STATE OF GEORGIA
RETAIL COMPENDIUM OF LAW

Prepared by
Paul D. Ivey
Hall Booth Smith, P.C.
191 Peachtree Street
Suite 2900
Atlanta, GA 30303-1775
Tel: (404) 954-5000
Pivey@hallboothsmith.com
www.hallboothsmith.com

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1. Introduction

The potential for a lawsuit arising from a slip or trip and fall is a ubiquitous concern for retailers of all shapes and sizes. Like every other state, Georgia law has a slightly different approach to premises liability claims. Our goal is to provide an easy reference guide to jump start your case and a general overview of topics we believe will encompass the potential issues your client will face.

Hall Booth Smith, P.C. is a full-service law firm with offices in Georgia, Florida, South Carolina, and Tennessee. If you have any questions, please contact Paul D. Ivey, the chair of the firm's Retail and Hospitality Practice Group.

Paul D. Ivey
706-494-3818
pivey@hallboothsmith.com

2. Georgia Court System

a. State

Premises liability claims are filed in superior or state court, Georgia's trial level courts.[1] The rules for superior or state court are essentially the same for civil litigation purposes.[2] Georgia's Civil Practice Act, O.C.G.A. Title 9 Chapter 11, contains rules for service, pleading, discovery, trials, and judgments.[3] The Civil Practice Act applies to superior and state courts. Decisions in premises liability cases from state or superior court are appealable to the Georgia Court of Appeals.[4]

b. Federal

Georgia is comprised of three federal districts (northern, middle, and southern), which are part of the 11th Circuit. The greater Atlanta area is in the northern district, and its offices are located in Atlanta, Gainesville, Newnan, and Rome. Augusta and Savannah are in the southern district (the "southern" district includes the southeastern portion of Georgia), and its offices are located in Augusta, Brunswick, Dublin, Savannah, Waycross, and Statesboro. The middle district is a diagonal southwest to northeast line across the entire state. The middle district primarily includes the southwest corner, and its offices are located in Albany, Athens, Columbus, Macon, and Valdosta.

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1 Magistrate court has a $15,000.00 damages cap, and the Uniform Magistrate Court Rules prohibit discovery. Premises liability claims in magistrate court are rare.

2 *See* Uniform Superior Court Rules and Uniform State Court Rules.

3 Forms are available at O.C.G.A. §§ 9-11-100 to -133.

4 *See* O.C.G.A. §§ 5-6-30 to -51 for Georgia's appellate practice rules. *See also* http://www.gaappeals.us/rules2/ for the rules of the Georgia Court of Appeals.

3. Standard of Care: Duty owed depends on entrant's status.

Premises liability claims, like all negligence allegations, require four elements: duty, breach, causation, and damages.[5] In Georgia, the specific duty of care owed to an entrant depends on the entrant's status.[6] There are three categories of entrants: invitee, licensee, and trespasser. A property owner owes the highest duty, ordinary care, to an invitee.[7] An invitee is one who enters the premises for any lawful purpose "by express or implied invitation."[8] Georgia courts have reasoned, "By encouraging others to enter the premises to further the owner/occupier's purpose, the owner/occupier makes an implied representation that reasonable care has been exercised to make the place safe for those who come for that purpose."[9]

The test for invitee status is whether the entrant's presence mutually benefits the property owner. This test is sometimes referred to as the "business relations" test.[10] There must be a "privity of interest" between the property owner and the entrant.[11] Since retailers have a mutually beneficial relationship with customers, the vast majority of retail liability cases will be analyzed under the invitee standard. However, of course there are fact patterns that alter this analysis.

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5 *Rasnick v. Krishna Hospitality, Inc.*, 289 Ga. 565, 566, 713 S.E.2d 835 (2011).

6 *Jarrell v. JDC & Assoc.*, LLC., 296 Ga. App. 523, 675 S.E.2d 278 (2009); *see* O.C.G.A. §§ 51-3-1, 51-3-2.

7 *Jarrell*, 296 Ga. App. at 525, 675 S.E.2d at 280.

8 O.C.G.A. § 51-3-1.

9 *Robinson v. Kroger Co.*, 268 Ga. 735, 741, 493 S.E.2d 403, 409 (1997) (citing Prosser, Law of Torts (4th Ed.)), § 61, p. 422).

10 *Moore-Sapp Investors v. Richards*, 240 Ga. App 798, 799 522 S.E.2d 739, 741 (1999); *accord Anderson v. Cooper*, 214 Ga. 164, 104 S.E.2d 90 (1958) (courts should look for "real or supposed" benefits to landowner and purported invitee); *see also Jarrell v. JDC & Assoc.*, 296 Ga. App. 523, 525, 675 S.E.2d 278, 280 (2009).

11 *Epps v. Chattahoochee Brick Co.*, 140 Ga. App. 426, 231 S.E.2d 443 (1976).

For example, in *Howard v. Gram Corp*,[12] the Georgia Court of Appeals ruled plaintiff was a licensee, because there was no mutual benefit. There, plaintiff accompanied her daughter to an interview at defendant's radio station, and plaintiff had no other business at the radio station.[13] Plaintiff missed a step down in the lounge area and fractured her hip.[14] The court reasoned since plaintiff was not required to drive her daughter to the interview, her daughter drove them to the radio station, and plaintiff deposed she went to the radio station "just to be with" her daughter and deposed she had "no other business ... at the radio station," plaintiff qualified as a licensee.[15]

In dicta, the *Howard* court provided additional examples where an accompanying entrant could qualify as an invitee:

> [W]here such retail establishment sells goods to all comers, any person entering the premises occupies the status of invitee. Even if the injured party does not have a present intent to make a purchase upon entry, the existence of a possible economic exchange is of mutual benefit to both parties. Similarly, mutual benefit may be found where a parent takes a child to school or where a friend or family member drives an elderly patient to the hospital.[16]

Additionally, even though an invitee is injured when a store is closed, the owner may still be liable for failure to exercise ordinary care. In *Lee v. Myers*, plaintiff/invitee's friend's husband was the owner/operator of store. Plaintiff requested of the owner/operator that she be allowed to buy items after store hours. Owner/operator agreed to allow the plaintiff to accompany the owner/occupier while owner/occupier went to store to do paperwork. The plaintiff in turn fell on some stairs located in the store. The

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12 *Howard v. Gram Corp.*, 268 Ga. App. 466, 602 S.E.2d 241 (2004).

13 268 Ga. App. at 467; 602 S.E.2d at 242.

14 *Id.*

15 268 Ga. App. at 467-68; 602 S.E.2d at 243.

16 268 Ga. App. at 469, 602 S.E.2d at 244 (citations omitted).

court held that plaintiff was an invitee and reasoned that plaintiff "did not exceed the temporal or spatial limits of her invitation. Although the wholesale part of the market [store] was officially closed to the general public at the time, Myers [plaintiff] was present with express permission and for the intended purpose of purchasing produce, which purpose would have been mutually beneficial to her and to defendant [owner/occupier]."[17]

On the other hand, a licensee is neither a customer, servant, or trespasser and does not stand in any contractual relationship with the property owner. A licensee is permitted to go on the premises merely for his own interests, convenience, or gratification.[18] For instance, the Georgia Court of Appeals ruled plaintiff qualified as a licensee where the owner gave his nephew permission to hunt on his property, the nephew gave his friend permission to hunt on his uncle's property, and the friend asked a co-employee (plaintiff) to help build a deer stand on the property.[19]

A property owner owes a lesser duty to a licensee than an invitee. Generally, an owner or occupier of land is liable to a licensee if the owner:

> (1) knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to the licensee;
> (2) should expect the licensee will not discover or realize the danger; and
> (3) fails to exercise reasonable care to make the condition safe or to warn the licensee of the condition and risk involved.

If a licensee alleges a static condition, the standard changes, and the duty remains not to injure the licensee willfully or wantonly.[20] A static defect is not inherently

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[17] 189 Ga. App. 87, 87-89, 374 S.E.2d 797, 798-799 (1988).

[18] 268 Ga. App. at 467, 602 S.E.2d at 243.

[19] *Jones v. Barrow*, 304 Ga. App. 337, 696 S.E.2d 363 (2010).

[20] 268 Ga. App. at 468, 602 S.E.2d at 243.

dangerous or likely to cause injury until someone falls into or trips over it.[21] For example, a hazardous staircase,[22] partially fallen tree,[23] or drop-off to a drainage culvert[24] are static conditions. To the licensee, as to the trespasser, no duty arises of keeping the usual condition of the premises up to any given standard of safety, except that they must not contain pitfalls, mantraps, and things of that character.[25]

Finally, a trespasser enters upon the property of another intentionally or by mistake without authority or permission from the owner.[26] A landowner does not owe a duty to trespassers to keep the premises in a safe condition. Instead, a landowner owes only a minimal duty to a trespasser: to avoid willfully or wantonly injuring him. It is considered willful or wanton not to exercise ordinary care to protect anticipated trespassers from dangerous activities or hidden perils on the premises. An anticipated trespasser is actually known to be or may reasonably be expected to be within the range of the dangerous activity or hidden peril. The landowner must have had reason to anticipate that the trespasser would be in *close proximity* to the dangerous activity or hidden peril.[27]

For example, in *Craig v. Bailey Brothers Realty, Inc,.*[28] the Georgia Court of Appeals affirmed summary judgment to defendant, because the injured, ten year old child was not an anticipated trespasser in close proximity to the hazard. There, the child played in an empty parking lot of an apartment complex, jumped on a retaining wall of railroad

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21 *Bartlett v. McDonough Bedding Co.*, 313 Ga. App. 657, 659, 722 S.E.2d 380, 382 at n. 3 (2012) (citing *Gaydos v. Grupe Real Estate Investors*, 211 Ga.App. at 813, 440 S.E.2d 545 (1994).

22 *Id.*

23 *Jones v. Barrow*, 304 Ga. App. 337, 696 S.E.2d 363 (2010).

24 *Barrett v. Georgia Dept. of Transportation*, 304 Ga. App. 667, 697 S.E.2d 217 (2010).

25 *Jones v. Barrow*, 304 Ga. App. 337, 696 S.E.2d 363 (2010) (citing *Jarrell v. JDC & Assocs.*, 296 Ga. App. 523, 526, 675 S.E.2d 278, 281 (2009).

26 *Craig v. Bailey Bros. Realty, Inc.*, 304 Ga. App. 794, 697 S.E.2d 888 (2010).

27 *Craig,* 304 Ga. App. at 798-99, 697 S.E.2d at 892-93.

28 *Id.*

crossties in a grassy area that surrounded the parking lot, and the child's right foot landed on a protruding railroad spike. The child was not a tenant and had not been given permission to play on the property. Even though the owner testified he knew children played at the apartment complex, there was no evidence the owner knew children played in proximity to the timber spikes. Therefore, the court affirmed summary judgment to the defendant.[29] The court also rejected plaintiff's attractive nuisance claim, because the owners were not aware children played on the crossties, and a retaining wall of railroad crossties was not "inherently alluring."[30]

4. The Goal of Every Case: Obtaining Summary Judgment after *Robinson v1 Kroger Co1*

From the defense perspective, discovery is completed with an eye toward obtaining summary judgment to close the case. However, after the Georgia Supreme Court decided *Robinson v. Kroger Co.* in 1997, [31] summary judgment became more difficult to win for property owners. *Robinson* changed the landscape of premises liability cases. When using case law decided prior to *Robinson*, read closely. Although cases in every area of law are fact specific, premises liability cases in Georgia magnify the details. In *Robinson*, the court shifted the focus on summary judgment from a plaintiff's negligence to a high standard of undisputed evidence to avoid trial. The court articulated the following standard:

> [To] survive a motion for summary judgment, a plaintiff must come forward with evidence that, viewed in the most favorable light, would enable a rational trier of fact to find that the defendant had actual or constructive knowledge of the hazard. At that point, the burden of production shifts to the defendant to produce evidence

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[29] *Id.*

[30] *Craig*, 304 Ga. App. at 800, 697 S.E.2d at 894.

[31] 268 Ga. 735, 493 S.E.2d 403 (1997).

> that the plaintiff's injury was caused by his or her own voluntary negligence (intentional disregard of a known risk) or causal negligence (failure to exercise ordinary care for one's personal safety). If the defendant succeeds in doing so, the burden of production shifts back to the plaintiff to come forward with evidence that creates a genuine dispute of fact on the question of voluntary or causal negligence by the plaintiff or tends to show that any such negligence resulted from the defendant's own actions or conditions under the defendant's control.[32]

Moreover, routine issues of premises liability, such as a plaintiff's negligence, are generally not susceptible of summary adjudication. Summary judgment is granted only when the evidence is **plain, palpable, and undisputed.** In other words,

> [I]ssues such as how closely a particular retailer should monitor its premises and approaches, what retailers should know about the property's condition at any given time, how vigilant patrons must be for their own safety in various settings, and where customers should be held responsible for looking or not looking are all questions that, in general, must be answered by a jury as a matter of fact rather than by judges as a matter of law.[33]

Robinson eased plaintiff's burden at the summary judgment stage. Before *Robinson*, the combination of the Georgia Supreme Court's rulings in *Alterman Foods, Inc. v. Ligon*[34] and *Lau's Corp. v. Haskins*[35] required a plaintiff "establish[] both the defendant's knowledge of the foreign substance and the plaintiff's lack of knowledge of negligence either before the defendant moved for summary judgment or in response to that motion." [36] Before *Robinson*, the chances of a premises liability case reaching a jury were more difficult. When the plaintiff could not prove defendant's knowledge or plaintiff's lack of knowledge, defendant was entitled to summary judgment. *Robinson*, however, "adjusted the burdens of

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[32] *American Multi-Cinema v. Brown*, 285 Ga. 442, 444-45, 679 S.E.2d 25, 28 (citing *Robinson*).

[33] *American Multi-Cinema*, 285 Ga. at 445, 679 S.E.2d at 28 (citing *Robinson*).

[34] 246 Ga. 620, 272 S.E.2d 327 (1980). Even though *Robinson* overruled *Alterman's* summary judgment standard, *Alterman's* two-factor test for slip and fall cases was not overruled and is good law.[34] Commentators Cynthia Trimboli Adams and Charles R. Adams III believe that *Alterman* is to Georgia slip-and-fall jurisprudence what *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938) is to federal diversity law.[34]

[35] 261 Ga. 491(1), 405 S.E.2d 474 (1991).

[36] *Robinson*, 268 Ga. at 747, 493 S.E.2d at 413.

production on summary judgment to more accurately reflect the doctrinal underpinnings of premises liability theory and to restore the jury to its rightful role in elaborating the content of a merchant's duty of care to the invited public."[37]

5. The Key to Every Case: Defendant's Superior Knowledge

The lynchpin of every case is the owner's superior knowledge of a hazard. "In order to prevail on a premises liability claim, a plaintiff must prove that "(1) the owner or proprietor had actual or constructive knowledge of the hazard, and (2) the plaintiff lacked knowledge of the hazard despite exercising ordinary care. '*The true basis of a proprietor's liability for personal injury to an invitee is the proprietor's superior knowledge of a condition that may expose the invitees to an* ***unreasonable risk of harm****. Recovery is allowed only when the proprietor had knowledge [of the hazard] and the invitee did not*.'"[38] Although *Robinson* heightened the summary judgment standard, if a defendant can prove a lack of superior knowledge, summary judgment should be granted. "[A]n owner or occupier of land is not an insurer of the safety of its invitees."[39] An owner is not obligated to protect its customers from any object that could present a danger to them. "An owner has no duty to foresee and warn against dangers which are not reasonably expected, and which would not

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[37] *American Multi-Cinema*, 285 Ga. at 444, 679 S.E.2d at 28 (discussing the history of Georgia's "pendulum-like" premises liability jurisprudence).

[38] *Ward v. Autry Petroleum Co.*, 281 Ga. App. 877, 877, 637 S.E.2d 483, 484-85 (2006) (citations omitted) (emphasis added).

[39] *Bryant v. DIVYA, Inc.*, 278 Ga. App. 101, 102, 628 S.E.2d 163, 164 (2006) (citation omitted).

occur except under exceptional circumstances or from unexpected acts of the person injured."[40]

For example, in *Bryant v. DIVYA, Inc.,*[41] the Georgia Court of Appeals affirmed summary judgment, because plaintiff failed to prove the owner's superior knowledge of the alleged hazard. There, plaintiff motel guest slipped and fell in the shower. The evidence showed prior to plaintiff's accident, defendant motel never received any reports or complaints of guests slipping in the motel's showers. In a recent case, *Sipple v. Newman*,[42] the court of appeals reversed a denial of summary judgment to defendant, because there was no evidence defendant homeowner had any superior knowledge of the hazard. There, the homeowner hired a contractor to clean pine straw from her roof. When the contractor lightly rested his weight on an awning, the awning gave way, and the contractor fell. The homeowner was 93 and bedridden at the time of the fall. There was no evidence the homeowner had actual knowledge or that there was anything that would have put the homeowner on notice of a possible problem with the awning, which would have provided a basis for the homeowner's constructive knowledge. Therefore, plaintiff did not prove homeowner's superior knowledge of the hazardous awning.

In another recent case, *Siegel v. Park Avenue Condominium Association, Inc.*,[43] the court of appeals affirmed summary judgment to defendant, because plaintiff failed to produce evidence of defendant's superior knowledge of an alleged malfunctioning door. There, plaintiff was hurt by a rotating door when she signaled to the valet, her movement

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[40] *Aubain-Gray v. Hobby Lobby Stores, Inc.*, 323 Ga. App. 672, 674, 747 S.E.2d 684, 686 (2013).

[41] 278 Ga. App. 101, 628 S.E.2d 163 (2006).

[42] 313 Ga. App. 688, 722 S.E.2d 348 (2012).

[43] 322 Ga. App. 337, 744 S.E.2d 876 (2013).

triggered the door's sensor, the door rotated, hit her foot, and caused her to fall. The court reasoned since plaintiff presented no evidence of a malfunction or defect, there was no evidence defendant had superior knowledge of the hazard. In contrast, the court of appeals reversed the trial court's grant of summary judgment in *Tyree v. Westin Peachtree, Inc.*,[44] plaintiff was injured by an automatic revolving door when she heard an automated voice say, "please step forward," the door lurched forward, struck her, and caused her to fall. The hotel pointed to no evidence showing plaintiff failed to exercise ordinary care. Plaintiff testified she was not distracted by anything, would not have stepped into the door if there was no room for her, and she did not try to step into the door until the last possible second.

In a very recent case, *Aubain Gray v. Hobby Lobby Stores, Inc.*,[45] the court of appeals affirmed the grant of summary judgment to defendant, because defendant store had no superior knowledge. There, plaintiff picked up a multiple piece glass candle holder while shopping, and the glass globe on the top of the candle holder fell and cut plaintiff. Plaintiff testified she thought the multiple piece glass candle holder was actually a one piece vase. The store manager testified there had not been an incident at the store in which a customer had been injured by a multi-piece glass item. Plaintiff had no evidence of a similar injury at defendant's store. Therefore, defendant had no superior knowledge of a dangerous condition.

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[44] 319 Ga. App 330, 735 S.E.2d 127 (2012).

[45] 323 Ga. App. 672, 747 S.E.2d 684 (2013)

a. Owner's Actual or Constructive Knowledge of a Hazard

A plaintiff may prove defendant's superior knowledge by showing actual or constructive knowledge. To show constructive knowledge, a plaintiff usually has two options. First, a plaintiff may show an employee of defendant was in the immediate area of the hazard and could have easily seen it. Second, a plaintiff can attempt to show that the substance remained in the area long enough that, exercising ordinary care, a defendant should have discovered it.[46]

A lack of reasonable inspection procedures can lead to the conclusion that the owner had constructive knowledge.[47] In turn, a reasonable inspection procedure can negate constructive knowledge, and an owner is allowed a reasonable amount of time to exercise ordinary care in inspecting and maintaining its premises in a safe condition.[48] "Whether an inspection procedure is reasonable as a matter of law varies from case-to-case, depending on the nature of the business, the size of the store, the number of customers, 'the nature of the dangerous condition, and the store's location.'"[49] An owner is not required to constantly check his property unless there are facts that would show that the property is particularly dangerous.[50] Along the same lines, "a proprietor need not inspect for every theoretically possible hazard when no reason appears for doing so."[51]

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[46] *Brown v. Piggly Wiggly S. Inc.*, 228 Ga. App. 629, 631, 493 S.E.2d 196,199 (1997).
[47] *Avery v. Cleveland Ave. Motel, Inc.*, 239 Ga. App. 644, 645, 521 S.E.2d 668, 670. (1999).
[48] *Winn-Dixie Stores, Inc. v. Hardy*, 138 Ga. App. 342, 226 S.E.2d 142 (1976).
[49] *Shepard v. Winn Dixie Stores*, 241 Ga. App. 746, 748, 527 S.E.2d 36 (1999).
[50] *Food Lion v. Walker*, 290 Ga. App. 574, 660 S.E.2d 426 (2008).
[51] *Parks-Nietzold v. J.C. Penney, Inc.*, 227 Ga. App. 724, 725, 490 S.E.2d 133, 135 (1997).

Even if an owner has constructive knowledge, again, if a plaintiff has equal knowledge, plaintiff cannot recover. In a recent case, *Courter v. Pilot Travel Centers, LLC*,[52] the court affirmed summary judgment to defendant gas station. There, plaintiff slipped and fell on wet, fuel covered ground. Plaintiff admitted he knew the combination of diesel fuel and water could make the ground slippery, and he saw both before falling. Even assuming defendant gas station had constructive knowledge, since plaintiff had equal knowledge of the hazard, summary judgment was affirmed.

6. Who Qualifies as a Defendant

O.C.G.A. § 51-3-1 provides,

> 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.

(emphasis added). To determine whether a person qualifies as an owner/occupier, and is thereby subject to liability under O.C.G.A. § 51-3-1, the crucial question is whether the individual exercised sufficient control over the subject premises at the time of injury to justify the imposition of liability.[53] "Control" can be legal control, including ownership or other possessory interest,[54] or supervisory control.

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[52] 317 Ga. App. 229, 730 S.E.2d 493 (2012).

[53] *Poll v. Deli Management, Inc.*, No. 1:07-cv-959-RWS, 2007 WL 2460769, at *4 (N.D. Ga. Aug. 24, 2007) (unpublished) (citing *Scheer v. Cliatt*, 133 Ga. App. 702, 704, 212 S.E.2d 29, 31 (1975)).

[54] *Ga. Building Services, Inc. v. Perry*, 193 Ga. App. 288, 387 S.E.2d 898 (1989) (title or superior right of possession determines control); *compare Adams v. Sears, Roebuck & Co.*, 227 Ga. App. 695, 490 S.E.2d 150 (1997) (store manager could not be held liable, because the manager was not an owner or occupier), *with Lee v. Myers*, 189 Ga. App. 87, 89, 374 S.E.2d 797, 799 (1988) (store manager with maintenance duties owed duty to exercise care in maintaining premises).

O.C.G.A. § 51-3-1 is inapplicable to independent contractors, because independent contractors are not owners or occupiers of the premises.[55] Although independent contractors do not owe invitees a duty under O.C.G.A. § 51-3-1, independent contractors may be liable for the failure to use ordinary care in the performance of the contract. Also, if full possession and complete control were delivered and surrendered to an independent contractor, a property owner is not liable.[56]

7. Defenses

Premises liability defenses in Georgia fall into one of two categories: the entrant saw the hazard (equal knowledge) or the entrant should have avoided the hazard (contributory negligence). The first category is based on a lack of defendant's superior knowledge. The second category, which focuses on actions plaintiff should have taken to avoid the hazard, became harder to win after *Robinson* without going to trial given the *Robinson* court's statement,

> In sum, we remind members of the judiciary that the "routine" issues of premises liability, i.e., the negligence of the defendant and the plaintiff, and the plaintiff's lack of ordinary care for personal safety are generally not susceptible of summary adjudication, and that summary judgment is granted only when the evidence is plain, palpable, and undisputed.[57]

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[55] *Greene v. Piedmont Janitorial Servs*., 220 Ga. App. 743, 744-45, 470 S.E.2d 270, 272 (1996).

[56] *Towles v. Cox*, 181 Ga. App. 194, 351 S.E.2d 718 (1986).

[57] *Robinson,* 268 Ga. at 748, 493 S.E.2d at 414.

a. Plaintiff's Equal Knowledge

i. Plain View Doctrine

Although the plain view doctrine seems like a straightforward defense, the *Robinson* court explicitly held a failure to see a hazard before falling does not warrant a decision that a plaintiff did not exercise ordinary care as a matter of law. When determining if a plaintiff exercised ordinary care, "The established standard is whether, taking everything into account [sic] the act is one which the common sense of mankind pronounces want of such prudence as the ordinarily careful person would use in a like situation."[58] The invitee is not bound to avoid hazards not usually present on the premises and which the invitee, exercising ordinary care, did not observe.[59] Further, the invitee is not required, in all circumstances, to look continuously at the floor, without intermission, for defects in the floor, or to look in all directions.[60] An invitee also does not have to inspect the premises for latent defects or observe for patent defects or exercise extreme care to discern negligence on the premises.[61] What constitutes a reasonable lookout depends on all the circumstances.[62]

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[58] *Robinson*, 268 Ga. at 741, 493 S.E.2d at 409 (quoting Wynne v. S. Bell Tel. & Tel. Co., 159 Ga. 623, 628, 126 S.E. 388 (1924)).

[59] *Robinson*, 268 Ga. at 741, 493 S.E.2d at 409 (citing *King Hardware Co. v. Teplis*, 91 Ga. App. 13, 15, 84 S.E.2d 686 (1954)).

[60] *Robinson*, 268 Ga. at 741, 493 S.E.2d at 409 (citing *Food Giant v. Cooke*, 186 Ga. App. 253(2), 366 S.E.2d 781 (1988) (no obligation to look continuously at the floor); *Chaves v. Kroger, Inc.*, 213 Ga. App. 348, 444 S.E.2d 606 (1994) (looking all directions not required)).

[61] *Robinson*, 268 Ga. at 741, 493 S.E.2d at 409 (citing *Ellington v. Tolar Constr.*, 237 Ga. 235, 238, 227 S.E.2d 336 (1976) (no obligation to discover latent or observe patent defects); *King Hardware v. Teplis*, 91 Ga. App. at 15 (no obligation to exercise extreme care for plaintiff's exercise of ordinary care)).

[62] *Robinson*, 268 Ga. at 742, 493 S.E.2d at 409 (citations omitted).

In the recent case of LeCroy v. Bragg,[63] the court of appeals held plaintiff, who fell in a hole in the parking lot, had equal knowledge of the hazard. Plaintiff testified she knew the hole was present and misjudged her step. The hole was a static condition that did not change and was only dangerous if someone failed to see it and walked into it. The hole was readily discernible and thereby subject to the plain view doctrine.

ii. Prior Traversal

When analyzing whether prior traversal of a hazard establishes a plaintiff's equal knowledge, the previously traversed hazard must be the same. For example, in Rutherford v. Revco Discount Drug Centers, Inc.,[64] the court of appeals held there was an issue of material fact as to whether a hazard causing a patron's fall was readily observable to her in the exercise of ordinary care. In this case, plaintiff/invitee went up the ramp and through the doors to the single store entrance. When she came out of the store onto the same ramp, she fell as she walked down the ramp. Even though the plaintiff walked up the ramp before she returned and fell down, the court explained, "[T]he ramp was not painted or marked in any way to make it stand out from the sidewalk. The steepness of the ramp was not readily discernible because the door blocked Rutherford's [plaintiff/invitee] view of the ramp until it was opened. Moreover, going up a ramp is obviously very different from coming down a ramp, so she had not navigated the ramp's decline before her fall."[65]

When the previously traversed hazard is the same, the prior traversal doctrine bars recovery. When a person successfully negotiates a dangerous condition, he is presumed to have knowledge of that condition and cannot recover for a subsequent injury resulting

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[63] 319 Ga. App. 884, 739 S.E.2d 1 (2013).

[64] 301 Ga. App. 702, 689 S.E.2d 59 (2009).

[65] 301 Ga. App. at 704, 689 S.E.2d at 61.

from the hazard.[66] For example, in *El Ranchero Mexican Restaurant v. Hiner,*[67] the court reversed the trial court's denial of summary judgment to defendant. There, plaintiff fell while leaving the restroom and returning to her table. She was aware on prior occasions the floor could be slippery. On the date of her fall, she walked through the area and nearly fell, noticing the area was slick. She did not alert any employee but continued to the bathroom. Upon exiting the restroom, she fell and sustained injury. Since plaintiff successfully negotiated the slippery floor, plaintiff had equal or greater knowledge than defendant.

iii. Assumption of Risk

To prevail on an assumption of risk defense, plaintiff's knowledge of a hazard must be actual and subjective and of the specific, particular risk of harm associated with the activity or condition that proximately causes injury.[68] Assumption of risk applies if plaintiff, with a full appreciation of the danger involved and without restriction from his freedom of choice either by the circumstances or by coercion, deliberately chooses an obviously perilous course of conduct so that it can be said as a matter of law he has assumed all risk of injury.[69]

In *Baker v. Harcon, Inc.*,[70] the court held that fact issues of plaintiff's equal knowledge of the hazard, whether plaintiff exercised ordinary care for his own safety, and

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[66] *El Ranchero Mexican Restaurant, No. 10, Inc. v. Hiner*, 316 Ga. App. 115, 728 S.E.2d 761 (2012).

[67] *Id.*

[68] *Vaughn v. Pleasant*, 266 Ga. 862, 471 S.E.2d 866 (1996).

[69] *Baker*, 303 Ga. App. at 754, 694 S.E.2d at 678 (citations omitted).

[70] 303 Ga. App. 749, 694 S.E.2d 673 (2010). In n.6, the court disapproved of *Englehart v. OKI America*, 209 Ga. App. 151, 153-54(2), 433 S.E.2d 331 (1993) to the extent that it suggested that any time an experienced construction worker takes a step on a job site without first looking, he has failed to exercise

plaintiff's assumption of the risk precluded summary judgment for the defendant. In that case, plaintiff/construction supervisor informed defendant/subcontractor in the weeks prior to the accident of the location of the one and only trash chute to be constructed within the 7-building construction project. Plaintiff fell into this very trash chute. But, when plaintiff told defendant of the desired location of the trash chute, the concrete floor was not yet constructed around the trash chute, and debris did not cover the area, as it did when plaintiff fell. Plaintiff was clearing debris off the concrete floor with his crew.

Whether plaintiff appreciated the *specific* hazard of the trash chute covered by debris was a jury question, because plaintiff could not see the trash chute while he was removing the debris and ply wood.[71] Also, because plaintiff's employer ordered plaintiff to inspect the trash chute area for debris, a jury could conclude that plaintiff did not make a voluntary choice to engage in perilous conduct. Therefore, the trial court erred in granting summary judgment to defendant.

Assumption of risk and contributory negligence are different defenses,

> Significant is the distinction between assumption of risk and contributory or comparative negligence. Assumption of risk means the plaintiff is fully aware of the dangerous defect or condition caused by defendant's negligence but freely chooses to proceed nonetheless. Contributory or comparative negligence means the plaintiff, though exposing himself to danger, nevertheless is unaware of the defendant's negligence and thus expects the defendant to act or to have acted with reasonable care.[72]

b. Plaintiff's Contributory Negligence

Notably, if a plaintiff voluntarily departs from the designated route, the degree of caution required by an invitee to exercise care for his own safety is heightened by any

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reasonable care for his own safety as a matter of law and/or assumed the risk of any resulting injury as a matter of law.

[71] 303 Ga. App. at 755-56, 694 S.E.2d at 679.

[72] *Baker v. Harcon, Inc.*, 303 Ga. App. 749, 755, 694 S.E.2d 673, 679 (2010) (citations omitted).

increased risk resulting from that choice.[73] In the recent case of *Bartlett v. McDonough Bedding Co.*,[74] the court affirmed the trial court's grant of summary judgment, because plaintiff (an invitee) voluntarily departed from the route maintained by defendant bedding shop and failed to exercise ordinary care for his own safety. There, plaintiff fell down stairs located behind displayed merchandise.[75] No one from defendant's bedding shop or the adjoining business used the stairway, there was a chain at the top of the stairs, and there was a small table, chair, and fireplace screen displayed around the stairs.[76] The merchandise was arranged on the floor so tightly that it completely concealed an opening in the floor of the dimensions of the stairwell.[77] Plaintiff alleged he could not see the stairs due to the display, but his wife deposed she had no trouble seeing the stairs, because she was watching where she was going.[78] Since plaintiff continued to move in the direction of the stairs despite his ability to see beyond the merchandise, and there was no aisle or clear area of floor beyond the thick clutter of merchandise, plaintiff voluntarily departed from the designated route, was aware of the lack of visibility, and should have exercised more care for his safety.[79]

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[73] *Bartlett v. McDonough Bedding Co.*, 313 Ga. App. 657, 659, 689 S.E.2d 380, 382 (2012).

[74] 313 Ga. App. 657, 722 S.E.2d 380 (2012).

[75] 313 Ga. App. at 658, 722 S.E.2d at 381.

[76] *Id.*

[77] 313 Ga. App. at 659, 722 S.E.2d at 382.

[78] 313 Ga. App. at 658, 722 S.E.2d at 381.

[79] 313 Ga. App. at 659-60, 722 S.E.2d at 382-83.

c. Speculative Causation Not Enough

Moreover, a mere possibility of causation is not enough. When causation is pure speculation or conjecture, summary judgment is appropriate.[80] For example, in *Anderson v. Canup*,[81] plaintiff fell outside an insurance agent's office but could not provide testimony as to the cause of her fall. The court of appeals affirmed summary judgment to defendant. Likewise, in the recent case of *Taylor v. Thunderbird Lanes*,[82] the court of appeals also affirmed summary judgment to defendant. There, plaintiff fell at a bowling alley. Although plaintiff contended there must have been oil on the floor, there was no evidence of such. There was no evidence of a hazardous condition, and mere speculation was not enough to withstand summary judgment.

8. Frequent Factual Scenarios

Every premises liability case should be viewed through the lens of *Robinson* and with the key component of the owner's superior knowledge in mind. However, certain fact patterns create additional twists and turns to be aware of.

a. Negligent Security Cases

In order for a negligent security claim to be successful, the criminal activity must be foreseeable. Although prior criminal activity must be substantially similar, the prior activity need not be identical to the crime in question.[83] The prior incident needs to attract the landlord's attention to the dangerous condition which resulted in the litigated

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[80] *Anderson v. Canup*, 317 Ga. App. 558, 731 S.E.2d 786 (2012).

[81] *Id.*

[82] 748 S.E.2d 308 (2013).

[83] *Drayton v. Kroger Co.*, 297 Ga. App. 484, 485-86, 677 S.E.2d 316, 318 (2009) (citations omitted).

incident.[84] Whether a criminal attack is reasonably foreseeable is generally a jury issue.[85] For example, in *Whitfield v. Tequila Mexican Restaurant No. 1,*[86] the court of appeals affirmed summary judgment, because there was no evidence there were any other stabbings or similar assaults at the restaurant or in the parking lot.

Negligent security cases also involve the same basic issues as other premises liability claims: whether plaintiff had equal knowledge, defendant had superior knowledge, or defendant caused the harm. For example, In *Post Properties Inc. v. Doe*, the court reversed defendant/owner's denial of summary judgment, because plaintiff/tenant did not present evidence that defendant's act/omission caused the rape when plaintiff failed to show how assailant entered plaintiff's ground floor apartment, the apartment complex's property, or whether assailant was lawfully on the property.[87]

In *Dolphin Realty v. Headley*,[88] plaintiff had equal knowledge of the hazard and failed to exercise care for her own safety, and the court reversed a denial of summary judgment to defendant.[89] Plaintiff was sexually assaulted in her apartment, and ten months later, the same assailant forced his way into her apartment, held a sharp object to her throat, and stole her television and VCR. During both instances, plaintiff had come back from doing laundry in the dark. The first time, the assailant told plaintiff not to go out or do laundry after dark. Because plaintiff proceeded to do the very action that the assailant warned her

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[84] *Id.*

[85] *Id.*

[86] 748 S.E.2d 281 (2013).

[87] *Post Props.*, 230 Ga. App. 34, 495 S.E.2d 573 (1997).

[88] 271 Ga. App. 479, 610 S.E.2d 99 (2005).

[89] *Headley*, 271 Ga. App. at 482, 610 S.E.2d at 103.

was dangerous, defendant did not have superior knowledge of the danger of the second assault.

The two-year statute of limitation for personal injuries, which is found in O.C.G.A. § 9-3-33, applies to negligent security cases, as well as all other retail liability claims for bodily injury. In the recent case of *Martin v. Herrington Mill, LP,*[90] plaintiff, who had been sexually assaulted, sued her landlord and attempted to toll the two-year statute of limitations by claiming mental incapacity. Plaintiff was diagnosed with PTSD after the assault and underwent psychological sessions. Twenty years prior to the assault, plaintiff was diagnosed with depression and an anxiety disorder. The court reasoned since the evidence showed plaintiff was able to manage the ordinary affairs of life following her assault, she failed to show mental incapacity sufficient to toll the two-year statute of limitation.

i. Apportioning Fault to a Non-Party Criminal Assailant Pursuant to O.C.G.A. § 51-12-33

Georgia's apportionment of fault statute is O.C.G.A. § 51-12-33. O.C.G.A. § 51-1233(c) - (d) allow a jury to apportion a percentage of fault (not liability) to non-parties if certain procedural rules are followed. O.C.G.A. § 51-12-33(d) provides:

> (d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty **or** if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.
>
> (2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

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[90] 316 Ga. App. 696, 730 S.E.2d 164 (2012).

In the seminal case of *Couch v. Red Roof Inns, Inc.*,[91] the Georgia Supreme Court held a jury is allowed to apportion fault to a non-party criminal assailant pursuant to O.C.G.A. § 51-1233, and jury instructions or a special verdict form requiring apportionment between the property owner and the criminal assailant(s) would not violate plaintiff's constitutional rights.

b. Naturally Occurring Hazards

"Plaintiffs in rainy day slip and fall cases are [typically] charged with equal knowledge that water is apt to be found in any area frequented by people coming in from rain outside."[92] Unless there has been an unusual accumulation of water, and the proprietor failed to follow reasonable inspection and cleaning procedures, proprietors will not typically be liable to patrons who slip and fall under these circumstances.[93] If an obvious hazard is not attributable to any affirmative action on the proprietor's part, the proprietor has no affirmative duty to discover and remove the hazard.[94] In naturally occurring hazard cases, defendant's superior knowledge remains the basis for liability.

c. Landlord/Tenant Issues

O.C.G.A. § 44-7-14 provides:

> 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.

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91 291 Ga. 359, 729 S.E.2d 378 (2012).

92 *Emory Univ. v. Smith*, 260 Ga. App. 900, 901-02, 581 S.E.2d 405, 406 (2003).

93 *Walker v. Sears Roebuck & Co.,* 278 Ga. App. 677, 680, 629 S.E.2d 561, 564 (2006).

94 *Columbus Doctors Hosp. v. Thompson*, 224 Ga. App. 682, 482 S.E.2d 705 (1997).

In determining landlord's liability for injuries suffered on landlord's property, tenant's family and his invitees stand in shoes of tenant. Under O.C.G.A. § 44-7-14, a landlord is not liable to third persons for damages resulting from the negligence or illegal use of the premises by the tenant. A landlord must have superior knowledge of the hazard for liability to attach under O.C.G.A. § 44-7-14.[95] However, O.C.G.A. § 51-3-1 (statute imposing duty on owner or occupier to keep premises safe) imposes a legal duty on a landlord who retains control over the common areas to exercise ordinary care to keep the common areas safe.[96]

d. Animals

The basic concepts of premises liability cases apply to cases in which the alleged hazard arises from an animal. In a notable and recent decision by the Georgia Supreme Court, *Landings Association, Inc. v. Williams*,[97] the court reversed a denial of summary judgment to defendant. There, when plaintiff went for a walk near her daughter's home, which was near a lagoon, plaintiff was attacked an eaten by an alligator. The estate and the deceased's heirs sued the owners and management companies of the residential property. The daughter's home was located in a residential development, and this attack was the first. The court reasoned since the testimony showed plaintiff knew alligators were dangerous but chose to walk at night near a lagoon, where she knew alligators were present, plaintiff had equal knowledge of the alligators, assumed the risk, or failed to exercise ordinary care. The court emphasized the lack of defendants' superior knowledge.

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95 *Norman v. Jones Lang LaSalle Americans, Inc.*, 277 Ga. App. 621, 627 S.E. 382 (2006).

96 *Maloof v. Blackmon*, 105 Ga. App. 207, 124 S.E.2d 441 (1962).

97 291 Ga. 397, 728 S.E.2d 577 (2012).

Notably, O.C.G.A. § 51-3-30 provides immunity from civil liability to landowners or hunters (who are on property with permission) for wildlife that traverses the property and enters a public road or right of way, as long as the conduct of the owner or hunter is not grossly negligent or willful and wanton.

e. Dram Shop

In 1988, the Georgia legislature enacted the Dram Shop Act, O.C.G.A. § 51-1-40, which is the exclusive remedy for claims based on furnishing alcohol.[98] The statute provides:

> (a) The General Assembly finds and declares that **the consumption of alcoholic beverages, rather than the sale or furnishing or serving of such beverages, is the proximate cause of any injury,** including death and property damage, inflicted by an intoxicated person upon himself or upon another person, except as otherwise provided in subsection (b) of this Code section.
>
> (b) A person who sells, furnishes, or serves alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury, death, or damage caused by or resulting from the intoxication of such person, including injury or death to other persons; provided, **however, a person who willfully, knowingly, and unlawfully sells, furnishes, or serves alcoholic beverages to a person who is not of lawful drinking age, knowing that such person will soon be driving a motor vehicle, or who knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication of such minor or person when the sale, furnishing, or serving is the proximate cause of such injury or damage.** 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.
>
> (c) In determining whether the sale, furnishing, or serving of alcoholic beverages to a person not of legal drinking age is done willfully, knowingly, and unlawfully as provided in subsection (b) of this Code section, evidence that the person selling, furnishing, or serving alcoholic beverages had been furnished with and acted in reliance on identification as defined in subsection (d) of Code Section 3-3-23

[98] *Kappa Sigma International Fraternity v. Tootle*, 221 Ga. App. 890, 473 S.E.2d 890 (1996).

> showing that the person to whom the alcoholic beverages were sold, furnished, or served was 21 years of age or older shall constitute rebuttable proof that the alcoholic beverages were not sold, furnished, or served willfully, knowingly, and unlawfully.
>
> (d) No person who owns, leases, or otherwise lawfully occupies a premises, except a premises licensed for the sale of alcoholic beverages, shall be liable to any person who consumes alcoholic beverages on the premises in the absence of and without the consent of the owner, lessee, or lawful occupant or to any other person, or to the estate or survivors of either, for any injury or death suffered on or off the premises, including damage to property, caused by the intoxication of the person who consumed the alcoholic beverages.

(emphasis added). Only customers that travel to and from a land-based supplier may file an action pursuant to O.C.G.A. § 51-1-40 (no viable claim for recovery against airline).[99]

11. Dram Shop Act

In Georgia, liability for the sale of alcohol to a visibly intoxicated person, or to a person who is not of lawful drinking age, falls under the state's "Dram Shop Act," O.C.G.A. §51-1-40. Generally, the Act declares that the consumption of alcoholic beverages, rather than the sale or furnishing or serving of such beverages, is the proximate cause of any injury caused by an intoxicated person. However, subsection (b) of the Act creates liability to a person who willfully, knowingly, and unlawfully sells, furnishes, or serves alcoholic beverages to a person who is not of lawful drinking age, knowing that such person will soon be driving a motor vehicle. Subsection (b) also imposes liability on a person who knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a noticeable state of intoxication, knowing such person will soon be driving a motor vehicle.

A cause of action under O.C.G.A. § 51-1-40(b) is an injured person's exclusive remedy for seeking to impose liability on a provider of alcohol for damages caused by a driver who

[99] *Delta Airlines v. Townsend*, *279 Ga. 511*, *513 (2005).*

consumed the alcohol.[100] Not only is the Georgia Dram Shop Act the sole legal remedy available to a person seeking to impose liability on a provider of alcohol, but because the Act is a derogation from the common law, it "must be limited strictly to the meaning of the language employed, and not extend beyond the plain and explicit terms of the statute."[101]

A. Commercial Sale

Because the Act is to be strictly construed, commercial sale is not required to find liability under the act. Subsection (b) of the Act imposes liability on anyone who sells, *furnishes*, or serves alcoholic beverages to a visibly intoxicated person or a person who is not of lawful drinking age. Therefore, commercial sale is not required for liability to be imposed under the Act.

B. Visible Intoxication

The Act requires a showing that a person knowingly furnished alcoholic beverages to a person who was noticeably intoxicated. Where there is an absence of evidence to support that alcoholic beverages were actually furnished after the person became noticeably intoxicated, liability will not be imposed.[102] Where it is undisputed that a provider of alcoholic beverages has no reason to know that the intoxicated person has consumed additional beverages after the person first becomes visibly intoxicated, liability cannot be imposed on the provider.[103]

Furthermore, the absence of evidence that a party guest was in a state of noticeable intoxication at the time he was furnished alcoholic beverages precludes a motorist from recovering against the provider under the Dram Shop Act when there is evidence that the

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[100] *Delta Airlines v. Townsend*, *279 Ga. 511*, *513 (2005).*
[101] *Id*. at 512.
[102] *Shin v. Estate of Camacho*, 302 Ga.App. 243, 245 (2010).
[103] *Id*. at 246.

provider of the beverages has no knowledge of how many drinks the guest consumed or whether the guest became intoxicated.[104]

C. Knowledge That Person Will Soon Be Driving.

In addition to the requirement that the person be visibly intoxicated, a person who serves alcohol must also be shown that the provider knows the individual will soon be driving a car. Liability under the Dram Shop Act can apply when a provider sells closed or packaged containers of alcohol not intended for consumption on the premises to a noticeably intoxicated adult, knowing that the intoxicated adult will soon be driving.[105] Where it is foreseeable to the provider that the consumer will drive intoxicated, a jury would be authorized to find that it is foreseeable to the provider that the intoxicated driver may injure someone.[106]

D. Consumer Defense

Liability under the Dram Shop Act only applies to injured third-persons as a result of the intoxication of the person causing the harm. Georgia courts have explicitly held that "nothing contained in the Code section shall authorize the consumer of any alcoholic beverages to recover from the provider of such alcoholic beverages for injuries suffered by the consumer.[107] Thus, an alcohol provider may be the proximate cause of injuries to third-parties resulting from the intoxicated person's operation of a car, but the provider is not liable to injuries suffered by the intoxicated person. The rationale behind that rule relates to the alcohol consumer's own duty to exercise ordinary care.[108]

E. Sale to Underage Persons

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[104] *See Hodges v. Erickson*, 264 Ga.App. 516 (2003).
[105] *Flores v. Exprezit! Stores 98-Georgia, LLC.*, 289 Ga. 466 (2011).
[106] *See Shin supra*.
[107] *Mowell v. Marks*, 269 Ga.App. 147, 148-49 (2004).
[108] *Id*. at 149.

The Georgia Dram Shop Act treats sales of alcoholic beverages to minors and noticeably intoxicated adults identically.[109] Courts of Georgia have stated that the Act must be read in context with O.C.G.A. § 3-3-23, prohibiting the sale of alcohol to those under the age of 21. Subsection (h) of that statute imposes a duty on the seller to request to see proper identification, where a reasonable or prudent person could reasonably be in doubt as to whether or not the person to whom the alcoholic beverage is to be sold is actually 21 years of age or older.[110] Furthermore evidence that the person "selling . . . alcoholic beverages had been furnished with and acted in reliance on identification showing that the person to whom the alcoholic beverages were being sold was 21 years of age or older shall constitute rebuttable proof that the alcoholic beverages were not sold . . . willfully, knowingly, and unlawfully."[111]

f. Roller Skating

O.C.G.A. § 51-1-43, the Roller Skating Safety Act of 1993, provides special rules for operators, owners, or anyone who has operational responsibility for public roller skating. Each operator is required to post the duties of roller skaters, which include: maintaining reasonable control of speed, reading all signs and warnings, maintaining a proper look-out, accepting responsibility for knowing their own ability to negotiate travel, and refraining from "acting in a manner which may cause injury to others."[112] Each participant accepts the obvious, "necessary," and "inherent" risks of roller skating.[113]

An operator (one who controls or has operational responsibility of a roller skating center) must post duties of roller skaters and spectators pursuant to O.C.G.A. § 51-1-43,

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[109] *See Flores supra*.
[110] *Riley v. H & H Operations, Inc.*, 263 Ga. 652, 654 (1993).
[111] *Id*.
[112] O.C.G.A. § 51-1-43(c), (d)(1)-(5).
[113] O.C.G.A. § 51-1-43(e).

maintain the stability and legibility of all required notices, and comply with the ordinarily accepted safety standards in the roller skating rink industry. If a roller skater, spectator, or operator violates O.C.G.A. § 51-1-43, they shall be liable in a civil action for damages resulting from the violation.

9. Spoliation

Spoliation is the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation. Notice of *potential liability* differs from notice of *potential litigation*. In order to prove spoliation, "[T]he injured party must show that the alleged tortfeasor was put on notice that the party was contemplating litigation. The simple fact that someone is injured in an accident, without more, is not notice that the injured party is contemplating litigation sufficient to automatically trigger the rules of spoliation."[103] Further, the mere contemplation of potential liability and the completion of an accident report after an investigation do not demonstrate contemplated or pending litigation.[104]

In a recent and notable case, *Powers v. Southern Family Markets of Eastman, LLC*,[105] the Georgia Court of Appeals affirmed the trial court's grant of defendant's motion in limine to exclude any argument or testimony referring to the alleged spoliation of video evidence. The trial court had denied plaintiff's motion for sanctions based on alleged spoliation of evidence. Since the record showed no spoliation, any questioning about the absence of the

[103] *Powers v. Southern Family Markets of Eastman*, LLC, 320 Ga. App. 478, 479-80, 740 S.E.2d 214, 217 (2013).
[104] 320 Ga. App. at 480, 740 S.E.2d at 217.
[105] 320 Ga. App. 478, 740 S.E.2d 214 (2013).

video would have misled the jury and created undue prejudice. There was also no evidence any video would have recorded the incident, and the video footage was irrelevant.

10. Recreational Activities for the Public: The Recreational Property Act

The Recreational Property Act, O.C.G.A. § 51-3-20 to 26, provides liability guidelines for landowners who make their property available to the public for recreational purposes. "Recreational purposes" include, but are not limited to, any of the following or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archeological, scenic, or scientific sites.[106] Unless a landowner charges a fee, in order to hold a landowner liable, injuries must result from the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.[107]

**Prepared by: Paul D. Ivey and Tyler Pritchard*

[106] O.C.G.A. § 51-3-21.

[107] O.C.G.A. § 51-3-25.