Georgia Defense Lawyers Association

2010 Law Journal

Advancing the Civil Defense Bar©

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Contents

President's Message ii

Editor's Acknowledgement iii

Articles

The Evolution of Georgia's Tort Reform Legislation: Five Years After SB3
By Andrew W. Wilkes and George T. Major, Jr. 1

Conflict of Interest: An Unspoken *Daubert* Factor and
an Undeniable Aspect of Reliability in Some Cases
By Jennifer M. Techman 20

Labor and Employment Law Update
By W. Melvin Haas, III, William M. Clifton, III,
W. Jonathan Martin, II, and Glen R. Fagan 25

The Hindsight Charge: The Past and Future
By L. Lee Hicks, II 43

Insurance Coverage: Chinese Drywall Claims
By Brian T. Moore and Eric R. Mull 50

A Primer on Premises Liability
By Lynn M. Roberson 54

Georgia Mechanic's and Materialmen's Liens:
Protect Your Client and Protect Yourself
By Ken Sisco 117

Georgia Court of Appeals Rejects Common Law
Failure to Recall Claim in Product Liability Cases
By Richard J. Baker 125

Employment Discrimination Defense: Recent Trends in
Supreme Court and Eleventh Circuit Jurisprudence
By Stephen W. Mooney 130

The Evolving Duty to Settle: A Foundation Made of Shifting Sands
By Philip W. Savrin and Jonathan J. Kandel 148

Recent Case Law Developments in Workers' Compensation
By David A. Smith, David H. Schulte, and Matthew D. Walker 155

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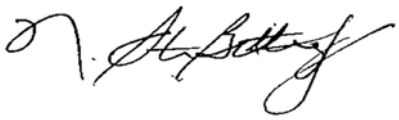
President's Message

The Georgia Defense Lawyers Association *Law Journal* has been published annually for many years. It is designed to offer practical analysis of current topics and issues in the law that are of interest to those engaged in civil litigation. The aim of the Journal is to make a contribution to the efficient and fair resolution of civil disputes. GDLA trusts you will find this year's edition of our *Law Journal* to be beneficial to you, whether you are an advocate or judge.

The members of GDLA thank the authors who volunteered their time and talents in preparing the articles for inclusion in this edition of the *Law Journal*. These authors are experienced practitioners and their practical, useful approach is evident. We also want recognize the outstanding work of our editor, Ted Freeman, whose planning and organizational skills resulted in the quality content of this *Law Journal*. Thanks also to our multi-tasking Executive Director, Jennifer Davis. Congratulations to all on a job well done.



N. Staten Bitting, Jr.
President
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Editor's Acknowledgement

The *GDLA Law Journal* does not just happen. It starts with the considerable time and effort of the contributors who volunteer to author an article for the publication. This year, we were fortunate to have had 19 such unselfish individuals who combined to produce 11 superb articles. They are listed alphabetically below, along with their firm names.

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Andrew W. Wilkes
Oliver Maner LLP

But publication of the *Law Journal* does not stop there. It also requires the assistance of those who are working behind the scenes. This year, I would be remiss if I did not recognize by name the help of our fine Executive Director, Jennifer Davis, and Jake Daly, who is Of Counsel to Freeman Mathis & Gary, LLP. While Jake tirelessly Bluebooked and reformatted each article, adding photographs, bios and color, Jennifer helped pull it all together. Each of their efforts made my job all the easier.

Suffice it to say, I am extremely proud of the 2010 *GDLA Law Journal.* I have enjoyed serving as its Editor, and I hope you will find all of the articles to be interesting, informative, and useful to you in your practices.

Theodore Freeman
Vice President and Editor
Georgia Defense Lawyers Association

THE EVOLUTION OF GEORGIA'S TORT REFORM LEGISLATION: FIVE YEARS AFTER SB3

By Andrew W. Wilkes and George T. Major, Jr.

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February 16, 2010, marked the five-year anniversary of the enactment of Senate Bill 3 ("SB3").[1] Challenges to the legislation and application of the legislation by the trial courts have provided clarity to some of these statutes and have completely dispensed with others. Within three years of the enactment of SB3, the legislation had already undergone many challenges, some of which eroded or dismantled key provisions of the legislation. A more detailed survey of the case law issued between the enactment of SB3 and early 2008 can be found in the article *SB3: Three Years Later*, which was published in the 2008 *GDLA Law Journal*.[2]

This article will discuss the reported cases from the past two years that have had significant ramifications on the provisions of SB3 and will briefly recount some of the key decisions that affected SB3 within its first three years of existence.

VENUE AND FORUM NON CONVENIENS

O.C.G.A. § 9-10-31

Soon after its enactment, O.C.G.A. § 9-10-31(c) was challenged and found to be unconstitutional.[3] Subsection (c) had provided, "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." In finding this subsection unconstitutional, the Georgia Supreme Court found that it was not a proper exercise of the legislature's authority because it vested the power to change venue in the nonresident defendant rather than in the trial court.[4]

O.C.G.A. § 9-10-31.1

O.C.G.A. § 9-10-31.1 codified the doctrine of forum non conveniens. The doctrine, which provides that a court may refuse to hear a case if the case would more properly be tried before a different court, and its codification have already withstood appellate scrutiny.[5] Pursuant to O.C.G.A. § 9-10-31.1, the transferring trial court must make certain findings of fact, or its order may be vacated and remanded with direction to make these findings.[6]

SB3 AND THE GEORGIA CIVIL PRACTICE ACT

O.C.G.A. § 9-11-9.1: Expert Affidavits

O.C.G.A. § 9-11-9.1, which provides that professional malpractice complaints must be accompanied by an expert affidavit, was amended in two notable ways by SB3. First, the 45-day grace period to file an expert affidavit was abolished.[7] The second significant amendment under SB3 provided that defendants would have until the close of discovery to file a motion to dismiss premised upon a defective affidavit.[8]

In *Scott v. Martin*,[9] the Court of Appeals upheld the amendment to O.C.G.A. § 9-11-9.1(b) which revoked the 45-day grace period. In *Rockdale Health System, Inc. v. Holder*,[10] the Court of Appeals held that retroactive application of the 2005 amendments was unconstitutional. Other cases discussing the interaction of O.C.G.A. § 9-11-9.1 and O.C.G.A. § 24-9-67.1 are discussed in more detail below.

O.C.G.A. § 9-11-9.2: Medical Authorizations and Ex Parte Communications

O.C.G.A. § 9-11-9.2, which requires a plaintiff to file a medical authorization form with her complaint and provides for ex parte communications between defense counsel and plaintiff's treating physicians, was declared preempted by federal law in the first appellate case to address the issue. In *Northlake Medical Center, LLC v. Queen*,[11] the Georgia Court of Appeals found that the Health Insurance Portability and Accountability Act of 1996[12] preempted O.C.G.A. § 9-11-9.2 because O.C.G.A. § 9-11-9.2 did not require a description of the information to be used or disclosed that specifically identified the information in a meaningful fashion, did not provide for an expiration date or event that related to the individual or the purpose of the use or disclosure, and did not contain notice of the right to revoke the authorization.[13]

In *Allen v. Wright*,[14] the Georgia Supreme Court examined the issues defined by the Court of Appeals in *Northlake* and likewise held that O.C.G.A. § 9-11-9.2 did not comply with HIPAA and was therefore preempted by federal law.[15] The Supreme Court also clearly explained the deficiencies of O.C.G.A. § 9-11-9.2 and invited the legislature to amend or rewrite the law to make it compliant with HIPAA.[16] To date, the legislature has not amended the statute.

In *Moreland v. Austin*,[17] the Georgia Supreme Court further held the provisions of O.C.G.A. § 9-11-9.2 were preempted by HIPAA and reversed a decision of the Court of Appeals.[18] In *Moreland*, the Supreme Court specifically focused on the ex parte communications allowed under O.C.G.A. § 9-11-9.2 and

whether that language was compatible with the provisions set forth under HIPAA.[19] The Supreme Court found that "HIPAA requires a physician to protect a patient's health information, unless the patient is given reasonable notice and an opportunity to object. Georgia law stands in sharp contrast: it facilitates and streamlines the litigation process; it was not designed to protect a patient's private health information in the course of oral communications between the patient's physicians and defense counsel."[20] The Supreme Court, however, stopped short of declaring all communication between defense counsel and plaintiff's physicians off-limits and only prevented inquiries intended to elicit protected health information.[21]

In *Hamilton v. Shumpert*,[22] a plaintiff sought to use the Supreme Court's decision in *Moreland* as a basis for sanctions against the defendant for defense counsel's ex parte communications with her treating physicians.[23] The plaintiff filed her 2005 complaint with an O.C.G.A. § 9-11-9.2 medical authorization that granted the defendant's attorneys unfettered access to her treating physicians.[24] In 2006, the defendant's attorneys communicated ex parte with one of the plaintiff's treating physicians and obtained health information protected by HIPAA.[25] The plaintiff moved for sanctions, claiming that the defendant had violated HIPAA by obtaining the information and that *Moreland* had relieved her of the broad authorization she had filed with her complaint.[26] The trial court denied the plaintiff's motion for sanctions, and the Court of Appeals affirmed, finding that the trial court had not abused its discretion because the plaintiff's authorization "did not in any way restrict discussions between defense counsel and [the plaintiff's] former treating physicians," despite the fact that the HIPAA protections the plaintiff sought to invoke had been enacted prior to her authorization.[27] However, the Court of Appeals softened its holding by noting that the communications at issue occurred "at a time when arguably the applicability of HIPAA to *ex parte* communications was uncertain."[28]

O.C.G.A. § 9-11-68: Offers of Settlement

Under O.C.G.A. § 9-11-68, either party may serve upon the other party a written demand or offer to settle a tort claim for a specified amount of money. In the event the offer is declined, the offering party may seek an award of attorney fees as provided under subsection (b) of the statute. In *Smith v. Baptiste*,[29] a divided Georgia Supreme Court upheld the constitutionality of O.C.G.A. § 9-11-68, finding that the statute did not limit the right of access to the courts.[30]

In *Smith*, the plaintiffs sued a radio host and a radio station for defamation resulting from remarks the host made on the air. After the suit was filed, the defendants served an offer of settlement of $5,000 upon the plaintiffs. The plaintiffs did not respond to the offer to settle. The trial court subsequently granted the defendants' motion for summary judgment. The trial court declined to award attorney fees as provided by O.C.G.A. § 9-11-68(b)(1) and held the statute impeded access to the courts and, thus, violated the Georgia Constitution.[31]

Writing for a four-justice majority, Presiding Justice Carley provided a detailed analysis of the history of Article I, Section I, Paragraph XII of the Georgia Constitution of 1983.[32] This clause pro-

vides, "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any off the courts of this state." Following the Supreme Court's previous decision in *Nelms v. Georgian Manor Condominium Association, Inc.*,[33] the majority concluded that "'Art. I, Sec. I, Par. XII is a 'right of choice' (between self-representation and representation by counsel) provision, and not an 'access to the courts' provision such as found in the constitutions of [other states].'"[34] In reaching its decision, the majority relied upon accounts of Georgia's Constitutional Convention contained within Samuel W. Small's *A Stenographic Report of the Proceedings of the Constitutional Convention Held in Atlanta, Georgia 1877*.[35] The majority's reliance upon this account was based in part upon *Nelms* and its reliance upon the unofficial record of the Constitutional Convention.[36] The dissent argued against the use of Small's stenographic report, arguing that the report was incomplete and amounted to a newspaper editorial.[37] The majority countered that "prior to the dissent in this case, no legal authority has ever questioned the clear authenticity, accuracy and validity of the stenographic report, which provides the sole verbatim record of the Convention debates."[38]

The Supreme Court noted that the trial court improperly concluded that O.C.G.A. § 9-11-68 was unconstitutional "because it permits the recovery of attorney's fees absent the prerequisite showings of either O.C.G.A. § 9-15-14 or O.C.G.A. § 13-6-11."[39] In reversing the trial court, the majority held "there is nothing in Art. I, Sec. I, Par. XII, or any other provision of the Georgia Constitution, which mandates that attorney's fees can only be awarded pursuant to those two code sections. Rather, in Georgia, '[a]ttorney's fees are recoverable . . . where authorized by some statutory provision or by contract.'"[40] The majority found O.C.G.A. § 9-11-68 to be "such a statutory provision authorizing the recovery of attorney's fees under specific circumstances."[41]

In Division 2 of its opinion, the majority addressed the trial court's finding that O.C.G.A. § 9-11-68 "is a special law that violates the uniformity clause of the Georgia Constitution."[42] The majority held "OCGA § 9-11-68 is not a special law affecting only a limited activity in a specific industry during a limited time frame" but instead "'operates uniformly throughout the state upon the subject or class of subjects with which it proposes to deal.'"[43] Further, the majority held that the fact that the law applies only to tort cases, and not all civil actions, "does not render it an impermissible special law" and that the purpose of the law to encourage litigants to make and accept good faith settlement offers was consistent with the state's "'strong public policy of encouraging negotiations and settlements.'"[44]

In Division 3 of its opinion, the majority declined to consider the plaintiffs' claim that retroactive application of O.C.G.A. § 9-11-68 was unconstitutional.[45] The majority based its refusal to consider the issue of retroactivity on the fact that the trial court did not distinctly rule upon the issue.[46]

Justice Nahmias wrote the special concurrence to the majority's opinion.[47] The special concurrence joined in the majority's opinion except for the majority's discussion of stare decisis.[48] Division 1 of the concurring opinion reiterates the importance of stare decisis, but

emphasizes that a deeper analysis of precedent is necessary when a constitutional issue is involved.[49] "[S]tare decisis in the constitutional context requires more careful consideration of factors such as the age of the precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning."[50]

Division 2 of the concurring opinion discusses the majority's use of the stenographic report and the use of unofficial sources. The concurring opinion approves of the use of unofficial sources, referring to accepted, but unofficial, sources such as James Madison's notes of the Constitutional Convention of 1787, the *Federalist Papers*, and the writings of Thomas Jefferson.[51] The concurrence urges that it is necessary to look to writings contemporary to the adoption of the constitution in order to determine the meaning of the terms included in the document: "Where the meaning of the provision at issue is unclear, it is useful to look to contemporaneous sources of various kinds to understand it, as well as the problems that the provision was meant to address. The official records of our constitutional conventions are certainly one such source, but they are not the exclusive documents to which we may refer."[52]

Division 3 of the concurring opinion joins the majority's decision that O.C.G.A. § 9-11-68 does not infringe upon access to the courts and adds that the right of access to the courts does not mean that the access should be unfettered.[53]

Finally, Division 4 of the special concurrence discusses whether "arbitrary or discriminatory limitations on the ability of litigants to access the courts may be challenged."[54] The concurrence notes "such challenges should be raised and must be reviewed under more well-established standards for due process and equal protection claims."[55] The concurrence, however, notes that the dissent did not raise these issues because "they would obviously fail."[56] In support of its conclusion, the concurrence notes that "statutes of limitations and repose and other restrictions that have survived judicial scrutiny" can be argued to limit access to the courts, thus permitting O.C.G.A. § 9-11-68 to survive the same judicial scrutiny.[57] Moreover, the concurrence discounts that the statute has a chilling effect on the filing of lawsuits because the plaintiffs "accessed the court by filing their tort claims" with O.C.G.A. § 9-11-68 "on the books."[58] The concurrence, however, left open the possibility of such a decision "[s]hould a case be brought in which it is established that a party was actually precluded from filing, defending, or maintaining a meritorious tort case because of O.C.G.A. § 9-11-68."[59]

The dissent focuses squarely upon the majority's use of Small's stenographic report of the Constitutional Convention to give meaning to Article I, Section I, Paragraph XII of Georgia's Constitution. After a discussion of the alleged unreliability of the stenographic report, the dissent argues, "The majority's reliance on an unofficial journalist's account is in direct contravention to our precedent refusing to accept as authority even the actual videotaped recordings of statements made by legislators themselves because those recordings are not official accounts on which this Court may rely when interpreting our statutes."[60] The dissent further states that "it is this Court's purpose to correct errors, not sanctify or perpetuate them"

and that "[a] right to access the courts is too important, too fundamental to the maintenance of all our other rights, to be accorded such casual treatment."[61] The dissent further finds "[w]hether OCGA § 9-11-68(b)(1) violates our right to access the courts is a close question on which reasonable minds may disagree. The existence of a right to access the courts, however, is not a close question at all. That right is clearly and plainly set forth in the unambiguous language of Art. I, Sec. I, Par. XII."[62] In footnote 9 to the dissenting opinion, the dissent states that it disagrees with the majority and that O.C.G.A. § 9-11-68 violates Article I, Section I, Paragraph XII of the Georgia Constitution.[63]

Other noteworthy cases involving the interpretation of O.C.G.A. § 9-11-68 include *McKesson Corp. v. Green*,[64] in which the Court of Appeals held that a voluntary dismissal of a complaint will not subject a plaintiff to an award of attorney fees, and *Fowler Properties, Inc. v. Dowland*,[65] in which the Supreme Court held that O.C.G.A. § 9-11-68 affects substantive, rather than procedural, rights and does not apply retroactively, notwithstanding the legislature's intent that the statute apply to all causes of action pending on its effective date.

SB3 AND EVIDENCE

O.C.G.A. § 24-3-37.1: Statements of Regret, Mistake, Error, Etc.

O.C.G.A. § 24-3-37.1 prevents introduction of statements of regret, benevolence, or apology as an admission of liability or an admission against interest. In *Arisan v. Shaak*,[66] the Georgia Court of Appeals analyzed the application of O.C.G.A. § 24-3-37.1(c), which states,

> In any claim or civil action brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which are made by a health care provider . . . to the patient, a relative of the patient, or a representative of the patient and which relate to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.[67]

In *Arisan*, the plaintiff appealed the trial court's exclusion of alleged admissions against interest of the defendant physician in a medical negligence action.[68] The trial court excluded the physician's statements pursuant to O.C.G.A. § 24-3-37.1(c).[69] On appeal, the plaintiff argued that O.C.G.A. § 24-3-37.1 should not apply retroactively based upon an argument of legislative intent.[70] The Court of Appeals roundly rejected this argument, citing the legislative intent as expressed in SB3.[71] Citing a lack of jurisdiction, the Court of Appeals sidestepped the issue of whether the retroactive application of the statute would pass constitutional muster.[72]

O.C.G.A. § 24-9-67.1: Daubert

O.C.G.A. § 24-9-67.1 brought the admissibility of expert testimony in Georgia under the umbrella of federal law established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[73] and its

progeny.[74] The provisions of O.C.G.A. § 24-9-67.1 apply to all civil actions.[75] Since enactment, the application of the statute has been examined on multiple occasions by the appellate courts. One of the most common challenges to the statute involved whether it required that physicians practice in the same specialty of any other physician against whom they offered testimony as to the standard of care. Georgia's appellate courts have held that O.C.G.A. § 24-9-67.1 does not require an expert in a medical malpractice action to practice in the same specialty as the defendant physician.[76] Additionally, the statute withstood a constitutional attack when the Georgia Supreme Court held that it does not violate equal protection despite the fact that it only applies to civil actions.[77]

In *Gibson v. Ford Motor Co.*,[78] the Georgia Supreme Court was called upon to determine the constitutionality of the retroactivity of O.C.G.A. § 24-9-67.1. In *Gibson*, a defendant challenged the trial court's failure to apply the statute to exclude plaintiff's expert witness.[79] In doing so, the trial court had determined that O.C.G.A. § 24-9-67.1 was unconstitutional because it would have denied the plaintiff due process "by imposing a new standard for expert witnesses."[80] The Supreme Court found other grounds for affirming the effect of the trial court's ruling and declined to determine the constitutionality of O.C.G.A. § 24-9-67.1 on due process grounds.[81]

In *Condra v. Atlanta Orthopaedic Group, P.C.*,[82] the Georgia Supreme Court overruled the prior body of cases holding that evidence of the personal practices of an expert witness was inadmissible in medical malpractice actions.[83] In overruling *Johnson v. Riverdale Anesthesia Assocs., P.C.*,[84] the Supreme Court pointed to the recent enactment of O.C.G.A. § 24-9-67.1.[85] Because the admissibility of expert testimony under O.C.G.A. § 24-9-67.1 is partially dependent on the expert's personal experience and practice, "it would defy logic to find such [personal practice] experience categorically irrelevant in assessing the credibility of the expert's testimony."[86] Citing language from an Arizona appellate case, the court stated, "'[T]he jury is entitled to fully evaluate the credibility of the testifying expert, and the fact that an expert testifies that the standard of care does not require what that expert personally does in a similar situation may be a critical piece of information for the jury's consideration.'"[87] The court also found that though the presentation of this additional testimony could confuse the jury, such confusion "may be remedied through the careful use of jury instructions," including pronouncement of the principle that a mere difference in views between physicians does not by itself prove malpractice.[88] Further, a party whose expert has been cross-examined will have the ability to elicit explanations for why the expert's practices differ from what that expert attested to as the standard of care.[89] The court acknowledged that the growing body of case law from other jurisdictions supporting the admissibility of expert personal practices was important in reaching its decision to overrule *Johnson*.[90]

Application of *Condra* will certainly require defense counsel to think long and hard before bringing to trial an expert whose personal practices differ from the medical treatment at issue in the case. While the holding in *Condra* may make finding experts more difficult for counsel who are hesitant to identify experts whose opinions differ from the

treatment provided by the defendant physician, it may also ensure that the experts who are ultimately presented to the jury on behalf of either party are more credible and better capable of supporting their opinions on the relevant medical care at issue.

SB3 AND TITLE 51: TORTS

O.C.G.A. § 51-1-29.5: Emergency Medical Care

O.C.G.A. § 51-1-29.5 states that in cases in which emergency medical care is rendered, gross negligence must be proven for a plaintiff to recover from an emergency medical care provider. In *Gliemmo v. Cousineau*,[91] a divided Georgia Supreme Court rejected a constitutional challenge to that portion of SB3 that elevated the burden of proof and lowered the standard of care required by physicians and medical providers administering emergency medical care.[92]

Justice Carley, writing for a four-justice majority, upheld the constitutionality of O.C.G.A. § 51-1-29.5(c) against several challenges to the statute.[93] The majority first held that O.C.G.A. § 51-1-29.5(c) "is not a special law affecting only a limited activity in a specific industry during a limited time frame. Rather, . . . it is a general law because it operates uniformly upon all health care liability claims arising from emergency medical care as provided in the statute, and . . . that 'classification of the designated class is neither arbitrary nor unreasonable.'"[94]

In response to a challenge that the statute violated the Georgia equal protection guarantee, the majority held, "Since the code section 'does not disadvantage a suspect class or interfere with the exercise of a fundamental right . . . it need only bear a reasonable relationship to a legitimate state purpose.'"[95] The majority cited the statement of purpose within SB3 and held,

> Promoting affordable liability insurance for health care providers and hospitals, and thereby promoting the availability of quality health care services, are certainly legitimate legislative purposes. Furthermore, it is entirely logical to assume that emergency medical care provided in hospital emergency rooms is different from medical care provided in other settings, and that establishing a standard of care and a burden of proof that reduces the potential liability of the providers of such care will achieve those legitimate legislative goals."[96]

As the majority noted, "the equal protection argument made by [the plaintiffs] 'boils down to nothing more than [a] claim that the General Assembly has made a bad policy judgment . . . and [such a claim] should be directed to the General Assembly and the Governor rather than this Court.'"[97]

Finally, the majority held that the term "gross negligence" "'has a commonly understood meaning'" as defined by O.C.G.A. § 51-1-4, is not unconstitutionally vague, and is not, therefore, violative of due process.[98]

The majority declined to consider the constitutional vagueness challenge to the definition of "emergency medical care," as set forth in O.C.G.A. § 51-1-29.5(a), because this issue was not properly raised in the trial court or addressed by the trial judge.[99] Only time will tell

whether the Supreme Court's silence as to this narrow issue leaves open the possibility of the statute being found unconstitutional in the future. Certainly not all medical care dispensed by health care providers in a hospital emergency department, obstetrical unit, or surgical suite could be deemed "emergency medical care." However, the majority does not seem to allow for this reasoning based upon its conclusion that "it is entirely logical to assume that emergency medical care provided in a hospital emergency room is different from medical care provided in other settings, and that establishing a standard of care and a burden of proof that reduces the potential liability of the providers of such care will help achieve those legitimate legislative goals."[100]

Justice Benham, along with Chief Justice Hunstein and Justice Thompson, authored the dissent and concluded the statute was unconstitutional on two separate grounds.[101]

First, the dissent concluded that O.C.G.A. § 51-1-29.5(c) is a special law that regulates subject matter already addressed by a general law: "Here, the General Assembly has already enacted O.C.G.A. § 51-1-27, a general law which states the standard of care in medical malpractice cases to be 'reasonable care.' Because O.C.G.A. § 51-1-29.5(c) is a special law that regulates the same subject matter as O.C.G.A. § 51-1-27, it is unconstitutional under the Georgia Constitution of 1983."[102]

Second, the dissent concluded that the statute failed to pass constitutional muster because it is a special law and its application results in an arbitrary and unreasonable classification.[103] The dissent noted that "all health-care providers," not merely those who dispense emergency medical care in a hospital emergency room, are incurring difficulty in locating affordable liability insurance.[104] According to the dissent, the statute, as written, is arbitrary in that it applies only to emergency medical care dispensed at certain locations identified by statute, and it is unreasonable in that it differentiates the standards of liability between physicians providing the same medical care in different locations.[105]

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 identifies the notice necessary to inform the public in order to avoid liability for the actions of independent contractors.[106] 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.[107]

Though there have not been any reported cases that provide a detailed analysis, the Court of Appeals noted in *Blackmon v. Tenet Healthsystem Spalding, Inc.*[108] that O.C.G.A. § 51-2-5.1 replaced the eleven-factor test gleaned from *Lee v. Satilla Health Services, Inc.*[109] and *Cooper v. Binion*,[110] but was not to be retroactively applied.[111]

JOINT AND SEVERAL LIABILITY

To date, the appellate courts have not yet had the opportunity to decide the issues presented by the changes SB3 made to O.C.G.A. §§ 51-12-31 and 51-12-

33. These issues should receive some clarity once post-SB3 lawsuits are decided by the appellate courts.

O.C.G.A. § 51-12-31: No Fault Assessed Against Plaintiff

The amended O.C.G.A. § 51-12-31 provides that "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." In comparison, the pre-SB3 statute provided that "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." At this point, it is unclear whether the amendment to O.C.G.A. § 51-12-31 has abolished joint and several liability as many believe the legislature intended.

O.C.G.A. § 51-12-32: Contribution

SB3 did not amend O.C.G.A. § 51-12-32. The continued validity of O.C.G.A. § 51-12-32 has caused confusion over whether O.C.G.A. § 51-12-31, as amended by SB3, abolished joint and several liability. Cases concerning contribution under O.C.G.A. § 51-12-32 continue to reach Georgia's appellate courts.[112]

O.C.G.A. § 51-12-33: Fault Assessed Against Plaintiff

The interpretation and application of O.C.G.A. § 51-12-33 is currently being examined in *Cavalier Convenience, Inc. v. Sarvis*,[113] which is pending in the Georgia Court of Appeals. The issue on appeal is whether SB3 abolished joint and several liability in its entirety, or only as it applies to certain cases. Subsection (a) provides that where "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 plaintiff in proportion to his or her percentage of fault."[114] Subsection (b) states that "the trier of fact, in its determination of . . . damages to be awarded, if any, shall after reduction of damages pursuant to subsection (a) . . . , if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned . . . 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."[115] In *Sarvis*, the trial court interpreted subsection (b) to apply only when the plaintiff is to some degree responsible for his own harm and there are multiple defendants. The defendant's position, however, is that the "if any" clause in subsection (b) is rendered meaningless under the trial court's interpretation.

Subsections (c) and (d) allow for the trier of fact, in assessing percentages of fault, to consider the liability of nonparties after the proper notice of potential nonparty liability is presented.[116] The trier of fact shall be allowed to consider the liability of a 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.[117] Subsection (f) provides that assessments

of fault of nonparties shall not be introduced as evidence of liability in any action against the nonparty.[118]

Hopefully, the decision in *Sarvis* will provide much-needed insight for all practitioners as to the application of joint and several liability.

MEDICAL MALPRACTICE DAMAGES CAPS

O.C.G.A. § 51-13-1: Noneconomic Damages Caps

The portion of SB3 receiving the most press and media attention was the limitation placed upon noneconomic damages awards in medical malpractice actions. In *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*,[119] the Georgia Supreme Court held unconstitutional the limitation on noneconomic damages in medical malpractice cases imposed by O.C.G.A. § 51-13-1.

Chief Justice Hunstein authored the opinion for the court, with Justice Nahmias concurring specially along with Presiding Justice Carley and Justice Hines. The court held that the noneconomic damages caps in O.C.G.A. § 51-13-1 violate the constitutional right to trial by jury. The scholarly nature of the opinion underscores the importance the Supreme Court places on its ruling. The majority opinion goes to great lengths to cite the constitutional, statutory, and common law bases undermining the statute.

The majority's opinion is anchored in the provision of the Georgia Constitution providing that "'[t]he right to trial by jury shall remain inviolate.'"[120] The opinion cites the origins of Georgia's common-law right to a jury trial as it existed at the time of the adoption of the Georgia Constitution in 1798.[121] The majority concluded that the right to a jury trial in a medical malpractice claim was clearly encompassed within the Georgia Constitution of 1798 and in Georgia's earliest reported case law.[122]

The majority then confirmed that the determination of damages rests "'peculiarly within the province of the jury.'"[123] Likewise, "'[t]he right to a jury trial includes the right to have a jury determine the *amount* of . . . damages, if any, awarded to the [plaintiff].'"[124] Extending this analysis further, the court held that "[n]oneconomic damages have long been recognized as an element of total damages in tort cases, including those involving medical negligence."[125] In summing up its analysis, the majority stated, "Based on the foregoing, we conclude that at the time of the adoption of our Constitution in 1798, there did exist the common law right to a jury trial for claims involving the negligence of a health care provider, with an attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury."[126]

Requiring a court to reduce an award of noneconomic damages as determined by a jury clearly nullifies and undermines the jury's basic function, as guaranteed by the Georgia Constitution.[127] "The very existence of caps, in any amount, is violative of the right to trial by jury."[128] This constitutional analysis applicable to caps on noneconomic damages is distinct from the analysis applicable to punitive damages or treble damages, as these statutes do not address protections afforded by the Georgia Constitution.[129] Likewise, a trial court's authority to issue a remittitur "is a corollary of the courts' constitutionally

derived authority to grant new trials."[130]

In footnote 8 of its opinion, the majority considered contrary authority from other jurisdictions and concluded that jurisdictions upholding similar statutes were governed by less comprehensive constitutional jury trial provisions.[131]

After dispensing with the constitutional analysis of the statute, the Supreme Court next addressed whether the setting aside of the noneconomic caps is an improper retroactive application as to the defendant.[132] The court noted that "'[t]he general rule is that an unconstitutional statute is wholly void and of no force from the date it was enacted.'"[133] Although exceptions may be made to this general rule, the applicable analysis does not "militate in favor of deviation from the general rule of retroactivity."[134] Interestingly, the court noted that the defendant could not have concluded that the "caps' validity was assured," given the political environment attendant to, and following, the enactment of SB3.[135] The defendant's contention that its litigation strategy would have been different had it known the caps were invalid was not sufficient to apply the exception to the general rule of retroactivity as to an unconstitutional statute, nor did any basis exist for granting the defendant a new trial premised upon this ruling.[136]

Justice Nahmias, joined by Presiding Justice Carley and Justice Hines, concurred specially. The concurrence agreed with the majority's finding that the caps violate the state's constitutional guarantee of the right to trial by jury.[137] The concurrence agreed that the holding that O.C.G.A. § 51-13-1 is unconstitutional must be applied retroactively, but differed in the analysis applied by the majority as to whether to apply the statute retroactively.[138]

CONCLUSION

The past few years have witnessed significant alterations to the provisions of SB3. Perhaps the most significant of these alterations is the noneconomic damages caps in medical malpractice cases being declared unconstitutional. However, there are some issues that have not yet reached the appellate courts and remain unsettled. Practitioners should expect these issues to evolve further as cases reach the appellate courts.

ENDNOTES

1 2005 Ga. Laws, Act 1.

2 Andrew M. Wilkes, *SB3: Three Years Later*, 2008 GA. DEF. LAW. ASS'N L.J. 216.

3 EHCA Cartersville, LLC v. Turner, 280 Ga. 333, 626 S.E.2d 482 (2006).

4 *Id.* at 333-36, 626 S.E.2d at 484-86.

5 *Id.* at 337, 626 S.E.2d at 486; Hewitt v. Raytheon Aircraft Co., 273 Ga. App. 242, 614 S.E.2d 875 (2005).

[6] *Hewitt*, 273 Ga. App. at 246-50, 614 S.E.2d at 878-81.

[7] 2005 Ga. Laws, Act 1, § 3. In 2007, the General Assembly reinstated the 45-day grace period. 2007 Ga. Laws, Act 125, § 1 (codified at O.C.G.A. § 9-11-9.1(b)).

[8] 2005 Ga. Laws, Act 1, § 3 (codified as amended at O.C.G.A. § 9-11-9.1(e)).

[9] 280 Ga. App. 311, 313, 633 S.E.2d 665, 666-67 (2006).

[10] 280 Ga. App. 298, 300, 640 S.E.2d 52, 54 (2006) (noting that "[t]he 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").

[11] 280 Ga. App. 510, 634 S.E.2d 486 (2006).

[12] Pub. L. No. 104-191, 110 Stat. 1936 (1996).

[13] 280 Ga. App. at 513, 634 S.E.2d at 490.

[14] 292 Ga. 9, 644 S.E.2d 814 (2007).

[15] *Id.* at 12, 644 S.E.2d at 816-17.

[16] *Id.* at 14, 644 S.E.2d at 818.

[17] 284 Ga. 730, 670 S.E.2d 68 (2008), *rev'g* Austin v. Moreland, 288 Ga. App. 270, 653 S.E.2d 347 (2007).

[18] *Id.* at 732, 670 S.E.2d at 71.

[19] *Id.*

[20] *Id.* at 733, 670 S.E.2d at 71-72.

[21] *Id.*, 670 S.E.2d at 72.

[22] 299 Ga. App. 137, 682 S.E.2d 159 (2009).

[23] *Id.* at 139, 682 S.E.2d at 162.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 140, 682 S.E.2d at 162.

[28] *Id.*, 682 S.E.2d at 163.

[29] No. S09A1543, 2010 Ga. LEXIS 215 (Mar. 15, 2010).

[30] *Id.* at *10.

[31] *Id.* at *1.

[32] *Id.* at *3-12.

[33] 253 Ga. 410, 321 S.E.2d 330 (1984).

[34] *Smith*, 2010 Ga. LEXIS at *10 (quoting *Nelms*, 253 Ga. at 413, 321 S.E.2d at 333) (alteration in original).

[35] *Id.* at *6.

[36] *Id.*

[37] *Id.* at *3-5.

[38] *Id.* at *9.

[39] *Id.* at *11.

[40] *Id.* (quoting Georgia Subsequent Injury Trust Fund v. Muscogee Iron Works, 265 Ga. 790, 790-91, 462 S.E.2d 367, 368 (1995)) (alteration in original).

[41] *Id.*

[42] *Id.* at *12.

[43] *Id.* (quoting Lasseter v. Ga. Pub. Serv. Comm'n, 253 Ga. 227, 229, 319 S.E.2d 824, 827 (1984)).

[44] *Id.* (quoting Edelkind v. Boudreaux, 271 Ga. 314, 317, 519 S.E.2d 442, 445 (1999)).

[45] *Id.* at *14.

[46] *Id.* at *15.

[47] *Id.*

[48] *Id.* at *15-16 (Nahmias, J., concurring specially).

[49] *Id.* at *16-20.

[50] *Id.* at *19-20 (citing Montejo v. Louisiana, 129 S. Ct. 2079, 2088-89 (2009)).

[51] *Id.* at *21 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)).

[52] *Id.* at *20-21.

[53] *Id.* at *28-30.

[54] *Id.* at *30.

[55] *Id.* at *30-31.

[56] *Id.* at *31.

[57] *Id.*

[58] *Id.* at *31-32.

[59] *Id.* at *34.

[60] *Id.* at *40-41 (Hunstein, J., dissenting) (citing DeKalb Dev. Auth. v. State, 286 Ga. 36, 40 n.4, 684 S.E.2d 856, 860 n.4 (2009)).

[61] *Id.*

[62] *Id.* at *43 (footnote omitted).

[63] *Id.* at *43-44 n.9.

[64] 286 Ga. App. 110, 116, 648 S.E.2d 457, 462 (2007).

[65] 282 Ga. 76, 77-79, 646 S.E.2d 197, 199-200 (2007).

[66] 289 Ga. App. 540, 657 S.E.2d 600 (2008).

[67] O.C.G.A. § 24-3-37.1(c).

[68] 289 Ga. App. at 540, 657 S.E.2d at 601.

[69] *Id.*

[70] *Id.* at 541, 657 S.E.2d at 602.

[71] *Id.* SB3 provides as follows:

> Code Sections 51-12-31 and 51-12-33, as amended by this Act, and Code Sections 51-1-29.5, 51-2-5.1, and 51-13-1, as enacted by this Act, shall apply only with respect to causes of action arising on or after the effective date of this Act, and any prior causes of action shall continue to be governed by prior law. It is the intention of the General Assembly that all other provi-

> sions of this Act shall apply to causes of action pending on its effective date, unless such application would be unconstitutional.

2005 Ga. Laws, Act 1, § 15(b).

[72] 289 Ga. App. at 542, 657 S.E.2d at 602.

[73] 509 U.S. 579 (1993).

[74] *See* O.C.G.A. § 24-9-67.1(f).

[75] O.C.G.A. § 24-9-67.1(a).

[76] MCG Health, Inc. v. Barton, 285 Ga. App. 577, 580-82, 647 S.E.2d 81, 85-86 (2007); Mays v. Ellis, 283 Ga. App. 195, 196-98, 641 S.E.2d 201, 202-03 (2007); Abramson v. Williams, 281 Ga. App. 617, 618-19, 636 S.E.2d 765, 766-67 (2006); Cotten v. Phillips, 280 Ga. App. 280, 282-85, 633 S.E.2d 655, 657-59 (2006).

[77] Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008).

[78] 283 Ga. 398, 659 S.E.2d 346 (2008).

[79] *Id.* at 403, 659 S.E.2d at 351.

[80] *Id.* (internal quotation marks omitted). It should be noted that the plaintiff's claims arose in 1999, prior to the enactment of SB3.

[81] *Id.* at 404, 659 S.E.2d at 352.

[82] 285 Ga. 667, 681 S.E.2d 152 (2009).

[83] *Id.* at 669-72, 681 S.E.2d at 153-56.

[84] 275 Ga. 240, 563 S.E.2d 431 (2002).

[85] 285 Ga. at 669, 681 S.E.2d at 154.

[86] *Id.* at 670, 681 S.E.2d at 154.

[87] *Id.* (quoting Smethers v. Campion, 108 P.3d 946, 956 (Ariz. Ct. App. 2005)) (alteration in original).

[88] *Id.* at 672, 681 S.E.2d at 155.

[89] *Id.*

[90] *Id.* at 671, 681 S.E.2d at 155 (citing cases).

[91] No. S09A1807, 2010 Ga. LEXIS 218 (Mar. 15, 2010).

[92] *Id.* at *8.

[93] *Id.*

[94] *Id.* at *4-5 (quoting State v. Martin, 266 Ga. 244, 246, 466 S.E.2d 216, 218 (1996)).

[95] *Id.* at *9 (quoting Anderson v. Atlanta Comm. for the Olympic Games, 273 Ga. 113, 115, 537 S.E.2d 345, 348 (2000)).

[96] *Id.* at *10-11.

[97] *Id.* at *11-12 (quoting Rhodes v. State, 283 Ga. 361, 363, 659 S.E.2d 370, 372 (2008)) (second and third alterations in original).

[98] *Id.* at *11 (quoting Rouse v. Dep't of Natural Res., 271 Ga. 726, 729, 524 S.E.2d 455, 459 (1999)).

[99] *Id.* at *13 (citing Nathans v. Diamond, 282 Ga. 804, 807-08, 654 S.E.2d 121, 124-25 (2007)).

[100] *Id.* at *10-11.

[101] *Id.* at *14 (Benham, J., dissenting).

[102] *Id.* at *22.

[103] *Id.* at *22-23.

[104] *Id.* at *24.

[105] *Id.*

[106] O.C.G.A. § 51-2-5.1(c).

[107] O.C.G.A. § 51-2-5.1(f), (g).

[108] 288 Ga. App. 137, 653 S.E.2d 333 (2007), *rev'd on other grounds*, 284 Ga. 369, 667 S.E.2d 348 (2008).

[109] 220 Ga. App. 885, 886-87, 470 S.E.2d 461, 462-63 (1996).

[110] 266 Ga. App. 709, 710-13, 598 S.E.2d 6, 9-11 (2004).

[111] 288 Ga. App. at 139 n.7, 653 S.E.2d at 338 n.7.

[112] *See, e.g.*, R. Larry Phillips Constr. Co. v. Muscogee Glass, No. A09A1744, 2010 Ga. App. LEXIS 194 (Mar. 4, 2010) (finding that "the legislature intended that the right to contribution should exist independent of and before a judgment or settlement"); Green-

horne & O'Mara, Inc. v. City of Atlanta, 298 Ga. App. 261, 679 S.E.2d 818 (2009) (holding that no claim for contribution exists when proposed defendant cannot be made a joint tortfeasor because of prior ruling of court); Urban Servs. Group, Inc. v. Royal Group, Inc., 295 Ga. App. 350, 671 S.E.2d 838 (2008) (finding that contribution permitted even in the absence of a judgment); Emergency Professionals of Atlanta, P.C. v. Watson, 288 Ga. App. 473, 654 S.E.2d 434 (2007) (holding that no indemnification or contribution can be recovered by the alleged tortfeasor from a third-party if the alleged tortfeasor had a defense available which would have defeated the action but failed to assert it).

[113] Sarvis v. Cavalier Convenience, Inc., No. 06-SV-45 (State Ct. of Evans County Aug. 31, 2009) (order granting plaintiff's motion in limine to preclude apportionment of damages), *appeal docketed*, No. A10A0538 (Ga. Ct. App. Nov. 2, 2009). Another defendant in *Sarvis*, Ken's Supermarkets, Inc., filed a separate appeal on the same issue. *See* Ken's Supermarkets, Inc. v. Sarvis, No. A10A0539 (Ga. Ct. App. appeal docketed Nov. 2, 2009).

[114] O.C.G.A. § 51-12-33(a).

[115] O.C.G.A. § 51-12-33(b).

[116] O.C.G.A. § 51-12-33(c), (d).

[117] *Id.*

[118] O.C.G.A. § 51-12-33(f).

[119] No. S09A1432, 2010 Ga. LEXIS 272 (Mar. 22, 2010).

[120] *Id.* at *5 (quoting GA. CONST. art. I, § 1, para. 11(a)).

[121] *Id.* (citing Benton v. Ga. Marble Co., 258 Ga. 58, 66, 365 S.E.2d 413, 420 (1988)).

[122] *Id.* at *7-8.

[123] *Id.* at *8 (quoting Dimick v. Scheidt, 293 U.S. 474, 480 (1935)).

[124] *Id.* at *9 (quoting Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998)) (alterations in original).

[125] *Id.* at *10.

[126] *Id.* at *11.

[127] *Id.*

[128] *Id.* at *12.

[129] *Id.* at *13-15.

[130] *Id.* at *15.

[131] *Id.* at *17 n.8.

[132] *Id.* at *18.

[133] *Id.* (quoting City of Atlanta v. Barnes, 226 Ga. 449, 452, 578 S.E.2d 110, 114 (2003)).

[134] *Id.* at *19.

[135] *Id.*

[136] *Id.* at *21.

[137] *Id.* at *24 (Nahmias, J., concurring specially).

[138] *Id.* at *24-25.

CONFLICT OF INTEREST: AN UNSPOKEN *DAUBERT* FACTOR AND AN UNDENIABLE ASPECT OF RELIABILITY IN SOME CASES

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> "The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it."
>
> –Judge Richard A. Posner[1]

In the roughly five years since Georgia adopted a *Daubert*-like approach to scientific or technical testimony,[2] Georgia courts have addressed scientific reliability from various angles, but conflict of interest, or bias, does not figure prominently among them. This is due in large part to the fact that witness bias is traditionally examined in the context of credibility, not admissibility. This article explores whether Georgia courts should incorporate an analysis of conflicts of interest as part of the gatekeeping function contemplated by O.C.G.A. § 24-9-67.1(b).

GEORGIA'S RULE 702: O.C.G.A. § 24-9-67.1(b)

Nearly identical to Rule 702 of the Federal Rules of Evidence,[3] O.C.G.A. § 24-9-67.1(b) provides as follows:

> (b) 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 any 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;[4]
> >
> > (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.[5]

Where two-thirds of the enumerated admissibility criteria refer to reliability,

it begs the question: how does one determine what is reliable? "An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it."[6] "The expert's assurances that he has utilized generally accepted scientific methodology are insufficient."[7] "[T]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'"[8]

Subsection (f) notes that Georgia courts may look to *Daubert* and its progeny for guidance.[9] Consistent with *Daubert*'s interpretation of Rule 702, Georgia courts can take a two-pronged approach to interpreting subsection (b) whereby the court considers whether the proffered expert testimony is at first scientifically sound (i.e., reliable) and second, whether it is relevant to the case (i.e., a good "fit").

Conflict of interest – or, more simply, bias – is not among the factors set out by the Supreme Court in *Daubert*, but perhaps it should be in some cases. Bias is a basis for seeking recusal of a judge.[10] Should we not also look at bias when evaluating the admissibility of an expert's testimony, particularly in cases where bias seems to be interwoven with reliability? Undoubtedly, bias, or conflict of interest, has the ability to materially impair reliability.

Broadly speaking, a conflict of interest exists when one's personal and professional interests diverge. Conflict of interest is ubiquitous and does not, in and of itself, mean that the one with the conflict can no longer offer reliable opinions. But coupled with other factors, conflict of interest can lead to bias sufficient to undermine the expert's reliability.

As David Goodstein wrote in his chapter *How Science Works* in the *Reference Manual on Scientific Evidence, Daubert* and its progeny "put judges in the position of having to decide what is 'scientific' *and what is not*."[11] Separating science from pseudo-science is no small feat. In the courtroom, the two can often look very much alike. Bias is not always readily apparent. Consider a publication with undisclosed funding sources or medical research prompted by the promise of patent rights to the results – a promise about which the party relying on or opposing the research results is unaware.

Consider the expert who earns virtually all of his income from litigation consulting and testifying or the expert who relies on a professional (e.g., a researcher or a doctor) whose sole source of income is litigation-related. Surely the substance of such an expert's testimony, or the substance of the professionals' research, will bear heavily on his or her future employment in the underlying litigation.

In his article *Diagnosing for Dollars*, Roger Parloff reported on fraud perpetrated by medical screening companies working in conjunction with personal injury lawyers.[12] Thousands of individuals previously diagnosed with asbestosis were later diagnosed – through medical screening companies, not their treating physicians – with silicosis. The problem lay in the fact that it is exceedingly rare for a person to actually have both conditions. Discovery revealed that one very industrious radiologist was involved in the diagnosis of more than

75% of the thousands of silicosis cases. Until the litigation landed in the lap of a United States District Court Judge in Texas, it seemed possible that the radiologist's role, and the role of the other so-called scientists behind the silicosis litigation machine, might go unnoticed. The Texas judge determined that the doctors who screened the recycled plaintiffs were subject to discovery.[13] During that discovery, defendants learned, among other things, that the silicosis plaintiffs were prior asbestos plaintiffs. The silicosis claims unraveled from there. In an order, the judge commented that "these diagnoses were driven by neither health nor justice: they were manufactured for money. The record does not reveal who originally devised this scheme, but it is clear that the lawyers, doctors and screening companies were all willing participants."[14]

Another illustration of the impact of conflict of interest in the context of mass tort litigation was published in *Hopkins Medicine*.[15] A radiologist from Johns Hopkins School of Medicine had six doctors blindly read x-rays that had originally been read as consistent with asbestosis. Though defense lawyers orchestrated the independent review, the six doctors were not told who was sponsoring the study. Likewise, they were not told that the films had previously been read to show asbestosis. Independent review revealed that 85% of the x-rays did not show radiographic markers supporting a diagnosis of asbestosis. This was not a case of a few doctors disagreeing. All six doctors who independently reviewed the films all agreed that the purported findings simply were not there.

In 2007, defendants in asbestos mass tort cases mounted an attack on a flood of diagnoses rendered by a doctor. The doctor previously testified that it takes 60 to 90 minutes to diagnose silicosis or asbestosis. Despite this, he participated in nearly 40,000 diagnoses of asbestos-related conditions over a 13-year period. Assuming the doctor followed his own staunchly held opinion, as reflected in his testimony, that it took 60 to 90 minutes to complete a diagnosis, he would have diagnosed roughly eight people per day, every day, including holidays and weekends, for a period of 13 years.[16]

Where the Texas silicosis fiasco represents the exception, not the rule, and bias issues emanating from experts are left for consideration in conjunction with determination of witness credibility, there is a real risk that harm which cannot be undone will occur. For example, in *Diagnosing for Dollars*, Parloff noted that "the lessons of the silicosis consolidation extend beyond the asbestos scandals. A March 2005 cover story in The American Lawyer reports how the multibillion-dollar settlement of the fen-phen diet pill litigation in 2000 has been undermined by a deluge of low-level claimants identified by attorney-sponsored 'echo mills'–i.e., echocardiogram screenings. A recent audit of more than 900 claims by a panel of outside cardiologists found that almost 70% should never have been paid."[17]

Though bias is not an enumerated prong of the Supreme Court's *Daubert* analysis, even the Ninth Circuit seemed attuned to these issues when on remand of *Daubert* the court resumed consideration of the admissibility of plaintiffs' experts. "[A]part from the small but determined group of scientists testifying on behalf of the Bendectin Plaintiffs in this and many other cases, there doesn't

appear to be a single scientist who has concluded that Bendectin causes limb reduction."[18]

CONCLUSION

In some instances, particularly in high-volume tort litigation, the court should include an evaluation and analysis of bias when determining the admissibility of expert witness testimony. As counsel, we should fully explore conflicts of interest when discovering opposing experts. Likewise, we should be aware of any conceivable conflicts or biases in our own experts, as what's good for the goose is good for the gander!

ENDNOTES

1 Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996).

2 O.C.G.A. § 24-9-67.1; *see also* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

3 Rule 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact 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, (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.

FED. R. EVID. 702.

4 In *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 275, 658 S.E.2d 603, 608 (2008), the Georgia Supreme Court held that the language "which are or will be admitted into evidence at the hearing or trial" should be severed from subsection (b)(1) because it conflicted with subsection (a) and because reading those two subsections together rendered the statute unconstitutionally vague.

5 O.C.G.A. § 24-9-67.1(b) (emphasis added).

6 FED. R. EVID. 702 advisory committee's note.

7 McLain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1244 (11th Cir. 2005) (punctuation and internal quotation marks omitted).

8 FED. R. EVID. 702 advisory committee's note.

9 O.C.G.A. § 24-9-67.1(f).

10 UNIF. SUPER. CT. R. 25.

[11] REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 68 (2d ed. 2000) (emphasis added).

[12] Roger Parloff, *Diagnosing for Dollars*, FORTUNE MAG., June 13, 2005, at 95.

[13] As one of the defense attorneys noted, it was "very big deal" to be able to conduct extensive discovery of the screening doctors. Plaintiffs' counsel in mass tort cases often do not call screening doctors to testify, and as a result, the screening doctors often do not see the light of discovery.

[14] *In re* Silica Prod. Liab. Litig., MDL No. 1553 (S.D. Tex. June 30, 2005) (Order 29: Addressing subject-matter jurisdiction, expert testimony, and sanctions).

[15] Marjorie Centofanti, *True Grit: With Thousands of Asbestos Workers Demanding Compensation for Lung Disease, a Radiology Researcher Here Finds That Most Cases Lack Merit*, HOPKINS MED. (Fall 2006), *available at* http://www.hopkinsmedicine.org/hmn/F06/medical.cfm.

[16] Adam Liptak, *Defendants See a Case of Diagnosing for Dollars*, N.Y. TIMES, Oct. 1, 2007, at A14.

[17] Parloff, *supra* note 12.

[18] Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1314 (9th Cir. 1995).

LABOR AND EMPLOYMENT LAW UPDATE

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This article surveys recent developments in the state statutory and common law that affect labor and employment relations of Georgia employers.[1] Accordingly, it surveys published decisions interpreting Georgia law from June 1, 2008 to May 31, 2009. This article also includes highlights of certain revisions to the Official Code of Georgia Annotated.[2]

RECENT LEGISLATION

Modification of Covenants Not to Compete

On April 29, 2009, Governor Sonny Perdue signed into law House Bill 173,[3] which amends existing law regarding employment contracts that restrict competition,[4] but this legislation will not become effective unless Georgia passes an amendment to the Georgia Constitution.[5] House Bill 173, if it becomes effective, would allow a court to modify and limit the relief of otherwise unenforceable covenants rather than invalidate them entirely.[6] It would also provide specific guidelines for determining such covenants' enforceability.[7] Georgia law already recognizes covenants not to compete in employment contracts, but under current law, if any covenant in a given contract is unreasonable, then all remaining covenants in the same contract are unenforceable.[8] In 1991, the Georgia Supreme Court invalidated a statute that allowed judicial modification of covenants not to compete[9] on the ground that the statute defeated or les-

sened competition or encouraged monopolies in violation of the Georgia Constitution.[10] To prevent House Bill 173 from encountering similar constitutional problems, Georgia must hold a referendum in 2010 to amend its constitution to provide for the enforcement of covenants in commercial contracts that limit competition.[11] If Georgia ratifies this constitutional amendment, then House Bill 173 will become effective the following day; otherwise, House Bill 173 will be automatically repealed.[12]

WRONGFUL TERMINATION

Overview

"At-will employment" refers to employment that either an employer or an employee may terminate at any time without cause.[13] Though the employment-at-will doctrine is weakening in many jurisdictions,[14] Georgia law presumes that all employment is at-will unless there is a contractual or a statutory exception.[15] In particular, O.C.G.A. § 34-7-1 provides that an "indefinite hiring" is at-will employment.[16] Indefinite hiring includes "permanent employment," "employment for life," and "employment until retirement."[17] Reference to an annual salary does not specify a definite period of employment.[18] If an employment contract specifies a definite period of employment, any employment beyond that definite period is employment at-will.[19]

Generally, the discharge of at-will employees is not actionable[20] regardless of the employer's motives or reasons.[21] An employer's oral promise not to discharge or treat adversely an at-will employee does not modify the at-will relationship between employer and employee because oral promises are generally not enforceable by at-will employees.[22] When there is no written contract of employment, there is no cause of action against the employer for alleged wrongful termination.[23] When there is an at-will-employment contract, the terms of the employment contract are generally unenforceable.[24]

During the survey period, the United States District Court for the Northern District of Georgia held in *Soloski v. Adams*[25] that under Georgia's at-will-employment doctrine, an employer's oral promise not to find an at-will employee in violation of a sexual harassment policy in exchange for that employee's resignation is unenforceable.[26]

In *Soloski*, a female University of Georgia employee alleged that the plaintiff, the dean of the University's Grady College of Journalism, sexually harassed her verbally. The plaintiff did not deny making the comments but denied that they constituted sexual harassment.[27] The plaintiff claimed that during an investigation by the University's Office of Legal Affairs, he and the provost agreed orally that if the plaintiff resigned, the University would not find him in violation of the sexual harassment policy, and the OLA would only write positive things about him. The plaintiff resigned, and two days later the OLA officially found that the plaintiff had violated the sexual harassment policy.[28] Among other things, the plaintiff claimed that the provost and others committed fraud by making a promise not to find him in violation of the sexual harassment policy in exchange for his resignation without the intention of ever following through with that promise.[29] Under Georgia law, "'fraud can be predicated on a misrepresentation [about] a future event where the defendant knows

[such] event will not take place, [but] fraud cannot be predicated on a promise which is *unenforceable at the time it is made*.'"[30]

Among the issues before the court was whether the provost's promise, if actually made,[31] would have been enforceable at the time it was made.[32] The court held that "oral promises by employers are not enforceable by at-will employees."[33] Because the plaintiff's employment contract specifically provided that he held his "administrative title and position at the pleasure of the President," his employment was at-will under Georgia law.[34] Because the provost could have "terminate[d the] plaintiff's employment as dean for any reason at any time, any terms of the agreement reached between [the] plaintiff and [the] defendants not reduced to writing were unenforceable at the time they were made."[35] Therefore, the charge of fraud could not be supported by the alleged oral promise.[36]

Exceptions to At-Will Employment

The statute creating the employment-at-will doctrine contains a significant exception: the parties may contract otherwise.[37] During the survey period, the Georgia Court of Appeals in *Avion Systems, Inc. v. Thompson*[38] held that an employee's covenant to work for at least twelve months was enforceable, even though the employment was generally at-will.[39]

In *Avion*, the employer claimed that its former employee violated a provision in the employment contract by terminating her employment before the required term of one year. The introductory paragraph of the contract provided that the employee was a "full time employee at will," but the body of the contract provided that the employee agreed to provide services "for a minimum of twelve (12) months."[40] Among the issues before the court was whether the agreement to provide services for twelve months was invalid because it conflicted with the general provision for employment at-will.[41] The court of appeals held the agreement was valid.[42] Relying on the general rule of contract construction that "'when a [contractual] provision specifically addresses the issue in question, it prevails over any conflicting general language,'" the court reasoned that the specific provision for a minimum of twelve months' service prevailed over the conflicting general at-will language.[43] The court reasoned that this result effectuated the intent of the parties, upheld the whole contract and each of its parts, and was consistent with common practice.[44]

Continued Employment as Consideration Supporting Other Agreements

During the survey period, the United States District Court for the Northern District of Georgia held in *Dixie Homecrafters, Inc. v. Homecrafters of America, LLC*[45] that under Georgia law, a forum selection clause in a nondisclosure agreement is enforceable against at-will employees, even though the only consideration is continued employment.[46]

In *Dixie Homecrafters*, the plaintiff business organizations, citizens of Georgia, sued several business and individual defendants, alleging various torts and unlawful competition.[47] Six of the individual defendants were former employees in the plaintiff's Pennsylvania office,[48] and all six testified individually that they were not residents of Geor-

gia.[49] Three of these defendants had signed a nondisclosure agreement with the plaintiff.[50] Paragraph 6.1 of that agreement provided as follows:

> This Agreement and any disputes arising under or related thereto (whether for breach of contract, tortious conduct, or otherwise) shall be governed by the laws of the State of Georgia, without reference to its conflict of law principles. Any legal actions, suits or proceedings arising out of this Agreement (whether for breach of contract, tortious conduct, or otherwise) shall be brought exclusively in the state or federal courts of Georgia, and the parties to this Agreement hereby accept and submit to the personal jurisdiction of these Georgia courts with respect to any legal actions, suits or proceedings arising out of this Agreement.[51]

The defendants claimed that Georgia lacked personal jurisdiction over them and argued that the nondisclosure agreement was invalid because there was no additional consideration, which Pennsylvania law would require.[52] The district court applied Georgia's choice-of-law rule and held that, unlike Pennsylvania law, Georgia law "permits the signing of a non-disclosure or non-compete agreement for at-will employees with no additional consideration other than continued employment."[53] Accordingly, it found the nondisclosure agreement valid and concluded that the defendants who signed the agreement had contractually consented to Georgia's exercise of personal jurisdiction over them.[54]

NEGLIGENT HIRING OR RETENTION

Overview

Under O.C.G.A. § 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."[55] The Georgia Court of Appeals has held that this statute imposes a duty on the employer to "warn other employees of dangers incident to employment that 'the employer knows or ought to know but which are unknown to the employee.'"[56] For an employee to sustain an action for negligent hiring or retention, a plaintiff must show that the employer employed an individual who "the employer knew or should have known posed a risk of harm to others where it [was] reasonably foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff."[57] Typically, "the determination of whether an employer used ordinary care in hiring an employee is a jury issue."[58]

Evidence of Prior Similar Misconduct

During the survey period, the Georgia Court of Appeals held in *Ferman v. Bailey*[59] that evidence of an employee's previous harassment of other employees is relevant to a claim of negligent hiring and retention because it tends to show that the employer should have known that the employee posed a risk of committing similar harassment against the plaintiff.[60]

In *Ferman*, a female dental hygienist sued a male dentist for numerous tort charges and sued the dental center

where they both worked for negligent hiring and retention of that dentist. The dentist possessed a photograph of the hygienist in her bathing suit taken in Mexico on an employer-sponsored trip. He posted the picture in her workspace with the words "Ready in Mexico" written on it and told her that he would have the photograph enlarged. He habitually called her "R.I.M," which stood for "Ready in Mexico," in front of patients and other employees.[61]

The dentist followed the hygienist around the workplace so frequently that she asked other employees to accompany her to the supply room and the restroom, but the dentist habitually sent those employees to the front of the office. He told her that he wanted to play strip poker with her, then gave her a deck of cards and told her to start practicing. The following month, the dentist carried a bottle of vodka to the hygienist's home so that, according to him, they could play strip poker and probably have sex. At her home, he grabbed her and pushed her body against his. After she asked him to leave, the dentist threatened to kill her and kissed her on the mouth.[62] The jury returned a verdict in favor of the hygienist on the negligent hiring and retention claims.[63]

At trial, the hygienist presented evidence that the dental center knew the dentist had harassed other employees.[64] The dentist and the dental center argued on appeal that the trial court should not have admitted such evidence because the witnesses did not testify to tortious conduct against the plaintiff.[65] The court of appeals held that such evidence was admissible for the claim of negligent hiring and retention "because it tended to show that the Dental Center should have known that [the dentist] posed a risk of committing the same type of harassing behavior against [the hygienist]."[66]

Unrelated Criminal History

During the survey period, the United States Court of Appeals for the Eleventh Circuit held in *CSX Transportation, Inc. v. Pyramid Stone Industries, Inc.*[67] that, under Georgia law, liability for negligent hiring will not attach simply because an employee has a criminal history unrelated to the misconduct at issue in the current litigation unless that criminal history made the misconduct foreseeable.[68]

In *CSX*, the defendant's employee drove a front-end loader over railroad tracks, causing the tracks such damage that the plaintiff's train derailed. The defendant knew its employee had a criminal record.[69] The railroad argued that the employee's criminal record demonstrated "dangerous propensities to disobey rules, take things that do not belong to him, and trespass onto other people's property and damage their property" and, therefore, "a reasonable jury could find that [the defendant] breached its duty of ordinary care in hiring, retaining, training and supervising [the employee]."[70]

The Eleventh Circuit disagreed and noted that under the plaintiff's reasoning, "it would be negligent for any employer whose work includes dangerous machinery to hire an employee who has a history of violence or irresponsibility."[71] Moreover, the court pointed out that the employee was well qualified for the job because of his prior experience with dangerous heavy machinery, and "none of his past criminal conduct occurred during his prior work with such

equipment."[72] The court also noted that, under Georgia law, the causation element in the torts of negligent hiring and retention require that it be "reasonably foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff."[73] To satisfy this test, the "'victim's injuries should have been foreseen as the natural and probable consequence of hiring [or retaining] the employee.'"[74] The court held that the employee's criminal history would not make it natural and probable that he would trespass on the plaintiff's property using the defendant's equipment.[75]

RESTRICTIVE COVENANTS

Noncompete Agreements

1. Overview. Agreements that place general restraints on trade are void as against public policy.[76] Generally, noncompete agreements are disfavored in contractual relations because they place restrictions on trade, thereby reducing competition.[77] Nonetheless, courts will uphold a noncompete agreement when the agreement merely places a partial restraint upon trade.[78] In general, a noncompete agreement is valid as a partial restraint on trade when the agreement is specific and is reasonable in regard to duration, territorial coverage, and the scope of activities prohibited.[79]

Whether the terms of the noncompete agreement are reasonable is a question of law for the court to decide.[80] A questionable restriction, if not void on its face, may require the introduction of additional facts to determine whether it is reasonable.[81] However, depending on the type of contract, the court will apply different levels of scrutiny to determine the reasonableness of the contract.[82] If the noncompete agreement is ancillary to an employment agreement, a stricter standard is applied; and if any provision of that agreement is considered overbroad or unreasonable, the entire agreement is invalid.[83] But if the agreement is pursuant to a contract for the sale of a business, a less stringent standard allows for broader provisions; even if provisions of that agreement are deemed overbroad or unreasonable, the court may "blue pencil" to rewrite or sever the overly broad provisions.[84] However, "in restrictive covenant cases strictly scrutinized as employment contracts, Georgia does not employ the 'blue pencil' doctrine of severability."[85]

2. Franchise Agreements. Shortly after the survey period ended, the Georgia Supreme Court affirmed the decision of the Georgia Court of Appeals in *Atlanta Bread Co. International v. Lupton-Smith*.[86] The court held that a covenant not to compete in a franchise agreement, to be enforceable, must contain definite territorial limitations and specify the restricted activities with sufficient particularity.[87]

In *Atlanta Bread*, the plaintiff owned several franchises of the Atlanta Bread Company, and his franchise agreement contained the following restrictive covenant:

> During the term of this Agreement, neither Franchisee nor any Principal Shareholder, for so long as such Principal Shareholder owns an Interest in Franchisee, may, without prior written consent of Franchisor, directly or indirectly engage in, or acquire any financial or beneficial interest in (including any interest in corpo-

> rations, partnerships, trusts, unincorporated associations or joint ventures), advise, help, guarantee loans or make loans to, any bakery/deli business whose method of operation is similar to that employed by store units within the System.[88]

While the plaintiff owned these franchises, Atlanta Bread learned that the plaintiff had entered into a franchise agreement with PJ's Coffee, a competing business, and so Atlanta Bread terminated the plaintiff's franchise agreement on the ground that his new PJ's Coffee franchise constituted a material breach of the restrictive covenant.[89]

The court held that the restrictive covenant was unenforceable because it lacked a territorial limitation.[90] The court noted that in a franchise agreement, if any part of a restrictive covenant is unreasonable, the entire agreement is unenforceable.[91] In response to Atlanta Bread's contention that the usual rules regarding employment-context restrictive covenants should not apply to franchise agreements, the court held that a covenant not to compete in a franchise agreement should "receiv[e] the same treatment as noncompetition covenants found in employment contracts."[92] The same measure of reasonableness applies to both contracts.[93]

3. Scope of Prohibited Activities. During the survey period, the Georgia Court of Appeals held in *Azzouz v. Prime Pediatrics, P.C.*[94] that a provision in a covenant, which prohibited a pediatrician from using a broad variety of advertising venues within a five-county region for two years, was not unreasonably broad.[95]

In *Azzouz*, a pediatrician's employment contract contained a covenant prohibiting him from practicing pediatric medicine in a five-county area for two years if his employment should terminate. After the pediatrician informed his employer of his intent to leave and start his own practice in the prohibited area, the employer obtained an interlocutory injunction, from which the pediatrician appealed.[96] The pediatrician's primary claim on appeal was that the language in the restrictive covenant was ambiguous and thus overbroad.[97] The restrictive covenant provided, among other things, that

> [n]othing contained herein however shall be construed so as to prohibit the Employee from practicing medicine as a pediatrician outside the territory set forth above before the expiration of said two (2) years, or within the territory as described above after the expiration of two (2) years, nor from prohibiting the Employee from practicing specifically any specialty of medicine other than pediatrics.[98]

The agreement prohibited

> advertising in any form, including but not limited to, telephone, white and yellow pages, radio, newspaper advertisements, signage advertising, keeping or maintaining an office within the prohibited geographical area, posting web-sites showing business locations in the prohibited geographical area, or mailings to patients of Employer within the prohibited geographical area.[99]

The pediatrician argued that the covenant could "be read to mean either (1) the defendant is only barred from work-

ing as a pediatrician and advertising his services within the five-county area, or (2) the defendant is *also* barred from working in any hospital that advertises within the five-county area."[100] The court disagreed and held that in light of the clause reading "[n]othing contained herein however shall be construed so as to prohibit the Employee from practicing medicine as a pediatrician outside the territory," the agreement was unambiguous.[101]

The court then considered whether this unambiguous agreement was reasonable.[102] It held,

> With regard to the restriction on mailings to all of [the employer's] patients, there is an interplay between the scope of the prohibited behavior and the territorial restriction: "if the scope of prohibited behavior is narrow enough (e.g., contacting those with whom the employee dealt while working for the employer), the covenant may be reasonable even if it has no territorial limitation or has a territorial limitation which is very broad. But if the scope of the prohibition is broader, the territorial limitation must be specified and closely tied to the area in which the employee actually worked."[103]

The trial court concluded that the pediatrician intended to continue practicing in all five of the prohibited counties and had practiced in all five on behalf of his employer.[104] Accordingly, the court of appeals held that the restrictive covenant was reasonable.[105] Also relevant to the court's analysis was a factually similar case, *Raiford v. Kramer*,[106] in which the Georgia Supreme Court upheld a covenant that (1) had a duration of two years, (2) "applied to [a] five-county [region] where the employer's practice was located and from which it drew patients," and (3) was limited to a particular medical specialty.[107]

4. Specification with Particularity. During the survey period, the Georgia Court of Appeals held in *Avion Systems, Inc. v. Thompson*[108] that a covenant prohibiting an employee "from dealing with a client for any pecuniary gain, regardless of whether her activities were related to [the employer's] business [was] overbroad and unenforceable, as it [was] not reasonably necessary to protect the interests of [the employer]."[109] To determine the reasonableness of the covenant, the court endorsed a "three-element test of duration, territorial coverage, and scope of activity."[110] Regarding the third element of this test, the court noted that a covenant that "does not specify with particularity the nature of the business activities in which the employee is forbidden to engage is generally considered unreasonable."[111] The court held that the provision against dealing with a client for "any pecuniary gain" did not specify the prohibited activities and was thus unreasonable.[112]

Also during the survey period, the Georgia Court of Appeals held in *Global Link Logistics, Inc. v. Briles*[113] that "[a]lthough facts may be necessary 'to show that a questionable restriction, though not void on its face, is, in fact, reasonable,' a covenant containing sufficiently indefinite restrictions '[can]not be saved by additional facts' and is 'void on its face.'"[114]

In *Global Link Logistics*, the plaintiff, who left an executive position at the defendant firm and began working for a

competitor, sought injunctive and declaratory relief regarding the restrictive covenants in his employment agreement.[115] The noncompete covenant barred the plaintiff from "engag[ing] (whether as an owner, operator, manager, employee, officer, director, consultant, advisor, representative *or otherwise*), *directly or indirectly*, in any Competitive Business" and also barred solicitation of all customers and employees.[116] The agreement also contained an arbitration clause, providing that "arbitration . . . shall be the sole and exclusive method for resolving any claim or dispute . . . arising out of or relating to the rights and obligations of the parties under this Agreement."[117]

The trial court held the covenants unenforceable and denied the defendant's motion to compel arbitration regarding the covenants. The defendant appealed, contending that the trial court abused its discretion in finding the covenants unenforceable and in refusing to submit the entire matter to arbitration.[118] The court of appeals noted that "'[w]hether [a] restraint imposed by [an] employment contract is reasonable is a question of law for determination by the court, which considers the nature and extent of the trade or business, the situation of the parties, and all the other circumstances.'"[119] The court of appeals thus reviewed the trial court's denial of the motion to compel arbitration in terms of its correctness as a matter of law.[120] Under Georgia law, "'[a] noncompetition covenant which prohibits an employee from working for a competitor in any capacity, that is, a covenant which fails to specify with particularity the activities which the employee is prohibited from performing, is too broad and indefinite to be enforceable.'"[121] Thus, the court held the covenant unenforceable.[122] Because the plaintiff did not hold any interest in the defendant company, the lesser scrutiny afforded to covenants ancillary to the sale of a business did not apply in this case; therefore, the covenants could not be judicially modified to make them acceptable.[123]

Nondisclosure Agreements

The court of appeals also held in *Global Link Logistics* that a nondisclosure clause was overbroad and unenforceable because the clause had no time limitation and prohibited the defendant from disclosing or using for his own purposes "the information (including lists of customers or potential customers), observations, customer and vendor relationships and data (including trade secrets) obtained by him while employed by the Company."[124]

Also during the survey period, the Georgia Court of Appeals held in *Atlanta Bread Co. International, Inc. v. Lupton-Smith*[125] that a nondisclosure restriction in a franchise agreement—which forbade the franchisee from appropriating or disclosing the franchisor's trade secrets—was reasonable insofar as it pertained to information meeting the statutory definition of a trade secret.[126] The nondisclosure clause provided as follows:

> Neither Franchisee nor any Shareholder shall at any time (i) appropriate or use the trade secrets incorporated in the System, or any portion thereof, in any business which is not within the System, (ii) disclose or reveal any portion of the System to any person, other than to Franchisee's Store employees as an incident of their training, . . . (iv) communi-

> cate, divulge or use for the benefit of any other person or entity any confidential information, knowledge or know-how concerning the methods of development or operation of a store utilizing the System, which may be communicated by Franchisor in connection with the franchise granted hereunder.[127]

The court noted that under Georgia law, a "nondisclosure clause with no time limitation, as here, is unenforceable as to information that is not a trade secret."[128] Therefore, it held that this nondisclosure clause was only enforceable with regard to trade secrets as defined by O.C.G.A. § 10-1-761(4).[129] The court also held that the issue of whether a party has disclosed a trade secret is a question of fact for the jury to determine.[130]

Nonsolicitation Agreements

The court of appeals held in *Global Link Logistics* that a nonsolicitation agreement barring an employee from soliciting any of the employer's customers, present or future suppliers, or employees for twenty-four months was unenforceable.[131] However, because this nonsolicitation was discussed only in conjunction with the same contract's unenforceable noncompete agreement,[132] and because under Georgia law the unenforceability of one part of a restrictive covenant will render the entire covenant unenforceable,[133] it does not appear that the nonsolicitation agreement at issue was essential to the judgment.

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, or trial law, it is important to recognize that any one law or legal proceeding can and does impact other relations between employer and employee.

ENDNOTES

[1] This article is printed with the express permission of the *Mercer Law Review* and can be found in its original publication format at W. Melvin Haas, III et al., *Labor and Employment Law, Annual Survey of Georgia Law*, 61 MERCER L. REV. 213 (2009).

[2] Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See, e.g.*, THE DEVELOPING LABOR LAW (John E. Higgins, Jr. et al. eds., 5th ed. 2006); BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (4th ed. 2007).

[3] Ga. H.R. Bill 173, Reg. Sess., 2009 Ga. Laws 231 (codified at O.C.G.A. §§ 13-8-2, -50 to -59 (1982 & Supp. 2009)).

[4] *Id.*, 2009 Ga. Laws at 231 ("AN ACT To amend Chapter 8 of Title 13 of the Official Code of Georgia Annotated, . . . to provide for the enforcement of contracts that restrict

or prohibit competition in certain commercial agreements; to provide for the judicial enforcement of such provisions; to provide for the modification of such provisions . . . .").

[5] *Id.* § 4, 2009 Ga. Laws at 246 ("This Act shall become effective on the day following the ratification at the time of the 2010 general election of an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition and shall apply to contracts entered into on and after such date and shall not apply in actions determining the enforceability of restrictive covenants entered into before such date. If such amendment is not so ratified, then this Act shall stand automatically repealed.").

[6] *Id.* § 3, 2009 Ga. Laws at 243 (codified at O.C.G.A. § 13-8-54 (Supp. 2009)) ("[I]f a court finds that a contractually specified restraint does not comply with [certain provisions], then the court may modify the restraint provision and grant only the relief reasonably necessary to protect [legitimate business interests established by the person seeking enforcement] and to achieve the original intent of the contracting parties to the extent possible.").

[7] *Id.*, 2009 Ga. Laws at 242-43, 244-46 (codified at O.C.G.A. §§ 13-8-53, -55 to -58 (Supp. 2009)).

[8] Ward v. Process Control Corp., 247 Ga. 583, 584, 277 S.E.2d 671, 673 (1981) ("If any covenant not to compete within a given employment contract is unreasonable either in time, territory, or prohibited business activity, then all covenants not to compete within the same employment contract are unenforceable.").

[9] O.C.G.A. § 13-8-2.1(g)(1) (Supp. 2009), *invalidated by* Jackson & Coker, Inc. v. Hart, 261 Ga. 371, 371, 405 S.E.2d 253, 254 (1991), *and repealed by* Ga. H.R. Bill 173, § 2, 2009 Ga. Laws at 232-37. The statute provided as follows:

> Every court of competent jurisdiction shall enforce through any appropriate remedy every contract in partial restraint of trade that is not against the policy of the law or otherwise unlawful. In the absence of extreme hardship on the part of the person or entity bound by such restraint, injunctive relief shall be presumed to be an appropriate remedy for the enforcement of the contracts described in subsections (b) through (d) of this Code section. If any portion of such restraint is against the policy of the law in any respect but such restraint, considered as a whole, is not so clearly unreasonable and overreaching in its terms as to be unconscionable, the court shall enforce so much of such restraint as it determines by a preponderance of the evidence to be necessary to protect the interests of the parties that benefit from such restraint. Such a restraint shall be subject to partial enforcement, whether or not it contains a severability or similar clause and regardless of whether the unlawful aspects of such restraint are facially severable from those found lawful.

O.C.G.A. § 13-8-2.1(g)(1).

[10] *Jackson & Coker*, 261 Ga. at 371-72, 405 S.E.2d at 254 (citing GA. CONST. art. III, § 6, para. 5(c) ("The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly . . . .")).

[11] Ga. H.R. Bill 173, § 4, 2009 Ga. Laws at 246.

[12] *Id.*

[13] BLACK'S LAW DICTIONARY 566 (8th ed. 2004).

[14] W. Melvin Haas, III et al., *Labor and Employment Law, Annual Survey of Georgia Law*, 60 MERCER L. REV. 217, 219 (2008) ("[T]he employment-at-will doctrine is gradually eroding in other jurisdictions.") (citing Mark A. Fahleson, *The Public Policy Exception to Employment at Will—When Should Courts Defer to the Legislature?*, 72 NEB. L. REV. 956 (1993); Melanie Robin Galberry, Note, *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); Kimberly Anne Huffman, Note, Salt v. Applied Analytical, Inc.*: Clarifying the Confusion in North Carolina's Employment-at-Will Doctrine*, 70 N.C. L. REV. 2087 (1992); Cortlan H. Maddux, Comment, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997); Richard J. Pratt, Comment, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197 (1990)).

[15] *E.g.*, Zimmerman v. Cherokee County, 925 F. Supp. 777, 781 (N.D. Ga. 1995) (citing O.C.G.A. § 34-7-1).

[16] O.C.G.A. § 34-7-1 (2008).

[17] Ga. Power Co. v. Busbin, 242 Ga. 612, 613, 250 S.E.2d 442, 443-44 (1978) (per curiam).

[18] Gatins v. NCR Corp., 180 Ga. App. 595, 597, 349 S.E.2d 818, 820 (1986).

[19] Schuck v. Blue Cross & Blue Shield of Ga., Inc., 244 Ga. App. 147, 148-49, 534 S.E.2d 533, 535 (2000).

[20] Balmer v. Elan Corp., 278 Ga. 227, 228, 599 S.E.2d 158, 160-61 (2004).

[21] Mr. B's Oil Co. v. Register, 181 Ga. App. 166, 167, 351 S.E.2d 533, 534 (1986) ("[When] the plaintiff's employment is terminable at will, the employer, with or without cause and regardless of the motives involved, can discharge the employee without incurring liability. Lengthy allegations regarding the motives or reasons for the firing are legally irrelevant.").

[22] *Balmer*, 278 Ga. at 228-29, 599 S.E.2d at 161.

[23] *Id.*; *see also* Jacobs v. Georgia-Pacific Corp., 172 Ga. App. 319, 320, 323 S.E.2d 238, 239 (1984).

[24] Rodriguez v. Vision Corr. Group, Inc., 260 Ga. App. 478, 479, 580 S.E.2d 266, 268 (2003).

[25] 600 F. Supp. 2d 1276 (N.D. Ga. 2009).

[26] *Id.* at 1320.

[27] *Id.* at 1290-91.

[28] *Id.* at 1294-95.

[29] *Id.* at 1317.

[30] *Id.* at 1320 (quoting Studdard v. George D. Warthen Bank, 207 Ga. App. 80, 81, 427 S.E.2d 58, 59 (1993)).

[31] *Id.* at 1317 (noting that the provost denied ever making such a promise).

[32] *Id.* at 1319.

[33] *Id.* at 1320.

[34] *Id.* at 1319-20.

[35] *Id.* at 1320.

[36] *Id.*

[37] O.C.G.A. § 34-7-1.

[38] 293 Ga. App. 60, 666 S.E.2d 464 (2008). This is a later procedural instance of *Avion Systems, Inc. v. Thompson*, 286 Ga. App. 847, 650 S.E.2d 349 (2007), *rev'd*, 284 Ga. 15, 663 S.E.2d 236 (2008), *discussed in* Haas, *supra* note 14, at 221-22. For further discussion of this case, see *infra* notes 108-12 and accompanying text.

[39] 293 Ga. App. at 60-61, 666 S.E.2d at 465-66.

[40] *Id.* at 61, 666 S.E.2d at 466.

[41] *Id.* at 62, 666 S.E.2d at 467.

[42] *Id.* at 62-63, 666 S.E.2d at 467.

[43] *Id.* at 63, 666 S.E.2d at 467 (quoting Woody's Steaks, LLC v. Pastoria, 261 Ga. App. 815, 818, 584 S.E.2d 41, 44 (2003)). In *Avion Systems*, "although the employment was generally at-will, it was subject to [the employee's] agreement to refrain from terminating her employment for [twelve] months." *Id.*

[44] *Id.*

[45] No. 1:08-CV-0649-JOF, 2009 WL 596009 (N.D. Ga. Mar. 5, 2009).

[46] *Id.* at *6.

[47] *Id.* at *1.

[48] *Id.*

[49] *Id.* at *1-3 (discussing the residence of each employee defendant and their contacts with Georgia).

[50] *Id.* at *4.

[51] *Id.*

[52] *Id.*

[53] *Id.* at *6. The court explained, "'[i]n a case founded on diversity jurisdiction, the district court must apply the forum state's choice of law rules.'" *Id.* (quoting Federated Rural Elec. Ins. Exch. v. R.D. Moody & Assocs., Inc., 468 F.3d 1322, 1325 (11th Cir. 2006)).

[54] *Id.*

[55] O.C.G.A. § 34-7-20 (2008).

[56] Tecumseh Prods. Co. v. Rigdon, 250 Ga. App. 739, 740, 552 S.E.2d 910, 912 (2001) (quoting O.C.G.A. § 34-7-20).

[57] Munroe v. Universal Health Servs., Inc., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004) (internal quotation marks omitted).

[58] *Tecumseh Prods. Co.*, 250 Ga. App. at 741, 552 S.E.2d at 912 (citing Sparlin Chiropractic Clinic, P.C. v. TOPS Pers. Servs., Inc., 193 Ga. App. 181, 181-82, 387 S.E.2d 411, 412 (1989)).

[59] 292 Ga. App. 288, 664 S.E.2d 285 (2008).

[60] *Id.* at 290, 664 S.E.2d at 287.

[61] *Id.* at 288-89, 664 S.E.2d at 286-87.

[62] *Id.* at 289, 664 S.E.2d at 287.

[63] *Id.* at 288, 664 S.E.2d at 286.

[64] *Id.* at 291, 664 S.E.2d at 288.

[65] *Id.* at 290, 664 S.E.2d at 287.

[66] *Id.*

[67] 293 F. App'x 754 (11th Cir. 2008) (per curiam).

[68] *Id.* at 756.

[69] *Id.* at 755. The court did not discuss the specific nature of the employee's criminal history other than that it involved the employee's "irresponsibility for others' property." *Id.* at 756.

[70] *Id.* at 755 (internal quotation marks omitted).

[71] *Id.* at 756.

[72] *Id.*

[73] *Id.* (internal quotation marks omitted).

[74] *Id.* (quoting TGM Ashley Lakes, Inc. v. Jennings, 264 Ga. App. 456, 459, 590 S.E.2d 807, 813 (2003) (en banc)) (alteration in original).

[75] *Id.*

[76] O.C.G.A. § 13-8-2(a)(2) (1982 & Supp. 2009).

[77] JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW § 2:11 (4th ed. 2008).

[78] *Id.*

[79] W.R. Grace & Co. v. Mouyal, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992); *see also* WIMBERLY, *supra* note 77, § 2:11.

[80] *Mouyal*, 262 Ga. at 465, 422 S.E.2d at 531.

[81] Koger Props., Inc. v. Adams-Cates Co., 247 Ga. 68, 69, 274 S.E.2d 329, 331 (1981).

[82] WIMBERLY, *supra* note 77, § 2:11.

[83] *Id. But see supra* notes 3-12 and accompanying text.

[84] WIMBERLY, *supra* note 77, § 2:11 n.35.

[85] Advance Tech. Consultants, Inc. v. Roadtrac, LLC, 250 Ga. App. 317, 320, 551 S.E.2d 735, 737 (2001). *But see supra* notes 3-12 and accompanying text.

[86] 285 Ga. 587, 679 S.E.2d 722 (2009).

[87] *Id.* at 591, 679 S.E.2d at 725.

[88] *Id.* at 588, 679 S.E.2d at 723 (internal quotation marks omitted).

[89] *Id.*, 679 S.E.2d at 724.

[90] *Id.* at 591, 679 S.E.2d at 725.

[91] *Id.*

[92] *Id.* at 589, 679 S.E.2d at 724.

[93] *Id.*

[94] 296 Ga. App. 602, 675 S.E.2d 314 (2009).

[95] *Id.* at 607, 675 S.E.2d at 319.

[96] *Id.* at 602, 675 S.E.2d at 316.

[97] *Id.* at 603, 675 S.E.2d at 317.

[98] *Id.* (internal quotation marks omitted).

[99] *Id.* at 604, 675 S.E.2d at 317 (internal quotation marks omitted).

[100] *Id.*

[101] *Id.* at 604-05, 675 S.E.2d at 318 (alteration in original) (internal quotation marks omitted).

[102] *Id.* at 606, 675 S.E.2d at 319-20.

[103] *Id.*, 675 S.E.2d at 319 (quoting Chaichimansour v. Pets are People Too, No. 2, Inc., 226 Ga. App. 69, 71, 485 S.E.2d 248, 250 (1997)).

[104] *Id.* at 607, 675 S.E.2d at 319.

[105] *Id.*

[106] 231 Ga. 757, 204 S.E.2d 171 (1974).

[107] *Azzouz*, 296 Ga. App. at 607, 675 S.E.2d at 319 (citing *Raiford*, 231 Ga. at 758, 204 S.E.2d at 172).

[108] 293 Ga. App. 60, 666 S.E.2d 464 (2008). For further discussion of this case, see *supra* notes 38-44 and accompanying text.

[109] 293 Ga. App. at 64, 666 S.E.2d at 468 (internal quotation marks omitted).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] 296 Ga. App. 175, 674 S.E.2d 52 (2009). For further discussion of this case, see *infra* notes 131-33 and accompanying text.

[114] 296 Ga. App. at 177, 674 S.E.2d at 54 (quoting *Koger Props., Inc.*, 247 Ga. at 69, 274 S.E.2d at 331) (second alteration in original).

[115] *Id.* at 175, 674 S.E.2d at 53.

[116] *Id.* at 178, 674 S.E.2d at 55 (alteration in original) (internal quotation marks omitted).

[117] *Id.* at 176, 674 S.E.2d at 54.

[118] *Id.* at 175, 675 S.E.2d at 53.

[119] *Id.* (quoting Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 292, 498 S.E.2d 346, 350 (1998)) (alterations in original).

[120] *Id.*

[121] *Id.* at 178, 675 S.E.2d at 55 (quoting Nat'l Teen-Ager Co. v. Scarborough, 254 Ga. 467, 469, 330 S.E.2d 711, 713 (1985)).

[122] *Id.*

[123] *Id.* at 177, 675 S.E.2d at 55.

[124] *Id.* at 175, 177-78. 674 S.E.2d at 53-54, 55 (internal quotation marks omitted).

[125] 292 Ga. App. 14, 663 S.E.2d 743 (2008), *aff'd*, 285 Ga. 587, 679 S.E.2d 722 (2009). The supreme court did not address the nondisclosure restriction. For a discussion of the supreme court's opinion, see *supra* text accompanying notes 86-93.

[126] 292 Ga. App. at 20, 663 S.E.2d at 748.

[127] *Id.* at 16, 663 S.E.2d at 745-46 (internal quotation marks omitted).

[128] *Id.* at 20, 663 S.E.2d at 748.

[129] *Id.* The statute provides as follows:

> "Trade secret" means information, without regard to form, including, but not limited to, technical or nontechnical 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 which is not commonly known by or available to the public and which information:
>
> > (A) Derives 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) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

O.C.G.A. § 10-1-761(4) (2009).

[130] *Atlanta Bread Co.*, 292 Ga. App. at 21, 663 S.E.2d at 749.

[131] 296 Ga. App. at 175-76, 178, 674 S.E.2d at 54, 55. For further discussion of this case, see *supra* notes 113-23 and accompanying text.

[132] 296 Ga. App. at 178, 674 S.E.2d at 55 ("The noncompete covenant at issue here bars [the employee] from 'engag[ing] (whether as an owner, operator, manager, employee, officer, director, consultant, advisor, representative *or otherwise*), *directly or indirectly*, in any Competitive Business,' and also bars solicitation of all [the employer's] customers as well as employees. As such, it is unenforceable." (second alteration in original)).

[133] *See, e.g.*, Trujillo v. Great S. Equip. Sales, LLC, 289 Ga. App. 474, 478, 657 S.E.2d 581, 584 (2008) ("Because the nonsolicitation clause was unenforceable, the noncompetition clause included in the agreement was likewise unenforceable.").

The Hindsight Charge: The Past and Future

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Recently, in *Smith v. Finch*,[1] the Georgia Supreme Court issued a much-anticipated ruling on what is called the "hindsight charge," commonly given in medical malpractice cases. *Smith* will have a significant effect on future litigation in medical malpractice cases. Interestingly, during the appellate litigation involving *Smith*, there was some concern amongst defense counsel that the Supreme Court may flatly reject the hindsight charge. Certainly, while the result in *Smith* was not that advocated by the defense, the Supreme Court's ruling is on balance a positive for the defense of medical malpractice cases in the future.

This article provides a brief history of the hindsight charge, an analysis of the Supreme Court's opinion in *Smith*, and a prognosis for the future of the hindsight charge in medical malpractice cases.

A HISTORY OF THE HINDSIGHT CHARGE

The hindsight charge was first approved in *Haynes v. Hoffman*.[2] The hindsight charge, as approved in *Haynes*, reads as follows:

> [I]n a medical malpractice action, a defendant cannot be found negligent on the basis of an assessment of a patient's condition which only later, or in hindsight, proved to be incorrect, as long as the initial assessment was made in accordance with the then reasonable standards of medical care. In other words . . . the concept of negligence does not encompass hindsight. In other words, negligence consists in not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely and slightly possible.[3]

This hindsight charge is included in the pattern jury instructions adopted by the Council of Superior Court Judges of Georgia with only slight changes.[4] Much of the appellate litigation involving the hindsight charge before *Smith* focused on when and under what evidentiary circumstances the hindsight charge should be given. The Georgia Court of Appeals determined that the following criteria should be used to determine when to give the hindsight charge in a medical malpractice case:

> In a medical malpractice case, a hindsight charge is authorized where the evidence raises an issue as to whether the negligence claim is based on later acquired knowledge or information not known or reasonably available to the defendant physician at the time the medical care was rendered.[5]

The so-called "after-acquired knowledge" test was the subject of more than a dozen decisions by the Court of Appeals between 1982 and 2009. Two of the leading cases are discussed here.

In *Horton v. Eaton*,[6] the plaintiffs alleged the defendant-radiologist failed to interpret an emergency room x-ray and diagnose Mr. Horton's spinal fracture. The defendant-radiologist presented evidence at trial that he became aware of all of Mr. Horton's symptoms and complaints only after he interpreted the x-ray. As such, the defense contended there was a contested issue at trial as to whether the plaintiffs' claim was based on information the defendant-radiologist became aware of after he interpreted the x-ray.

Based on this, the Court of Appeals ruled that the hindsight charge was properly given.[7] The Court of Appeals reasoned that the hindsight charge was appropriate because the parties disputed what the defendant-radiologist knew or should have known at the time he examined the plaintiff's x-rays, and because there was evidence to show that the defendant-radiologist became aware of Mr. Horton's complaints only after he evaluated the x-ray.[8] In short, the Court of Appeals approved of the hindsight charge because there was an evidentiary issue as to whether the plaintiffs' claim was based on after-acquired knowledge.

In *Cherry v. Schwindt*,[9] Thomas Cherry died from a heart condition called aortic dissection. The issue at trial was whether the defendants were negligent because they failed to diagnose this condition. The plaintiff alleged that the defendants missed obvious signs and symptoms evident during Mr. Cherry's initial presentation at the emergency room that indicated aortic dissection.[10]

The plaintiff argued that the trial court erred in charging the jury on hindsight. However, the evidence was disputed about whether aortic dissection was the most likely diagnosis based on Mr. Cherry's presenting symptoms. The evidence at trial showed that Mr. Cherry did not present with the most common symptoms of aortic dissection, and that, to the contrary, his symptoms suggested the presence of other maladies, including a heart attack and unstable angina.[11]

The Court of Appeals concluded that the evidence raised an issue about whether the defendants had "sufficient indication, in the form of Mr. Cherry's presenting symptoms, that aortic dissection was one of the most likely possibilities, thereby requiring immediate testing in lieu of pursuing other leads."[12] Therefore, the Court of Appeals went on to hold that "the hindsight charge was appropriate."[13] In short, the Court of Appeals held that the evidence raised an issue about whether the plaintiff's claim was based on after-acquired information (in the form of changing symptoms). This, the Court of Appeals held, justified the hindsight charge.

Clearly, one of the pre-*Smith* deficiencies in the hindsight charge was the "after-acquired knowledge" test itself. Counsel (and no doubt trial judges) were

often left wondering exactly what sort of evidence authorized the hindsight charge. This was in no small part the result of the somewhat awkward formulation of the "after-acquired knowledge" test and some Court of Appeals' decisions which were difficult to reconcile. Frankly, it was difficult to always predict exactly what evidence would show that an issue had been raised "as to whether the negligence claim is based on later acquired knowledge or information not known or reasonably available to the defendant physician at the time the medical care was rendered."[14] Applying the evidence in a given medical malpractice case to such a test certainly required the skills of very capable counsel, if not a magician.

SMITH V. FINCH

In *Smith*, the defendants argued that the evidence satisfied the "after-acquired knowledge" test. In the defendants' view, the plaintiffs' claim against the doctors was based on information that was not known or reasonably available to the doctors on the days in which the doctors treated the plaintiffs' child. Specifically, the defendants argued that the hindsight charge was authorized because the child's rash at issue in the case did not become consistent with Rocky Mountain Spotted Fever (which was the ultimate diagnosis) until after the doctors treated the child. Both the trial court and the Court of Appeals agreed with the defendants' argument, holding that the "after-acquired knowledge" test was satisfied and that the hindsight charge was justified.[15]

Once the Supreme Court granted certiorari, the defendants argued more broadly that the hindsight charge was consistent with Georgia law. Specifically, the defendants argued that it is well established in Georgia that a person is required to foresee and guard against that which usually happens or is likely to happen but is not required to anticipate or foresee that which is unusual and not likely to happen or, in other words, that which is only remotely and slightly possible.[16] This longstanding principle of Georgia negligence law tracks nicely with the wording of the hindsight charge.

In *Ellington v. Tolar Construction Co.*,[17] Justice Hall provided a helpful insight into negligence law, explaining as follows:

> Negligence consists of exposing another to whom one owes a duty, or exposing oneself, to a foreseeable unreasonable probability of harm. Reasonable foresight does not require of a plaintiff or a defendant that he anticipate exactly what will happen and exercise perfect judgment to prevent injury. Not what actually happened, but what the reasonably prudent person would then have foreseen as likely to happen, is the key question of reasonableness. *Negligence is predicated on faulty or defective foresight rather than on hindsight which reveals a mistake.*[18]

As one can imagine, the defendants in *Smith* highlighted quotes like this, which are found throughout Georgia law, against the plaintiffs' challenge that the hindsight charge was inconsistent with Georgia law. Put simply, the defendants argued that, under longstanding principles of Georgia law, foreseeability (as opposed to hindsight) is a necessary predicate before liability can be

imposed for negligence. In the absence of foreseeability (despite the presence of hindsight), liability for negligence cannot be imposed. The hindsight charge merely crystallizes this longstanding principle of law.

The principle of negligence based on foreseeability (and not hindsight) tracks the hindsight charge originally approved in *Haynes*. The hindsight charge merely ensures that the jury understands that a finding of negligence must be "*predicated on faulty or defective foresight rather than on hindsight*."[19] The defendants in *Smith* argued that Georgia law on negligence bases liability on foreseeability and prohibits liability based on hindsight. For these reasons, the hindsight charge is entirely consistent with Georgia law on negligence.

Moreover, the defendants argued that the hindsight charge is necessary to give in certain medical malpractice cases to ensure that the jury is warned against making judgments based on knowledge known at the trial, but not previously known to the doctors. Doctors are routinely criticized by experts who have the benefit of hindsight. Without the admonition to guard against the temptation to judge based on hindsight, a jury may very well allow hindsight to taint its judgment, especially when much of the testimony they consider comes from experts who have the benefit of hindsight.

The defendants also argued that the hindsight charge is consistent with other areas of Georgia law. Judgments based on hindsight are not only strongly disfavored in Georgia negligence law but also repudiated in criminal law. In *Venegas v. State*,[20] a criminal defendant challenged his conviction based on ineffective assistance of counsel. In evaluating the claim, the Court of Appeals held that the defendant must show that his counsel's representation fell below an objective standard of reasonableness without resort to hindsight. "*Hindsight is not the measuring rod to be utilized in such situations*, but whether [some] reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial."[21]

Under Georgia law, hindsight is the enemy to a proper adjudication of negligence and ineffective-assistance-of-counsel claims. The defendants in *Smith* went on to argue that what is good for a lawyer must also be good for a doctor. In truth, *no defendant* can be properly judged if the toxicity of hindsight creeps in to the jury's judgment, a risk that becomes particularly acute in malpractice cases where experts criticize with the benefit of hindsight. For that reason, the hindsight charge, consistent with Georgia negligence law, must be authorized in certain cases so that defendants are safeguarded from the poison of hindsight.

These arguments, while compelling to the defendants, were not persuasive to the Supreme Court. In *Smith*, the Supreme Court carefully analyzed the three sentences that comprise the hindsight charge. The Supreme Court determined that the final sentence of the hindsight charge is inconsistent with the "medical decision-making process."[22] Also, the Supreme Court determined that this final sentence was inconsistent with the standard of foreseeability in Georgia negligence law.[23] How this final sentence is inconsistent was not clearly explained. However, the Supreme Court seemed to rely on the fact that the standard of care for physicians often requires a differential diagnosis metho-

dology where a physician considers all potential diagnoses of a patient's symptoms and then methodically eliminates certain diagnoses based on examination, clinical testing, and case history.[24] The Supreme Court determined that because a physician may in fact be required to consider what may be deemed "only remotely and slightly possible," the last sentence of the hindsight charge is inconsistent with a physician's standard of care.[25]

The Supreme Court then went on to hold that the second sentence of the hindsight charge is duplicative of the first sentence and adds nothing to the jury's understanding of the law.[26] Therefore, the Supreme Court disapproved of the second sentence of the hindsight charge.[27] Fortunately, the first sentence of the hindsight charge was approved as a non-controversial statement of the law that juries should apply in medical malpractice cases.[28] This was certainly good news for medical malpractice defendants.

A LOOK FORWARD

Perhaps most beneficial to medical malpractice defendants is footnote 3 of *Smith*. There, in discussing the first sentence of the hindsight charge, the Supreme Court noted that this portion of the instruction is appropriate in any medical malpractice case in which "the facts warrant it."[29] The Supreme Court explained that the hindsight charge should be given where a negligence claim is based in whole or in part on the assertion that the physician made an incorrect assessment of a patient's condition.[30] In footnote 5 of *Smith*, the Supreme Court expressly disapproved of the "after-acquired knowledge" standard.[31] The *Smith* test would seem to encompass almost any medical malpractice claim in which "failure to diagnose" is alleged. This formulation is clearly superior to the awkward "after-acquired knowledge" test and will hopefully make the job of deciding when the charge should be given easier for both counsel and trial judges.

Based on footnote 3, defendants in the future will argue that the hindsight charge should be given in any medical malpractice case that concerns patient assessments or diagnoses in any way. It will also be important to highlight exactly what portion of the hindsight charge the Supreme Court approved:

> In a medical malpractice action, a defendant cannot be found negligent on the basis of an assessment of a patient's condition that only later, in hindsight, proves to be incorrect as long as the initial assessment was made in accordance with reasonable standards of medical care.[32]

This charge, if given in a medical malpractice case, will clearly permit defense counsel to argue to jurors that they must "stand in the shoes" of their clients and judge them based only on what was known at the time of assessment or diagnosis. The argument will continue, as it has before, that jurors cannot and should not judge the doctor based on what is known to everybody now. Judgments based on hindsight are still not allowed.

Of course, this article should not be seen as an effort to "sugar coat" *Smith*. Obviously, for defense counsel, the preferable result would have been to approve the hindsight charge in whole. The original hindsight charge is clearly a statement of the law that is consistent

with longstanding principles of Georgia law. Moreover, *Smith* seems to rest on unexplained, if not weak, logic. However, footnote 3 of *Smith* was clearly welcomed and unexpected. The impact of footnote 3 is only beginning to be felt, but there is no doubt that it should simplify and broaden the impact of the hindsight charge. And for that, defense counsel – and, more importantly, their clients – can be glad.

ENDNOTES

[1] 285 Ga. 709, 681 S.E.2d 147 (2009), *rev'g* Smith v. Finch, 292 Ga. App. 333, 665 S.E.2d 25 (2008). The author and his firm were involved in litigating this case at both the trial and appellate levels.

[2] 164 Ga. App. 236, 296 S.E.2d 216 (1982), *overruled by* Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009).

[3] *Id.* at 237, 296 S.E.2d at 218.

[4] COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. I: CIVIL CASES § 62.311 (5th ed. 2007).

[5] Cherry v. Schwindt, 262 Ga. App. 48, 51, 584 S.E.2d 673, 675 (2003), *overruled by* Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009) (internal quotation marks omitted).

[6] 215 Ga. App. 803, 452 S.E.2d 541 (1994) (en banc).

[7] *Id.* at 807, 452 S.E.2d at 545.

[8] *Id.*

[9] 262 Ga. App. 48, 584 S.E.2d 673 (2003), *overruled by* Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009).

[10] *Id.* at 48-49, 584 S.E.2d at 674.

[11] *Id.* at 49, 584 S.E.2d at 674.

[12] *Id.* at 51, 584 S.E.2d at 676.

[13] *Id.*

[14] *Id.*, 584 S.E.2d at 675 (internal quotation marks omitted).

[15] 292 Ga. App. 333, 665 S.E.2d 25 (2008), *rev'd*, 285 Ga. 709, 681 S.E.2d 147 (2009).

[16] *See, e.g.*, Ellington v. Tolar Constr. Co., 237 Ga. 235, 238, 227 S.E.2d 336, 339 (1976); Timmons v. Cook, 287 Ga. App. 712, 714, 652 S.E.2d 604, 607 (2007); Mills v. Jack Eckerd Corp., 224 Ga. App. 785, 786, 482 S.E.2d 449, 450 (1997); Savannah Bank

& Trust Co. v. Weiner, 193 Ga. App. 616, 617, 388 S.E.2d 725, 726 (1989); Eckerd-Walton, Inc. v. Adams, 126 Ga. App. 210, 212-13, 190 S.E.2d 490, 492 (1972); Feldman v. Whipkey's Drug Shop, 121 Ga. App. 580, 581, 174 S.E.2d 474, 475 (1970); Shockley v. Zayre of Atlanta, Inc., 118 Ga. App. 672, 675, 165 S.E.2d 179, 182 (1968); Daneker v. Megrue, 114 Ga. App. 312, 313, 151 S.E.2d 157, 158 (1966); Misenhamer v. Pharr, 99 Ga. App. 163, 168, 107 S.E.2d 875, 879 (1959) (physical precedent).

[17] 237 Ga. 235, 227 S.E.2d 336 (1976).

[18] *Id.* at 238, 227 S.E.2d at 339 (citation and internal quotation marks omitted) (emphasis added).

[19] *Id.*

[20] 285 Ga. App. 768, 647 S.E.2d 422 (2007).

[21] *Id.* at 770, 647 S.E.2d at 424 (internal quotation marks omitted) (alteration in original).

[22] 285 Ga. at 710, 681 S.E.2d at 149.

[23] *Id.*

[24] *Id.* at 711, 681 S.E.2d at 150.

[25] *Id.*

[26] *Id.* at 712, 681 S.E.2d at 150-51.

[27] *Id.*

[28] *Id.* at 711, 681 S.E.2d at 150.

[29] *Id.* at 711 n.3, 681 S.E.2d at 150 n.3.

[30] *Id.*

[31] *Id.* at 713 n.5, 681 S.E.2d at 151 n.5.

[32] COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, *supra* note 4.

Insurance Coverage: Chinese Drywall Claims

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Between 2004 and 2008, Chinese drywall was installed in more than 100,000 homes in the United States.[1] Since that time, it has been discovered that Chinese Drywall emits sulfide gases, damaging property and raising human health concerns. As a result, homeowners are filing class actions and builders are filing a myriad of suits against the manufacturers and distributors of Chinese drywall.[2] In response to this litigation, insureds will likely turn to both their property and liability carriers for coverage.[3] To provide additional guidance when attempting to litigate the coverage issues that will undoubtedly arise, this article draws decisions from multiple jurisdictions to provide an overview of the types of claims and defenses that can be expected from first-party liability insurers.

PROPERTY DAMAGE LIABILITY COVERAGE

A threshold issue when determining whether coverage exists is whether the damage can be considered a "direct physical loss" as defined by the policy. Although case law is somewhat scarce on the issue of whether construction defects constitute "direct physical loss," the trend suggests that construction defects do not constitute a loss. For example, in *Whitaker v. Nationwide Mutual Fire Insurance Co.*,[4] the court held that a claim for the cost to repair poor workmanship did not constitute a direct physical loss. The court explained that "the language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state."[5]

Despite the trend, there are recent cases recognizing that the odor element of a Chinese drywall claim does constitute a physical injury for insurance coverage purposes. To illustrate, in the liability context, the court in *Essex Insurance Co. v. BloomSouth Flooring Corp.*[6] concluded that allegations regarding odor constituted physical injury within the scope of coverage under a CGL poli-

cy. Accordingly, an analysis of the Chinese drywall property damage claim should include a thorough evaluation of the different manners in which the insured could present the claim.

EXCLUSIONS

Next, insurers will also need to evaluate whether particular exclusions apply to deny or restrict coverage. In the homeowner's policy context, this would generally include the following types of exclusions.

Pollution Exclusion

A typical pollution exclusion provides that coverage is excluded for bodily injury and property damage:

> arising out of the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant, pollutant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and waste.

Courts have usually interpreted this policy language in a narrow fashion, requiring that the insurer satisfy a high standard of proof as to whether a particular substance is in fact an irritant, pollutant, or contaminant. For example, in *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Co.*,[7] the court held:

> The terms "irritant" and contaminant," when viewed in isolation, are virtually boundless, for there is virtually no substance or chemical in existence that would not irritate or damage some person or property. Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by someone who slips and falls on the spilled contents of a bottle of Drano, and for bodily injuries caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.[8]

Per the court's rationale, the controlling factor is whether a reasonable policyholder would characterize the hazard as pollution. Accordingly, under *Pipefitters*, a court must determine whether a reasonable insured would consider the emission of gases from drywall to fall within the meaning of the exclusion.[9]

In addition, courts must also determine what constitutes "discharge," "dispersal," or "release" under the pollution exclusion. Although limited, several courts have addressed this issue in the context of indoor air quality claims, and have held that the policy terms should be narrowly construed. For example, in *Lumbermens Mutual Casualty Co. v. S-W Industries, Inc.*,[10] the court was faced with whether to classify fumes in a manufacturing plant as a "discharge," "dispersal" or "release." In refusing to so classify the fumes, the court reasoned:

> It strains the plain meaning, and obvious intent of the language to suggest that these fumes, as they went from the container to lungs,

> had somehow been "discharged, dispersed, released or escaped." Or considering that the fumes were confined to a work area, that they had been discharged into the "atmosphere" as that word is ordinarily understood.[11]

With the limited case law applying the pollution exclusion to indoor air, it is impossible to determine exactly how a court will interpret this exclusion within the context of Chinese drywall. However, given that other jurisdictions have rejected the pollution exclusion in indoor air cases, there is a significant likelihood that Georgia courts will apply the same reasoning and reject the pollution exclusion when presented in this context.

Water Exclusion

As many of the hazardous effects of Chinese drywall arise when the drywall is exposed to water, many first-party homeowners insurance claims may fall with the scope of water damage exclusions. Because water and the hazardous effects both contribute to the damage, an analysis of concurrent causation may be the determinative factor as to whether coverage is provided. This analysis will also require consideration of the policy's "anti-concurrent causation" language, which provides that there is no coverage when a loss arises from both an excluded peril and a covered peril. Such language is routinely approved by courts.[12]

"Inherent Vice" Exclusion

For this discussion, a final exclusion that may apply to Chinese drywall claims relates to damage caused by "mechanical breakdown, latent defect, inherent vice, or any quality in property that causes it to damage or destroy itself." Although such claims appear to fall with in the plain language of the exclusion, courts have been skeptical of this argument.

For example, in *NUCO Investments, Inc. v. Hartford Fire Insurance Co.*,[13] an insurer cited the "inherent vice" exclusion as a reason for denying coverage in a mold damage case. Specifically, the insurer argued that a combination of the wall covering used, water, and a lack of an exhaust system all contributed to mold growth. The court rejected the argument, holding that "the fact that numerous conditions converged to increase moisture in the walls of the hotel resulting in mold damage is simply insufficient to allow the court to conclude that each and every one of these conditions is inherent vice or latent defect."[14] In applying *NUCO Investments* to the Chinese drywall claim, it seems unlikely that Georgia courts will allow the "inherent vice" exclusion to defeat a homeowners claim.

CONCLUSION

We expect the number of Chinese drywall claims to continue to increase. Accordingly, insurers should be mindful of the issues involved. Homeowners will have significant opportunities for insurance coverage, while insurers will be setting precedent with regard to policy interpretation and the application of certain exclusions to these claims.

ENDNOTES

[1] Brian Skoloff & Cain Burdeau, *Drywall From China Might Pose Risks*, COURIER-JOURNAL (Louisville), Apr. 12, 2009, at A1.

[2] *See, e.g.*, Morlas v. Knauf Gips KG, No. 2:09-CV-03265-EEF-JCW (E.D. La. filed Apr. 9, 2009); Chauffe v. Knauf Gips KG, No. 2:09-CV-03215-EEF-JCW (E.D. La. filed Apr. 2, 2009); Whitfield v. Knauf Gips KG, No. 1:09-CV-00234-LG-RHW (S.D. Miss. filed Mar. 27, 2009); Minafri v. M/I Homes, Inc., No. 2:09-CV-00167-ALM-NMK (S.D. Ohio filed Mar. 5, 2009); Harrell v. South Kendall Constr. Corp., No. 09-8401 (Miami-Dade County Cir. Ct. filed Feb. 3, 2009).

[3] *See, e.g.*, Builders Mut. Ins. Co. v. Dragas Mgmt. Corp., No. 2:09-CV-00185-RBS-TEM (E.D. Va. filed Apr. 23, 2009); Baker v. American Home Assurance Co., No. 2:09-CV-00188-CEH-DNF (M.D. Fla. filed Mar. 30, 2009).

[4] 115 F. Supp. 2d 612 (E.D. Va. 1999).

[5] *Id.* at 616 (punctuation and internal quotation marks omitted).

[6] 562 F.3d 399 (1st Cir 2009).

[7] 976 F.2d 1037 (7th Cir. 1992).

[8] *Id.* at 1043 (citation and internal quotation marks omitted).

[9] *Id.*

[10] 39 F.3d 1324 (6th Cir. 1994).

[11] *Id.* at 1336.

[12] *See, e.g.*, South Carolina Farm Bureau Mut. Ins. Co. v. Durham, 671 S.E.2d 610 (S.C. 2009); Bao v. Liberty Mut. Fire Ins. Co., 535 F. Supp. 2d 532 (D. Md. 2008).

[13] No. 1:02-CV-1622-CAP, 2005 WL 3307089 (N.D. Ga. Dec. 5, 2005).

[14] *Id.* at *6.

A Primer on Premises Liability

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This article will bring the reader up to date on the current state of premises liability law in Georgia. Premises liability covers a broad spectrum of cases, including slip and fall, trip and fall, and negligent security claims, among others. Dram shop liability is also covered.

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 *Flowers v. Wal-Mart Stores, Inc.*,[2] the risk was a defective ladder that collapsed beneath an employee. 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, Inc. v. Doe*,[3] a woman sued the owner of her apartment complex for negligent security after being raped in her first-floor apartment.

Georgia law is clear regarding what a plaintiff must prove. For a plaintiff to recover from a premises owner, she "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.

Constructive knowledge is when a party objectively *should have known* of a hazard but subjectively did not.[6] A plaintiff proves the defendant's constructive knowledge one of two ways: (1) by demonstrating that the defendant's employee was in the vicinity of the hazard with the opportunity to discover or remove it; 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 defendants in a personal injury suit arising out of the plaintiff's 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 the plaintiff testified that the hazard was visible (even though she did not see it before she fell).

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

THE SUMMARY JUDGMENT STANDARD

As practitioners are well familiar, many defendants pursue early resolution through a motion for summary judgment in premises liability cases. In *Lau's Corp. v. Haskins*,[10] the Supreme Court set forth the following 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."[11]

The Supreme Court established a high standard for premises liability cases in *Robinson v. Kroger Co.*[12] The evidence must be "plain, palpable, and undisputed."[13] Thus, "[w]here reasonable minds can differ as to the conclusion to be reached with regard to questions of 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."[14]

Under this standard, many claims survive summary judgment. In *Rozy Investments, Inc. v. Bristow*,[15] the 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.[16] Thus, although the plaintiff used this pump for 60 years, the Court of Appeals 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.

The 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."[17] The court disagreed, stating that "[o]ur law does not require . . . [the plaintiff] keep her eyes firmly on the ground."[18] Citing *Robinson*, it held "the plaintiff's lack of ordinary care for personal safety" was a triable issue of fact.[19]

Compare, however, *Garrett v. Hanes*,[20] wherein the Court of Appeals affirmed summary judgment, noting that the plaintiff did not notice that the porch extended slightly over the top

step. Instead, she was looking up. She could not recover for tripping over the overhanging edge because she should have seen it, the step was not negligently designed, constructed, or maintained, and—although the step was part of the defendant's home—the defendant did not have superior knowledge of the risk. A similar case is *Rowland v. Murphy Oil USA, Inc.*,[21] where the Court of Appeals affirmed summary judgment to the owner of a gas station. The plaintiff tripped and fell over the legs of an advertising sign. The court found the owner 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] the plaintiff slipped in a 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 because it was not enough to prevent her fall. The Court of Appeals 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 the 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 of Appeals noted that "[a]lthough [the plaintiff], as nonmovant, is entitled to all reasonable inferences from the evidence presented, such inferences cannot be based upon mere conjecture or possibility."[28] The plaintiff tripped over boxes while entering her darkened office on a 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 Corp.*, the court held the defendant demonstrated that "there is no evidence to support at least one essential element" of the plaintiff's claim and that the plaintiff could not point to specific competent evidence as to a fact question. Thus, summary judgment was appropriate.

In contrast, credibility and conflicting accounts may create an issue of fact. In *Fuchs v. Wal-Mart Stores, Inc.*,[30] the 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, the plaintiff testified that the cashier's sloppy attempt to stuff the pack into a small bag caused the cola to spill and the 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]

In *McNeely v. Wal-Mart Stores, Inc.*,[32] wherein the Court of Appeals overturned summary judgment for the defendant "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." The evidence showed the following:

> The key to [the defendant's] defense was 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.[33]

The Court of Appeals held that "[i]t 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."[34] "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."[35]

A plaintiff also may not create a question of fact and avoid summary judgment through contradictory testimony.[36]

Notably, the weight of *the defendant's* burden is often unclear. Many plaintiffs believed that the higher standard adopted in *Robinson* would uniformly defeat defendants' motions for summary judgment. However, in *Cleveland v. Snowdrop Properties, N.V.*,[37] 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."

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 following express language of the Supreme Court in *Lau's Corp.*:

> 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.[38]

In spite of this apparent mandate, the Court of Appeals has carved out an exception for premises liability cases in-

volving 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.

In *Ingles Markets, Inc. v. Martin*,[39] the defendant contended that summary judgment was appropriate because the plaintiff could not show how long the slippery liquid was on the floor. The court "emphatically rejected" the defendant's motion for summary judgment and held that the defendant had the *initial burden* to introduce evidence of a reasonable inspection.[40] It specifically held that "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."[41]

Also, in *Straughter v. J.H. Harvey Co.*,[42] the Court of Appeals reversed the trial court's grant of summary judgment for the defendant. The plaintiff slipped on a "green item" in the grocery store.[43] The plaintiff did not have to show how long the item was there until the defendant presented evidence of its inspection procedure. To meet this burden, the defendant submitted "sweep cards" documenting the inspections. The court held that "even if the cards were admissible, they do not establish defendant's [actual] compliance with reasonable inspection and cleaning procedures."[44] Because it could not adequately show it followed this procedure on the day of the accident, the 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 Supreme Court precedent. Moreover, this approach also contradicts the Court of Appeals' precedent. In *Sharfuddin v. Drug Emporium, Inc.*,[45] the Court of Appeals did not require affirmative evidence from the defendant. 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.
>
> . . . .
>
> 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.*[46]

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

The Court of Appeals continues to apply the higher *Straughter* standard.[47] Still, in *Patrick v. Macon Housing Authority*,[48] the Court of Appeals cited the *Straughter* standard but held, "The cir-

cumstances 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."[49] However, in *Patrick*, the 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."[50] Thus, the 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 a defendant's additional evidentiary burden on summary judgment *does not apply at trial.* At trial, the plaintiff continues to have the burden of proving each element of the claim.

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."[51] This alternative to the plaintiff's prima facie requirements "allows an inference of negligence," even though the plaintiff lacks affirmative evidence of negligence.[52]

Alternatively, res ipsa loquitur requires the plaintiff to show (1) the injury sustained would not ordinarily occur absent negligence; (2) the injury was caused by an agency or instrumentality within the defendant's exclusive control; and (3) the injury was not due to any voluntarily action or contribution by the plaintiff.[53]

Exclusive control is the linchpin in the plaintiff's case and must exist "at the time of the accident."[54] Still, older cases explain that 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.'"[55]

However, courts apply res ipsa loquitur "with caution and only in extreme cases; and it does not apply when there is an intermediary cause which could have produced the injury."[56]

Several cases establish the evidentiary burden for a plaintiff injured by a falling object in the defendant's store. In *Sams v. Wal-Mart Stores, Inc.*,[57] cookware fell from a shelf and struck the plaintiff from behind. She claimed the store negligently stacked the items. Because the boxes were "within the reach of other customers," the plaintiff could not establish exclusive control.[58] Summary judgment was appropriate.

In *Metts v. Wal-Mart Stores*,[59] the plaintiff could produce no evidence regarding the events surrounding her injury. "[The plaintiff] did not know what caused the boxes to fall, nor did she see any employee in the area where she was hit by the boxes."[60] Citing *Sams*, the Court of Appeals held the 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."[61]

In *Green v. Home Depot U.S.A, Inc.*,[62] a janitor knocked a box of light bulbs onto the plaintiff's head. The Court of Appeals 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."[63] 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."[64]

The Court of Appeals held that the trial 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.[65]

PREMISES CASES: ADEQUATE INSPECTION

Like other premises liability cases, in a slip-and-fall case involving a foreign substance, the plaintiff must show (1) that the defendant had actual or constructive knowledge of the foreign substance on its floor, and (2) that the plaintiff had no knowledge of the substance or was unable to discover it by some act of the defendant.[66] Most summary judgment cases involve constructive knowledge because proof of actual knowledge is rare.

As discussed above, a plaintiff can prove a 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 effected its discovery."[67] On the other hand, a defendant may obtain summary judgment by demonstrating it had a reasonable inspection program and followed it on the day in question. A defendant may also prevail if it can demonstrate that the area was inspected shortly prior to the fall, whether or not it had a formal "inspection program."[68]

Constructive knowledge turns on the facts. In *Quarles v. Georgia Service Systems, LLC*,[69] 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."

The Court of Appeals rejected the 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."[70] However, 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."[71]

The evidence showed that the mat never caused anyone else to fall and that the plaintiff was the only person who ever complained that it was unsafe. In fact, on 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; the plaintiff failed to demonstrate constructive knowledge.

In contrast, the Court of Appeals held in *Valentin v. Six Flags Over Ga., L.P.*,[72] that the defendant was not entitled to summary judgment because 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.

Similarly, in *Hicks v. Walker*,[73] the defendants were not entitled to summary judgment because the Court of Appeals recognized several bases for constructive knowledge. *Hicks* involved a visiting child who was 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."[74]

However, in *Wingo v. Harrison*,[75] the Court of Appeals reversed the trial court's denial of summary judgment because there was no 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 was not clear how old the deck was, however.) The 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 the Wingos' attention after they moved in."[76] Moreover, next to the section "Deck(s) – Rot Observed," the condition column was blank. This "obviously indicates that none had been" observed.[77]

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."[78] In fact, the practice was acceptable. The court stated that "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."[79]

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

In *Thomas v. Deason*,[80] the Court of Appeals affirmed the grant of summary judgment to the homeowner because the plaintiff failed to show that he had actual or constructive knowledge of the alleged hazard—a hole in the flat, grassy area to the side of his house. The plaintiff testified that the hole was not visible because grass obscured it. The homeowner 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 the homeowner did not have constructive knowledge of the hole, since the hole was difficult to see and the plaintiff failed to show that by ordinary care in inspecting the premises, the homeowner could have discovered and remedied the hazard.

The plaintiff prevailed in *Gibson v. Halpern Enterprises*,[81] wherein 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 parking lot, which the owner had recently repaved. The court held that a jury question remained as to whether the 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 Ga. 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.[82]

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. 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.

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.[83]

In *Leibel v. Sandy Springs Historic Community Foundation, Inc.*,[84] the Court of Appeals affirmed summary judgment for the defendant. The 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. The 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 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.

In contrast, the Court of Appeals affirmed the entry of a judgment upon a jury verdict for the plaintiff in *Augusta Country Club, Inc. v. Blake*.[85] The plaintiff 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. In affirming the judgment for the plaintiff, the court held 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 also that the employee responsible for blowing the walkway did not do so that morning. The court distinguished the "naturally occurring" cases by holding,

> [T]he 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.[86]

In *Walker v. Sears Roebuck & Co.*,[87] the Court of Appeals 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." 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 was entitled to summary judgment because it did not have superior knowledge of the hazard.

In *Escobedo v. Wal-Mart Stores, Inc.*,[88] the Northern District of Georgia recently granted summary judgment to the owner and summarized Georgia's "rainy day slip and fall" jurisprudence as follows:

> Georgia courts have considered these general rules in light of the specific circumstances of "rainy day slip and fall" cases. . . . Under Georgia law, the owner of such premises is not an insurer of safety of persons invited therein, nor is there any presumption of negligence on the part of the owner or occupier merely upon a showing of injury. The [Georgia Court of Appeals] further stated that:
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> > It is common knowledge that when people enter any building in rainy conditions, moisture is tracked in and the inside of the door is likely to be wet; it is a matter of common knowledge that some water will normally be present where shoppers pass during rainy weather. It is not the duty of persons in control of such buildings to keep a large force of moppers to remove the rain as fast as it collects. The duty owed to such invitees is one of ordinary care, or to protect against an unreasonable risk of harm. The risk of harm imposed by some accumulation of water on the floor of business premises during rainy days is not unusual or unreasonable in itself, but is one to which all who go out on a rainy day may be exposed and which all may expect or anticipate.

> 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. Thus, Georgia courts have determined that the common knowledge of the fact that patrons bring rain in with them from outdoors on a rainy day which can then accumulate in entrance ways, is a risk of harm shared by all who go out on a rainy day. Ultimately, 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.
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> Here, Plaintiff acknowledged that it was raining heavily on the evening in question. Defendant has presented undisputed evidence that two bright orange cones in the entryway warned customers of the presence of accumulated water from the rain. Store associates were frequently mopping the entrance area, providing umbrella bags to patrons, and drying buggies before bringing them into the store. No evidence has been presented that the accumulation of water was unusual.[89]

The Court of Appeals continues to assert that slippery conditions caused by rainwater present no unreasonable risk of harm.[90] In *Flagstar Enterprises, Inc. v. Burch*,[91] the Court of Appeals reversed the trial court's denial of summary judgment 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 it was 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.

Still, the plaintiff can prove that a combination of the rainwater *and other factors* gave the defendant superior knowledge. In *Flournoy v. Hospital Authority of Houston County*,[92] the 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 v. Smith*,[93] this testimony defeated summary judgment because it created a fact question about whether the plaintiff had equal knowledge of the hazard posed by this combination of factors. Thus, "[t]he 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."[94]

Under the theory that no good deed goes unpunished, a theater which set up an A-frame "Wet Floor" sign over a spill outside the theater door just before a movie ended, was sued by a patron who tripped over the sign after it had fallen over and was lying flat on the floor. Her vision was obscured by the people around her, and she did not see the sign until her toe caught in the handle. She fell and was injured. In *American Multi-Cinema, Inc. v. Brown*,[95] the Supreme

Court held that the theater was not entitled to summary judgment. The question was whether the patron "presented evidence that would have enabled a rational jury to find the theater had actual or constructive knowledge of the tripping hazard that injured the patron. The theater argued that it knew the sign was there but did not know it was a hazard. But the patron presented evidence that such signs tended to collapse on contact with moving crowds, constituted a tripping hazard when knocked over, and should not be used in high-traffic areas. A jury could well find that the theater was in a better position that the patron to ascertain the risks to the public of the various approaches to addressing spills, and that on these facts, the theater should be liable for premises liability."

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."[96] 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."[97]

In *Nair v. Aramark Food Service Corp.*,[98] the lessor, Emory University, was *not* entitled to summary judgment. The plaintiff was injured when he sat on the cafeteria's 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."[99] However, this table was not clearly under either party's control.

In *Green v. Home Depot U.S.A, Inc.*,[100] the Court of Appeals 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 the 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."[101] 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."[102] 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.[103]

O.C.G.A. § 44-7-14 determines a landlord's liability to third parties injured on his leased property.[104] This statute 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.[105]

Accordingly, an out-of-possession landlord can be held liable in tort to a

third party only if the landlord constructed the structure which caused damages, if he failed to keep the premises in repair, or if he had knowledge of the hazard.[106] Note, however, that "defective construction exists only in cases where the structure is built by [the landlord] in person or under his supervision or direction."[107]

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."[108] For example, in *Ray v. Smith*,[109] summary judgment was appropriate where the plaintiff fell through the closet ceiling located next to an interior skating ramp constructed by the tenant. In this case, the Court of Appeals 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.

"PREMISES OR APPROACHES"

A plaintiff cannot recover if she cannot show she was on the defendant's premises or approaches.[110] For example, in *Harris v. Inn of Lake City*,[111] the Court of Appeals stated,

> Under OCGA § 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. In this context, the term "approach" has been defined
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> > 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.
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> 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 plaintiffs' 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. Nor did the plaintiffs' injuries occur within the last few steps taken by invitees. 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.[112]

PLAINTIFF'S EQUAL OR ACTUAL KNOWLEDGE

The plaintiff cannot recover if he has equal knowledge of the risk, assumed the risk, or negligently created the risk. As the Court of Appeals recently wrote, "[r]ecovery is allowed only when the proprietor had knowledge and the invitee did not."[113] 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."[114] The Court of Appeals explained, "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."[115]

To prove knowledge, a defendant can use direct or circumstantial evidence. The Court of Appeals has held that, "when 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."[116]

In *Right Stuff Food Stores, Inc. v. Gilchrist*,[117] 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."[118] Under these facts, the Court of Appeals held that the trial court erred in denying summary judgment to the gas station because the plaintiff had actual knowledge of the hazard and was therefore unable to establish that the proprietor had superior knowledge of it.[119]

In *Gantt v. Dave & Busters of Ga., Inc.*,[120] the Court of Appeals affirmed summary judgment for the proprietor of a restaurant/gaming establishment. The plaintiff and her sister stepped onto a raised platform to play a video game. After playing games, the plaintiff stepped down the same step and fell. Although she looked, she could not 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.[121] Still, the court held that the plaintiff had equal knowledge of the step-down because she had successfully negotiated the step-up. She could not recover because she had constructive knowledge of the step.

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."[122] In fact, the plaintiff asserted that she was looking where she was walking.

In *Trans-Vaughn Development Corp. v. Cummings*,[123] the 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 . . . ."[124] The 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."[125] She also knew that the rear entrance "had always been 'free-swinging' and lacked 'tension' to prevent it from flinging open."[126] Because she had equal knowledge, she was unable to recover.[127]

In *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 knowledge, thereby extinguishing the premises liability claim.

The equal or superior knowledge defense also succeeded in *Sudduth v. Young*.[129] There, an at-home caregiver sued the infirm homeowner when she slipped and fell on the hallway floor. The 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 the plaintiff produced no evidence of the homeowner's superior knowledge or even a hazardous condition. In contrast, the plaintiff used the hallway for three nights before the fall; her knowledge of the hallway's condition was at least equal to the homeowner's. The court reiterated, "the law is clear that when 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]

More recently, the plaintiff's equal knowledge of the hazard barred her recovery in *Kim v. Municipal Market Co.*[132] There, the Court of Appeals affirmed summary judgment for the market because the plaintiff had equal knowledge of the leaking cooler:

> [W]hile there had been no repair of the problem leak, nothing done by the landlord prior to [the plaintiff's] fall distracted her from the hazard created by water leaking from the cooler and the wet floor sign placed in the area. Rather, knowing that the leak was persistent but unpredictable, [the plaintiff] walked directly into the area where the water leaked without looking at the floor. In doing so, [the plaintiff] either chose not to be or forgot to be careful of the known specific danger. The fact that the water's presence was intermittent would mandate more, rather than less, care from the tenant who was aware that, if present, the water would present a hazard to her.[133]

Still, the plaintiff avoided summary judgment in *Barton v. City of Rome*.[134] The Court of Appeals 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."[135] The city had constructive knowledge of defective design and construction. The fact that the plaintiff dumped his trash weekly did not bar his claim.[136]

PLAINTIFF'S ASSUMPTION OF RISK OR NEGLIGENCE

A plaintiff's voluntary action, "in view of her knowledge, assumes the risks and dangers incident to the known condition."[137] Importantly, assumption of the risk requires the plaintiff's *actual knowledge*; constructive knowledge is insufficient. "Knowledge of the risk is the watchword of assumption of risk, and means both *actual* and *subjective* knowledge on the plaintiff's part."[138] If the plaintiff assumes the risk, he has a heightened duty to act for his own safety.[139]

Courts mandate that, to assume a risk, the plaintiff's knowledge must be to "the specific, particular risk of harm associated with the activity or condition that proximately causes injury."[140] In *Flowers v. Wal-Mart Stores, Inc.*,[141] the 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."[142] Moreover, the ladder's warning labels did not put him on notice. The court found that "there is no evidence that [the 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."[143]

The plaintiff may also prevail if he proves that he did not voluntarily assume a risk. In *Gillis v. Foodonics International, Inc.*,[144] the plaintiff cited 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."[145] In these cases, the plaintiffs did not exercise "free choice."[146] In *Gillis*, the 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 and that she could have used the dry inside stairwell. Although the plaintiff 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.[147]

The Court of Appeals has carved out another exception: the necessity rule. This rule allows "tenants to pursue their premises liability claims even though they had knowingly risked injury."[148]

In *Norman v. Jones Lang LaSalle Americas, Inc.*,[149] the plaintiff argued that her equal knowledge was immaterial because she *had to* navigate past the boxes that caused her fall and that she had no alternative route into her dark office. Rejecting this argument, the Court of Appeals clarified the scope of the necessity rule. It is "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.'"[150] The rule did not apply in *Norman* because the building was *commercial*.[151] Furthermore, the plaintiff could not show the boxes obstructed the doorway or that they were an "unavoidable hazard that would have prevented her from entering or leaving."[152]

On a different note, the 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.*,[153] the plaintiff could not recover because the sole proximate cause of his injury was his own negligence. The plaintiff was responsible for changing light bulbs on Six Flags' 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. The 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 of Appeals held that the plaintiff, himself, was to blame: "[The plaintiff] violated OSHA regulations and NFPA standards governing electrical safety in numerous respects. Most importantly, he failed to 'deenergize' (shut off power to) the scoreboard . . . . In connection with this failure, he also failed to lock out or tag the circuit energizing the part . . . or to confirm that the circuit was deenergized."[154] Finally, the

plaintiff "failed to use a ladder with *non-conductive siderails*" and "failed to use insulated tools or personal protective equipment properly rated for the voltage."[155] The plaintiff's acts of negligence per se were the proximate cause of his injury; thus, he could not recover.

In a recent case affirming a directed verdict for an apartment complex, the Court of Appeals held the complex was not liable for the drowning death of a 10-year-old child in an apartment complex swimming pool. The Court found that the decedent was capable of appreciating the risk associated with swimming in the pool.[156]

In *La Quinta Inns, Inc. v. Leech*,[157] the Court of Appeals reversed the denial of the defendants' motion for summary judgment since there was no evidence that that the hotel guest's suicide was triggered by anything that the defendants did or failed to do and the guest's act of suicide was the sole proximate cause of his death.

SUPERIOR KNOWLEDGE BY DEFENDANT

A plaintiff cannot recover unless he demonstrates that the defendant had superior knowledge of the hazard.[158] In *Klein v. Weaver*,[159] a limb fell from the defendant's tree and struck the plaintiff. The 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."[160]

In *Fernandez v. Georgia Theatre Co. II*,[161] a battered patron could not recover from the theater owner. The plaintiff was seated in the theater when another patron entered, cursing loudly. This patron sat behind the plaintiff and his family and continued to curse loudly for the next several minutes. The plaintiff's sister suggested they move. Instead, the plaintiff 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 the plaintiff got up, the man asked him where he was going. The plaintiff replied that he was getting the theater manager. The loud man then body-slammed the plaintiff 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*,[162] 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.[163]

In *Diaz v. Wild Adventures, Inc.*,[164] the Court of Appeals affirmed the grant of summary judgment to Wild Adventures Theme Park, holding that the plaintiff 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. The plaintiff 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 occur when it rains, and accidents happen in such circumstances." There was no evidence that the park had knowledge of any hazard other than the rainwater of which the plaintiff had equal knowledge; and the plaintiff could not show constructive knowledge, since the undisputed evidence showed that the park cleaned the floor of the ride every morning.

The Court of Appeals recently held that, where both the plaintiff and the defendant have *no* knowledge of a hazard, the defendant is entitled to summary judgment. In *Norman v. Jones Lang LaSalle Americas, Inc.*,[165] the court reasoned that, because the defendant was as naive as the plaintiff, the plaintiff had "knowledge of the hazard . . . *equal to or greater than*" the defendant.[166] Because neither knew more than the other, recovery was barred.

However, when there is evidence that both the plaintiff and the defendant had knowledge of the defect, superior knowledge may be a question for the jury. In *Flowers v. Wal-Mart Stores, Inc.*,[167] the court recognized that both the defendant and the plaintiff had knowledge. There, the store manager commented that he knew the ladder was defective before it collapsed beneath the 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."[168] 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."[169]

FORESEEABILITY

In *McAfee v. ETS Payphones, Inc.*,[170] the 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-damaged phone would fall on his head while the plaintiff was kneeling on the ground and pulling on the phone cord, the plaintiff could not recover.

In *Thomas v. Home Depot, U.S.A., Inc.*,[171] the Court of Appeals 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 his cart with the sharp tips protruding through the front of the cart and then push the cart forward just as the plaintiff 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 plaintiff 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.

NO DUTY – O.C.G.A. § 51-3-1 APPLIES ONLY TO OWNERS AND OCCUPIERS

The defendant's duty is normally the first element a plaintiff must prove. Duty is usually presumed in premises liability cases, but it is important to recognize that O.C.G.A. § 51-3-1 imposes an affirmative duty of ordinary care only on *owners and occupiers*. In *Dixon v. Infinity Broadcasting East, Inc.*,[172] the Court of Appeals affirmed the grant of summary judgment to Infinity in the plaintiff's suit for injuries she sustained when her foot was allegedly caught in an indentation on a stage at a conference that was held on the Georgia World Congress Center's premises and sponsored by two Infinity-owned radio stations. The court held that the plaintiff'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 that Infinity was a mere licensee with permission to use those facilities.

NO REQUIREMENT 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 the defendant's duty is foreseeabilty: "one 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."[173] Still, "[t]here is no duty to warn of the obvious."[174]

In *Sisson v. Elliott*,[175] the Court of Appeals held that the defendants had no reason to know of the hazard and could not be liable for failure to remove it. The 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 the plaintiff's argument that the owners were liable per se under O.C.G.A. § 44-1-14, which authorizes the county to fill an abandoned well or hole, for not reporting the well to the county. The court noted that "the abandoned well or hole on [the defendants'] property did not become an 'open' abandoned well or hole until after [the plaintiff] stepped into it."[176] Moreover, the owners did not construct the well and the former owner misrepresented that it was filled. The defendants had no duty to report the well to the county or fill it themselves.

The court also held that "[b]ecause 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 the plaintiff of its existence.[177] This duty would exceed the limits of ordinary diligence. The court explained, "[t]o 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."[178] This would effectively make the proprietors "absolutely liable for all defective conditions on their property."[179]

PROOF OF FAULT AND NEGLIGENCE PER SE

If the plaintiff cannot point to *any evidence* that the defendant breached his duty of ordinary care, summary judgment is appropriate. In *Norman v. Jones Lang LaSalle Americas, Inc.*,[180] 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 for blaming the defendant; he must be negligent. When the plaintiff could only prove she fell over boxes, there was no superior knowledge of a hazard to create fault.

In *Pirkle v. Robson Crossing, LLC*,[181] the court affirmed summary judgment to the premises owner after the 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."[182] Instead, the plaintiff testified that she did not appreciate the curb's height. The plaintiff's failure was unforeseeable; protecting against it would impose an extraordinary duty.

Similarly, in *Hamblin v. City of Albany*,[183] 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. The 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*,[184] the Court of Appeals again denied recovery. In this case, a family sued the owner and manager (collectively, "landlord") of an 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 thirteen feet of grass before striking Leslie and crushing her against the brick wall of her apartment building."[185] The plaintiffs argued the landlord should have installed "a 'barrier curb' or 'bumper stop' instead of the lower, mountable curb" to protect their daughter.[186] Summary judgment was appropriate because "there was no competent evidence that the landlord had a duty" to install the higher bumper stops.[187]

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, the plaintiffs' expert opined the landlord should 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 federal, state, or local laws mandating the use of bumper

stops or 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.[188]

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 bumper stops in front of the plaintiffs' apartment building "when it installed the devices in front of the leasing office." There was "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 landlord on notice that the bumper stops may be necessary safety precaution.

The court explained that "[d]uty cannot be divorced from foreseeability."[189] An event is not foreseeable if it is an "extraordinary 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."[190] The death was a remote possibility and an "extraordinarily rare event[]."[191] Thus, the landlord had no duty to guard against it.

In *Mock v. Kroger Co.*,[192] the plaintiff slipped on a small puddle of water while cutting through an empty Kroger checkout lane. The 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 did not bag the produce. The plaintiff argued that Kroger had constructive knowledge because it knew about this risk. It should have posted signs to require all produce to be bagged, and it should have assigned employees to ensure compliance and warn customers of the risk.

The 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*,[193] 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 the plaintiff had no evidence the defendant had knowledge that the step was a hazard. Even with a handrail, causation was a problem because the plaintiff did not remember trying to catch herself. Thus, the fall was a result of her own negligence. The plaintiff knew that there was no handrail and that residents were usually assisted climbing onto the stage.[194]

In *Walker v. Bruhn*,[195] the 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 customer asked to have the saw plugged in to make sure it worked. The plaintiff plugged in the saw, which immediately started running and cut into the 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 the 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. The plaintiff failed to show that the pawn shop did not 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 often grant summary judgment when the plaintiff cannot point to a substance that he slipped on. For example, summary judgment was appropriate for the fast food restaurant in *Flagstar Enterprises, Inc. v. Burch*.[196] The plaintiff fell on the "slick floors" but could not show what made the floors "slick."[197]

In contrast, the plaintiff raised a fact question in *Hagadorn v. Prudential Insurance Co.*[198] The plaintiff stepped into a steeply graded area leading directly into a storm drain on the defendant's property. The 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."[199] The 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.[200]

In *Norman v. Jones Lang LaSalle Americas, Inc.*,[201] 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] suggest[] that proof of *any* building code violation would automatically establish negligence per se under any circumstances, [they are] overly broad

and misleading."[202] To establish negligence per se, the 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.[203]

The defendant was entitled to summary judgment because the plaintiff did not meet this burden. The plaintiff "failed to specify which building or safety code provisions the defendants allegedly violated in this case or to request that the trial court take judicial notice of such provisions."[204]

Moreover, the court clarified that a defendant's superior knowledge is *still* required. It stated, "[n]egligence per se does not equal liability per se, and [the plaintiff's] equal knowledge of the hazard would still entitled [the defendant] to summary judgment."[205]

STATIC DEFECT / OPEN AND OBVIOUS

> It is axiomatic that in everyday life, persons are required to negotiate the floors, steps and doorways of buildings. Proof of a fall, without more, does not give rise to liability. The true ground of liability is superior knowledge. There must be proof of fault on the part of the owner and ignorance of the danger on the part of the invitee.[206]

"Where the case involves a static dangerous condition, the rule is well established that the basis of the proprietor's liability is his superior knowledge and if his invitee knows of the condition or hazard there is no duty on the part of the proprietor to warn him and there is no liability for resulting injury because the invitee has as much knowledge as the proprietor does."[207] In *Callaway Gardens Resort, Inc. v. Bierman*,[208] the Court of Appeals applied this rule to reverse the denial of summary judgment to Callaway Gardens in Bierman's premises liability suit for injuries Bierman sustained when she fell from an outdoor deck at the Discovery Center Cafe at the Callaway Gardens Resort. Bierman fell while moving the tables and chairs away from the edge of the deck, which had no guardrail and was 30 inches above the ground. The court held that, even assuming Callaway Gardens had actual knowledge of the hazard, Bierman's own testimony established that she was aware of the generally unsafe nature and shape of the raised deck in question, as well as the open and specific hazard that the indentation on one side of the deck presented, and that she should have had full appreciation of the danger and, in the exercise of ordinary care, she should have avoided the injury to herself.

A static defect is one that is unchanging or "passive."[209] In *Delk v. Quiktrip Corp.*,[210] 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."[211]

In *Bonner v. Southern Restaurant Group, Inc.*,[212] the plaintiff fell over a curb in the TGI Friday's parking lot. The court affirmed the defendant's summary judgment because there was no basis for fault. The plaintiff alleged the curb was "dark due to inadequate lighting" and because it was the "same color as the curb apron."[213]

For the first allegation, the court noted that the plaintiff's evidence was flawed. The plaintiff admitted that she was unaware of the lighting that night. The plaintiff's witness, Marion Hawk, testified he was "familiar" with this parking lot, and "averred that the curb . . . was dark due to inadequate lighting."[214] 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."[215] "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 illumination and because he did not state when he observed the lighting in the parking lot."[216]

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 [the plaintiff] successfully negotiated it prior to entering the restaurant, she cannot recover for her subsequent injury."[217] The court reached a similar conclusion in *James v. Sirmans*,[218] when it held that a beauty shop's customer could not recover because the condition of the concrete in front of the shop's front door was open and obvious, and thus, in the exercise of ordinary care, the customer could have avoided it.

In *Rowland v. Murphy Oil USA, Inc.*,[219] 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, the plaintiff cannot recover.[220] For example, in *Nemeth v. RREEF America, L.L.C.*,[221] the Court of Appeals held that the landowner was entitled to summary judgment a tenant's slip-and-fall action because the uneven and unstable brick-paver walkway where the tenant fell was visibly uneven and because the tenant 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. And in *Wright v. K-Mart Corp.*,[222] the Court of Appeals affirmed the grant of summary judgment to K-Mart in a case where the plaintiff tripped and fell on a shelving unit because the plaintiff failed to come forward with evidence showing that K-Mart had superior knowledge of the al-

leged hazard. The court noted that the plaintiff had at least equal knowledge of and could have avoided the corner of the shelving unit, which caught his pants cuff, because 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.

PROOF OF CAUSATION

The defendant may also prevail if the plaintiff cannot establish the defendant's breach of duty was the proximate cause of the injuries to the plaintiff.[223] For example, in *Mitchell v. Austin*,[224] summary judgment was proper because the plaintiff failed to present any evidence that the building code violations in the construction of the stairs caused her to fall.

Similarly, in *Imperial Investments Doraville, Inc. v. Childers*,[225] the Court of Appeals reversed the trial court's denial of the defendant's motion for a directed verdict, because the plaintiff failed to establish causation in his trip-and-fall lawsuit. The plaintiff was injured when he tripped and collided with a friend at the defendant's hotel and they both fell through a plate glass window. The plaintiff admitted at trial that he did not know if he tripped over an object and never looked to see anything he might have tripped on. The plaintiff's friend testified that the carpet was bunched up and various spots had duct tape on them, but he also said he did not see what happened. Since the plaintiff presented no nonspeculative evidence that a condition on the premises caused the fall, he could not recover.

Finally, in *Sturdivant v. Moore*,[226] the 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 Court of Appeals affirmed the judgment because 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.

PLAINTIFF'S STATUS ON THE PROPERTY

The plaintiff's status on the defendant's property determines the level of care the defendant owes to the plaintiff. Georgia courts recognize three categories of plaintiffs: invitees, licensees, and trespassers. The owner 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.[227]

In contrast, the owner only owes licensees and trespassers the duty not to willfully or wantonly injure them.[228] A licensee is permitted to go on the property for his own interest but is neither a

customer, a servant, nor a trespasser, nor is he in privity with the owner. A social guest, for example, is a licensee. Finally, a person is a trespasser if he is not authorized to be on the property.

A plaintiff's status is not permanent. A person can lose his status as an invitee if he strays from the portion of the premises to which the invitation extended[229] or remains on the premises after it closes to the public.[230] In *Clark Atlanta University, Inc. v. Williams*,[231] 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. Gram Corp.*,[232] the plaintiff accompanied her adult daughter to a job interview and fell on a step in the defendant's lobby. There was no evidence of willful or wanton acts. Because the 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*,[233] the plaintiff's daughter was killed on New Year's Eve by a falling bullet. The plaintiff sued the apartment complex owner where the accident occurred, alleging that he breached his duty to keep his premises safe. The 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."[234]

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

In so holding, the court would not apply premises liability precedent involving prior similar incidents. The plaintiff failed to offer evidence of substantially similar crimes on the property. Moreover, the 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, the plaintiff could not show the requisite willful or wanton conduct.

In *Nunn v. Page*,[235] summary judgment was appropriate for the homeowners in a case where a visiting four-year-old boy was injured while jumping on a trampoline after receiving permission from the homeowners to do so. The child was a licensee and could sue only for willfully or wantonly caused 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."[236] Thus, summary judgment was proper as to the homeowners' duty to the child as a licensee, but not as to whether the homeowners assumed a higher standard of care.[237]

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.*,[238] the owners placed a "dirt-colored cable across the dirt trail" to "serve as a barrier for four wheelers and bikes."[239] Generally, a property owner must not

willfully or recklessly injure a trespasser or set a "mantrap."[240] 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."[241] Moreover, the duty to protect from a static or passive danger is less than the duty to protect from an active or hidden peril. The court explained that it is "wilful 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 wilfully or wantonly."[242] Here, the cable was a static condition, and there was no evidence the owner intended to harm the anticipated trespasser. This trespasser was not anticipated because the owners had never seen "any motorcycle tracks or motorcyclists" on the land.[243]

PLAINTIFF DEPARTED FROM DESIGNATED ROUTE

A plaintiff may be unable to recover where he voluntarily departs from the designated route of travel. A plaintiff who voluntarily departs from the designated path or walkway must exercise a heightened degree of care because he assumes the risk of hazards found.[244]

In *Chamblee v. Grayco*,[245] the 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 the plaintiff, the manager had actual knowledge of the pipe but did not think it was a hazard. He explained that it was off the path and that he never saw tenants walking there. Thus, the 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."[246]

In *Williams v. Park Walk Apartments, L.P.*,[247] the Court of Appeals discussed undesignated shortcuts. Allowing liability would effectively "require a landlord to ensure that every possible route across his property was safe."[248] Thus, the plaintiff could not recover after taking a shortcut across the grass.

However, courts recognize a notable exception when "the owner has notice that the unauthorized route is being regularly used improperly."[249] In *Brad Bradford Realty, Inc. v. Callaway*,[250] the plaintiff and her son regularly used 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 discourage the tenants."[251] Thus, the plaintiff could recover when she fell in a hole on this path.

NO DIRECT CLAIM AGAINST INDEPENDENT CONTRACTORS

In *R&S Farms, Inc. v. Butler*,[252] the Court of Appeals granted summary judgment to a janitorial service company in a case where the plaintiff slipped on

an egg white at a Kroger grocery store. The court held that the janitorial service company, an independent contractor, owed no duty to the plaintiff under its janitorial contract with Kroger. The court reasoned, "Nor did the evidence authorize a finding of malfeasance in the performance of the contract that would preclude a grant of summary judgment."[253] In *Perkins v. Compass Group USA, Inc.*,[254] the Northern District of Georgia further explained this principle as follows:

> Landowners 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. 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. Thus, the duties imposed on owners or occupiers of land are *not* applicable to independent contractors.[255]

In *Brown v. All-Tech Investment Group, Inc.*,[256] 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. The 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 others from criminal assault. Similarly, in *CDP Event Services, Inc. v. Atcheson*,[257] the Court of Appeals reversed the trial court's denial of the private security company's motion for summary judgment, holding as follows:

> As we have previously stated, we 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. [They] 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.[258]

Another similar case was *Taylor v. AmericasMart Real Estate, LLC*,[259] in which the Court of Appeals affirmed summary judgment for a janitorial ser-

vice company, holding that the company was not liable for the 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 company's invitee. In addition, the company was merely an independent contractor which agreed to provide certain cleaning services in the building where the invitee fell. Consequently, the company owed no independent duty to the invitee to inspect the premises for spills.

DUTY OF INDEPENDENT CONTRACTOR/PLAINTIFF

In *Carpenter v. Capital City Club*,[260] the Court of Appeals affirmed summary judgment against an independent contractor who was injured while repairing carpet at the defendant's premises. The plaintiff had been installing and repairing carpet for more than twenty years, but he did not notice any defect in the carpet while he was working on it. The plaintiff alleged that an employee of the defendant had showed him areas of the carpet that were a tripping hazard, but he did not present any evidence showing that the defendant knew or should have known of some defect in the carpet. Noting that "[a]n independent contractor is expected to determine for himself whether his place of employment is safe or unsafe, and ordinarily may not recover against the owner for injuries sustained in the performance of the contract," the Court of Appeals held that summary judgment was proper because the plaintiff had a duty to inspect the area where he was working and could not impose liability on the defendant for a defect which he also failed to notice.

NEGLIGENT SECURITY CASES

Equal or Superior Knowledge

Georgia law imposes an affirmative duty on landowners to "exercise ordinary care to keep [their] premises safe for invitees."[261] (Note that an action for negligent security may be limited to *invitees*.[262]) Thus, "an intervening criminal act by a third party generally insulates a proprietor from liability unless such criminal act was reasonably foreseeable."[263] 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."[264]

Thus, a premises owner's liability in these cases stems from his "superior knowledge."[265] The 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."[266]

In *Snellgrove v. Hyatt Corp.*,[267] the hotel was entitled to summary judgment for the second of two fights between the plaintiff and his co-worker. The hotel broke up the first fight between the two earlier that night. Later, the plaintiff returned to the hotel despite the fact that his co-worker issued a subsequent threat. The Court of Appeals recognized that the 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 did not seek hotel security

protection.[268]

As *Snellgrove* illustrates, courts consider whether the victim and perpetrator know each other or have a history of troubled relations.[269] In *Dolphin Realty v. Headley*,[270] the Court of Appeals reversed a denial of summary judgment when the same assailant attacked the plaintiff twice. The first attack occurred at night when the plaintiff 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.[271]

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 them that "[a]s you realize, no one can guarantee your safety. . . . [Y]our security is the responsibility of the local law enforcement and yourself."[272]

The plaintiff remained at the complex because she "felt like it was still a good location" and "wasn't a bad crime area otherwise."[273] 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 did not owe a duty because "the only record of previous property crimes in the area was a computer printout used by [the plaintiff's] expert showing dates and addresses of various area crimes and numerous copies of crime reports in the area."[274] 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."[275]

In *Cook v. Micro Craft Inc.*,[276] the plaintiffs were not entitled to recover from the decedent's employer, Micro Craft, Inc., because the employer did not have superior knowledge of the risk. The decedent's estranged husband, Willie Charles Jackson, murdered the decedent and injured the decedent's aunt. Both victims "knew of Jackson's violent history and were terrified of him."[277] Despite this knowledge, just prior to the attack, "the decedent had several long phone conversations with Jackson . . . and . . . told Jackson where she lived and worked. [Moreover, b]oth women knew that Jackson had specifically told the decedent he was coming over to kill her *that day*."[278] 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 Mi-

cro Craft that the women were fleeing a potential killer. At most, the decedent mentioned that her husband had "'a history of violence.'"[279] However, Micro Craft was unaware Jackson knew the 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.[280] 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 [Jackson] for the attack just happened to be the employer's [premises]. The employer did not create or allow to exist an environment which placed [the decedent or her aunt] at risk any more than if [they] had been at home or on the street.[281]

Likewise, in *Davis v. Crum*,[282] the plaintiff knew that the perpetrators in the defendant's trailer park were violent. The plaintiff approached the group after they beat his cousin. One of the men, brandishing a stick, demanded the plaintiff's money. The men then beat the plaintiff unconscious. Since the plaintiff failed to avoid this known danger, summary judgment was properly granted to the trailer park owner.[283] Similarly, in *Gateway Atlanta Apartments, Inc. v. Harris*,[284] the Court of Appeals reversed the denial of summary judgment to the apartment complex and its management where the decedent was shot and killed by a bail bondsman who was attempting to apprehend him for bond forfeiture.

Finally, in *Norby v. Heritage Bank*,[285] the Court of Appeals affirmed summary judgment for a bank in an ATM robbery/murder case on the ground that the location and setting of the depository must have been apparent to the decedent before he used it. It therefore appeared that the decedent had equal knowledge of the danger, which barred recovery. The bank's night deposit box and ATM were located under a canopy at the rear of the bank facing a wooded area, and the area was poorly lit.

Voluntary Entry Into Affray

In *Cornelius v. Morris Brown College*,[286] the Court of Appeals reaffirmed the principle that "'[a]n adult of ordinary intelligence will be held to be aware of manifest risk or danger of possible injury when he deliberately and voluntarily joins in an affray, as a matter of law.'" Rejecting the dissent's argument that the rescue doctrine excuses a rescuer's assumption of the risk, the court held that "[e]ven when a person enters into an altercation with the purpose of breaking it up, the responsibility for any injury lies with the intervenor: 'the superior knowledge must always remain with the combatants, as they, by their voluntary participation, have selected the time, date, and place for the altercation.'"

Foreseeability

An owner can be liable for failure to keep the premises or approaches rea-

sonably safe through adequate security.[287] Although a landowner is not an insurer of safety,[288] he has a duty to protect against the foreseeable criminal acts of third parties.[289] "Foreseeable consequences are those which are probable, according to ordinary and usual experience, those which, because they happen so frequently[,] may be expected to happen again."[290]

One can establish foreseeability by showing the proprietor has notice of substantially similar prior criminal acts.[291] 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."[292] This is usually a fact question that survives summary judgment. It is questionable whether a plaintiff can establish foreseeability solely through expert testimony.[293] However, where the plaintiff fails to produce evidence of a prior substantially similar crime on the property, summary judgment is called for.[294]

In *Mason v. Chateau Communities, Inc.*,[295] the Court of Appeals held that a prior sexual assault put a trailer park owner on notice of this kind of danger. In *Norby v. Heritage Bank*,[296] the Court of Appeals held that a robbery/murder at a bank's night deposit box and ATM was reasonably foreseeable by the bank because a previous late-night attempt to break into the ATM was sufficient to put the bank on notice of the possibility of a criminal attack upon a customer at the incident's time and place.

In *Baker v. Simon Property Group, Inc.*,[297] the defendant's summary judgment turned on foreseeability. The plaintiff, Jason Baker, sued the mall manager and security company after he was shot during a carjacking 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."[298] 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."[299] The admissible evidence showed that the defendants were aware of five thefts from *unoccupied* vehicles the year before. Although foreseeability is usually a fact question, the Court of Appeals 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."[300]

The court held that the 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."[301] Any evidence of security deficiencies "ignore[s] the fact that there was no duty to protect against this type of attack."[302] In other words, foreseeabilty is a prerequisite for recovery. "Undertaking measures to protect patrons does not heigh-

ten the standard of care; and taking some measures does not ordinarily constitute evidence that further measures might be required."[303]

Similarly, in *Agnes Scott College, Inc. v. Clark*,[304] the Court of Appeals rejected the 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 abducted the student from the lot and raped her off-campus. Summary judgment was appropriate absent evidence of "any kidnappings, rapes, attacks, or other similar crimes occurring in the parking lot prior to the incident involving the student."[305]

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."[306] The victim only produced city crime statistics and evidence that other students were afraid to walk in the lot at night. The school had actual knowledge only of break-ins to unoccupied cars in the area.

The Court of Appeals and trial court disagreed whether the plaintiff's evidence was probative. The trial court reasoned that "carjackings were on the rise across the nation" and that, therefore, "a jury question existed regarding whether Agnes Scott could have foreseen the daytime attack."[307] The Court of Appeals disagreed, citing Georgia Supreme Court precedent.[308] The 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.[309]

In the recent case of *Walker v. Aderhold Properties, Inc.*,[310] the Court of Appeals reversed the grant of summary judgment to the defendants in a premises liability case involving a sexual assault in the plaintiff's apartment. The court, in a 6-1 decision, held that police reports regarding previous crimes committed on the property were not hearsay because they were not offered to prove that crimes had happened, but rather to show that the defendants had reasonable grounds to appreciate that another attack would occur. The court also held that the trial court erred in excluding evidence of one assailant's videotaped statement to the police that he entered the property through an open gate because the plaintiff was seeking the statement's admission for the sole purpose of showing how the assailant accessed the property.

Breach of Duty

In *Brown v. All-Tech Investment Group, Inc.*,[311] 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. The defendants included the two day-trading firms and a private security company. The day-trading firms were entitled to summary judgment because the plaintiffs failed to prove that the shooting was a "reasonably foreseeable outcome of the trading firms' actions."[312] Moreover, the private

security company did not assume a duty to protect the plaintiffs and the decedents from criminal assault.

Georgia courts apply *Restatement (Second) 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."[313] Because there were no "prior incidents sufficiently similar so as to alert" the security company to the risk, there was no basis for liability.[314]

Premises owners may not have a duty to passersby. In *Barnes v. St. Stephen's Missionary Baptist Church*,[315] the Court of Appeals affirmed summary judgment to the property owner of an abandoned church. While the 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 [the plaintiff] testified the assault occurred."[316] 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 or that the church was aware of any such inadequacy prior to the assault.

The court held that summary judgment was proper because the plaintiff failed to establish the church owed a duty of care. The plaintiff was only a passerby and member of the general public. She had "no relationship with the church as an invitee, a tenant, a licensee, or even a trespasser."[317] Georgia law recognizes that "a landowner may have a duty towards those traveling a public way adjacent to the property in certain limited circumstances."[318] 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 persons. . . . 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 persons.[319]

The 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 people or entities can be sued in a premises liability suit. In *Spivey v. Hembree*,[320] 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 daugh-

ter's account. She could not be liable because she "had no role in supervising . . . the residence. Neither did she live there nor had she ever had any ownership interest in the property."[321] Thus, she had no duty to keep the premises safe.

In *Brookview Holdings LLC v. Suarez*,[322] 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 its trailer park. 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.

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."[323] 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."[324] A third party's criminal act attenuates the causal connection.

In *Brown v. All-Tech Investment Group, Inc.*,[325] lack of proximate causation was so "plain, palpable and indisputable" that summary judgment was appropriate as a matter of law.[326] In this case, the Court of Appeals 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."[327] The customer's shooting 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.*[328] created a question of fact as to whether the defendant's negligence caused the armed robbery and shooting of the convenience store. Although it was 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 of outside the store from the register. The plaintiff's expert testified that these were the "top two robbery deterrence factors."[329] Thus, causation was a question for the jury.

In the recent case of *Johns v. Housing Authority for the City of Douglas*,[330] the Court of Appeals affirmed the grant of summary judgment to the defendant in a case in which the plaintiff was raped by a stranger in her apartment. The court held that the plaintiff failed to show a sufficient causal connection between the rape and the defendant's alleged failure to improve security and lighting and to repair a fence hole at the apartment complex. The plaintiff had placed an air conditioner in a rear window, along with a piece of cardboard to fill the gap between the air conditioner

and the side of the window. Apparently, the rapist entered her apartment "by removing the cardboard, shoving the air conditioner unit to the side, and reaching through the opening to unlock the adjacent back door. There [was] no evidence indicating how the assailant entered the apartment complex, or whether he was on the grounds as a resident, guest, or trespasser."[331]

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."[332]

Note that the Georgia Supreme Court distinguishes premises liability and negligent hiring and retention. It reasons that, 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."[333]

In *TGM Ashley Lakes, Inc. v. Jennings*,[334] 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 defendants did not follow hiring procedures by conducting a background check or requiring letters of reference. Finally, the defendants 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 and retention "can be based on a tort that occurred *outside* of the scope of employment."[335] The court expressly overruled precedent to the contrary.

The proper question is whether "in view of his known characteristics" the injury should have been anticipated.[336] The court held that a plaintiff 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.[337] In *Jennings*, the murder was "the natural, reasonable, probable result" of negligent hiring.[338]

Likewise, the employer is not liable for an employee's sexual misconduct if it is unforeseeable. In *Munroe v. Universal Health Services, Inc.*,[339] the Georgia Supreme Court held that the perpetrating employee was not foreseeably dangerous. In this case, a mental health assistant raped the plaintiff after incapacitating her with medication. The plaintiff could not recover for negligent hiring or retention because the health center had no reason to anticipate the perpetrating employee's propensity for sexual assault. The health center's background check showed that he had no criminal record. Moreover, dishonest application information did not put the health 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 [the plaintiff's] injuries," the plaintiff did not show that the defendant breached its duty to avoid hiring a *dangerous* employee.[340]

In *Piedmont Hospital, Inc. v. Palladino*,[341] the Supreme Court discussed claims for respondeat superior as opposed to negligent hiring and retention. A male nurse sexually assaulted a patient after he underwent surgery in his groin area. The nurse 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."[342] After the surgery, the patient allegedly awoke to the nurse rubbing his penis with both hands near his mouth. On the 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'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.

Other Defenses

A condominium homeowners association can limit its liability expressly. In *Bradford Square Condominium Association, Inc. v. Miller*,[343] the Court of Appeals recognized the "hybrid form" of a condominium homeowners association in terms of the overarching association and its individual homeowners. In this case, the plaintiff's husband died during an armed robbery in the parking lot. However, the association did not owe the unit owners a legal duty to provide security in the common areas. In Georgia, an association's responsibilities "are dependent upon those allocated" by the declaration and bylaws.[344] The declaration at issue in this case 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.[345]

The homeowners association in *Hayes v. Lakeside Village Owners Association, Inc.*[346] similarly limited its liability. The plaintiff, a 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 was bound by a restrictive covenant assigning homeowners a duty to inspect common facilities and to use them at their own risk. The Court of Appeals affirmed the judgment.

In comparison, the Court of Appeals reversed the trial court's grant of summary judgment in *Mason v. Chateau Communities, Inc.*[347] In this case, the plaintiff owned her trailer and rented

her lot. The assault occurred inside her trailer, and the rental agreement provided that the property manager "was responsible for maintaining 'common areas and underground utilities.'"[348] Moreover, there were no formal provisions or assurances relating to security. However, the manager reassured the plaintiff the park was safe.

The majority rejected the property manager's argument that it had relinquished the property to the plaintiff. Instead, the plaintiff's rape was foreseeable because a neighbor experienced a similar assault. Additionally, another neighbor requested that the property manager run a report on the suspicious-looking perpetrator. The property manager neither investigated the prior assault nor provided additional security measures. The majority opinion highlighted the property manager'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."[349]

In *Atlanta Committee for the Olympic Games, Inc. v. Hawthorne*,[350] the Georgia Supreme Court held that the Recreational Property Act[351] "limits . . . the liability of an owner of land who has made property available without charge to the public for 'recreational purposes.'"[352] 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.[353] However, the property's purpose or "the nature and extent of mixed uses" is a question of fact.[354] The fact finder must take the totality of the circumstances into account.

In *Hawthorne*, the 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 as to whether ACOG "directly or indirectly invited or permitted without charge any person to use the property for *recreational* purposes" in light of evidence that it may have done so "to derive, directly or indirectly, a financial benefit for pecuniary gain from business interests thereon."[355]

In *Anderson v. Atlanta Committee for the Olympic Games, Inc.*,[356] the Supreme Court clarified the meaning of "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."[357] Moreover, recreation does not have to be the exclusive purpose of the property. All "social and economic aspects of the activity" should be considered.[358]

In *Department of Transportation v. Thompson*,[359] the Court of Appeals held that the RPA applies to highway rest areas and, therefore, bars a visitor's claim against the DOT.

DRAM SHOP CASES

No Recovery by the Consumer of Intoxicants

The dram shop statute governs the liability of alcohol-serving premises owners. An alcohol consumer cannot recover from the server or premises owner. Specifically, the dram shop statute provides as follows:

> [T]he 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.[360]

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

Public policy also bars such claims under the dram shop statute, which provides as follows:

> 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.[361]

This statute applies even to wrongful death suits. In *Mowell v. Marks*,[362] the Court of Appeals held that this statute barred a wrongful death claim asserted by the mother of a consumer.

Moreover, in *Sutter v. Hutchings*,[363] the Supreme Court held that O.C.G.A. § 51-1-18(a), which allows a minor's custodial parent to sue anyone who sells or furnishes alcohol to the parent's child, allows a consumer's parent to recover only general and special damages suffered directly; damages the parent has to pay to a third party are not recoverable. Even if not explicitly barred, these damages are barred by public policy.[364] 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."[365]

However, O.C.G.A. § 51-1-18(a) allows a minor's custodial parent to sue anyone who sells or furnishes alcohol to the child. Under this statute, the consumer is not the plaintiff; the parent is. Thus, the parent has an independent action, even where the consumer defense bars wrongful death recovery. In *Eldridge v. Aronson*,[366] the Court of Appeals 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 statute, "'furnishing' means providing in any way."[367] Thus, summary judgment for the host was inappropriate.

No Recovery in Non-Motor Vehicle Accident Cases or Where Consumer Not Driving

Under the dram shop statute, "a person who willfully, knowingly, and unlawfully . . . furnishes . . . alcoholic beverages" to someone who is noticeably intoxicated, "knowing that such person will soon be driving a motor vehicle, may become liable for injury" when the furnishing of the alcohol proximately causes the injuries.[368] Consumption, rather than furnishing of alcohol, is the proximate cause as a matter of law when the plaintiff is not driving or the server does not know that he will be driving soon.[369] Moreover, the Supreme Court has held that "nothing in that statute or any other provision of Georgia law mandates that a provider of alcoholic beverages must prevent an intoxicated per-

son from driving."[370]

In *Lumpkin v. Mellow Mushroom*,[371] 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. Recovery was barred because the furnishing of alcohol was not the proximate cause of the consumer's death. In addition, the dram shop statute specifically insulates providers of alcohol from third-party claims of negligence except as provided in O.C.G.A. § 51-1-40(b). So where an employer is sued for improperly serving alcoholic beverages to a person who thereafter violently attacks his girlfriend, the employer is not liable.[372]

Summary judgment also is proper when the plaintiff lacks evidence of noticeable intoxication or constructive knowledge of future driving.[373] In *Sugarloaf Café, Inc. v. Willbanks*,[374] the Supreme Court held that circumstantial evidence of the server doing business in a remote location and of most customers driving to the restaurant were *not* sufficient to show that the server knew the customer would soon be driving. Moreover, in this case, the consumer had been driven to and from the restaurant by a co-worker.

No Duty to Determine Transportation

The Supreme Court maintains that there is no affirmative duty to determine how a consumer plans to depart the establishment.[375] In *Baxley v. Hakiel Industries, Inc.*,[376] the plaintiff could not establish that the providers had knowledge that the consumer planned to drive. The Court of Appeals held that the plaintiff had 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*." The court noted that the establishment was accessible by foot or taxi. Moreover, employees at both bars "testified that they had no information suggesting" the plaintiff would drive away.

No Application to Airlines

In 2005, the Supreme Court held that an airline that served a drunk passenger was not liable for his subsequent drunk-driving accident. In *Delta Airlines, Inc. v. Townsend*,[377] 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."[378] Thus, "[b]ecause the patrons of *land-based* establishments serving alcohol generally have direct and immediate access to their vehicles, liability should attach to an owner who knew or should have known a departing intoxicated customer would shortly be driving."[379] In contrast, the "proximate connection" between the air-based consumer and the act of driving "is much more remote and attenuated."[380] Proximate cause does not follow. Thus, the cause of action applies "only in the limited case of a traditional land-based supplier."[381]

No Liability Where No Evidence of Service After Aware of Intoxication

In *Shin v. Estate of Camacho*,[382] the Court of Appeals reversed the denial of the defendant's motion for summary judgment in a dram shop action for the wrongful death. Seung Park, who was a guest at the defendant's home for a party, drove away from the defendant's

home intoxicated, ran a red light, and crashed his van into the car that the decedent was driving, killing her and injuring her minor son. The Court of Appeals held that the defendant was entitled to summary judgment because there was no evidence that he knowingly furnished alcoholic beverages to Park while Park was in a state of noticeable intoxication.

> Park's intoxication was first noticeable when he argued belligerently with another guest. Although it is undisputed that Park consumed two glasses of soju after the fight, it is also undisputed that [the defendant] did not personally serve Park the soju, did not see Park consume the soju, and did not have any other reason to know that Park consumed any additional alcoholic beverages after that point when he first became noticeably intoxicated. To the contrary, although we note that Georgia law does not impose a duty on a provider of alcoholic beverages to prevent an intoxicated person from driving, the undisputed evidence showed that, after Park's intoxication became apparent, [the defendant] and his wife expressed their concern that he not drive until he became sober, urged him to stay and rest as long as necessary, and offered to drive him home if he could not wait. Because there is no evidence that [the defendant] knew or should have known that Park consumed additional alcoholic beverages after he became noticeably intoxicated, there is no record evidence that [the defendant] knowingly furnished or served alcoholic beverages to a noticeably intoxicated Park. Accordingly, the trial court erred in denying [the defendant's] motion for summary judgment.[383]

No Punitive Damages

In *Capp v. Carlito's Mexican Bar & Grill #1, Inc.*,[384] the Court of Appeals reversed the trial court's denial of the defendant's motion to dismiss the plaintiff's claim for punitive damages because the punitive damages statute "makes clear . . . that 'such damages shall not be the liability of any defendant other than an active tort-feasor,' that is the defendant acting under the influence of alcohol."[385]

Application of Spoliation Doctrine

In *Baxley v. Hakiel Industries, Inc.*,[386] the Supreme Court reversed summary judgment for one defendant in a dram shop suit because the spoliation doctrine dictated a presumption against that defendant based on its manager allowing the employee responsible for replacing the surveillance videotape of the bar area to destroy the tape after she became aware of the customer's involvement in the accident at issue and the potential for litigation. In *Silman v. Associates Bellemeade*,[387] the Supreme Court held that the phrase "potential for litigation," as used in *Baxley*, "refers to litigation that is actually 'contemplated or pending,' and nothing more." Thus, in *Silman*, the Supreme Court affirmed the Court of Appeals' rejection of spoliation sanctions because the plaintiff waiting almost two years after the incident to file suit and there was no evidence showing that the plaintiff had notified the defendants that she was contemplating litigation when the alleged spoliation occurred.[388]

ENDNOTES

[1] Flowers v. Wal-Mart Stores, Inc., No. 3:03-CV-35(CAR), 2005 U.S. Dist LEXIS 25578, at *4 (M.D. Ga. Oct. 27, 2005) (citing Hamblin v. City of Albany, 272 Ga. App. 246, 612 S.E.2d 69 (2005)).

[2] No. 3:03-CV-35(CAR), 2005 U.S. Dist LEXIS 25578 (M.D. Ga. Oct. 27, 2005).

[3] 230 Ga. App. 34, 495 S.E.2d 573 (1997) (physical precedent).

[4] *Flowers*, 2005 U.S. Dist. LEXIS 25578, at * 5.

[5] *Id.* (emphasis added).

[6] *See infra* notes 66-82 and accompanying text.

[7] Washington v. J.D. Royer Wholesale Florist, 275 Ga. App. 407, 620 S.E.2d 626 (2005).

[8] 289 Ga. App. 731, 658 S.E.2d 242 (2008).

[9] 275 Ga. App. 407, 620 S.E.2d 626 (2005).

[10] 261 Ga. 491, 405 S.E.2d 474 (1991).

[11] *Id.* at 491, 405 S.E.2d at 475.

[12] 268 Ga. 735, 493 S.E.2d 403 (1997).

[13] *Id.* at 748, 493 S.E.2d at 414.

[14] *Id.* at 740, 493 S.E.2d at 408.

[15] 276 Ga. App. 278, 623 S.E.2d 171 (2005).

[16] *Id.* at 280, 623 S.E.2d at 173.

[17] *Id.* at 282, 623 S.E.2d at 175 (internal quotation marks omitted).

[18] *Id.* at 281-82, 623 S.E.2d at 174.

[19] *Id.* at 282, 623 S.E.2d at 175 (internal quotation marks omitted).

[20] 273 Ga. App. 894, 616 S.E.2d 202 (2005).

[21] 280 Ga. App. 530, 634 S.E.2d 477 (2006).

[22] *See infra* notes 180-205 and accompanying text.

[23] 278 Ga. App. 101, 628 S.E.2d 163 (2006).

[24] *Id.* at 102, 628 S.E.2d at 164-65.

[25] *Id.*, 628 S.E.2d at 165.

[26] *Id.* at 102-03, 628 S.E.2d at 165; *see also* Ford v. Bank of Am. Corp., 277 Ga. App. 708, 709, 627 S.E.2d 376, 378 (2006) ("Proof of an injury, without more, is not enough to establish a proprietor's liability. . . . Without first establishing that a dangerous condition existed, the plaintiff cannot establish that the defendant knew about the danger and therefore cannot recover."); Gibson v. Symbion, Inc., 277 Ga. App. 721, 722, 627 S.E.2d 84, 86 (2006) (affirming summary judgment for the defendant because there was no evidence of improper design or construction of the handicap ramp on which the plaintiff slipped, even though the plaintiff could not see the slope of the ramp from her angle).

[27] 277 Ga. App. 621, 627 S.E.2d 382 (2006).

[28] *Id.* at 625, 627 S.E.2d at 386-87.

[29] *Id.* at 625-26, 627 S.E.2d at 387.

[30] No. 1:04-CV-136(WLS), 2005 U.S. Dist. LEXIS 38051 (M.D. Ga. Dec. 22, 2005).

[31] *Id.* at *10.

[32] 246 Ga. App. 852, 542 S.E.2d 575 (2000) (en banc).

[33] *Id.* at 852, 542 S.E.2d at 577.

[34] *Id.*

[35] *Id.*

[36] Pinckney v. Covington Athletic Club & Fitness Ctr., 288 Ga. App. 891, 892-93, 655 S.E.2d 650, 652 (2007) (en banc).

[37] 232 Ga. App. 447, 449 n.1, 501 S.E.2d 546, 548 n.1 (1998); *see also* Steele v. Rosehaven Chapel, Inc., 233 Ga. App. 853, 854, 505 S.E.2d 245, 246-47 (1998).

[38] *Lau's Corp.*, 261 Ga. at 491, 405 S.E.2d at 475-76 (emphasis added) (citation omitted).

[39] 236 Ga. App. 810, 513 S.E.2d 536 (1999).

[40] *Id.* at 811, 513 S.E.2d at 538.

[41] *Id.*

[42] 232 Ga. App. 29, 500 S.E.2d 353 (1998) (en banc).

[43] *Id.* at 30, 500 S.E.2d at 354.

[44] *Id.* at 31, 500 S.E.2d at 356.

[45] 230 Ga. App. 679, 498 S.E.2d 748 (1998) (en banc).

[46] *Id.* at 684-85, 498 S.E.2d at 753.

[47] *See, e.g.*, Davis v. Bruno's Supermarkets, Inc., 263 Ga. App. 147, 587 S.E.2d 279 (2003).

[48] 250 Ga. App. 806, 552 S.E.2d 455 (2001) (en banc).

[49] *Id.* at 812, 552 S.E.2d at 460.

[50] *Id.* at 813, 552 S.E.2d at 460.

[51] Metts v. Wal-Mart Stores, Inc., 269 Ga. App. 366, 368 n.1, 604 S.E.2d 235, 237 n.1 (2004) (internal quotation marks omitted).

[52] Evans v. Heard, 264 Ga. 239, 240, 442 S.E.2d 753, 754 (1994) (internal quotation marks omitted).

[53] Kmart Corp. v. Larsen, 240 Ga. App. 351, 352, 522 S.E.2d 763, 765 (1999).

[54] Green v. Home Depot U.S.A., Inc., 277 Ga. App. 779, 782 n.2, 627 S.E.2d 836, 839 n.2 (2006).

[55] Smith v. Telecable of Columbus, Inc., 142 Ga. App. 535, 536, 236 S.E.2d 523, 525 (1977) (internal quotation marks omitted).

[56] Sams v. Wal-Mart Stores, Inc., 228 Ga. App. 314, 316, 491 S.E.2d 517, 519 (1997); *see also* Harrelson v. Wild Adventures, Inc., 263 Ga. App. 569, 571, 588 S.E.2d 341, 343 (2003) (physical precedent); *Larsen*, 240 Ga. App. at 353, 522 S.E.2d at 765.

[57] 228 Ga. App. 314, 491 S.E.2d 517 (1997).

[58] *Id.* at 316, 491 S.E.2d at 519.

[59] 269 Ga. App. 366, 604 S.E.2d 235 (2004).

[60] *Id.* at 367, 604 S.E.2d at 236.

[61] *Id.* at 368 n.1, 604 S.E.2d at 237 n.1.

[62] 277 Ga. App. 779, 627 S.E.2d 836 (2006).

[63] *Id.* at 782 n.2, 627 S.E.2d at 839 n.2.

[64] *Id.*

[65] Aderhold v. Lowe's Home Ctrs., Inc., 284 Ga. App. 294, 643 S.E.2d 811 (2007).

[66] *Robinson*, 268 Ga. at 736, 493 S.E.2d at 406; Matthews v. The Varsity, Inc., 248 Ga. App. 512, 512-13, 546 S.E.2d 878, 880 (2001).

[67] *Straughter*, 232 Ga. App. at 29, 500 S.E.2d at 354.

[68] *See, e.g.*, Mucyo v. Publix Super Markets, Inc., 301 Ga. App. 599, 688 S.E.2d 372 (2009) (evidence showed that a Publix employee, who was dust mopping the store, inspected the area where the plaintiff fell within two minutes prior to her fall and did not then see any liquid or other substance on the floor); 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 when 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 Enters., Inc., 268 Ga. App. 313, 601 S.E.2d 712 (2004) (defendant disproved constructive knowledge as a matter of law by testimony that it inspected floor 5-10 minutes before plaintiff fell, despite risk of frequent spills); *Matthews*, 248 Ga. App. at 512-13, 546 S.E.2d at 880 (stairs inspected 4-5 minutes before fall); Deloach v. Food Lion, Inc., 228 Ga. App. 393, 491 S.E.2d 845 (1997) (area of fall inspected 10 minutes prior); Jenkins v. Bi-Lo, Inc., 223 Ga. App. 735, 479 S.E.2d 14 (1996) (en banc) (area of store where the plaintiff fell inspected 10 minutes before the fall); Super Discount Markets, Inc. v. Clark, 213 Ga. App. 132, 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 *Crook*, the Court of Appeals reversed summary judgment despite uncontroverted evidence that the defendant conducted inspections of the property every two hours and that the procedure was followed on the day of the accident. The defendant last inspected the area around the gas pumps approximately 1-1½ hours before the plaintiff slipped in a large puddle of gas. The trial court found the defendant 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 reasonableness of the procedure 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."

[69] 263 Ga. App. 563, 588 S.E.2d 338 (2003).

[70] *Id.* at 565, 588 S.E.2d at 340 (internal quotation marks omitted).

[71] *Id.*

[72] 286 Ga. App. 508, 649 S.E.2d 809 (2007).

[73] 262 Ga. App. 216, 585 S.E.2d 83 (2003).

[74] *Id.* at 219, 585 S.E.2d at 86.

[75] 268 Ga. App. 156, 601 S.E.2d 507 (2004).

[76] *Id.* at 159, 601 S.E.2d at 510.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] 289 Ga. App. 753, 658 S.E.2d 165 (2008).

[81] 288 Ga. App. 790, 655 S.E.2d 624 (2007).

[82] *Id.* at 793, 655 S.E.2d at 627 (footnotes omitted).

[83] *See, e.g.*, Sunlink Health Sys., Inc. v. Pettigrew, 286 Ga. App. 339, 649 S.E.2d 532 (2007) (en banc) (reversing the denial of the hospital's motion for summary judgment because the plaintiff had equal knowledge of the accumulation of rainwater on the hospital's flat concrete entrance walkway).

[84] 281 Ga. App. 390, 636 S.E.2d 27 (2006).

[85] 280 Ga. App. 650, 634 S.E.2d 812 (2006).

[86] *Id.* at 655, 634 S.E.2d at 817 (internal quotation marks omitted) (second alteration in original).

[87] 278 Ga. App. 677, 629 S.E.2d 561 (2006).

[88] No. 1:08-CV-03237-JOF, 2009 U.S. Dist. LEXIS 94371 (N.D. Ga. Oct. 7, 2009).

[89] *Id.* at *4-6.

[90] *Quarles*, 263 Ga. App. at 564 n.2, 588 S.E.2d at 339 n.2; *see also* Music v. Steamco, Inc., 265 Ga. App. 185, 593 S.E.2d 370 (2004) (holding that summary judgment was proper where the plaintiff fell on stairs containing standing water because she could have exited to the left or right of the stairs).

[91] 267 Ga. App. 856, 600 S.E.2d 834 (2004).

[92] 232 Ga. App. 791, 504 S.E.2d 198 (1998) (en banc).

[93] 260 Ga. App. 900, 581 S.E.2d 405 (2003).

[94] 232 Ga. App. at 793, 504 S.E.2d at 200; *see also* Roberts v. Outback Steakhouse of Fla., Inc., 283 Ga. App. 269, 641 S.E.2d 253 (2007).

[95] 285 Ga. 442, 679 S.E.2d 25 (2009). This case was subsequently tried to defense verdict. Alyson M. Palmer, *Jury Sides With AMC Chain in Trip-and-Fall Suit*, FULTON COUNTY DAILY REP., Dec. 16, 2009, at 1.

[96] Nair v. Aramark Food Serv. Corp., 276 Ga. App. 793, 794, 625 S.E.2d 78, 80 (2005) (internal quotation marks omitted).

[97] *Id.* at 794-95, 625 S.E.2d at 80 (internal quotation marks omitted) (alteration in original).

[98] 276 Ga. App. 793, 625 S.E.2d 78 (2005).

[99] *Id.* at 795, 625 S.E.2d at 80.

[100] 277 Ga. App. 779, 627 S.E.2d 836 (2006).

[101] *Id.* at 780-81, 627 S.E.2d at 838.

[102] *Id.* at 781, 627 S.E.2d at 838.

[103] *Id.*

[104] Martin v. Johnson-Lemon, 271 Ga. 120, 123, 516 S.E.2d 66, 68 (1999); Colquitt v. Rowland, 265 Ga. 905, 906, 463 S.E.2d 491, 492 (1995).

[105] O.C.G.A. § 44-7-14.

[106] *Colquitt*, 265 Ga. at 906, 463 S.E.2d at 492; *Norman*, 277 Ga. App. at 632, 627 S.E.2d at 391.

[107] *Martin*, 271 Ga. at 123, 516 S.E.2d at 69 (internal quotation marks omitted).

[108] 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 proper 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).

[109] 259 Ga. App. 749, 577 S.E.2d 807 (2003).

[110] *See, e.g.*, Robinson v. Kroger Co., 284 Ga. App. 488, 644 S.E.2d 316 (2007) (holding that the trial court correctly granted summary judgment and correctly determined that the parking lot in which a customer fell was owned and maintained by the grocery

store's landlord and was not an "approach" to the premises for purposes of O.C.G.A. § 51-3-1).

[111] 285 Ga. App. 521, 647 S.E.2d 277 (2007).

[112] *Id.* at 522-23, 647 S.E.2d at 279-80 (footnotes, citations, punctuation, and internal quotation marks omitted).

[113] *Bryant*, 278 Ga. App. at 102, 628 S.E.2d at 164 (internal quotation marks omitted).

[114] Wright v. JDN Structured Fin., Inc., 239 Ga. App. 685, 687, 522 S.E.2d 4, 6 (1999).

[115] *Id.* at 686, 522 S.E.2d at 5 (internal quotation marks omitted).

[116] Mech. Equip. Co. v. Hoose, 241 Ga. App. 412, 413, 523 S.E.2d 575, 576 (1999) (internal quotation marks omitted); *see also* Hannah v. Hampton Auto Parts, Inc., 234 Ga. App. 392, 394, 506 S.E.2d 910, 912 (1998); Pierce v. Wendy's Int'l, Inc., 233 Ga. App. 227, 230, 504 S.E.2d 14, 17 (1998); Ray v. Rest. Mgmt. Servs., Inc., 230 Ga. App. 145, 146, 495 S.E.2d 613, 614 (1998); Williams v. Sing Bros., Inc., 226 Ga. App. 657, 658, 487 S.E.2d 445, 446 (1997); Steinberger v. Barwick Pharmacy, Inc., 213 Ga. App. 122, 125, 444 S.E.2d 341, 344 (1994); Souder v. Atlanta Family Rests., Inc., 210 Ga. App. 291, 292, 435 S.E.2d 764, 765 (1993).

[117] 279 Ga. App. 784, 632 S.E.2d 405 (2006).

[118] *Id.* at 785, 632 S.E.2d at 406.

[119] *Id.* at 786, 632 S.E.2d at 406-07.

[120] 271 Ga. App. 457, 610 S.E.2d 116 (2005).

[121] *Id.* at 457, 610 S.E.2d at 117.

[122] *Id.* at 458, 610 S.E.2d at 118.

[123] 273 Ga. App. 505, 615 S.E.2d 579 (2005).

[124] *Id.* at 506, 615 S.E.2d at 581.

[125] *Id.* (internal quotation marks omitted).

[126] *Id.*

[127] *Id.* at 508, 615 S.E.2d at 582; *see also* Briddle v. Cornerstone Lodge of Am., LLC, 288 Ga. App. 353, 654 S.E.2d 188 (2007) (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, Inc., 284 Ga. App. 354, 643 S.E.2d 855 (2007) (no recovery where the plaintiff had actual

knowledge of ice); Rayburn v. Ga. Power Co., 284 Ga. App. 131, 643 S.E.2d 385 (2007) (employee not allowed to recover as he had observed the conditions and knew that cutting trees with a chain saw was hazardous); Trulove v. Jones, 271 Ga. App. 681, 610 S.E.2d 649 (2005) (affirming summary judgment to the homeowner where plaintiff fell off an unfinished deck surrounding a pool while 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); Young v. Richards Homes, Inc., 271 Ga. App. 382, 609 S.E.2d 729 (2005) (affirming summary judgment for the defendant because the plaintiff had equal knowledge that the temporary stairs were made of 2x4s (as opposed to 2x8s) and had no railing; it was immaterial whether these conditions violated regulations).

[128] 289 Ga. App. 812, 658 S.E.2d 637 (2008).

[129] 260 Ga. App. 56, 579 S.E.2d 7 (2003).

[130] *Id.* at 57, 579 S.E.2d at 9 (internal quotation marks omitted).

[131] *Id.* at 60, 579 S.E.2d at 11 (internal quotation marks omitted); *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's claim failed because she admitted she noticed standing water on the steps before she began her descent); Watson v. Williams 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 slipped on the fuel when she quickly moved to turn off the pump).

[132] No. A09A1673, 2010 WL 1078224 (Ga. Ct. App. Mar. 25, 2010).

[133] *Id.* at *2 (internal quotation marks omitted).

[134] 271 Ga. App. 858, 610 S.E.2d 566 (2005).

[135] *Id.* at 860-61, 610 S.E.2d at 569.

[136] *Id.* at 861-62, 610 S.E.2d at 569-70; *see also* Berson v. American Golf Corp., 265 Ga. App. 772, 595 S.E.2d 622 (2004) (plaintiff was entitled to get to a jury when she slipped while walking in her golf cleats on the clubhouse's waxed floor).

[137] *Gilchrist*, 279 Ga. App. at 785, 632 S.E.2d at 406 (internal quotation marks omitted).

[138] Vaughn v. Pleasant, 266 Ga. 862, 864, 471 S.E.2d 866, 868 (1996) (footnote and internal quotation marks omitted).

[139] In *White v. Georgia Power Co.*, 265 Ga. App. 664, 595 S.E.2d 353 (2004), two young boys tragically drowned when they entered a river knowing they could not 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).

[140] *Vaughn*, 266 Ga. at 864, 471 S.E.2d at 868.

[141] No. 3:03-CV-35(CAR), 2005 U.S. Dist LEXIS 25578 (M.D. Ga. Oct. 27, 2005).

[142] *Id.* at *14.

[143] *Id.* at *14-15.

[144] 273 Ga. App. 759, 615 S.E.2d 854 (2005).

[145] *Id.* at 760, 615 S.E.2d at 856.

[146] *Id.*

[147] *Id.* at 760-61, 615 S.E.2d at 856.

[148] *Norman*, 277 Ga. App. at 631, 627 S.E.2d at 390.

[149] 277 Ga. App. 621, 627 S.E.2d 382 (2006).

[150] *Id.* at 631, 627 S.E.2d at 390.

[151] *Cf.* Belcher v. Kentucky Fried Chicken Corp., 266 Ga. App. 556, 597 S.E.2d 604 (2004) (physical precedent). In *Belcher*, the Court of Appeals held that the plaintiff did not assume the risk when she entered a men's restroom to use the facilities. Her sister warned her that the ladies' room was flooded, that there was "water everywhere," and that she should use the men's restroom. The plaintiff did not see the water in the men's restroom and did not know the warning extend to *inside* the men's restroom. Finally, the restaurant did not place a warning cone either at the door of or inside the men's restroom.

[152] *Norman*, 277 Ga. App. at 632, 627 S.E.2d at 391.

[153] 264 Ga. App. 715, 592 S.E.2d 143 (2003) (en banc).

[154] *Id.* at 717, 592 S.E.2d at 145.

[155] *Id.*

[156] Rice v. Oaks Investors II, 292 Ga. App. 692, 666 S.E.2d 63 (2008).

[157] 289 Ga. App. 812, 658 S.E.2d 637 (2008).

[158] Carpenter v. Capital City Club, 299 Ga. App. 265, 683 S.E.2d 351 (2009); Schuessler v. Bennett, 287 Ga. App. 880, 652 S.E.2d 884 (2007).

[159] 265 Ga. App. 390, 593 S.E.2d 913 (2004).

[160] *Id.* at 392, 593 S.E.2d at 914 (internal quotation marks omitted); *see also* Gibson v. Rezvanpour, 268 Ga. App. 377, 601 S.E.2d 848 (2004) (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).

[161] 261 Ga. App. 892, 583 S.E.2d 926 (2003).

[162] 256 Ga. App. 131, 567 S.E.2d 750 (2002).

[163] Cases reaching the opposite conclusion include *Hicks v. Walker*, 262 Ga. App. 216, 585 S.E.2d 83 (2003), where the court held that 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 was 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. Similarly, in *O'Connell v. Historic Investments of the South, Inc.*, 265 Ga. App. 262, 593 S.E.2d 731 (2004), the court upheld the denial of summary judgment to the landlord because of questions about whether the ceiling collapse resulted from the 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 held that the landlords were entitled to summary judgment where the plaintiff slipped and fell while descending stairs—although those stairs violated the building code.

[164] 289 Ga. App. 889, 658 S.E.2d 362 (2008).

[165] 277 Ga. App. 621, 627 S.E.2d 382 (2006).

[166] *Id.* at 624, 627 S.E.2d at 386.

[167] No. 3:03-CV-35(CAR), 2005 U.S. Dist LEXIS 25578 (M.D. Ga. Oct. 27, 2005).

[168] *Id.* at *12.

[169] *Id.*

[170] 283 Ga. App. 756, 642 S.E.2d 422 (2007).

[171] 284 Ga. App. 699, 644 S.E.2d 538 (2007) (en banc).

[172] 289 Ga. App. 71, 656 S.E.2d 211 (2007).

[173] Sotomayor v. TAMA I, LLC, 274 Ga. App. 323, 327, 617 S.E.2d 606, 610 (2005) (physical precedent) (punctuation and internal quotation marks omitted).

[174] Bonner v. Southern Rest. Group, Inc., 271 Ga. App. 497, 500, 610 S.E.2d 129, 133 (2005) (internal quotation marks omitted).

[175] 278 Ga. App. 156, 628 S.E.2d 232 (2006).

[176] *Id.* at 158, 628 S.E.2d at 234.

[177] *Id.*

[178] *Id.* at 159, 628 S.E.2d at 235.

[179] *Id.* (internal quotation marks omitted).

[180] 277 Ga. App. 621, 627 S.E.2d 382 (2006).

[181] 272 Ga. App. 259, 612 S.E.2d 83 (2005).

[182] *Id.* at 261, 612 S.E.2d at 85.

[183] 272 Ga. App. 246, 612 S.E.2d 69 (2005).

[184] 274 Ga. App. 323, 617 S.E.2d 606 (2005) (physical precedent).

[185] *Id.* at 323, 617 S.E.2d at 608.

[186] *Id.*

[187] *Id.* at 324, 617 S.E.2d at 608.

[188] *Id.* at 326, 617 S.E.2d at 610.

[189] *Id.* at 327, 617 S.E.2d at 610.

[190] *Id.* (internal quotation marks omitted).

[191] *Id.* at 329, 617 S.E.2d at 611.

[192] 267 Ga. App. 1, 598 S.E.2d 789 (2004).

[193] 260 Ga. App. 174, 581 S.E.2d 568 (2003).

[194] A similar case is *Duvall v. Green*, 262 Ga. App. 669, 586 S.E.2d 369 (2003), where the Court of Appeals held that the defendant homeowner was not negligent. Green, the caretaker, sued Duvall when her knee buckled walking down the stairs. Green alleged that Duvall had knowledge of the steepness. However, Green produced no other evidence regarding the stairs. In fact, she claimed she did not know why her knee buckled. She traveled the stairs several times and could not identify any basis for fault. The court held that "[Green] failed to rebut in any way Duvall's affidavit testimony that the stairs

were properly constructed and maintained." Duvall did not have superior knowledge of any dangerous 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 Ga., 262 Ga. App. 315, 585 S.E.2d 217 (2003) (defendant was not entitled to summary judgment 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) (summary judgment was not appropriate when plaintiff fell descending stairs she had just climbed because there was evidence the stairs violated the building code and were in a poorly lit area).

[195] 281 Ga. App. 149, 635 S.E.2d 322 (2006).

[196] 267 Ga. App. 856, 600 S.E.2d 834 (2004).

[197] *Id.* at 857-58, 600 S.E.2d at 835-36; *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 Dep't Store of Charleston, S.C., Inc. v. Cato, 267 Ga. App. 793, 600 S.E.2d 786 (2004) (store owner entitled to summary judgment because plaintiff did not see or feel any substance on the floor where he fell and instead merely assumed that he must have slipped on a substance; a store employee testified there was no substance on the floor and that the floor was clean and dry when she examined it after the fall); Metts v. Wal-Mart Stores, Inc., 269 Ga. App. 366, 604 S.E.2d 235 (2004) (Wal-Mart was entitled to summary judgment because plaintiff had no evidence that the display rack which fell on him had a defective design or was defectively constructed, that the boxes were stacked hazardously, or that Wal-Mart had superior knowledge of any hazard).

[198] 267 Ga. App. 143, 598 S.E.2d 865 (2004).

[199] *Id.* at 145, 598 S.E.2d at 867.

[200] Mitchell v. Austin, 261 Ga. App. 585, 583 S.E.2d 249 (2003).

[201] 277 Ga. App. 621, 627 S.E.2d 382 (2006).

[202] *Id.* at 627, 627 S.E.2d at 388.

[203] *Id.* at 628, 627 S.E.2d at 388 (internal quotation marks omitted).

[204] *Id.* at 629, 627 S.E.2d at 389.

[205] *Id.*

[206] Dickman v. South City Mgmt., Inc., 229 Ga. App. 289, 290, 494 S.E.2d 64, 65 (1997) (physical precedent) (punctuation, citations, and internal quotation marks omitted).

[207] Powell v. Woodridge Condo. Ass'n, Inc., 206 Ga. App. 176, 177, 424 S.E.2d 855, 856 (1992) (citation and punctuation omitted); *see also* Brewer v. Atlanta South 75, 288 Ga. App. 809, 655 S.E.2d 631 (2007).

[208] 290 Ga. App. 111, 658 S.E.2d 895 (2008).

[209] Harrison v. Plant Improvement Co., 273 Ga. App. 884, 887, 616 S.E.2d 123, 126 (2005).

[210] 258 Ga. App. 140, 572 S.E.2d 676 (2002).

[211] *Id.* at 141, 572 S.E.2d at 677.

[212] 271 Ga. App. 497, 610 S.E.2d 129 (2005).

[213] *Id.* at 499, 500, 610 S.E.2d at 132, 133.

[214] *Id.* at 499, 610 S.E.2d at 132.

[215] *Id.* (internal quotation marks omitted).

[216] *Id.*

[217] *Id.* at 500, 610 S.E.2d at 133.

[218] 299 Ga. App. 262, 683 S.E.2d 354 (2009).

[219] 280 Ga. App. 530, 634 S.E.2d 477 (2006).

[220] Brazier v. Phoenix Group Mgmt., 280 Ga. App. 67, 633 S.E.2d 354 (2006) (holding that defendant was entitled to summary judgment because the decedent mother was aware of the lake in which she drowned while attempting to rescue her 13-year-old autistic son).

[221] 283 Ga. App. 795, 643 S.E.2d 283 (2007).

[222] 286 Ga. App. 765, 650 S.E.2d 300 (2007).

[223] Gay v. Redland Baptist Church, 288 Ga. App. 28, 653 S.E.2d 779 (2007).

[224] 261 Ga. App. 585, 583 S.E.2d 249 (2003).

[225] No. A09A2248, 2010 WL 774959 (Ga. Ct. App. Mar. 9, 2010).

[226] 282 Ga. App. 863, 640 S.E.2d 367 (2006).

[227] O.C.G.A. § 51-3-1.

[228] O.C.G.A. § 51-3-2.

[229] Swanson v. Smith, 199 Ga. App. 471, 405 S.E.2d 301 (1991).

[230] Armstrong v. Sundance Entm't, Inc., 179 Ga. App. 635, 347 S.E.2d 292 (1986).

[231] 288 Ga. App. 180, 654 S.E.2d 402 (2007) (en banc).

[232] 268 Ga. App. 466, 602 S.E.2d 241 (2004).

[233] 261 Ga. App. 835, 584 S.E.2d 71 (2003).

[234] *Id.* at 836, 584 S.E.2d at 72 (internal quotation marks omitted).

[235] 265 Ga. App. 484, 594 S.E.2d 701 (2004).

[236] *Id.* at 486, 594 S.E.2d at 703 (internal quotation marks omitted).

[237] *Id.* at 485-86, 594 S.E.2d at 702-03; *see also* Collins v. Glover, 273 Ga. App. 352, 615 S.E.2d 194 (2005) (plaintiff, a licensee, was entitled to a jury trial to resolve factual issues concerning whether defendant knew or should have know that a leaky faucet, combined with freezing temperatures, created an unreasonable risk of harm to plaintiff).

[238] 273 Ga. App. 884, 616 S.E.2d 123 (2005).

[239] *Id.* at 885, 887, 616 S.E.2d at 124, 126.

[240] *Id.* at 886, 616 S.E.2d at 125.

[241] *Id.* (internal quotation marks omitted).

[242] *Id.* at 887, 616 S.E.2d at 126 (internal quotation marks omitted).

[243] *Id.* at 888, 616 S.E.2d at 126; *see also* Gomez v. Julian LeCraw & Co., 269 Ga. App. 576, 604 S.E.2d 532 (2004) (holding that 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).

[244] Brad Bradford Realty, Inc. v. Callaway, 276 Ga. App. 648, 650, 624 S.E.2d 179, 181 (2005).

[245] 266 Ga. App. 154, 596 S.E.2d 683 (2004).

[246] *Id.* at 156, 596 S.E.2d at 684 (internal quotation marks omitted); *see also* Gaydos v. Grupe Real Estate Investors, 211 Ga. App. 811, 440 S.E.2d 545 (1994).

[247] 253 Ga. App. 429, 559 S.E.2d 169 (2002).

[248] *Id.* at 431, 559 S.E.2d at 171.

[249] *Brad Bradford Realty, Inc.*, 276 Ga. App. at 650, 624 S.E.2d at 181 (internal quotation marks omitted).

[250] 276 Ga. App. 648, 624 S.E.2d 179 (2005).

[251] *Id.* at 651, 624 S.E.2d at 182.

[252] 258 Ga. App. 784, 575 S.E.2d 644 (2002).

[253] *Id.* at 786, 575 S.E.2d at 646; *see also* McCaskill v. Carillo, 263 Ga. App. 890, 589 S.E.2d 582 (2003) (holding that an independent contractor that installed carpet for an employer was not liable to an employee who tripped in the area where the carpet was being installed).

[254] 512 F. Supp. 2d 1296 (N.D. Ga. 2007).

[255] *Id.* at 1301 (footnote, citations, and internal quotation marks omitted).

[256] 265 Ga. App. 889, 595 S.E.2d 517 (2004).

[257] 289 Ga. App. 183, 656 S.E.2d 537 (2008).

[258] *Id.* at 185-86, 656 S.E.2d at 539-40 (footnotes, punctuation, and internal quotation marks omitted).

[259] 287 Ga. App. 555, 651 S.E.2d 754 (2007).

[260] 299 Ga. App. 265, 683 S.E.2d 351 (2009).

[261] Snellgrove v. Hyatt Corp., 277 Ga. App. 119, 123, 625 S.E.2d 517, 521-22 (2006).

[262] Barnes v. St. Stephen's Missionary Baptist Church, 260 Ga. App. 765, 767, 580 S.E.2d 587, 589 (2003) ("Georgia decisions considering the liability of property owners for criminal acts by third parties uniformly limit their discussions to the claims of invitees.").

[263] *Snellgrove*, 277 Ga. App. at 123, 625 S.E.2d at 522.

[264] *Id.* at 124, 625 S.E.2d at 522 (internal quotation marks omitted).

[265] Howell v. Three Rivers Sec., Inc., 216 Ga. App. 890, 892, 456 S.E.2d 278, 280 (1995) (en banc).

[266] *Snellgrove*, 277 Ga. App. at 124, 625 S.E.2d at 522 (internal quotation marks omitted).

[267] 277 Ga. App. 119, 625 S.E.2d 517 (2006).

[268] *Id.* at 124-25, 625 S.E.2d at 522.

[269] *See, e.g.*, Griffin v. AAA Auto Club South, Inc., 221 Ga. App. 1, 470 S.E.2d 474 (1996).

[270] 271 Ga. App. 479, 610 S.E.2d 99 (2005) (physical precedent).

[271] *Id.* at 479, 610 S.E.2d at 101.

[272] *Id.* at 480, 610 S.E.2d at 101 (internal quotation marks omitted).

[273] *Id.*, 610 S.E.2d at 102.

[274] *Id.* at 482, 610 S.E.2d at 102.

[275] *Id.*, 610 S.E.2d at 103; *see also* Brown v. All-Tech Inv. Group, Inc., 265 Ga. App. 889, 595 S.E.2d 517 (2004); Fallon v. Metro. Life Ins. Co., 238 Ga. App. 156, 518 S.E.2d 170 (1999) (physical precedent); Post Props., Inc. v. Doe, 230 Ga. App. 34, 495 S.E.2d 573 (1997) (physical precedent); Niles v. Bd. of Regents of Univ. Sys. of Ga., 222 Ga. App. 59, 473 S.E.2d 173 (1996).

[276] 262 Ga. App. 434, 585 S.E.2d 628 (2003).

[277] *Id.* at 439, 585 S.E.2d at 632.

[278] *Id.*

[279] *Id.*

[280] *Id.* at 438, 585 S.E.2d at 631 (internal quotation marks omitted).

[281] *Id.* at 439, 585 S.E.2d at 632 (internal quotation marks omitted); *see also* Britt v. Kelly & Picerne, Inc., 258 Ga. App. 843, 575 S.E.2d 732 (2002); Johnson v. Holiday Food Stores, Inc., 238 Ga. App. 822, 520 S.E.2d 502 (1999); Griffin v. AAA Auto Club South, Inc., 221 Ga. App. 1, 470 S.E.2d 474 (1996).

[282] 263 Ga. App. 682, 588 S.E.2d 849 (2003).

[283] *Id.* at 684-85, 588 S.E.2d at 851; *see also* Fernandez v. Georgia Theatre Co. II, 261 Ga. App. 892, 583 S.E.2d 926 (2003).

[284] 290 Ga. App. 772, 660 S.E.2d 750 (2008).

[285] Norby v. Heritage Bank, 284 Ga. App. 360, 644 S.E.2d 185 (2007).

[286] 299 Ga. App. 83, 681 S.E.2d 730 (2009) (en banc).

[287] O.C.G.A. § 51-3-1.

[288] *Lau's Corp.*, 261 Ga. at 492, 405 S.E.2d at 476.

[289] Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 785-86, 482 S.E.2d 339, 340 (1997).

[290] *Brown*, 265 Ga. App. at 893, 595 S.E.2d at 522 (punctuation and internal quotation marks omitted) (alteration in original).

[291] *Sturbridge Partners, Ltd.*, 267 Ga. at 786, 482 S.E.2d at 341.

[292] *Id.*

[293] *See, e.g.*, Hadden v. ARE Props., LLC, 280 Ga. App. 314, 316-17, 633 S.E.2d 667, 669-70 (2006) (physical precedent) (expert testimony insufficient to create a triable issue as to foreseeability); Carlock v. Kmart Corp., 227 Ga. App. 356, 361, 489 S.E.2d 99, 104 (1997) (en banc) (expert testimony not required to determine foreseeability of a shooting in a shopping center parking lot).

[294] *See, e.g.*, Drayton v. Kroger Co., 297 Ga. App. 484, 486-87, 677 S.E.2d 316, 318 (2009).

[295] 280 Ga. App. 106, 633 S.E.2d 426 (2006).

[296] 284 Ga. App. 360, 644 S.E.2d 185 (2007).

[297] 273 Ga. App. 406, 614 S.E.2d 793 (2005).

[298] *Id.* at 406, 614 S.E.2d at 794.

[299] *Id.* at 407, 614 S.E.2d at 795.

[300] *Id.* at 408, 614 S.E.2d at 795-96.

[301] *Id.* at 409, 614 S.E.2d at 796 (internal quotation marks omitted).

[302] *Id.* (internal quotation marks omitted).

[303] *Id.* (internal quotation marks omitted).

[304] 273 Ga. App. 619, 616 S.E.2d 468 (2005).

[305] *Id.* at 619, 616 S.E.2d at 469.

[306] *Id.* at 620, 616 S.E.2d at 469.

[307] *Id.* at 621, 616 S.E.2d at 470 (internal quotation marks omitted).

[308] *Id.* at 622-23, 616 S.E.2d at 471 (citing Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 268 Ga. 604, 606, 492 S.E.2d 865, 867 (1997)).

[309] *Id.* (citations omitted).

[310] No. A09A1951, 2010 WL 1078309 (Ga. Ct. App. Mar. 25, 2010) (en banc).

[311] 265 Ga. App. 889, 595 S.E.2d 517 (2003).

[312] *Id.* at 893, 595 S.E.2d at 521.

[313] *Id.* at 898, 595 S.E.2d at 525 (emphasis added).

[314] *Id.* at 899, 595 S.E.2d at 525.

[315] 260 Ga. App. 765, 580 S.E.2d 587 (2003).

[316] *Id.* at 766, 580 S.E.2d at 589.

[317] *Id.* at 767, 580 S.E.2d at 590.

[318] *Id.* at 768, 580 S.E.2d at 590.

[319] *Id.* at 769, 580 S.E.2d at 590-91 (internal quotation marks omitted).

[320] 268 Ga. App. 485, 602 S.E.2d 246 (2004).

[321] *Id.* at 487, 602 S.E.2d at 249.

[322] 285 Ga. App. 90, 645 S.E.2d 559 (2007).

[323] *Brown*, 265 Ga. App. at 893, 595 S.E.2d at 521 (internal quotation marks omitted).

[324] *Id.* (internal quotation marks omitted); *see also* Johns v. Hous. Auth. for City of Douglas, 297 Ga. App. 869, 678 S.E.2d 571 (2009).

[325] 265 Ga. App. 889, 595 S.E.2d 517 (2003).

[326] *Id.* at 896, 595 S.E.2d at 523.

[327] *Id.* at 893, 595 S.E.2d at 521.

[328] 267 Ga. App. 210, 598 S.E.2d 919 (2004) (physical precedent).

[329] *Id.* at 211, 598 S.E.2d at 921. Courts seem generally unsympathetic towards defendants that do not follow their own safety protocol.

[330] 297 Ga. App. 869, 678 S.E.2d 571 (2009).

[331] *Id.* at 869, 678 S.E.2d at 572.

[332] TGM Ashley Lakes, Inc. v. Jennings, 264 Ga. App. 456, 459, 590 S.E.2d 807, 813 (2003) (en banc).

[333] Munroe v. Universal Health Servs., Inc., 277 Ga. 861, 864 n.3, 596 S.E.2d 604, 606 n.3 (2004).

[334] 264 Ga. App. 456, 590 S.E.2d 807 (2003) (en banc).

[335] *Id.* at 459, 460, 590 S.E.2d at 813, 814.

[336] *Id.* at 460, 590 S.E.2d at 814 (internal quotation marks omitted).

[337] *Id.* at 464-65, 590 S.E.2d at 817 (internal quotation marks omitted).

[338] *Id.* at 464, 590 S.E.2d at 816-17 (internal quotation marks omitted).

[339] 277 Ga. 861, 596 S.E.2d 604 (2004).

[340] *Id.* at 866, 596 S.E.2d at 608.

[341] 276 Ga. 612, 580 S.E.2d 215 (2003).

[342] *Id.* at 613, 580 S.E.2d at 216.

[343] 258 Ga. App. 240, 573 S.E.2d 405 (2002).

[344] *Id.* at 244, 573 S.E.2d at 409.

[345] *Id.* at 242, 573 S.E.2d at 407.

[346] 282 Ga. App. 866, 640 S.E.2d 373 (2006).

[347] 280 Ga. App. 106, 633 S.E.2d 426 (2006) (en banc).

[348] *Id.* at 116, 633 S.E.2d at 434 (Andrews, P.J., concurring in part and dissenting in part).

[349] *Id.* at 114, 633 S.E.2d at 432.

[350] 278 Ga. 116, 598 S.E.2d 471 (2004).

[351] O.C.G.A. §§ 51-3-20 to -26.

[352] 278 Ga. at 116, 598 S.E.2d at 473.

[353] *Id.* at 117, 598 S.E.2d at 473.

[354] *Id.*, 598 S.E.2d at 474.

[355] *Id.* at 118, 598 S.E.2d at 474.

[356] 273 Ga. 113, 537 S.E.2d 345 (2000).

[357] *Id.* at 115, 537 S.E.2d at 348.

[358] *Id.* at 117, 537 S.E.2d at 349 (emphasis and internal quotation marks omitted).

[359] 270 Ga. App. 265, 606 S.E.2d 323 (2004).

[360] O.C.G.A. § 51-1-40(a).

[361] O.C.G.A. § 51-1-40(b); *see also* Leach v. Braswell, 804 F. Supp. 1551, 1554 (S.D. Ga. 1992).

[362] 269 Ga. App. 147, 152, 603 S.E.2d 702, 706 (2004).

[363] 254 Ga. 194, 199, 327 S.E.2d 716, 720 (1985).

[364] *See, e.g.*, *Leach*, 804 F. Supp. at 1554.

[365] Eldridge v. Aronson, 221 Ga. App. 662, 664, 472 S.E.2d 497, 499 (1996); *see also* Steedley v. Huntley's Jiffy Stores, Inc., 209 Ga. App. 23, 24, 432 S.E.2d 625, 626 (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, Inc., 192 Ga. App. 861, 862, 386 S.E.2d 889, 891 (1989).

[366] 221 Ga. App. 662, 472 S.E.2d 497 (1996).

[367] *Id.* at 664, 472 S.E.2d at 499 (internal quotation marks omitted).

[368] O.C.G.A. § 51-1-40(b).

[369] *Id.*

[370] Delta Airlines, Inc. v. Townsend, 279 Ga. 511, 513, 614 S.E.2d 745, 748 (2005) (internal quotation marks omitted).

[371] 256 Ga. App. 83, 567 S.E.2d 728 (2002).

[372] Solley v. Mullins Trucking Co., 301 Ga. App. 565, 687 S.E.2d 924 (2009).

[373] Hodges v. Erickson, 264 Ga. App. 516, 591 S.E.2d 360 (2003).

[374] 279 Ga. 255, 612 S.E.2d 279 (2005).

[375] *Id.* at 256-57, 612 S.E.2d at 281.

[376] 280 Ga. App. 94, 633 S.E.2d 360 (2006), *rev'd on other grounds*, 282 Ga. 312, 647 S.E.2d 29 (2007).

[377] 279 Ga. 511, 614 S.E.2d 745 (2005).

[378] *Id.* at 513, 614 S.E.2d at 748 (internal quotation marks omitted).

[379] *Id.* at 514, 614 S.E.2d at 749 (emphasis added).

[380] *Id.*

[381] *Id.* at 515, 614 S.E.2d at 749.

[382] 302 Ga. App. 243, 690 S.E.2d 444 (2010).

[383] *Id.* at ---, 690 S.E.2d at 446-47 (footnotes omitted).

[384] 288 Ga. App. 779, 655 S.E.2d 232 (2007).

[385] *Id.* at 784, 655 S.E.2d at 237 (quoting O.C.G.A. § 51-12-5.1(f)).

[386] 282 Ga. 312, 647 S.E.2d 29 (2007).

[387] 286 Ga. 27, 28, 685 S.E.2d 277, 279 (2009).

[388] *See* Silman v. Associates Bellemeade, 294 Ga. App. 764, 669 S.E.2d 663 (2008).

GEORGIA MECHANIC'S AND MATERIALMEN'S LIENS: PROTECT YOUR CLIENT AND PROTECT YOURSELF

By Ken Sisco

Ken Sisco is a partner in the Atlanta office of Hawkins & Parnell, LLP who has more than ten years of experience defending construction and personal injury lawsuits. His practice focuses on representing property owners, developers, general contractors, subcontractors, and design professionals in a wide variety of property damage, breach of contract, and personal injury lawsuits. He also defends manufacturers in product liability and breach of warranty claims, including "lemon law" cases. He has tried or arbitrated cases in Florida, Georgia, and New Jersey.

As many of us are aware, the current economy has been extremely hard on the construction industry. One of the consequences of these tough economic times is that there has been a large number of projects that have been halted or abandoned or have otherwise simply run out money, which has resulted in many contractors and suppliers going unpaid for the labor and materials that they supplied. Accordingly, now more than ever, contractors and material suppliers are heavily dependent upon their lien rights to protect them. Unfortunately, another consequence of many contractors and suppliers going unpaid is the growing number of legal malpractice suits brought by unpaid contractors and suppliers against their attorneys who failed to protect their lien rights.

The purpose of this article is to provide a focused summary of the requirements that must be met in order to properly perfect a lien and protect not only your clients, who are contractors and suppliers, but also you – the attorneys – who are asked to file lien claims on their behalf. This article is not intended to be an exhaustive study of Georgia lien law; rather, this article highlights the critical requirements for preserving a lien claim.

OVERVIEW AND BACKGROUND

Mechanic's and materialmen's liens are governed by O.C.G.A. §§ 44-14-360 to -369, and, as remedial statutes in derogation of the common law, these statutes are strictly construed against the lien claimant and in favor of landowners.[1] Therefore, claimants must strictly follow the statutory procedures for asserting liens or they will be without legal effect. However, once the lien has been established, a more liberal reading of the statute will be given so that fair and equitable relief may be obtained.[2]

The purpose of the mechanic's and materialmen's lien statutes is to give the furnishers of labor and material a claim upon the owner and to compel the owner, at the owner's peril, to withhold final payment until the owner has received

assurances from the contractor that the owner has paid all material and labor claims which are or may be perfected into liens.[3] The right to a lien is predicated upon the theory that the work and material or machinery for which the lien is sought has increased the value of the realty by becoming part thereof.[4]

Liens are very important for subcontractors and material suppliers since they typically do not have a direct contractual relationship with the property owner. Georgia law is clear that a materialman or subcontractor may not recover against an owner or general contractor with whom it has no contractual relationship under theories of unjust enrichment or implied contract; rather, they are limited to the statutory remedies provided by Georgia's lien statute.[5] Moreover, contractors and suppliers who do not have contractual relationships with the owner cannot seek payment under a third-party beneficiary theory or by arguing that the owner has been unjustly enriched by having the real estate improved.[6] Therefore, if the contractor or material supplier does not perfect its lien, its only recourse is against the party with whom it had a direct contractual relationship, and it is afforded no protection from the ultimate beneficiary of their labor and/or materials.

WHO IS ENTITLED TO A LIEN

Generally, there are two main requirements that must be met for a person or entity to be entitled to a lien on real estate:

1) the person or entity must provide labor, materials, or equipment for improvements in the real estate;[7] and

2) the labor, services, or materials were furnished at the request of the owner, contractor, or some other person acting for the owner or contractor.[8]

PERFECTING THE LIEN

The requirements for creating and declaring a lien are set forth in O.C.G.A. § 44-14-361.1, and "on failure of any of them the lien shall not be effective or enforceable."[9] The following is a summary of those requirements. The lien claimant must:

1) substantially comply with its contract for providing services, labor, or materials building;

2) file a claim of lien with the clerk of the superior court of the county where the property is located; and

3) file the claim of lien within 90 days after the completion of the work or the furnishing of services, materials, or machinery.[10]

The claim of lien shall be in substance as follows:

> A.B., a mechanic, contractor, subcontractor, materialmen, machinist, manufacturer, registered architect, registered forester, registered land surveyor, registered professional engineer, or other person (as the case may be) claims a lien in the amount of (specify the amount claimed) on the house, factory, mill, machinery, or railroad (as the case may be) and the premises or real es-

tate on which it is erected or built, of C.D. (describing the houses, premises, real estate, or railroad), for satisfaction of a claim which became due on (specify the date the claim was due, which is the same as the last date the labor, services, or materials were supplied to the premises) for building, repairing, improving, or furnishing material (or whatever the claim may be).[11]

The claim of lien shall also include the following two notices:

1) "The claim of lien expires and is void 395 days from the date of filing of the claim of lien if no notice of commencement of lien action is filed in that time period." (This notice must be in at least 12 point bold font.);[12] and

2) The owner of the property on which a claim of lien is filed has the right to contest the lien.[13]

The absence of these notices invalidates the lien.[14]

No later than two business days after the date the claim of lien is filed, the lien claimant must send a true and accurate copy of the claim of lien by registered or certified mail or statutory overnight delivery to:

1) the owner of the property or, if the owner's address cannot be found, the contractor, as the agent of the owner; and

2) if a notice of commencement is filed with the clerk of the superior court, to the contractor at the address shown on the notice of commencement.[15]

As previously stated, these requirements are strictly construed and the failure to comply can result in the lien be deemed invalid. However, it is also important to note that the claim of lien can be amended and modified as long as it is done before the expiration of the statutory time to file the claim of lien.[16]

NOTICE TO CONTRACTOR

Contractors and suppliers who are not in privity of contract with the contractor, such as sub-subcontractors and suppliers to subcontractors, also have to comply with the "notice to contractor" requirements set forth in O.C.G.A. § 44-14-361.5. Essentially, this statute requires these distant claimants to alert the contractor and owner that they are supplying labor and/or material to a project in order to have their rights protected.

From the outset, however, it is important to note that the requirements set forth in O.C.G.A. § 44-14-361.5 apply only if the contractor files a notice of commencement and complies with the other statutory requirements of a notice of commencement.[17] In those cases where the contractor files and complies with the notice of commencement requirements, the lien claimant who is not in privity of contract with the contractor must also send, by registered or certified mail or statutory overnight delivery, a written notice to contractor to the owner and the contractor for a project on which there has been filed with the clerk of the superior court a notice of commencement.[18]

The notice to contractor must be sent within 30 days of the later of the filing of the notice of commencement or the first delivery of labor, services, or materials

to the property, and it must set forth the following:

1) the name, address, and telephone number of the person providing labor, services, or materials;

2) the name and address of each person at whose instance the labor, services, or materials are being furnished;

3) the name of the project and location of the project set forth in the notice of commencement; and

4) a description of the labor, services, or materials being provided and, if known, the contract price or anticipated value of the labor, services, or materials to be provided or the amount claimed to be due, if any.[19]

PRELIMINARY NOTICE OF LIEN

Lien claimants have the option to afford themselves some additional protection by filing a preliminary notice of lien.[20] The purpose of the preliminary notice of lien is to put the owner on notice of a potential claim and to protect the lien claim from lien dissolution.[21] Under O.C.G.A. § 44-14-361.2, a lien is dissolved under certain circumstances such as when the contractor provides a sworn affidavit to the owner to receive final payment that states that the agreed price or reasonable value of the labor, services, or materials has been paid or waived in writing by the lien claimant.[22]

In order for a contractor or supplier to afford itself the protection of the preliminary notice of lien, it must file a preliminary notice of lien with the clerk of superior court of the county in which the real estate is located which sets forth the following:

1) the name, address, and telephone number of the potential lien claimant;

2) the name and address of the contractor or other person at whose instance the labor, services, or materials were furnished;

3) the name of the owner of the real estate and a description sufficient to identify the real estate against which the lien is or may be claimed; and

4) a general description of the labor, services, or materials furnished or to be furnished.[23]

The preliminary notice of lien must be filed within 30 days after the date the party delivered any materials or provided any labor or services for which a lien may be claimed.[24] If the party filing a preliminary notice of lien is not the contractor, then within seven days of filing the notice it must send by registered or certified mail or statutory overnight delivery a copy of the notice to the contractor or to the owner of the property.[25] The lien claimant may rely on the building permit issued on the property for the name of the contractor.[26]

FORECLOSING THE LIEN

Once the lien has been perfected, the lien claimant must make sure that it complies with all of the requirements to foreclose the lien. Once again, these requirements are strictly construed and require that the person or entity that has perfected its lien must commence an action (i.e., a lawsuit, arbitration, or bank-

ruptcy claim) within 365 days from the date of filing for record of the claim of lien.[27] Within 30 days after commencing the lien action, the lien claimant must file a notice of action with the clerk of the superior court of the county where the lien was filed.[28] The notice of action must:

1) contain a caption referring to the then-owner of the property against which the lien was filed and referring to a deed or other recorded instrument in the chain of title of the affected property;

2) be executed, under oath, by the party claiming the lien or by such party's attorney of record; and

3) identify the court or arbitration venue wherein the lien action is brought; the style and number, if any, of the lien action, including the names of all parties thereto; the date of the filing of the lien action; and the book and page number of the records of the county wherein the subject lien is recorded in the same manner in which liens specified in O.C.G.A. § 44-14-361 are filed.[29]

As a prerequisite to filing an action against the property owner, the lien claimant must file a lien action or obtain a judgment against the contractor or subcontractor to whom it supplied labor, materials, or services.[30] This prerequisite can be satisfied by filing a single action against either the contractor or subcontractor to whom it supplied labor, materials, or services and the property owner in the same lawsuit.[31]

Filing a lien action or obtaining a judgment against the contractor or subcontractor to whom it supplied labor, materials, or services is not required if:

1) the contractor or subcontractor absconds, dies, or leaves the state during the required time period for filing a lien action so that personal jurisdiction cannot be obtained;

2) the contractor or subcontractor is adjudicated as bankrupt; or

3) after the filing of a lien action, no final judgment can be obtained against the contractor or subcontractor for the value of such material, services, labor, or supplies because of:

    a. his or her death;

    b. his or her adjudication in bankruptcy; or

    c. the contract between the lien claimant and the contractor or subcontractor including a provision preventing payment to the claimant until after the contractor or subcontractor has received payment.[32]

A lien claimant may enforce the lien directly against the property if:

1) the action is filed within the required time period for filing a lien action; and

2) the judgment rendered is limited to a judgment in rem against the property improved and does not impose any personal liability upon the owner of the property.[33]

However, in such a lien action for recovery, the owner of the real estate improved, who has paid the agreed price or any part of same, may set up the payment in any lien action brought and prove by competent and relevant evidence that the payments were applied as provided by law, and no judgment shall be rendered against the property improved.[34]

Two important points must be emphasized. First, the failure of a lien claimant to commence a lien action within 365 days from the date of filing the lien, or the failure of the lien claimant to file the statutory notice of commencement of lien action in the county where the property is located, renders the claim of lien unenforceable.[35] Second, a claim of lien may be disregarded if no notice of commencement of lien action is filed within 395 days from the date the claim of lien was filed.[36]

OTHER CONSIDERATIONS

Lien Priority

Mechanic's and materialmen's liens are superior to all liens except tax liens, general and special liens of laborers, general liens of landlords of rent when a distress warrant is issued out and levied, claims for purchase money due persons who have only given bonds for titles, and to other general liens when actual notice of the general lien of landlords and others has been communicated before the work was done or materials or services furnished.[37]

As between lien claimants under O.C.G.A. § 44-14-361, they are ranked according to the date filed, but all of the liens for repairs, building, or furnishing materials or services, upon the same property, shall, as to each other, be of the same date when declared and filed for record within 90 days after the work is done or before that time.[38] As such, as between these lien claimants, there is no priority, and they are treated as a single class. If there are insufficient funds to satisfy all of these liens, the funds are distributed on a pro-rata basis.

Owner's Exposure to Lien Claims Are Capped by the Contract Amount

It is important to note that the potential liability of the owner of the real property upon which a lien is asserted is capped by the contract price with the contractor.[39] In keeping with this concept, it is also important to note that if the contractor on the project abandons its work, the owner is allowed to reduce the contract price by the amount necessary to complete the work.[40]

CONCLUSION

Georgia's mechanic's and materialmen's lien statutes are pretty straightforward; however, they are also strictly construed and the failure to comply with all of their requirements can result in a lien being declared invalid and unenforceable. The intent of this article is to highlight those key requirements and provide a guide that can be used as a checklist when filing liens. For those who are looking for a more exhaustive review of Georgia's mechanic's and materialmen's lien law, Daniel Hinkel's *Georgia Construction Mechanic's & Materialmen's Liens – With Forms*, which is published by West, is a good source.

ENDNOTES

[1] Brockett Road Apartments v. Georgia Pacific Corp., 138 Ga. App. 198, 225 S.E.2d 771 (1976).

[2] Atlanta Jewish Cmty. Ctr., Inc. v. Tom Barrow Co., 130 Ga. App. 608, 203 S.E.2d 921 (1974).

[3] Scott v. Williams, 111 Ga. App. 735, 143 S.E.2d 16 (1965).

[4] Skandia Draperies Mfg. Co. v. Augusta Innkeepers, Ltd., 157 Ga. App. 279, 277 S.E.2d 282 (1981).

[5] Kennessaw Flooring, Inc. v. Rector, 291 Ga. App. 704, 662 S.E.2d 808 (2008).

[6] Insilco Corp. v. Carter, 149 Ga. App. 772, 256 S.E.2d 70 (1979), *rev'd on other grounds*, 245 Ga. 513, 265 S.E.2d 794 (1980); *see also* Sundance, Inc. v. Guy, 174 Ga. App. 792, 331 S.E.2d 102 (1985); P.P.G. Indus., Inc. v. Hayes Constr. Co., 162 Ga. App. 151, 290 S.E.2d 347 (1982).

[7] O.C.G.A. § 44-14-361(a). This statute sets for an exhaustive list which includes contractors, subcontractors, materialmen, architects, foresters, land surveyors, mechanics, and laborers.

[8] O.C.G.A. § 44-14-361(b).

[9] O.C.G.A. § 44-14-361.1(a).

[10] O.C.G.A. § 44-14-361.1(a)(1), (2).

[11] O.C.G.A. § 44-14-361.1(a)(2).

[12] O.C.G.A. § 44-14-367.

[13] O.C.G.A. § 44-14-361.1(a)(2).

[14] O.C.G.A. §§ 44-14-361.1(a)(2), 44-14-367.

[15] O.C.G.A. § 44-14-361.1(a)(2). If the property owner is an entity on file with the Secretary of State's Corporations Division, sending a copy of the claim of lien to the entity's address or the registered agent's address shall satisfy this requirement.

[16] Shirah Contracting Co. v. Waite, 143 Ga. App. 355, 238 S.E.2d 728 (1977).

[17] *See* O.C.G.A. § 44-14-361.5(b) (listing the requirements that the contractor must meet to comply with the notice of commencement).

[18] O.C.G.A. § 44-14-361.5(a), (c).

[19] *Id.*

[20] O.C.G.A. § 44-14-361.3.

[21] O.C.G.A. § 44-14-361.2(a).

[22] O.C.G.A. § 44-14-361.2(a)(2)(A).

[23] O.C.G.A. § 44-14-361.3(a).

[24] *Id.*

[25] O.C.G.A. § 44-14-361.3(b).

[26] *Id.*

[27] O.C.G.A. § 44-14-361.1(a)(3).

[28] *Id.*

[29] *Id.* "[F]ailure to execute the notice under oath shall be an amendable defect which may be cured by the party claiming the lien or by such party's attorney without leave of court at any time before entry of the pretrial order and thereafter by leave of court. An amendment of notice pursuant to this Code section shall relate back to the date of filing of the notice." *Id.*

[30] *Id.*

[31] Taylor v. Mateer & Co., 117 Ga. App. 565, 161 S.E.2d 394 (1968).

[32] O.C.G.A. § 44-14-361.1(a)(4).

[33] *Id.*

[34] *Id.*

[35] O.C.G.A. § 44-14-361.1(a)(3).

[36] O.C.G.A. § 44-14-367.

[37] O.C.G.A. § 44-14-361.1(c).

[38] O.C.G.A. § 44-14-361.1(b).

[39] O.C.G.A. § 44-14-361.1(e).

[40] Mayer Elec. Supply Co. v. Fed. Ins. Co., 195 Ga. App. 191, 393 S.E.2d 270 (1990).

Georgia Court of Appeals Rejects Common Law Failure to Recall Claim in Product Liability Cases

By Richard J. Baker

Rick Baker is a partner with Owen, Gleaton, Egan, Jones & Sweeney, LLP, in Atlanta. His litigation practice focuses on complex product liability, medical malpractice, general casualty, employment, business, and construction and surety matters. He has represented the manufacturers and sellers of an assortment of products, such as motor vehicles, power equipment, medical device components, and heavy construction equipment. He is a member of Ford's trial and appellate teams in Reese.

For years, creative product liability plaintiffs' attorneys in Georgia have included claims for failure to recall allegedly dangerous products among their causes of action. The idea was to create a way to pin liability on a manufacturer without having to prove that a product was defective or negligently designed or manufactured, or that the manufacturer failed to issue an appropriate warning. My experience with failure to recall claims primarily has been in defending automobile manufacturers against claims that a vehicle passenger would not have been injured or died if a vehicle had been recalled and repaired or retrofitted. In just such a case, *Ford Motor Co. v. Reese*,[1] the Court of Appeals of Georgia has concluded that absent special circumstances not present in the case, no common law duty exists in Georgia requiring a manufacturer to recall a product after the product has left the manufacturer's control.

In *Reese*, a 76-year-old woman was injured when a loaded 58,000-pound dump truck slammed into the rear of her vehicle as she drove down a two-lane rural highway. The vehicle traveled 371 feet across the road and down an embankment before coming to a stop at the edge of some woods. The driver died 22 days later.

The plaintiffs sued Ford contending the driver's seatback collapsed in the rear impact, causing the driver to suffer more severe injuries than she otherwise would have suffered. They asserted claims for negligent and defective design, negligent failure to warn of the alleged defect, and negligent failure to recall the vehicle's seat. The trial court denied Ford's motions to dismiss the failure to recall claim for failure to state a claim and to exclude evidence about the issue. At trial, the plaintiffs' claim that Ford should have retrofitted the vehicle through a recall campaign in order to make the seat safer and prevent the driver's injuries and death was a centerpiece of their case.

Ford presented evidence that the design of the seatback was reasonable, protected occupants better than the seats suggested by the plaintiffs' experts, and

was consistent with the prevailing state of the art and industry standards. Ford also presented evidence that the driver's injuries and death did not occur as a result of the seatback's movement.

The plaintiffs began to set the stage for their failure to recall claim during voir dire, working to convince jurors that a manufacturer should recall a product if it presents any foreseeable danger. During the opening statement, plaintiffs' counsel repeatedly told the jury that Ford should have recalled and repaired the vehicle. They presented evidence that the vehicle could have been retrofitted with a seat with a different design, and their expert testified that under the alleged circumstances, a manufacturer should retrofit a vehicle with a different seat. The plaintiffs ended the case by arguing to the jury they had the power to get the vehicle recalled and prevent future harm by finding in favor of the plaintiffs.

Over Ford's objection, the court charged the jury:

> A negligent failure to warn or recall claim may arise from a manufacturer's post-sale knowledge acquired months, years, or even decades after the date of the sale of the first of these products. In such cases, the duty to warn or recall arises whenever the manufacturer knows, or reasonably should know, of the danger arising from the use of the product. The duty to warn or recall can arise even if the product is not defective but contains a danger or hazard that the manufacturer can anticipate.

The Cobb County jury returned a general verdict against Ford, but did not find liability for punitive damages. Ford appealed the verdict on several grounds, the first of which was that the trial court erred by instructing the jury on a duty to recall when no such duty exists under Georgia law. The Court of Appeals agreed with that enumeration of error and reversed and remanded the case. The Court found "the erroneous instruction did not merely draw the jurors away from the true issues in dispute, but actually authorized them to return a verdict in favor of [the plaintiffs] based on a legally invalid theory of recovery."[2] The Supreme Court of Georgia denied the plaintiffs' petition for certiorari.

According to the *Reese* Court, the threshold issue in any cause of action for negligence is whether, and to what extent, the defendant owes the plaintiff a duty of care. Without a legally cognizable duty, there can be no fault or negligence. The plaintiffs contended that the duty addressed in the trial court's charge was not an independent duty to recall, but a duty to *warn or recall*, which they believed was supported by *Mack Trucks, Inc. v. Conkle*.[3] The Court of Appeals disagreed with regard to *Mack Trucks*:

> Although the plaintiffs in *Mack Trucks, Inc.* had brought a claim "for negligent failure to recall or warn," there was no challenge or ruling on appeal as to the validity of that claim. Rather, the issue on appeal was whether a negligence claim for a defective product was a "product liability" cause of action under the punitive damages statute.[4]

Additionally, the plaintiffs argued that the trial court's combination of the words "warn or recall" in the charge meant that the Court did not need to

consider the validity of an independent failure to recall claim. But the Court pointed out that the plaintiffs clearly pursued an independent failure to recall claim throughout the trial and that the trial court had separately charged on an independent failure to warn claim. Meanwhile, Ford had offered evidence that a warning would not have been feasible or practical. Thus, under the circumstances, the jury could have agreed that no warning would have been feasible, but still found Ford liable for not recalling the vehicle and its seat.

The Court of Appeals also rejected the plaintiffs' contention that the question of whether a manufacturer has a duty to recall a product previously was resolved in *Smith v. Ontario Sewing Machine Co.*[5] In that case, the Court of Appeals purported to recognize a duty to recall, but the Supreme Court of Georgia expressly disapproved of the resolution of that issue and held that it was unnecessary for the Supreme Court to resolve the issue.[6] Based on that holding, the *Reese* Court found that the question of whether such a duty existed in Georgia had not yet been decided by the Supreme Court.

Ford urged that the Supreme Court, by citing Section 11 of the *Restatement (Third) of Torts: Products Liability* with approval in *Ontario*, had given an indication that it did not support an independent claim for failure to recall outside of the special limited circumstances addressed in the *Restatement*. Section 11 recognizes that there is a claim for negligent failure to recall only if a recall has been ordered by a government agency or a manufacturer voluntarily initiates a recall and performs it negligently. Neither of these circumstances was present in *Reese*.

The *Reese* Court found important public policy concerns supported not imposing a continuing duty to recall upon manufacturers.

> Because the cost of locating, recalling, and replacing mass-marketed products can be enormous and will likely be passed on to consumers in the form of higher prices, the recall power should not be exercised without extensive consideration of its economic impact. Courts, however, are constituted to define individual cases, and their inquiries are confined to the particular facts and arguments in the cases before them. Decisions to expand a manufacturer's post-sale duty beyond making reasonable efforts to warn product users about newly discovered dangers should be left to administrative agencies, which are better able to weigh the costs and benefits of such action.[7]

The vast majority of other jurisdictions have rejected a duty to recall and retrofit.[8] In the face of this fact, the plaintiffs addressed the nationwide authority contrary to their position only in a footnote. The Court of Appeals was persuaded by the holdings of other states, citing to an *American Law Reports* annotation which compiled cases from across the country and concluded "[t]he majority of courts refuse to extend upon the manufacturer the duty to repair or remedy its product postsale."[9]

Referring to the seminal case of *Banks v. ICI Americas, Inc.*,[10] the *Reese* Court reaffirmed that a manufacturer's duty to implement alternative safer designs is limited to the time the product is manufactured. That duty does not ex-

tend to months or years later when technology or knowledge may have changed. Any other rule, the court found, would render Ford a perpetual insurer of the safety of its products, contrary to established Georgia law. The court also noted that while the Georgia legislature has decided to impose a long-term continuing duty upon manufacturers to warn of a danger arising from a product after its sale or distribution pursuant to O.C.G.A. § 51-1-11(c), it has not chosen to impose a continuing duty upon product manufacturers to recall and retrofit their products. The Court presumed that the legislature could have created that duty if had desired to do so.

The plaintiffs also attacked the appeal on the ground that the jury issued a general verdict which Ford did not oppose. The jury, they argued, must be presumed to have found for the plaintiffs on their other theories, so that the failure to recall charge did not harm Ford. However, the court reaffirmed the long-held law that the verdict could not stand, because the court could not determine whether it was entered upon a proper basis.

Thus, unless one of the specific situations identified in the *Restatement* exists, manufacturers do not have a continuing duty to recall their products in Georgia.

ENDNOTES

[1] 300 Ga. App. 82, 684 S.E.2d 279 (2009). Facts, findings, and quotes throughout this article have been sourced from the *Reese* Court's decision and the parties' appellate briefs. In most instances, citations to *Reese* and the parties' briefs have been omitted, although some internal citations are included for the reader's reference.

[2] *Id.* at 87, 684 S.E.2d at 285 (quoting Hathaway v. Bishop, 214 Ga. App. 870, 873, 449 S.E.2d 318, 321 (1994)).

[3] 263 Ga. 539, 436 S.E.2d 635 (1993).

[4] 300 Ga. App. at 84, 684 S.E.2d at 283 (quoting *Mack Trucks, Inc.*, 263 Ga. at 539, 436 S.E.2d at 636) (citations omitted).

[5] 249 Ga. App. 364, 548 S.E.2d 89 (2001).

[6] Ontario Sewing Mach. Co. v. Smith, 275 Ga. 683, 685-86, 572 S.E.2d 533, 535 (2002).

[7] Victor Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 901 (1983) (footnotes omitted); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11, cmt. a, at 201 ("Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding the ramifications of such undertakings.").

[8] Tabieros v. Clark Equip. Co., 944 P.2d 1279, 1298-300 (Haw. 1997) (noting that "[v]irtually every other court" has rejected a duty to recall and retrofit).

[9] Lisa Anne Meyer, Annotation, *Products Liability: Manufacturer's Postsale Obligation to Modify, Repair, or Recall Product,* 47 A.L.R.5TH 395, § 2(a) (1997).

[10] 264 Ga. 732, 450 S.E.2d 671 (1994).

EMPLOYMENT DISCRIMINATION DEFENSE: RECENT TRENDS IN SUPREME COURT AND ELEVENTH CIRCUIT JURISPRUDENCE

By Stephen W. Mooney

Steve Mooney is a partner in the Atlanta office of Weinberg Wheeler Hudgins Gunn & Dial, LLC. His practice includes the representation of employers in labor relations cases, which encompasses all aspects of equal employment law, National Labor Relations Board matters, development of employment policies and procedures, and executive compensation issues. *He wishes to acknowledge the assistance of Josh Wood, a recent graduate of the University of Georgia School of Law who will join Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC in the fall of 2010.*

The United States Supreme Court decided four significant employment discrimination cases during the 2008-2009 Term[1] that will greatly affect how defense attorneys will advise clients and otherwise defend employment discrimination suits. These cases, which will be discussed in greater detail below, are:

Crawford v. Metropolitan Government of Nashville & Davidson County;[2]

AT&T Corp. v. Hulteen;[3]

Gross v. FBL Financial Services, Inc.;[4] and

Ricci v. DeStefano.[5]

The Eleventh Circuit Court of Appeals continues to be at the forefront in shaping the contours of employment discrimination law. The Eleventh Circuit issued several opinions last year that will frame discrimination cases for years to come. This article analyzes many of those decisions and their overall impact on the defense of employment discrimination lawsuits. A brief commentary is provided on select cases. Undoubtedly, each decision will have a significant impact on employers, employees, human resources personnel, insurers, and the employment bar as a whole.

SUPREME COURT CASES

Complaints During Investigations Are Protected Conduct Under Title VII

In *Crawford v. Metropolitan Government of Nashville & Davidson County*,[6] the Supreme Court held that Title VII protects employees who report discrimination or harassment in an internal investigation, even when the employee has not previously brought a formal complaint.

In this case, a thirty-year employee of the Metro School District, Vicky Crawford, did not independently come

forward with a complaint alleging sexual harassment. She instead reported inappropriate conduct during an investigation about purported harassing behavior by Metro's employee-relations director. When Metro's human resources officer asked Crawford if she had seen the director engage in "inappropriate behavior," Crawford described several occurrences where she contended that she had been the target of verbal and physical harassment from the director. For example, Crawford claimed that the director had replied to a greeting by Crawford by grabbing his crotch and stating, "[Y]ou know what's up"; that on several occasions he "put his crotch up to [her] window"; and that on one occasion the director entered Crawford's office and "grabbed her head and pulled it to his crotch." Additionally, two other employees also reported being sexually harassed by the director.

Metro did not take any corrective action against the director, but instead fired Crawford and the two other employees who accused the director of sexually harassing behavior soon after the investigation was concluded. Metro claimed that Crawford was fired for embezzlement of public funds, a claim later found to be baseless. Crawford argued that Metro was retaliating against her for providing information about the director's harassing behavior during the investigation. As a result, Crawford filed suit under Title VII of the Civil Rights Act of 1964, claiming retaliation in violation of 42 U.S.C. § 2000e-3(a), which makes it unlawful "for an employer to discriminate against any . . . employe[e]" who (1) "has opposed any practice made an unlawful employment practice by this subchapter" (the "opposition clause"); or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the "participation clause"). Crawford alleged that Metro violated both the opposition clause and the participation clause.

The district court granted Metro's motion for summary judgment, holding that Crawford's responses to Metro's questions did not "initiate or instigate" a complaint against Metro prior to investigation and, thus, did not warrant opposition clause protection. The district court held that responding to questions in an ongoing investigation did not constitute "opposition" under Title VII. Similarly, the district court believed Crawford's interview was not "participation" in violation of the participation clause because Crawford had not made any administrative charges at the time of the investigation and Metro's investigation was not the result of a pending EEOC charge. The Sixth Circuit Court of Appeals affirmed on the same grounds as the trial court, explaining that Crawford did not "oppose" any activities as required by the opposition clause because the statute requires "active, consistent 'opposing' activities to warrant . . . protection against retaliation."

The Supreme Court granted certiorari, noting that the Sixth Circuit's decision in this case was in conflict with the decisions of other circuits, particularly with regard to the opposition clause. The Supreme Court then unanimously reversed the Sixth Circuit, holding that the opposition clause of Title VII's anti-retaliation principle extends not only to an employee speaking out about discrimination on her own volition, but also protects an employee who answers questions during an employer's internal investigation.

The majority explained that the word "oppose" is undefined by the statute, and thus, it carries its ordinary dictionary meaning of "resisting or contending against." In doing so, the Supreme Court noted that an employee can "oppose" conduct by responding to questions in an investigation just as certain as by initiating discussion of the harassing conduct. The meaning of the word "oppose" includes providing a "disapproving account" of the ostensible behavior, even though the employee takes no further action beyond disclosing it. The Supreme Court clarified that "[n]othing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when asked a question."

In strong cautionary language, Justice Souter, who wrote the majority opinion, relied on an EEOC interpretation and of the opposition clause and made clear that: "When an employee communicates to her employer a belief that the employer has engaged in . . . employment discrimination, that communication virtually always constitutes the employee's opposition to the activity." Thus, an employee alleging retaliation under Title VII is not required to have initiated a formal administrative complaint for protections to apply; instead, the protections of the opposition clause can be established by answers to questions during an investigation. In this regard, the Supreme Court scrutinized both the district court's and the Sixth Circuit's interpretation of the law because it would go against the very purpose of Title VII and discourage employees from coming forward with complaints during an investigation. Because the Court decided this case on the opposition clause issue, it refrained from deciding whether the participation clause would have offered Crawford safeguard from termination.

Pre-PDA Bona Fide Seniority Systems Are Protected

In *AT&T Corp. v. Hulteen*,[7] the Supreme Court ruled that the employer, AT&T, did not violate the Pregnancy Discrimination Act by giving less credit for maternity leave taken before the PDA took effect in 1978 than for other medical leave in calculating pension benefits because the plan was a bona fide seniority system and was not adopted with a discriminatory intent.

By way of background, AT&T has long provided a pension plan to employees based on seniority, whereby benefits are calculated according to an employee's length of employment. This calculation is performed by deducting uncredited leave time from a particular employee's time of service. Before the enactment of the PDA, AT&T employees on "disability" leave received full service credit for the entire time they were absent, whereas employees who took "personal" leave received a maximum service credit of thirty days. Leave for pregnancy was considered personal leave.

In 1977, AT&T adopted a Maternity Payment Plan under which pregnant employees would receive disability credits for up to six weeks. Absences after six weeks were treated as "personal." Thus, pregnancy leave was treated differently than other types of disability leave, and absences were largely uncredited.[8] After the passage of the PDA in 1978, AT&T replaced the MPP with a plan that gave equal benefits for pregnancy-related disabilities and other

temporary disabilities. The new policy however, only acted prospectively; it did not make retroactive adjustments to service credit calculations for women who took leave prior to enactment of the PDA.

In this case, Noreen Hulteen and three other female employees who had taken pregnancy disability leave before passage of the PDA (and therefore received less service credit than other employees received under the AT&T's post-PDA policy) filed suit alleging pregnancy discrimination. On cross-motions for summary judgment, the district court held that post-PDA benefit calculations that use pre-PDA accrual rules violated Title VII. Affirming en banc, the Ninth Circuit Court of Appeals held that AT&T indeed violated Title VII by excluding time spent on pregnancy leave from service credit calculations.

The Supreme Court granted certiorari, noting conflicting judicial interpretations among the Sixth, Seventh, and Ninth Circuits. In a 7-2 decision authored by Justice Souter, the Supreme Court reversed the Ninth Circuit, holding that because AT&T's payments were part of a bona fide seniority system, and because it is not a violation of the PDA to calculate benefits under a discriminatory accrual rule applicable only prior to the PDA, AT&T was protected from the Title VII suit. Specifically, the Supreme Court explained that AT&T's benefit calculation procedure was safeguarded under Section 703(h) of Title VII, which the Court had previously held in *International Brotherhood of Teamsters v. United States*[9] insulates seniority systems that are bona fide and do not have discriminatory terms. Additionally, since the PDA does not apply retroactively, the calculation rule utilized by AT&T, which was lawful before the passage of the PDA under the Supreme Court's analysis in *Gilbert*, could not be retroactively applied.[10]

ADEA Suits Cannot Be Brought on a Mixed-Motive Theory

In *Gross v. FBL Financial Services, Inc.*,[11] the Supreme Court granted certiorari to address the issue of whether a plaintiff in an age discrimination case had to produce direct evidence of discrimination in order to obtain a mixed-motive instruction to a jury. A mixed-motive case is one in which a plaintiff claims the employer took the adverse employment action for both permissible and impermissible reasons. Instead, however, the Supreme Court decided an issue neither briefed nor argued by the parties. The Supreme Court defined the employee's burden of proof under the ADEA, holding that the plaintiff bringing the claim must prove by a preponderance of the evidence that age was the "but for" cause of the adverse employment action. The effect of this holding is that a mixed-motive, burden-shifting approach is not available under the ADEA; the burden of persuasion does not shift to the employer to show that it would have taken the same action regardless of age, even when the plaintiff has produced evidence that age was one motivating factor in that decision. The plaintiff retains the burden of persuasion at all times under the ADEA to prove that age was the "but for" cause of the decision at issue.

In this case, the plaintiff, Jack Gross, worked for FBL Financial Group, Inc. for more than thirty years. In 2003, when Gross was fifty-four years old, FBL reassigned him and transferred many of his previous duties to a younger woman

who formerly worked under his supervision. While Gross and the woman received the same salary, Gross considered the reassignment and loss of duties as a demotion. Consequently, he alleged FBL demoted him in violation of the ADEA, which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age."

At trial, Gross presented evidence that the reassignment was based at least partly on his age. FBL defended the decision on the grounds that the reassignment was part of a corporate restructuring and that Gross was better suited to the new position. Against FBL's objections, the lower court applied the mixed-motive standards applicable to Title VII to Gross's ADEA claim. The judge instructed the jury that it had to return a verdict for Gross if it determined that his age was a motivating factor in the decision, and that age would qualify as a motivating factor if it played a role in the decision to demote Gross. The judge also instructed that the verdict must be for FBL if it proved that it would have demoted him regardless of his age. The jury returned a verdict in Gross's favor, awarding $46,945 in lost compensation.

FBL appealed to the Eighth Circuit, challenging the lower court's instruction. The Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established for Title VII mixed-motive cases. That court found that the mixed-motive instruction was improper and that the jury instead should have been instructed to decide whether Gross had proved that age was the determining factor in the reassignment.

The Supreme Court granted certiorari and vacated the Eighth Circuit's decision in a 5-4 opinion authored by Justice Thomas. Interestingly, both parties had previously assumed that a mixed-motive theory could prevail, but they disagreed as to the requisite amount of proof. Instead, the Supreme Court held that plaintiffs pursuing ADEA age discrimination suits are held to a higher burden of proof than under other discrimination laws such as Title VII. The Supreme Court noted that because the ADEA and Title VII have different statutory frameworks, the case was not governed by Title VII precedent.

Justice Thomas, citing the text of the ADEA, rejected the availability of the mixed-motive, burden-shifting formula. The ADEA states that liability is imposed only when an adverse action is taken "because of" age. The Supreme Court interpreted "because of" to be the equivalent of "but for." Thus, plaintiffs must show that age discrimination was the basis for an adverse employment action, instead of merely showing that it was one motivating factor. The burden of persuasion remains on the plaintiff to prove that the decision would not have occurred "but for" his age, and the burden does not shift to the employer to show that it would have made the same decision regardless of age, even when the plaintiff has presented evidence that age was a factor. In his opinion, Justice Thomas emphasized that unlike Title VII, which was expressly amended in 1991 to authorize mixed-motive discrimination cases, the ADEA includes no such provision. "Unlike Title VII . . . the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor."

This decision essentially raises the bar for proof of a disparate treatment age discrimination claim. Before *Gross*, employees filing suit under the ADEA could, like Title VII plaintiffs, argue that age was a motivating factor that led to an adverse employment action, thereby shifting the burden to the employer to prove that age was not part of its decision. This is a marked change from lower court decisions which have held that an employer can be liable under a mixed-motive theory in ADEA cases. Now, the plaintiff must prove, by a preponderance of the evidence, that the adverse employment action would not have occurred "but for" her age, a higher standard than the mixed-motive standard allowed under Title VII for sex, race, national origin, and religious discrimination claims.

Employment Tests Cannot Be Disregarded Based on General Fear of Lawsuits by Other Employees

In *Ricci v. DeStefano*,[12] the Supreme Court held that a municipal employer could not disregard the results of a promotion test out of fear that other employees would bring a disparate impact claim if the city honored the results, because there was no "strong basis in evidence" that it would have been liable under the disparate impact doctrine.

In 2003, the City of New Haven, Connecticut, provided material to Industrial/Organization Solutions, Inc., an independent testing company, who developed and administered promotion examination tests for identifying qualified candidates for promotion to lieutenant and captain in the city's fire department. The testing process was administered in accordance with the city's collective bargaining agreement with its firefighters' union and set forth various criteria necessary to sit for the examination, including level of experience, training, and education, which comprised sixty percent of the candidate's score on the test. An oral examination accounted for the other forty percent of the candidate's score. Additionally, the city used expensive and detailed procedures to ensure that those scoring the examinations were independent assessors from outside the state and were comprised of a large percentage of minorities.

The test results showed a great disparity between eligible Caucasian candidates and minority candidates. Of the seventy-seven candidates who completed the lieutenant examination, forty-three were Caucasian, nineteen were African-American, and fifteen were Hispanic. Of these, twenty-five Caucasians, six African-Americans, and three Hispanics passed. Further, under New Haven's "rule of three" hiring standards, only the top ten scoring candidates were eligible for promotion to the eight positions then vacant for the lieutenant position, and all of the top ten scorers were Caucasian. Likewise, of the forty-one candidates completing the captain examination, twenty-five were Caucasian, eight were African-American, and eight were Hispanic. Of these, sixteen Caucasians, three African-Americans, and three Hispanics passed. Under the "rule of three," the top nine scorers were eligible for promotion to the seven vacant captain positions, which included seven Caucasians and two Hispanics.

In January 2004, officials realized and expressed concern about the statistical racial disparity of the test results. After many lively meetings, the Civil Service Board ultimately voted in a 2-2 deadlock that resulted in the pro-

nouncement not to certify the examination list results.

After the deadlock decision, Frank Ricci and seventeen other firefighters who passed the examinations but were denied promotions sued New Haven, as well as Mayor John DeStefano, Jr. and Civil Service Board members, under 42 U.S.C. § 1983 and Title VII, claiming that the failure to certify the test results was intentional discrimination based on race and a violation of the Equal Protection Clause. The city justified its decision not to certify the results on the ground that minority employees who did not score high enough on the tests would have sued under Title VII's disparate impact principles.

On cross-motions for summary judgment, the district court ruled in favor of New Haven. In doing so, the lower court explained that New Haven's motivation in denying the promotions, i.e., avoiding a disparate impact suit, was not per se intentional disparate treatment under Title VII. The district court also noted that the test results were discarded for everyone and no promotions were granted. As a result, the district court also denied Ricci's equal protection claim. In an eight-sentence per curiam opinion adopting the analysis of the district court, the Second Circuit affirmed.[13] The Supreme Court granted certiorari because the case "present[ed] two provisions of Title VII to be interpreted" and there are "few, if any, precedents in the courts of appeals."

In a 5-4 decision written by Justice Kennedy, the Supreme Court reversed the Second Circuit, holding that by discarding the promotion tests, New Haven violated Title VII's disparate treatment provisions. The majority began by holding that the decision to refuse to certify the lists of eligible candidates for promotion was intentional race-based discrimination that violated Title VII because the tests were rejected solely for the reason that Caucasian candidates were the majority of the employees eligible for the positions. Relying on its equal protection precedent, *Richmond v. J.A. Croson Co.*[14] and *Wygant v. Jackson Board of Education*,[15] the Supreme Court emphasized that before an employer can engage in intentional discrimination for the claimed purpose of avoiding unintentional disparate impact, the employer must have a "strong basis in the evidence" to believe that it will face a disparate impact suit if it proceeds with its action. Consequently, the Supreme Court articulated the principle that the "strong basis in evidence" standard applies to conflicts between Title VII's disparate treatment and disparate impact provisions.

The Supreme Court then held that the city could not meet the "strong basis in evidence" standard. Although it was undisputed that New Haven made a prima facie disparate impact showing, Justice Kennedy explained "[t]here is no genuine dispute that the examinations were job-related and consistent with business necessity." Additionally, there was no "strong basis in evidence" that there existed "an equally valid, less discriminatory" alternative to the test. A statistical showing of disparate impact, without more, fails to demonstrate a strong basis in the evidence for a race-conscious action. Justice Kennedy explained that the city could also use the "strong basis in evidence" standard should it face a later disparate impact suit.

Last, it is worth noting that the "White Firefighters Case" (as it has been called) has received much attention by commentators. This attention is undoubtedly because Supreme Court Justice Sonia Sotomayor was a judge of the Second Circuit when it issued its per curiam opinion, and she actively questioned the firefighters' lawyers at oral argument. Going forward, the hard question for employment practitioners will be how to advise clients in the wake of *Ricci*. Certainly, an employer who reviews hiring practices and believes that there is disparate impact must proceed with caution. The employer faces possible litigation from unhappy minority groups who are not awarded positions. The employer also faces possible litigation from non-minority workers if the employer disregards the results. The principle to take going forward is that a company can use carefully written promotion and retention tests as long as the tests are "job related for the position in question and consistent with business necessity." At the very least, *Ricci* promises to cause an increase in reverse discrimination claims as well as increased litigation over testing policies.

ELEVENTH CIRCUIT CASES

Shifting Job Duties Prior to Maternity Leave Does Not Violate PDA

In *Hyde v. K.B. Home, Inc.*,[16] a unanimous panel consisting of Judges Carnes, Marcus, and Wilson issued a per curiam opinion holding that a temporary reduction in job responsibilities is insufficient to support a claim for pregnancy discrimination.

Plaintiff Crystal Hyde became pregnant while she was an employee at K.B. Home. K.B. Home then granted Hyde leave under the Family and Medical Leave Act because of her pregnancy. Before Hyde's leave began, however, K.B. Home assigned many of her job responsibilities to another employee. Hyde then sued K.B. Home alleging gender and pregnancy discrimination, harassment, and retaliation under Title VII, as well as claims under the Pregnancy Discrimination Act and the FMLA. The Eleventh Circuit affirmed the district court's grant of summary judgment for K.B. Home on all claims.

Hyde argued that the withdrawal of substantially all of her work assignments constituted a serious and material change in employment involving a loss of prestige and responsibility. K.B. Home asserted that temporary reduction and reassignment of Hyde's job duties in preparation for maternity leave does not constitute an adverse employment action because it does not rise to the level of a serious and material change in the terms of employment. The Eleventh Circuit agreed with K.B. Home, explaining that Hyde had failed to make a claim for disparate treatment sex discrimination under Title VII because she had not been subjected to an adverse employment action. The Eleventh Circuit emphasized that Hyde's pay was not cut, her job title was not changed, and her job responsibilities were reduced and reassigned only because K.B. Home was preparing for her medical leave. The Eleventh Circuit also found it important that Hyde was not transferred or demoted.

The Eleventh Circuit likewise dismissed Hyde's harassment claim based on a hostile work environment theory because the conduct did not rise to the level of conduct that is "severe or perva-

sive to alter the conditions of [her] employment." Although Hyde's supervisor allegedly made several stray comments directed towards Hyde, "arguably" indicating that her reduction in responsibilities was due to her pregnancy, the Eleventh Circuit found that the comments did not rise to the level of being severe or pervasive, especially since they did not occur until *after* Hyde returned to work from FMLA leave. Additionally, Hyde's claims that her supervisor specifically ignored her and "slammed" papers on her desk did not constitute severe or pervasive conduct that altered her working conditions. In fact, Hyde offered no evidence that her supervisor's comments or conduct unreasonably interfered with her job performance. Therefore, Hyde's Title VII harassment claim based on a hostile work environment theory could not survive summary judgment.

In addition, the Eleventh Circuit upheld the dismissal of Hyde's retaliation claims under Title VII and the FMLA based upon her subsequent termination from employment in a reduction in force. To establish a prima face case of retaliation using circumstantial evidence, a plaintiff must show that "(1) [she] engaged in a statutorily protected activity; (2) the employer took an adverse employment action against [her]; and (3) there is a causal connection between the protected activity and the adverse action." Although Hyde alleged that her supervisor stated that he took work away from her because "she got fing pregnant" and was "milking the system," there was no evidence that he was a decisionmaker with regard to Hyde's termination or that any of the actual decisionmakers had any substantial input from her supervisor in making their decision. Therefore, Hyde could not maintain a retaliation claim under the "cat's paw" and mixed-motive theories. Hyde's supervisor did not play a part in the termination decision; therefore, Hyde could use no discriminatory motive by the supervisor in a retaliation claim brought against the company, and there was no evidence that her gender or pregnancy played any role in her termination through a reduction in force.

Failure to Identify a Suitable Comparator Continues to Be Fatal to Discrimination Claims

In *Smith v. Sunbelt Rentals, Inc.*,[17] a unanimous panel consisting of Judges Birch, Carnes, and Marcus issued a per curiam opinion holding that a sales representative could not establish a prima facie case of disparate treatment discrimination because he did not identify a valid comparator. Of the comparators proffered by him, the Eleventh Circuit found differences in their conduct, rank, and job responsibilities.

In this case, plaintiff Paul Roy Smith, a Caucasian employee of Sunbelt Rentals, brought suit alleging race discrimination under Title VII after he was disciplined and ultimately terminated. Smith contended that in March 2007, an African-American employee, Cory Colley, was found with a firearm in his truck in violation of Sunbelt's zero-tolerance firearms policy. Further, Smith alleged that during Sunbelt's investigation of the firearm incident, Colley falsely accused Smith of making a racially derogatory remark. Smith claimed that he was ultimately fired by Sunbelt in an "extremely unfair and racially discriminatory manner, as similarly situated African-American employees, including Colley, were not punished for similar or worse alleged misconduct."

Sunbelt argued that Smith was fired because of an event that occurred in July 2007 where he swerved toward a competing salesman's car on a highway and hit his front bumper against the competitor's rear bumper. Additionally, a Sunbelt manager testified that an incident involving inappropriate remarks by Smith in March 2007 (discussed below) also "played a part" in the discharge decision.

The district court addressed the only contested element in Smith's prima facie Title VII claim: "whether a similarly situated, African-American employee committed the same violations as Smith, a Caucasian employee, but did not suffer the same adverse employment action." Because Smith did not dispute the July 2007 termination, and because Smith provided no evidence that the July 2007 termination was discriminatory, the Eleventh Circuit focused its analysis on the March 2007 incident. The Eleventh Circuit then held that Smith was not involved in the same or similar conduct as Colley and that, therefore, no disparate treatment occurred.

During the March 2007 incident, Colley complained that Smith used a derogatory racial slur. More specifically, when Smith was completing a company form as an example to a new employee, he wrote "What It Is" in large letters in one of the blanks and showed the form to Colley. Colley questioned Smith as to what the words "What It Is" meant, and Smith responded, "You know, what it is. You talk like that, don't you?" Smith also referred to Colley as "y'all," and when Colley asked Smith, "Y'all, who's y'all?," Smith replied, "You know, y'all." When pressed by Colley, Smith responded, "You know, people." Sunbelt investigated the incident and, after interviewing witnesses to the exchange, determined that Smith's comments were racially offensive based on the tone and the way the words were used. As a result, he was suspended for two days. At the same time, Sunbelt also warned Smith that conduct he had exhibited toward a female employee on a previous occasion was chauvinistic and demeaning. Smith complained that he was suspended without having received any prior written warnings.

Prior to the March 2007 exchange between Smith and Colley, Colley was found with a gun in his truck on company property in violation of Sunbelt policy. Colley was given a written warning. The district court held that Smith failed to establish a prima facie case of discrimination, "solely due to the absence of a valid comparator." Therefore, the Eleventh Circuit limited its review to this issue.

The Eleventh Circuit, citing its seminal decision in *Jones v. Gerwens*,[18] reiterated that in order to maintain a claim for discriminatory discipline, a plaintiff must show "either that (a) he or she did not violate the work rule; or (b) he or she engaged in misconduct similar to that of a person outside of his or her protected class and the disciplinary measures enforced against him or her were more severe than those enforced against the other person."

Here, Smith was given a two-day suspension for his racially discriminatory remarks to Colley, while Colley was given a written warning for having a firearm in his vehicle on company property. The Eleventh Circuit opined that although "a written warning is less severe than a two-day suspension, racially discriminatory behavior is fundamental-

ly different than possession of a firearm." The Eleventh Circuit then explained that a claim of differential treatment requires "the misconduct at issue to be nearly identical." Additionally, the Eleventh Circuit noted that Colley, a driver, and Smith, a salesman, held different ranks and had different job responsibilities. Thus, the Eleventh Circuit affirmed summary judgment against Smith, concluding that Smith "ha[d] not identified any other Sunbelt employee – including Colley – who made a racially discriminatory remark to a co-employee or who engaged in similar conduct from which to establish a *prima facie* case."

Prompt Remedial Action Continues to Block Hostile Environment Claims

In *Blackmon v. Wal-Mart Stores East, L.P.*,[19] a unanimous panel consisting of Judges Barkett, Hull, and Anderson issued a per curiam opinion holding that since Wal-Mart took prompt remedial action after learning of a female employee's sexual harassment complaints, the employee could not maintain an action under Title VII or the Florida Civil Rights Act for a hostile work environment. It also upheld the dismissal of the employee's claim of retaliatory termination.

The Eleventh Circuit noted that because a co-worker, as opposed to a supervisor, allegedly harassed the plaintiff, Janis Blackmon, Wal-Mart could be liable only if "it knew or should have known of the harassing conduct and failed to take prompt remedial action." Citing *Watson v. Blue Circle Inc.*,[20] the Eleventh Circuit explained that "when an employer has a clear and published policy that outlines the procedures an employee must follow to report suspected harassment," actual notice is established when the complaining employee follows those procedures.

Here, after each alleged discriminatory action by Blackmon's co-worker, she complained to the assistant manager who was designated by Wal-Mart to receive harassment complaints. It was undisputed that after receiving notice, Wal-Mart reprimanded the co-worker after each complaint. Thus, the Eleventh Circuit concluded that there "is no genuine dispute as to the fact that Wal-Mart took prompt remedial action upon learning of the harassment." Moreover, the co-worker was terminated after he purportedly grabbed Blackmon's breasts. Both Wal-Mart's security camera and other witnesses confirmed that the employee had, in fact, touched Blackmon. However, because Blackmon and the co-worker were engaged in horseplay before the alleged touching, it was not clear whether the incident was an accident. Wal-Mart promptly investigated the alleged inappropriate touching, concluded that the touching was inappropriate, and fired the co-worker within two weeks.

Even after the co-worker was terminated, he came back to store on at least four occasions and threatened Blackmon that she too would be terminated. Blackmon was told by the assistant manager to walk away from her cash register whenever the co-worker entered the store. Blackmon contended that the remedial measures used by Wal-Mart were inadequate because (1) it had actual notice of the co-worker's behavior before the incident where he grabbed Blackmon's breasts; and (2) Wal-Mart refused to ban the co-worker from the store after he was terminated. The Ele-

venth Circuit disagreed with Blackmon's assertions and upheld summary judgment for Wal-Mart on her hostile work environment claim. It found that there was "no genuine dispute as to the fact that Wal-Mart took prompt remedial action upon learning of the harassment." The Eleventh Circuit emphasized that Wal-Mart reprimanded the co-worker on several occasions and that within two weeks of the touching incident it terminated his employment. In so holding, the Eleventh Circuit rejected Blackmon's argument that Wal-Mart should have banned the co-worker from the store. Instead, the Eleventh Circuit held that the termination "was a prompt and adequate remedy."

Likewise, the Eleventh Circuit held that Blackmon's retaliation claim under Title VII failed. Per Wal-Mart's four-strikes policy, Blackmon was fired for excessive absenteeism after a "Decision-Day" coaching. Although Blackmon argued that she was entitled to a warning before termination for poor attendance, the Eleventh Circuit held that this belief was incorrect. "Rather, under Wal-Mart's rules, a coaching received – for any reason, including absenteeism – after a Decision-Day coaching results in termination." Accordingly, the Eleventh Circuit reasoned that "Blackmon failed to provide any evidence that would indicate that Wal-Mart inconsistently applied its policies to her or otherwise retaliated against her for complaining." Thus, because Blackmon's termination was consistent with Wal-Mart policy, she could not prove that Wal-Mart's rationalization was mere pretext for retaliation.

ADA Plaintiffs Can Maintain Suit for an Illegal Pre-Offer Medical Inquiry

In *Harrison v. Benchmark Electronics Huntsville, Inc.*,[21] the Eleventh Circuit issued a unanimous opinion holding that a job applicant can sue his employer for making an illegal pre-offer medical inquiry, regardless of whether he was disabled under the Americans with Disabilities Act.

In 2005-2006, plaintiff John Harrison worked as a temporary employee for Benchmark through a staffing agency, Aerotek. Benchmark had established a practice whereby it would screen temporary employees for permanent positions. Harrison's supervisor at Benchmark asked him to submit an application for a permanent position, and in response Harrison submitted the application and agreed to take a drug test, pursuant to Benchmark's policy.

Harrison, however, took prescription barbiturates for treatment of his epilepsy. Harrison consequently tested positive for barbiturates. He was then summoned to his supervisor's office to discuss the positive drug test. Harrison told his supervisor that he had a lawful prescription for barbiturates, and the supervisor asked Harrison to retrieve the prescription.

The supervisor then telephoned Benchmark's Medical Review Officer to apprise him of the issue. The supervisor remained in the room while the MRO asked Harrison a series of questions regarding his use of barbiturates. Harrison answered the MRO's questions, including how long he had been taking barbiturates as well as the amount of barbiturates that he would take. Harrison told the MRO again (in the supervi-

sor's presence) that he was diagnosed with epilepsy at the age of two and was prescribed barbiturates to control his condition.

Because of Harrison's answers, the MRO subsequently cleared the results of Harrison's otherwise positive drug test. Also, and notably, Benchmark's human resources department had previously received authorization to hire Harrison for a permanent position. Harrison's supervisor, however, instructed the human resources department not to prepare an offer letter for Harrison. The supervisor additionally asked Aerotek not to allow Harrison to return to work at Benchmark. Aerotek then told Harrison that he was not permitted to work at Benchmark because he was cited as having performance and attitude problems and for allegedly threatening his supervisor.

Harrison subsequently filed suit alleging that Benchmark made an improper medical inquiry in violation of the ADA.[22] The trial court, however, held that Harrison could not maintain his claim. The court explained that "[the Eleventh Circuit] ha[s] never held that a private right of action exists for [pre-employment medical inquiry] claims." Additionally, the lower court asserted that even if a private cause of action did exist, the fact that Harrison tested positive for barbiturates authorized Benchmark to inquire into the legitimacy of his barbiturate use.

Upon appeal, the Eleventh Circuit noted that this was a case of first impression in that circuit. The court noted that "[w]e have not yet decided whether a plaintiff has a private right of action under 42 U.S.C. § 12112(d)(2)." The court was quick to point out, however, that the Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits had all addressed the issue and in each instance found that an employee has a private cause of action for an improper pre-offer medical inquiry, "irrespective of the plaintiff's disability status." The court then explained that the ADA provides a cause of action for any violation of its restrictions. In doing so, the Eleventh Circuit reached the same conclusion that other circuits have already espoused. Thus, Harrison properly pleaded his claim under the statute. Citing the statute's congressional intent and plain language, as well as EEOC regulations and guidelines, the Eleventh Circuit explained, "we now explicitly recognize that a plaintiff has a private right of action under 42 U.S.C. § 12112(d)(2), irrespective of his disability status."

As a result, the Eleventh Circuit found that the trial court erred in holding that Harrison could not establish a prima facie case of an ADA violation based on improper pre-offer medical inquiries. Despite the exception under the ADA whereby "employers may conduct follow-up questioning in response to a positive drug test," the Eleventh Circuit reversed the trial court because the lower court's decision "failed to acknowledge any limits on this type of questioning." "As the legislative history of § 12112(d)(2) makes clear, the drug test exemption 'should not conflict with the right of individuals who take drugs under medical supervision not to disclose their medical condition before a conditional offer of employment has been given.'"

According to Harrison, his supervisor was the person who told him that his drug test was positive. Further, Harrison asserted that all of the questions he

answered about his epilepsy condition and barbiturate medication were made in front of the supervisor, who should not have been in the room during Harrison's telephone conservation with the MRO. Although the supervisor denied knowing Harrison had epilepsy, the court determined that the factual disputes warranted consideration by a jury. Additionally, the supervisor gave other contradictory testimony, once stating that he was too busy to hire Harrison due to a companywide audit and later claiming that the audit itself was not enough of a reason to withhold the offer. As a result, the Eleventh Circuit opined that "a jury may find that [the] questions exceeded the scope of the likely-to-elicit standard . . . . A reasonable jury could infer that [the supervisor's] presence in the room was an intentional attempt *likely to elicit* information about a disability in violation of the ADA's prohibition against pre-employment medical inquiries."

This decision emphasizes the fact that employers must exercise great care and caution when conducting pre-offer medical inquiries. Employers should ensure that inquiries do not extend beyond the scope of an applicant's ability to perform job-related functions. At the very least, employers must keep in mind that they may face liability if it appears that their questions are likely to elicit information about a disability.

Gender-Specific Profanity Can Give Rise to a Disparate Treatment Claim

In *Reeves v. C.H. Robinson Worldwide, Inc.*,[23] the Eleventh Circuit issued a unanimous en banc opinion holding that gender-specific profane words can give rise to a disparate treatment claim, even when the words are not explicitly directed toward the plaintiff.

From July 2001 to March 2004, the plaintiff, Ingrid Reeves, was employed as a transportation sales representative in the Birmingham, Alabama branch of the shipping company C.H. Robinson. Reeves was the only woman who worked on the sales floor along with six male co-workers. The sales floor was an open area that was structured into an open pod of cubicles. As a result, Reeves could hear her male co-workers as they spoke over the phone or with each other.

Reeves was a former Merchant Marine and testified that she was "no stranger to coarse language." Still, Reeves claimed that the language used by her co-workers at C.H. Robinson was "unusually offensive." Much of the vulgar language, while generally offensive, was not gender-specific. Reeves frequently heard generally indiscriminate vulgar language and discussions of sexual topics. She claimed that her co-workers regularly used the "f-word," combined with various profanities and other obscene language. Additionally, her co-workers supposedly discussed sexual topics such as masturbation and bestiality.

Reeves also identified many instances where derogatory language aimed specifically at women as a group was used at C.H. Robinson. Although not speaking to Reeves directly, her male co-workers referred to individuals as "bitch," "f-ing bitch," "f-ing whore," "crack whore," and a crude word describing female genitalia. On one occasion, Reeves was told to speak with "that stupid bitch on line 4." Reeves also overheard her co-workers tell many lewd and offensive jokes, some with

sexual references to sisters and mothers and other inappropriate punch lines. In addition, each day Reeves' co-workers tuned the office radio to a crude morning show that featured regular discussions of women's anatomy, including graphic discussions of women's breasts. Further, one of Reeves' co-workers displayed a pornographic image of a fully naked woman with her legs spread on his computer screen.

According to Reeves, this offensive conduct occurred on a daily basis. She complained to her co-workers, and to upper management, but according to her, these complaints proved futile. In particular, Reeves complained about both nongender-specific vulgar conduct, as well as gender-specific offensive conduct.

Reeves resigned from C.H. Robinson in March 2004 and filed suit against the company in the Northern District of Alabama in February 2006, alleging that she had been subjected to a hostile work environment in violation of Title VII. Judge Inge P. Johnson granted C.H. Robinson's motion for summary judgment, holding "that the offensive conduct was not motivated by Reeves' sex, because the derogatory language in the office was not directed at her in particular."

Reeves appealed to the Eleventh Circuit, which reversed the lower court's ruling. The Eleventh Circuit then granted C.H. Robinson's motion for an en banc hearing. The opinion, written by Judge Marcus, began by explaining the framework of Title VII. The Eleventh Circuit noted that in order to prove a hostile work environment under 42 U.S.C. § 2000e-2(a)(1), a plaintiff must show "that her employer discriminated because of her membership in a protected group, and that the offensive conduct was either severe or pervasive enough to alter the terms or conditions of employment."[24] The Eleventh Circuit held that a plaintiff could prove a hostile work environment by showing severe or pervasive discrimination directed against her protected group, even if she herself was not individually singled out in the offensive conduct.

The Eleventh Circuit described the issue in the case as "whether the conduct alleged to have pervaded C.H. Robinson created a hostile work environment that 'exposed [Reeves] to disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed.'" Thus, the Eleventh Circuit believed that Reeves' case was properly evaluated under the disparate *treatment* framework as opposed to the disparate *impact* framework. In a footnote, the opinion notes that the hostile work environment that Reeves described was not "facially neutral" because she alleged that the office environment was permeated with gender-based derogatory slurs and conduct. As a result, "[t]he crux of Reeves' actionable claim [was] that these gender-specific actions exposed her to humiliation and discrimination that none of her male coworkers faced. She presented evidence of 'specific incidents,' not 'statistical disparities.'"

The Eleventh Circuit acknowledged the "bedrock principle that not all objectionable conduct or language amounts to discrimination under Title VII." General vulgarity or references to sex that are indiscriminate in nature will not, standing alone, be actionable. However, the use of sexually offensive, gender-based profanity in the workplace, such as the words "bitch," "slut," and other

sexually graphic language, could support a disparate treatment sexual harassment claim, even though the words are not explicitly directed toward the plaintiff. The Eleventh Circuit explained that "for purposes of establishing a claim of hostile work environment under Title VII, it is enough to hear co-workers on a daily basis refer to female colleagues as 'bitches[]' [and] 'whores' . . . to understand that they view women negatively, and in a humiliating or degrading way. The harasser need not close the circle with reference to the plaintiff specifically: 'and you are a bitch, too.'"

According to the Eleventh Circuit, Reeves had identified more than enough actionable conduct that a jury reasonably could find contributed to office conditions that were humiliating and degrading to women on account of gender, and therefore may have created a discriminatorily abusive working environment. "The terms 'whore[]' [and] 'bitch,' the vulgar discussions of women's breasts, nipples, and buttocks, and the pornographic image of a woman in the office were each targeted at Reeves's gender."

Of interest, the Eleventh Circuit briskly rejected C.H. Robinson's argument that there was no proof of gender animus because Reeves' co-workers had used gender-specific epithets before she arrived in the workplace. Judge Marcus explained, "This argument is inconsistent with the central premise of Title VII." The court noted that "[a]t the end of the day, this is a question of intent," which is difficult to discern. The court, however, held that the employer's intent was a question for the jury to decide.

Finally, the Eleventh Circuit rejected C.H. Robinson's argument that words such as "bitch" and "whore" were not gender-specific because at C.H. Robinson they are used to refer to both men and women. Reeves specifically disputed this fact, stating that she had never heard any man call another man "bitch" in the office. Judge Marcus gave little credence to this factual dispute. Instead, he reasoned that calling men these words did not make them any less offensive to women. "Calling a man a 'bitch' belittles him precisely because it belittles women. It implies that the male object of ridicule is a lesser man and feminine, and may not belong in the workplace. Indeed, it insults the man by comparing him to a woman, and, thereby, could be taken as humiliating to women as a group as well."

In sum, the Eleventh Circuit decided that a jury reasonably could find that C.H. Robinson's workplace exposed Reeves to disadvantageous terms or conditions of employment to which members of the other sex were not exposed. Thus, the case was reversed and remanded for further proceedings.

CONCLUSION

These recent decisions by the United States Supreme Court and Eleventh Circuit will have a substantial impact on the defense of employment discrimination lawsuits and may require changes in employers' current policies and procedures. Employers should carefully review their current policies and retrain their human resources and management staff, if necessary, regarding these new developments in the law.

ENDNOTES

[1] The 2008-2009 Term ended on June 29, 2009.

[2] 129 S. Ct. 846 (2009).

[3] 129 S. Ct. 1962 (2009).

[4] 129 S. Ct. 2343 (2009).

[5] 129 S. Ct. 2658 (2009).

[6] 129 S. Ct. 846 (2009).

[7] 129 S. Ct. 1962 (2009).

[8] Prior to the PDA, this treatment of pregnant employees was lawful. In 1976, the Supreme Court decided *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and held that differential treatment of pregnancy leave was not sex-based discrimination under Title VII. In 1978, Congress enacted the PDA and replaced *Gilbert*, making it illegal to treat pregnancy conditions worse than other medical conditions.

[9] 431 U.S. 324 (1977).

[10] The majority also explained that since AT&T's pregnancy leave policies were legal at the time that they were relevant for the plaintiffs, the amendment to Section 706(e) of the Lilly Ledbetter Fair Pay Act of 2009 was not applicable. The Act provides that for actions under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, there is an unlawful employment action when "an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice."

[11] 129 S. Ct. 2343 (2009).

[12] 129 S. Ct. 2658 (2009).

[13] The per curiam opinion was reviewed after a judge on the Eighth Circuit requested that the court hear the case en banc.

[14] 488 U.S. 469, 500 (1989).

[15] 476 U.S. 267, 290 (1986).

[16] No. 09-11755, 2009 WL 4269800 (11th Cir. Dec. 1, 2009) (per curiam); *see also Former Worker Failed to Establish Gender, Pregnancy Bias, Adverse Job Act on Claims*, 33 Empl. Discrim. Rep. (BNA) 726 (Dec. 30, 2009).

[17] No. 09-12585, 2009 WL 4672443 (11th Cir. Dec. 10, 2009) (per curiam); *see also Sales Rep Did Not Offer Valid Comparator Given Differences in Conduct, Rank, Duties*, 34 Empl. Discrim. Rep. (BNA) 41 (Jan. 13, 2010).

[18] 874 F.2d 1534 (11th Cir. 1989).

[19] No. 09-11953, 2009 WL 4979708 (11th Cir. Dec. 23, 2009) (per curiam); *see also Wal-Mart Took Prompt Remedial Action, Prevented Liability, Eleventh Circuit Says*, 34 Empl. Discrim. Rep. (BNA) 37 (Jan. 13, 2010).

[20] 324 F.3d 1252 (11th Cir. 2003) (per curiam).

[21] 593 F.3d 1206 (11th Cir. 2010).

[22] The relevant provision of the ADA provides that "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." 42 U.S.C. § 12112(d)(2)(A). Instead, an employer can only inquire into the "ability of an applicant to perform job-related functions." 42 U.S.C. § 12112(d)(2)(B). It is illegal to make targeted disability-related inquiries. The Eleventh Circuit's test as to whether an employer is asking disability-related questions is whether the questions are "likely to elicit information about a disability."

[23] 594 F.3d 798 (11th Cir. 2010) (en banc).

[24] Under Eleventh Circuit law, in order to prove a hostile work environment, the plaintiff must show:

1) that he or she belongs to a protected group;

2) that he or she has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature;

3) that the harassment was based on his or her sex;

4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and

5) a basis for holding the employer liable.

Reeves, 594 F.3d at 808.

THE EVOLVING DUTY TO SETTLE: A FOUNDATION MADE OF SHIFTING SANDS

By Philip W. Savrin and Jonathan J. Kandel

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Coverage lawyers are familiar with the principle that liability policies have separate obligations: the duty to defend and the duty to indemnify. Both of these duties run to the benefit of the insured; the duty to defend protects against liability being imposed, and the duty to indemnify protects the insured from having financial obligations within the limits of the policy that was purchased. Some jurisdictions blur the distinction between these obligations by holding that an insurer that wrongfully refuses to defend is estopped from asserting coverage defenses to damages awarded against the insured. In Georgia, however, an insurer that wrongfully refuses to defend can still contest its obligation to cover a settlement or damages that may be imposed.[1]

Despite the clear delineation between the scope of the duties owed by an insurer to its insured, a third duty has emerged in the case law that has no explicit contractual source: the obligation to settle a claim in certain circumstances when demanded by the adverse claimant within policy limits. This duty began as part of the insurer's obligation to protect the insured's personal assets from collection in the event a claim exceeded the limits of the policy. Steadily, however, the duty to settle has evolved from protecting the insured to also considering the interests of the claimant seeking to assert liability against the insured. This article explores the development of the duty, culminating most recently in *Fortner v. Grange Mutual Insurance Co.*[2]

INSURANCE POLICIES ARE PERSONAL CONTRACTS

Any discussion of duties owed by an insurer to its insured must begin with an acknowledgement that insurance poli-

cies are contracts that are governed by the same rules of interpretation as other contracts. In some aspects, insurance policies are narrower than ordinary agreements because they are "personal contracts." As the Court of Appeals has explained, "'[t]he insurer is selective of those risks which revolved around the character, integrity and personal characteristics of those whom they will insure.'"[3] For this reason, insurance policies cannot be transferred upon the sale of the property that is insured.[4]

Similarly, "claimants generally are not regarded as third-party beneficiaries of insurance policies."[5] Except in very limited circumstances, a claimant has no interest that can be protected by a direct suit on the policy until liability has been established – at that point, the claimant can seek to attach the policy proceeds as an asset of the insured.[6] Even then, however, the claimant's right to recover is limited by the terms of coverage under the policy and "any breach of conditions [by the insured] on which liability depended."[7] The only protection the claimant has before liability is resolved is from the policy being canceled once a loss has occurred.[8] Beyond that protection, the claimant's rights on the policy are derivative of the insured's.

INSURER'S CONTRACTUAL OBLIGATIONS

As stated in the introduction, the two obligations generally provided in a liability policy are the duty to defend and the duty to indemnify. Both of these duties arise from express contractual provisions such as the following example:

> We will pay those sums that the insured becomes legally obligated to pay for claims to which this insurance applies. We will have the right and duty to defend the insured against any claim seeking those damages.

The second sentence provides the duty to defend based on the allegations of the complaint. "If the facts as alleged in the complaint even arguably bring [the claim] within the policy's coverage, the insurer has a duty to defend the action."[9] The duty exists even if the allegations are "groundless, false or fraudulent."[10] Absent a contractual grant, there is no defense obligation.[11]

This duty to indemnify is also a creature of contract. Whereas the duty to defend is based on the *allegations* of wrongdoing, the duty to indemnify is based on demonstrated *proof* of liability.[12] This distinction in the scope of the duties is reflected in the measure damages resulting from a breach. "[W]hen the insurer breaches the contract by wrongfully refusing to provide a defense, the insured is entitled to receive only what it is owed under the contract – the cost of defense."[13] Breach of the duty to defend, in other words, does not impact whether coverage is owed under the separate duty to indemnify. Indeed, an insurer that wrongfully refuses to defend based on the allegations can still resist coverage under the narrower duty to indemnify based on the facts that are actually proved to exist.[14]

THE DUTY TO SETTLE

The duty to settle does not fall neatly into either the duty to defend or indemnify as it neither defeats a liability finding nor funds an amount the insured is legally obligated to pay. While the duties to defend and indemnify are based on express contractual commitments,

there is no duty to settle provision. The reasoning of the courts reflects, instead, that the duty to settle springs from the penumbra of obligations that the insurance company owes to its insured. In the early case of *United States Fidelity & Guaranty Co. v. Evans*, for example, the Court of Appeals explained that an insurance company, "[a]s the champion of the insured, . . . must consider as paramount [the insured's] interests . . . and may not gamble with his funds."[15] Because the relationship between an insurance company and its insured "is somewhat of a fiduciary one," the *Evans* court concluded that an insurer is negligent in failing to settle if proceeding to trial involves "an unreasonable risk . . . of unfavorable results out of reasonable proportion to the chances of favorable results."[16]

A few years later, the basis for the duty to settle was articulated in a slightly different manner: an insurance company "must accord the interest of its insured the same faithful consideration it gives its own interest."[17] This rule, although equitable, is not based on any explicit contractual duty but instead on the ground that an insurance company facing a policy-limits settlement demand faces no threat of additional loss by proceeding forward to a trial because it is the insured that will bear any damages beyond the policy limits. Consequently, the measure of damages to compensate the insured for the insurer's breach of the duty to settle is the full amount of damages awarded regardless of the liability limits of the policy.

The next significant discussion came in 1992 when an insurance company was presented with a time-limited demand for policy limits. In *Southern General Insurance Co. v. Holt*,[18] the insured's liability was clear in a case where the medical bills and lost wages alone exceeded the $15,000 policy limits. The policy-limits demand was left open for ten days and then extended five additional days. The insurance company did not respond to the demand within the time provided, and the case went to trial. After the jury returned an $82,000 verdict against the insured, the insured assigned her failure to settle claim against the insurance company to the claimant.

The Supreme Court upheld a subsequent jury verdict against the insurance company for its failure to settle. The court explained that an insurance company owes its insured the duty "to respond to a deadline to settle a claim within policy limits *when the company has knowledge of clear liability and special damages exceeding the policy limits*."[19] Even though the insurer was willing to pay the limits, the court emphasized that the insurance company acted unreasonably by not requesting an extension of time. With *Holt*, the Supreme Court made insurers accountable to claimants by requiring a response within a subjective and frequently artificial time period.

The Supreme Court considered another permutation of the duty to settle in 2003 when it decided *Cotton States Mutual Insurance Co. v. Brightman*.[20] In that case, the claimant made a policy-limit settlement offer that was contingent upon two separate insurers both agreeing to tender their policy limits. Neither company responded to the offer within the time period specified. Also, the insured in fact opposed any settlement believing that the claimant was responsible for causing the accident. After a verdict was returned for approximately

$1.8 million, the insured assigned her claims to the plaintiff who then convinced a jury that the refusal to settle was wrongful.

In the first layer of review, the Court of Appeals found that even though the demand was contingent on payment by two insurers, there is "an affirmative duty by the insurer to engage the injured party in discussions regarding an initial settlement demand in excess of policy limits."[21] This is so, the court reasoned, because initial demands are often above the final settlement figure, such that the insurer has a "duty" to explore settlement possibilities beyond simply receiving the injured party's demand.[22] Further, the court found an insured's opposition to settlement, or lack thereof, is irrelevant to the obligation to negotiate a settlement in good faith because the insured's consent was not required under the policy and the insurer is the expert on the settlement value of cases.

Upon certiorari review, the Supreme Court affirmed, albeit on different grounds. Importantly, the Supreme Court rejected the Court of Appeals' holding that an insurance company has a duty to explore settlement. The possibility of collusion by an injured party claiming that he would have settled within policy limits had that amount been offered is simply too great to allow such a rule to stand. Instead, the Supreme Court acknowledged that a claimant must make an unequivocal demand within policy limits so that the record may be clear as to the potential for resolution.[23] Nevertheless, the Supreme Court affirmed, explaining that an insurer faced with a demand contingent on agreements with others (such as when there are other insurers) can still "meet[] the portion of the demand over which it has control, thus doing what it can to effectuate the settlement."[24] Such a rule, the court explained, provides a "safe harbor" for the insurer by "protect[ing] the financial interests of policyholders in cases where continued litigation would expose them to a judgment exceeding their policy limits while protecting insurers from bad faith claims when there are conditions involved in the settlement demand over which they have no control."[25]

Although the issue of the insured's desire not to settle was briefed, the Supreme Court did not discuss its impact on the failure to settle, thereby leaving the Court of Appeals' holding untouched in that regard. The Supreme Court's silence on this issue is important because a failure to settle claim is vested in the insured. Absent an assignment of that right, the claimant has no cause of action.[26] As an assignee, the claimant "stands in the shoes" of the insured and can have no greater rights.[27] Logically, an insured's opposition to settlement demanded by the claimant should be a factor in deciding whether the insurer can be held liable *to the insured* for failing to settle the exposure. By allowing the claimant as assignee to seek recovery without allowing the insurer to introduce the insured's position on the settlement, *Brightman* effectively broadened the cause of action after it was assigned to the claimant.

FORTNER AND THE SHIFTING DUTY

The shift in the focus of the insurer's duty that was subtle in *Brightman* has been brought to the fore in *Fortner v. Grange Mutual Insurance Co.*[28] In *Fortner*, the claimant made a policy-limits demand to the tortfeasor's per-

sonal auto liability insurance company "contingent upon" the tortfeasor's business insurance policy paying an amount as well. The auto insurance company responded by tendering its policy limit in exchange for a full release of its insured with indemnification, including dismissing the claim against its insured with prejudice. The claimant treated the counteroffer as a rejection and proceeded to trial, where a jury returned a verdict for the claimant for $7 million. The tortfeasor subsequently assigned his failure-to-settle claim to the claimant. Following a trial on the failure-to-settle claim, the jury returned a verdict for the insurance company. The claimant appealed, arguing the jury was erroneously instructed that "an insurance company can offer its policy limits in response to the demand and then let the plaintiff negotiate with the remaining insurers."[29]

The Court of Appeals affirmed the jury verdict based on the *Brightman* safe harbor rule, but the Supreme Court reversed, finding that the insurance company had not offered its limits because it required full release of its insured.[30] The Supreme Court found that the condition would have potentially deprived the claimant of access to the tortfeasor's business policy. Accordingly, the court concluded, the jury should have been instructed to consider whether the condition was reasonable. Consequently, even though the insurer was seeking to protect its insured by negotiating for a dismissal, a jury must determine whether that effort was reasonable.

CONCLUSION

An insurance company's duty to act reasonably in considering settlement demands is based on the duties owed to the insured, not the claimant. The insurance company's request for a full release in *Fortner* was intended to protect its policyholder from excess liability, which is exactly what the duty to settle is meant to eliminate. Nonetheless, based on *Fortner*, an insurance company may still be found to have breached its duty to settle since the claimant *may* have been left without full recourse. This shift continues to broaden the insurance company's duty to settle from considering the interests of the insured to including the interests of the claimant as well.

ENDNOTES

1 Southern Guar. Ins. Co. v. Dowse, 278 Ga. 674, 676, 605 S.E.2d 27, 29 (2004).

2 286 Ga. 189, 686 S.E.2d 93 (2009).

3 Soufi v. Haygood, 282 Ga. App. 593, 596, 639 S.E.2d 395, 398 (2006) (quoting Higdon v. Ga. Farm Bureau Ins. Co., 204 Ga. App. 192, 194, 419 S.E.2d 80, 82 (1992)).

4 *Id.*

5 Payne v. Twiggs County Sch. Dist., 269 Ga. 361, 364, 496 S.E.2d 690, 692 (1998).

[6] Smith v. Gov't Employees Ins. Co., 179 Ga. App. 654, 655, 347 S.E.2d 245, 246 (1986).

[7] H.Y. Akers & Sons, Inc. v. St. Louis Fire & Marine Ins. Co., 120 Ga. App. 800, 804, 172 S.E.2d 355, 359 (1969).

[8] Harleysville-Atlantic Ins. Co. v. Queen, 250 Ga. App. 382, 384, 552 S.E.2d 436, 438 (2001).

[9] City of Atlanta v. St. Paul Fire & Mar. Ins. Co., 231 Ga. App. 206, 207, 498 S.E.2d 782, 784 (1998).

[10] Penn-Am. Ins. Co. v. Disabled Am. Veterans, Inc., 268 Ga. 564, 564, 490 S.E.2d 374, 376 (1997).

[11] Presidential Hotel v. Canal Ins. Co., 188 Ga. App. 609, 610, 373 S.E.2d 671, 672 (1988) (finding the duty to defend "is determined by the contract of insurance").

[12] Shafe v. Am. States Ins. Co., 288 Ga. App. 315, 317, 653 S.E.2d 870, 873 (2007).

[13] Colonial Oil Indus. v. Underwriters Subscribing to Policy Nos. TO31504670 & TO31504671, 268 Ga. 561, 562, 491 S.E.2d 337, 339 (1997).

[14] *Dowse*, 278 Ga. at 676, 605 S.E.2d at 29.

[15] 116 Ga. App. 93, 95, 156 S.E.2d 809, 811 (en banc), *aff'd*, 223 Ga. 789, 158 S.E.2d 243 (1967) (internal quotation marks omitted).

[16] *Id.* (internal quotation marks omitted).

[17] Great Am. Ins. Co. v. Exum, 123 Ga. App. 515, 519, 181 S.E.2d 704, 707 (1971).

[18] 262 Ga. 267, 416 S.E.2d 274 (1992).

[19] *Id.* at 269, 416 S.E.2d at 276.

[20] 276 Ga. 683, 580 S.E.2d 519 (2003).

[21] Cotton States Mut. Ins. Co. v. Brightman, 256 Ga. App. 451, 454, 568 S.E.2d 498, 500-01 (2002).

[22] *Id.*, 568 S.E.2d at 501.

[23] 276 Ga. at 686, 580 S.E.2d at 522.

[24] *Id.*

[25] *Id.*

[26] Metro. Prop. & Cas. Ins. Co. v. Crump, 237 Ga. App. 96, 96, 513 S.E. 2d 33, 33 (1999).

[27] Dep't of Transp. v. Mendel, 237 Ga. App. 900, 901, 517 S.E.2d 365, 367 (1999).

[28] 286 Ga. 189, 686 S.E.2d 93 (2009).

[29] *Id.* at 189, 686 S.E.2d at 94.

[30] *Id.* at 191, 686 S.E.2d at 95.

Recent Case Law Developments in Workers' Compensation

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Liberty Mutual Insurance Co. v. Roark, 297 Ga. App. 612, 677 S.E.2d 786 (2009).

Roark was injured in a motor vehicle accident while driving a truck for Short Mountain Trucking in Georgia. Short Mountain Trucking's insurer, Liberty Mutual, paid workers' compensation benefits to Roark under Tennessee law. Eventually, the workers' compensation claim was settled, after which Liberty had paid a total of $79,007.85 in benefits.

Thereafter, Roark and his wife sued the other driver involved in the motor vehicle accident, McReynolds, in Catoosa County Superior Court for personal injuries and loss of consortium. Liberty attempted to intervene to protect its subrogation lien under O.C.G.A. § 34-9-11.1(b). Although Roark and McReynolds agreed upon a tentative settlement, it was conditioned on resolution of the subrogation lien. Roark and Liberty could not resolve the lien because they could not agree on whether Georgia or Tennessee law governed. (Whereas O.C.G.A. § 34-9-11.1 requires that an employee be "fully and completely compensated" before an employer or insurer may recover under its subrogation lien, Tennessee law entitles an employer or insurer to reimbursement from a third-party tortfeasor *before the employee is entitled to recover*.[1])

Ultimately, Liberty filed suit in a Tennessee court to protect its rights, but Roark joined Liberty as an indispensable party in the Catoosa County Superior Court case, and then filed a motion for summary judgment. This was granted by the Catoosa County Superior Court. On appeal, the Georgia Court of Appeals affirmed the grant of summary judgment to Roark. In so ruling, the Court of Appeals stated that where an injury occurs in Georgia and the employee qualifies for workers' compensation benefits under Georgia law, it is Georgia law that governs the subrogation claim of the employer or insurer. The court found that Georgia conflicts of law rules "look to the state of the last act completing the tort to determine the applicable substantive law."

Liberty argued that because workers' compensation subrogation is a contract at law, the doctrine of *lex loci contractus* should be applied. The court reiterated that workers' compensation subrogation was a substantive issue, and that Georgia courts had already addressed the particular issue of subrogation rights presented and determined that Georgia law applied.

Finally, Liberty argued that when Roark moved to join Liberty as an indispensible party to the Georgia litigation, he consented to the governance of Tennessee law, and the trial court authorized the governance of Tennessee law when it granted the joinder request. The court held that nothing done by either Roark or the trial court amounted to consent to or authorization of Tennessee law.

City of Atlanta v. Roach, 297 Ga. App. 408, 677 S.E.2d 426 (2009).

Roach was a City of Atlanta police officer who sustained severe injuries, including a hip injury requiring surgery, in a May 13, 2004 motor vehicle accident arising out of and in the course of his employment. While out of work, he moved to Rochester, New York. After a long drive back and forth between Rochester and Atlanta to discuss a return to work with his commanding officer, Roach experienced increased pain in his hip. Therefore, he put a heating pad under his hip, and fell asleep. When he awoke, the heating pad had burned his hip in an area he could not feel because of nerve damage incurred during surgery on the hip. The heating pad had not been prescribed by a physician and had not been authorized or paid for by the City of Atlanta.

An ALJ found that the claimant's hip burns constituted a compensable superadded injury. The Appellate Division reversed, holding that the burns did not arise as a "natural consequence" of the claimant's left hip fracture. In so ruling, the Appellate Division also found the burns did not result from reasonably required medical treatment, in that the heating pad was neither prescribed or authorized.

The Superior Court reversed the Appellate Division. It found that the Appellate Division used the wrong standard, requiring a "direct causal relationship," when the superadded injury needed only to be a "consequence of" the original injury. The court further found that there was no requirement that the superadded injury arise from a medical treatment that was specifically pre-

scribed or authorized. Finally, it found that there was a "complete absence of medical or testimonial evidence" that the heating pad was "unreasonable or unnecessary."

The Court of Appeals found that there was sufficient evidence to conclude that claimant's hip burns resulted from both the use of the heating pad *and* falling asleep while using it. Therefore, there was sufficient evidence for the Board to determine that the burns were not "a natural consequence" of the original injury. The Court of Appeals also determined that Board was authorized to find that non-prescribed, non-authorized use of a medical device *while sleeping* was not "reasonable and necessary medical treatment." Therefore, the Superior Court's decision was reversed.

Home Depot v. Pettigrew, 298 Ga. App. 501, 680 S.E.2d 450 (2009).

The claimant, Pettigrew, injured her ankle in 2003, underwent physical therapy and surgery, and received TTD benefits. She began to experience back problems, which her physician attributed to an altered gait resulting from her ankle injury. She subsequently filed an application for catastrophic designation.

The ALJ ruled (a) that the claimant's ankle injury was catastrophic, but that (b) her back problems were degenerative rather than resulting from the ankle injury. Pettigrew appealed the ruling that the back condition was not compensable, arguing that the she did not have notice that the compensability of her back condition was a hearing issue. To that end, she argued that there was no WC-3 filed controverting the condition, no WC-14 filed to add the compensability issue to the hearing (regarding catastrophic designation), and that at the hearing, the ALJ framed the only issue as that of catastrophic designation. The Appellate Division found that because the claimant had listed her back as among the "body parts" on her WC-14 and both parties had the opportunity to present evidence on the issue, the ALJ's determination was authorized.

On appeal, the Superior Court disagreed with the Appellate Division, finding the issue of compensability of the back was not properly raised before the ALJ. Therefore, the court struck the portion of the ALJ's Award which ruled the back condition was not compensable. The employer/insurer appealed that ruling.

The Court of Appeals found that the mere listing of the back as a "body part" on the claimant's WC-14 was not enough to raise the issue of compensability. The court noted, "[I]n order for an issue to be determined at a hearing, a party must either have notice and an opportunity to be heard on the issue or have given express or implied consent for the issue to be heard." In determining whether consent could be implied in the present case, the court noted that the only evidence presented that was relevant to the issue of compensability was also relevant to the issue of catastrophic designation. Because the issue of compensability of the low back was not "squarely recognized" by the parties or the ALJ, there was no implied consent to litigate the issue. Ultimately, however, the Court of Appeals found that the Superior Court lacked the power to strike a portion of the ALJ's Award. Instead, the proper remedy was to remand the case back to the ALJ for a hearing on the compensa-

bility of the low back.

Strickland v. Crossmark, Inc., 298 Ga. App. 568, 680 S.E.2d 606 (2009).

The claimant, Strickland, was a merchandising sales representative for Crossmark. On August 15, 2008, she allegedly aggravated a pre-existing back injury while working at a Wal-Mart location (for Crossmark). She reported the injury to her supervisor that morning (between 11:00 a.m. and 11:30 a.m.). However, some evidence showed that the claimant did not sign in for work at the Wal-Mart until noon. She claimed she had forgotten to sign in until she left for the hospital. The employer/insurer paid TTD from August 23, 2005 until October 3, 2005, and then controverted the claim.

The ALJ denied the claim and the claimant's request for attorney fees. On appeal to the Appellate Division, the claimant argued *for the first time* that the Notice to Controvert filed by the employer/insurer was invalid because they had failed to pay the claimant all of the benefits due to her at the time of the controvert (as required by O.C.G.A. § 34-9-221(h)). The Appellate Division vacated the ALJ's decision and remanded the case for further proceedings and consideration of the issue of the validity of the Notice to Controvert. The employer/insurer appealed this decision to the Superior Court of Lowndes County.

The Superior Court ruled that the Appellate Division improperly considered an issue that had not been raised before the ALJ. On appeal to the Court of Appeals, the court found that because the Appellate Division had directed a remand to the ALJ, the Appellate Division had not issued a "final award," which is required for an appeal to the Superior Court. Instead, the case had been remanded back to the ALJ, and it remained pending there. There is no provision in the Workers' Compensation Act for an interlocutory appeal.

Kroger Co. v. Wilson, 301 Ga. App. 345, 687 S.E.2d 586 (2009).

The claimant, Wilson, was a truck driver who experienced a work-related injury while employed by Kroger in 1994. He underwent back surgery and was out of work on TTD for two years before returning to light duty work at Kroger for fourteen months. He underwent a second surgery in February 1998 and returned to work on sedentary duty. He received TPD through the 350th week, and his benefits were suspended in September 2001. He ceased work altogether in May 2004.

In August 2003, the claimant (who, again, was still working at this point) filed a WC-14 requesting TTD *or* TPD, but did not request catastrophic designation. This hearing request was subsequently withdrawn by the claimant. In April 2006, he filed a WC-R1CATEE. An ALJ ruled that the claimant's request for TTD in connection with catastrophic designation was barred by the change in condition statute of limitations, O.C.G.A. § 34-9-104(b). The Appellate Division reversed, apparently finding that the claimant's August 2003 application for TTD or TPD tolled the statute of limitations. However, the Superior Court reversed the Appellate Division's decision.

On appeal, the Court of Appeals reaf-

firmed its decision in *Williams v. Conagra Poultry of Athens, Inc.*,[2] which established that a request for catastrophic designation is subject to the change in condition statute of limitations under O.C.G.A. § 34-9-104(b). The court further found that the claimant's August 2003 WC-14 requesting TTD or TPD did not toll the statute of limitations with respect to a catastrophic designation claim. The court said,

> Were we to hold that a statute of limitation for requesting catastrophic designation is tolled when a working claimant applies for a hearing regarding a temporary disability claim, and then withdraws his hearing request, we would effectively invalidate the statute of limitation on catastrophic injury designation requests.

Because the claimant's WC-R1CATEE was filed more than two years after the last payment of TPD, the request for income benefits due to a change in condition based on catastrophic designation was barred under O.C.G.A. § 34-9-104(b). Therefore, the Superior Court's ruling was affirmed.

Performance Food Group, Inc. v. Williams, 300 Ga. App. 831, 686 S.E.2d 437 (2009).

Gunn, a Tennessee resident, was injured in a motor vehicle accident while driving a truck for Performance Food Group, Inc. in Georgia. Gunn, while driving in the course of his employment, collided with a vehicle owned by Mikula and driven by Williams. Performance Food Group, through its program servicer, paid medical and indemnity benefits to Gunn under Tennessee workers' compensation law. Performance Food Group brought an action against Williams and Mikula under Tennessee law to recover for the medical and indemnity benefits it paid to Gunn. The trial court granted Williams and Mikula's motion for summary judgment.

The Court of Appeals cited the recent decision in *Liberty Mutual Insurance Co. v. Roark* in holding that because Gunn was injured in Georgia and was eligible to receive workers' compensation benefits in Georgia, Georgia law governed Performance Food Group's subrogation claim. This is because Georgia conflicts of law rules look to the state of the last act completing the tort to determine the applicable substantive law. The Court of Appeals further held that O.C.G.A. § 34-9-11.1(b) provides the employer or insurer a right of subrogation limited to benefits paid under the Georgia Workers' Compensation Act, and as a consequence, Performance Food could not pursue a subrogation claim for benefits paid under Tennessee law. The trial court's grant of summary judgment was therefore upheld.

St. Joseph's Hospital v. Ward, 300 Ga. App. 845, 686 S.E.2d 443 (2009).

Ward was a nurse at St. Joseph's Hospital who asserted workers' compensation claims for the following injuries: left knee (12/19/03), right knee (6/23/05), right knee (7/7/05), and both knees (9/16/05). The ALJ acknowledged the four injury dates and specifically found the June 23, 2005 accident compensable. At that time, Ward injured her right knee when she turned to get a patient some water and twisted the knee. She felt a pop and felt an im-

mediate onset of pain. The ALJ further found that Ward sustained a fictional new accident on September 15, 2005, the date when she was no longer able to continue working due to a gradual worsening of her condition at least partially attributable to her continued work after her June 23, 2005 injury. The ALJ made no specific findings with regard to the compensability of any injuries to the left knee.

St. Joseph's Hospital appealed the decision and the Appellate Division held the December 19, 2003 injury barred by the statute of limitations. The Appellate Division further held that the June 23, 2005 injury was not compensable based on *Chapparal Boats, Inc. v. Heath*[3] because "the employee was not exposed to any risk unique to her employment by standing and turning, and that, in turning, she did not come into contact with any object or hazard of employment." The Appellate Division also noted that Ward returned to work on light duty for only one month in a sit-and-greet position and therefore did not show that any subsequent trauma to her idiopathic right knee injury resulted from the performance of her job duties.

The Superior Court reversed with the reasoning that the Appellate Division misconstrued *Chapparal*. The Superior Court held that Ward's injury directly resulted from the performance of her work duties while assisting a patient and that turning to get a cup of water for a patient is not a risk that Ward would have been exposed to outside of her employment. There was therefore a causal connection between Ward's injury and her employment duties. The Superior Court also held that the facts supported a fictional new injury on September 16, 2005 notwithstanding the Appellate Division's barring of the December 19, 2003 injury as in violation of the statute of limitations.

The Court of Appeals reversed, holding that the Superior Court exceeded its authority in rejecting the Appellate Division's application of *Chapparal*. The Court of Appeals held that to be compensable, an injury must both occur in the course of and arise out of the employment, and that Ward did not carry her burden of showing that her injury arose out of her employment. The *Chapparal* standard for whether an injury is compensable was whether the employee would have been equally exposed to the risk apart from the employment and whether the injury was related to or caused by the peculiar nature of a condition of the employment. The Court of Appeals stated that the decision of the Appellate Division should be deferred to as the fact finder should remain the final arbiter of the compensability of an injury and of whether a claimant's disability arose out of the employment as well as in the course of it. The Appellate Division previously concluded that Ward was not exposed to any risk unique to her employment by standing and turning and her injury was therefore not compensable.

The Court of Appeals further held that the Superior Court erred in reversing the Appellate Division's factual finding that a compensable fictional injury did not take place on September 16, 2005 as the facts with regard to the issues were in dispute.

Trucks, Inc. v. Trowell, 302 Ga. App. 488, --- S.E.2d --- (2010).

Trowell worked as a truck driver for

Trucks, Inc. She was rolling down the landing gear of a trailer on April 18, 2006 when she felt a burning sensation in her right shoulder. She reported the injury to Trucks and continued working. Trucks and its insurer, Great West Casualty Company, accepted her claim as compensable as a medical only claim and paid for her medical treatment while she continued to work. She was treated at her family medical practice and then referred to Dr. James Barber. Trowell later resigned and began working for Trans Systems, Inc. driving a dump truck. She left that job in December 2006 after about a month because it was slow.

Trowell underwent an MRI in January 2007 which revealed the presence of a positive impingement of the shoulder. Dr. Barber recommended arthroscopic surgery to remove the bone causing the impingement and evaluate the condition of Trowell's rotator cuff. He advised Trowell not to work until the surgery was performed. Great West refused to pay for surgery or any other medical treatment in light of Trowell's intervening employment with Trans Systems. A hearing was held in which the ALJ found that Trowell's medical condition was the result of the initial injury sustained on April 18, 2006 and not a change in condition or new accident. The ALJ rejected the contention by Trucks and Great West that Trowell's condition was caused by her employment with Trans Systems.

The Appellate Division affirmed the findings of the ALJ. The Superior Court also affirmed, but on the basis that Trowell had proven a change in condition entitling her to benefits.

The Court of Appeals affirmed, though it rejected the Superior Court's ruling that a change in condition occurred. The Court of Appeals cited *Cypress Cos. v. B*rown[4] in holding that a disability cannot be the result of a change in condition unless there has been a prior award of benefits (or the equivalent of such an award) issued by the State Board for the initial injury that resulted in the present disability. While the prior voluntary payment of income benefits by an employer or insurer is equivalent to a formal award of benefits for purposes of establishing a change in condition, prior voluntary payment of medical benefits by an employer or insurer was not held to be equivalent. As Trowell never received income benefits, by formal award from the State Board or otherwise, the Court of Appeals held that she could not have undergone a change in condition.

The Court of Appeals affirmed the award under the proposition that an award of benefits against an employer/insurer can be affirmed even in the absence of a change in condition, if there was evidence that the claimant's inability to work was solely attributable to the initial job-related injury, rather than to a worsening of the injury as a result of continuing to work after the initial injury. Such evidence was found to exist in this case, as Trowell's testimony, as well as the deposition testimony of Dr. Barber confirmed that condition was solely the result of her initial work injury.

***Flores v. Keener*, 302 Ga. App. 275, --- S.E.2d --- (2010).**

Garcia was catastrophically injured on January 22, 2005 and hired Keener on October 14, 2005 to represent him in

a workers' compensation claim. Garcia agreed to pay Keener 25% of any recovery or, in the event that Garcia dismissed Keener, a fee based upon time devoted to Garcia's case at a reasonable hourly rate or 25% of any offers which had been made by any adversary or collateral party, whichever was greater. After 20 months of litigation that included two mediations, a rehabilitation conference, and creation of a life care plan, Garcia's employer offered to settle the claim for $650,000 plus the value of a Medicare Set-Aside. Garcia rejected the offer and dismissed Keener on June 14, 2007 and hired Flores the same day. Keener filed a lien in the amount of $162,500, which was a quarter of the $650,000 settlement offer, plus accrued expenses. Garcia agreed to pay Flores 25% of any monetary recovery payable to him under the Workers' Compensation Act, whether already accrued or to be accrued in the future. Garcia settled his claim with his employer eight days after hiring Flores for $657,500 plus the value of a Medicare Set-Aside. The parties agreed that $162,875 was to be paid in attorney fees, with that amount to be held in escrow until the attorney fee lien was resolved.

Flores filed a motion to determine the amount of attorney fees owed to each party. The ALJ ruled that Keener's contingent fee contract was valid under the Workers' Compensation Act and that a 25% fee was reasonable under the circumstances. The ALJ therefore awarded Keener 98.8% of the total amount of attorney fees, and Flores the other 1.2%.

The Appellate Division found that the ALJ's apportionment of the value of the attorneys' services was not supported by a preponderance of competent and credible evidence in the record. The Appellate Division looked at Keener's hourly billing rate and number of hours worked and determined the value of his services to be $114,012.50, or 70% of the allotted attorney fees. The Appellate Division held that Flores was entitled to $48,862.50, or 30% of the allotted attorney fees. The Superior Court held that the Appellate Division applied a narrow one-sided view of the standard of quantum meruit and vacated the award and remanded with the direction that the Appellate Division "apply the correct law."

The Court of Appeals noted that O.C.G.A. § 34-9-108(a) provides for awards of attorney fees that are reasonable in light of evidence of the value of the services rendered but does not otherwise dictate the manner in which the amount of an award of attorney fees is determined. The Court of Appeals further held that the Board is vested with the discretion to determine whether the amount of fees claimed by an attorney is reasonable in light of evidence of the value of services rendered in the particular case. As the Appellate Division found that the ALJ's determination of the relative values of the attorneys' services did not meet the evidentiary standards of the Act, it was authorized to substitute its own valuation. Because the Board considered evidence regarding Keener's hourly billing rate and the amount of time he spent pursuing Garcia's claim, as well as the hourly billing rate of Flores and the amount of time he spent pursuing the claim, the Superior Court erred in stating that the Appellate Division committed legal error. Further, Flores failed to show any basis under O.C.G.A. § 34-9-105(c) for vacating the Appellate Division's ruling. As such, the ruling of the Superior Court was vacated, and the ruling of the Appellate

Division was reinstated.

Medical Office Management v. Hardee, No. A09A2381, 2010 WL 1037201 (Ga. Ct. App. Mar. 23, 2010).

Hardee was struck in the head with a cash box during a robbery. Afterwards, she had significant memory problems and would often become dizzy and fall. Two doctors and a clinical psychologist recommended that she receive eight hours a day of attendant care services as workers' compensation benefits. One doctor subsequently requested that she receive 16 hours per day in attendant services.

Hardee's retired husband, Lewis, provided continuing care for Hardee, would stay with her "most of the time," would hold on to her when walking, and would check behind her to make sure things were unplugged and turned off. He testified that he did not provide services to his wife because he expected to be paid, but because he loved his wife.

A hearing was held to determine if the employer was required to provide the services of a professional attendant care agency, if Lewis was entitled to receive reimbursement for the attendant care he provided, and if the employer was liable for attorney fees. The ALJ held that Lewis was not entitled to reimbursement and that no attorney fees were owed, but that Hardee was entitled to eight hours per day, seven days a week of direct physical attendant care.

The Appellate Division agreed that Hardee was entitled to eight hours per day of attendant care, but also held that Lewis was entitled to reimbursement for attendant care he provided and awarded $5,000 in assessed attorney fees. The Superior Court affirmed the ruling of the Appellate Division, though raised the amount of assessed attorney fees to $12,500.

The Employer argued that the Superior Court erred in finding that Lewis was not barred from recovering for the services rendered under *Bituminous Casualty Corp. v. Wilbanks*.[5] In *Bituminous*, a wife's care of her injured husband while he was confined in bed was held to be not compensable, as the term "other services" as used in the Act did not include the ordinary services a wife furnished to her husband after his return from a hospital. The Court of Appeals noted that changes in both domestic and workers' compensation law superseded the ruling and logic behind *Bituminous*. For instance, O.C.G.A. § 34-9-200(a) now provides for the payment of benefits for "other treatment, items, and services which are prescribed by a licensed physician." Further, *Bituminous* relied on now invalid principles, such as that the earnings and services of the wife belong to the husband and that a husband is entitled to the services of his wife.

The Court of Appeals held that an injured worker is entitled to recover, as an element of her workers' compensation benefits, the cost of such non-medical, in-home attendant care as was prescribed by a physician. Further, the Act does not preclude the recovery by an employee of attendant care services provided by a spouse, and the Employer did not show that a family member cannot provide attendant home care under the Board's rules and regulations. Lewis was not legally required to provide the physician-prescribed attendant care; it

was the employer's responsibility to do so under the Act. Lewis's motivation for helping his wife was also not a basis on which to deny reimbursement as "an employer or insurance carrier is not a third party beneficiary to a marriage contract." The Court of Appeals therefore reversed the decision of the Superior Court and reinstated the ruling of the Appellate Division. The court did, however, draw a distinction between physician-prescribed attendant care services and ordinary services rendered by one spouse to another.

The Court of Appeals also reversed the Superior Court's ruling on increased attorney fees as there was some evidence to support the Appellate Division's award of $5,000.

ENDNOTES

1 Tenn. Code Ann. § 50-6-112.

2 295 Ga. App. 744, 673 S.E.2d 105 (2009).

3 269 Ga. App. 339, 606 S.E.2d 567 (2004) (en banc).

4 246 Ga. App. 804, 542 S.E.2d 544 (2000).

5 60 Ga. App. 620, 4 S.E.2d 916 (1939).