Jason's driving record, there may be a fact question as to punitive damages. His numerous moving violations and the recent DUI could be viewed as a pattern of reckless driving behavior or as evidence of numerous and serious violations. However, the case of Danforth v. Bulman, 276 Ga.App. 531, 623 S.E. 2d 732 (2005) offers some good arguments that there is not enough evidence here for punitive damages.

Danforth shows that strong evidence of a pattern of reckless driving behavior is required to support a mere negligent entrustment claim, much less the much higher standard required to support punitive damages. In that case, the plaintiff asserted negligent entrustment claims. The court reiterated that in order to show actual knowledge of a habit of recklessness, the plaintiff must show that the entrustor had actual knowledge of the driver's pattern of recklessness. 276 Ga.App. at 535-536. In that case, the entrustor was the driver's mother.

The facts relied on by plaintiff included that the driver had (1) three prior arrests for underage drinking resulting in probation,(2) fines and required attendance at Alcoholics Anonymous meetings. The driver had previously been (3) arrested twice for simple battery and in both instances had been drinking. In one instance, he had been drinking to the point of stumbling. (4) He had been previously charged with public drunkenness. There was evidence that his mother/entrustor knew about all of these offenses. (5) His father had once caught him driving after he had been drinking and his parents, including the (6) entrustor/mother, had once caught him with a marijuana pipe. (7) At age 16, he had been ticketed for passing on a double yellow line. There was evidence that his mother/entrustor was aware of this ticket as well. He had once (8) rear-ended a car and once hit a curb while driving. Another time, (9) he lost control and totaled his truck.

There was evidence that his mother/entrustor knew about all of these accidents. Further, the driver admitted that he had used cocaine the afternoon before the collision with plaintiff's car and, although he claimed that he had not used alcohol that day, he in fact pled guilty to driving under the influence of alcohol in connection with the collision.

The Danforth court held that there was insufficient evidence to support a claim for negligent entrustment, despite the mother's knowledge of her son's habit for excessive drinking and his poor driving record. In Danforth, the

evidence was not enough to support the simple negligent entrustment claim, let alone a claim for punitive damages.

If you are defending a driver whose record contains one or two moving violations, or perhaps even more if spread out over a number of years, I think you have a great argument that such a driving record is not indicative of a "pattern" of reckless driving or of "numerous and serious" violations. I believe Danforth supports that much more is required.

Intoxication Is Never Presumed

Plaintiff's counsel will argue that Jason was impaired or intoxicated at the time of the accident, and that the evidence at least creates a jury issue as to the issue of punitive damages. Should the court allow plaintiff to present evidence and argue that Jason was a regular drug user, admittedly addicted to prescription medications who also had a DUI only a few months before this accident? Does this evidence create a fact issue as to whether Jason was impaired at the time of the accident?

In my view, no way. Surprisingly, there is virtually no case law in Georgia (at least that I have been able to find) stating outright that evidence of intoxication on other occasions does not create any inference of intoxication at the time in question. Perhaps, this proposition is so clearly encompassed under O.C.G.A. §24-2-1 and the case law cited above, such as, for example, that a "party's conduct on the occasion at issue in the case may be proved **only** by the facts of that event and not by evidence of the party's prior acts or general character for carelessness or recklessness". Feinberg v. Durga, 189 Ga.App. 733, 735(3), 377 S.E.2d 33 (1988).

The best case I have found on this issue is Ellis v. Southern Railway Co., 89 Ga. App. 407, 79 S.E.2d 541 (1953), where the court, referring to a party, stated: "There was no evidence that he was in fact intoxicated, and this condition will not be presumed." Compare, Lee v Augusta Coach Company, 223 Ga. 72, 153 S.E.2d 429 (1967)(Mental or physical impairment is never presumed).

Courts in other states have addressed this issue more clearly and more directly. See, Hemming v. Hutchinson, 221 Va. 1143, 277 S.E.2d 230 (1981)(consumption of beers hours before the accident was inadmissible absent evidence of impairment at the time of the accident); R.T. Herrin Petroleum Transport Co v. Proctortex, 161 Tex. 222, 338 S.W. 2d 422

(1960)(testimony as to past instances of drunkenness is inadmissible to establish as an independent proposition that a party was probably drunk upon the occasion in question.); Christianson v. Kramer, 255 Iowa 239, 122 N.W.2d 283 (1963)(testimony of plaintiff's prior drinking habits had no bearing on issues as to his alleged negligence, in absence of any evidence that plaintiff had been drinking on the day of accident); Sobczak v. General Motors Corp., 2007 WL 1500022 (Ill. 2007)(Where there is no evidence of intoxication, evidence of alcohol consumption is irrelevant); Bielaga v. Mozdzeniak, 328 Ill.App. 3d 291, 765 N.E.2d 1131 (2002) (Insinuations or innuendos of intoxication based upon evidence of drinking are impermissible and irrelevant where there is no evidence of intoxication); Chicchi v. Southeastern Pennsylvania Transp. Authority, 727 A.2d 604 (1999) (Mere evidence of a party's consumption of alcohol or controlled substance is generally inadmissible to prove recklessness or carelessness of the party, unless it is established that the party was intoxicated and physically impaired at the time of the accident).

In any event, I believe that the Ellis v. Southern Railway case, coupled with the general rule against character evidence, strongly supports that the jury should never be allowed to consider whether Jason was intoxicated at the time of the accident absent evidence of impairment or intoxication at that time. It really should not matter that he generally gets high or drunk very frequently at other times. The only relevant time under consideration is the time of the accident.

I also note that under O.C.G.A. §51-12-5.1, punitive damages based on impaired driving are only recoverable against the active tortfeasor, which is the person who was driving impaired. As such, punitive damages may not be awarded against Acme even if Jason was driving impaired.

In the hypothetical case, there was no evidence of impaired driving at the time of the accident, and I do not believe any evidence of his drug habits or drinking habits should be admissible to prove that he "must have been" impaired at the time of the accident.

Conclusion

Prudent employers who investigate an employee's driving history and background will avoid liability for claims of negligent hiring, negligent entrustment and similar claims because the company will not allow the employee to drive company vehicles in the first place. However, where such

claims are asserted, the employer will be entitled to summary judgment by admitting respondeat superior, unless meritorious claims for punitive damages are asserted. The threshold for punitive damages is high and actual knowledge on the part of the employer is required to support those claims.

The law discourages trials based on character evidence, and the above-discussed rules are effective in eliminating unsavory character evidence from the trial of automobile cases involving employee drivers.

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