ICLE

PREMISES LIABILITY

PROGRAM MATERIALS
October 6, 2017
179680

Friday, October 6, 2017 **ICLE: State Bar Series**

PREMISES LIABILITY SEMINAR

6.5 CLE Hours, Including

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FOREWORD

Dear ICLE Seminar Attendee,

Thank you for attending this seminar. We are grateful to the Chairperson(s) for organizing this program. Also, we would like to thank the volunteer speakers. Without the untiring dedication and efforts of the Chairperson(s) and speakers, this seminar would not have been possible. Their names are listed on the **AGENDA** page(s) of this book, and their contributions to the success of this seminar are immeasurable.

We would be remiss if we did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us at ICLE hope your attendance will be beneficial as well as enjoyable We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker's, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,
Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Tangela S. King
Director, ICLE

Rebecca A. Hall
Associate Director, ICLE

AGENDA

Presiding:

Michael J. Gorby, Program Chair, Gorby Peters & Associates LLC, Atlanta, GA

Speakers:

Gilbert H. Deitch, Deitch & Rogers LLC, Atlanta, GA
Andrew T. "Andy" Rogers, Deitch & Rogers LLC, Atlanta, GA
Michael J. Gorby
Peter A. "Pete" Law, Law & Moran, Atlanta, GA
E. Michael Moran, Law & Moran, Atlanta, GA
Mary Donne Peters, Author, Expert Testimony in Georgia,Gorby Peters & Associates LLC, Atlanta, GA
Matthew A. Cathey, Cathey & Strain LLC, Cornelia, GA
Tony C. Jones, Galloway Johnson Tompkins Burr & Smith PLC, Atlanta, GA
Jeffrey H. Gross, Jeffrey H. Gross Consulting, Atlanta, GA
James P. "Jim" Myers, Insley & Race LLC, Atlanta, GA
Taylor K. Owens, Bendin Sumrall & Ladner LLC, Atlanta, GA
Jeffrey M. "Jeff" Wasick, Gray Rust St. Amand Moffett & Brieske LLP, Atlanta, GA
Hon. Clyde L. Reese, III, Georgia Court of Appeals, Atlanta, GA

FRIDAY, OCTOBER 6, 2017

7:30 **REGISTRATION AND CONTINENTAL BREAKFAST**
(All attendees must check in upon arrival. A jacket or sweater is recommended.)

8:05 **WELCOME AND PROGRAM OVERVIEW**
Michael J. Gorby

8:15 **DEVELOPING LIABILITY IN A NEGLIGENT SECURITY CASE-PLAINTIFF PERSPECTIVE – STRATEGIC USE OF DISCOVERY**
Gilbert H. Deitch, Deitch & Rogers LLC, Atlanta, GA
Andrew T. "Andy" Rogers, Deitch & Rogers LLC, Atlanta, GA

8:50 **UPDATE ON PREMISES LIABILITY CASES**
Michael J. Gorby

9:25 **BREAK**

9:35 **DEVELOPING A CREDIBLE CLOSING ARGUMENT – PLAINTIFF PERSPECTIVE – PUTTING A POSITIVE SPIN ON ADVERSE TESTIMONY/EVIDENCE**
Peter A. "Pete" Law, Law & Moran, Atlanta, GA
E. Michael Moran, Law & Moran, Atlanta, GA

10:10 **DEALING WITH DAUBERT – PREMISES LIABILITY EXPERTS ARE IN THE CROSSHAIRS**
Mary Donne Peters, Author, "Expert Testimony in Georgia," Gorby Peters & Associates LLC, Atlanta , GA

AGENDA

10:45 **PURSUING A PREMISES CASE AGAINST A LANDLORD OR OUT OF POSSESSION OWNER – DIFFERENT RULES MAY APPLY**
Matthew A. Cathey, Cathey & Strain LLC, Cornelia, GA

11:20 **GEORGIA'S DRAM SHOP LAW – EXTENSION OF LIABILITY FOR PREMISES' OWNERS**
Tony C. Jones, Galloway Johnson Tompkins Burr & Smith PLC, Atlanta, GA

12:05 **BREAK**
Obtain boxed lunch (included in registration fee)and return to seminar room.

12:20 **LUNCH PRESENTATION**

FORENSIC INVESTIGATION OF THE PREMISES
Jeffrey H. Gross, Jeffrey H. Gross Consulting, Atlanta, GA

12:50 **DEFENDING A SEXUAL ASSAULT NEGLIGENT SECURITY CASE**
James P. "Jim" Myers, Insley & Race LLC, Atlanta, GA

1:20 **DEFENDING SLIP AND FALL STATIC DEFECT CASES**
Taylor K. Owens, Bendin Sumrall & Ladner LLC, Atlanta, GA

1:50 **APPORTIONMENT OF FAULT TO A NON PARTY – DEFENSE PERSPECTIVE**
Jeffrey M. "Jeff" Wasick, Gray Rust St. Amand Moffett & Brieske LLP, Atlanta, GA

2:15 **BREAK**

2:30 **PROFESSIONALISM**
Hon. Clyde L. Reese, III, Georgia Court of Appeals, Atlanta, GA

3:30 **ADJOURN**

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Atlanta, GA

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Deitch & Rogers LLC
Atlanta, GA

Update On Premises Liability Cases

Presented By:

Michael J. Gorby

PREMISES LIABILITY SEMINAR
October 6, 2017
State Bar Headquarters
Atlanta, Georgia

UPDATE ON PREMISES LIABILITY CASES

Mike Gorby
Gorby Peters & Associates
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Who Is Responsible/Legal Basis For Injury Recovery

If a person is injured as a result of a property owner's active negligence, as opposed to a defect on the property, the classification of the injured person, i.e. invitee or licensee, is irrelevant. The property owner has an independent duty not to subject others to harm through active negligence. For instance, in *Card v Dublin Construction Company, Inc., et al.* the court dealt with the issue of the active negligence of a sub-contractor at a construction site.[1] There, the plaintiff while delivering an item to an electrical subcontractor on site was struck by a falling concrete hose that belonged to a concrete subcontractor working at the site. Plaintiff sued both the general contractor and the concrete subcontractor. The trial court granted summary judgment holding that the plaintiff, as to both the general and sub-contractors, was a licensee and there was no showing of wanton or willful conduct. The appellate court reversed and distinguished the plaintiff's claims against the general and sub-contractors. As to the claim against the concrete sub-contractor, the court held that this claim involved active negligence i.e. allowing the concrete hose to fall and therefore, whether the plaintiff was an invitee or licensee was irrelevant:

> "As to the claims of active negligence, J&J owed Card a general duty of care. In other words, liability for J&J employees' failure to exercise ordinary care and not to subject others to an unreasonable risk of harm is based only on the nature of [their] negligent act[s] and is not affected by [Card's] status with respect to the premises."[2]

With respect to the plaintiff's claim against the general contractor as an occupier of the premises, the court held that whether the plaintiff was an invitee or licensee was a jury issue.

Recreational Property Act

The courts continue to broadly construe the immunity provisions set out in the Recreational Property Act.[3] The Act grants immunity to the property owner for injuries occurring on the property unless the injured party can show her injuries were caused by willful

[1] 337 Ga. App. 804, 788 S.E.2d 845
[2] 788 S.E.2d @847
[3] OCGA § 51–3–20 et seq.

and malicious conduct.[4] In *Stone Mountain Memorial Association* v *Amestoy* a bicyclist was killed when he struck a road barricade that had been set up shortly before the accident. The barricade was supposed to be manned but at the time of the accident, the police officer left the barricade to use the restroom. The trial court denied SMMA's summary judgment motion holding that whether the actions of SMMA amounted to a willful failure to warn against a dangerous condition was a jury issue. The appellate court reversed holding that as a matter of law, SMMA's actions did not amount to a willful or malicious failure to warn of a dangerous condition. Mixed in with its analysis the court held the barricade was open and obvious.[5]

Slip and Fall

The courts continue their skepticism of static condition cases where the "defect" is not apparent. In *Rentz* v *Prince of Albany, Inc*., plaintiff sued a car dealership after she tripped over a "cornhole" game set up in the customer waiting area. Apparently, the plaintiff had walked past the area three different times before she fell over it. In affirming the trial court's grant of summary judgment to the dealership, the appellate court noted the game was for customers' use and the plaintiff had no plausible explanation as to why she was not aware of the game before she fell over it.[6]

Maintaining reasonable inspection procedures continues to be a vehicle for summary judgment by property owners even where there is no dispute that a foreign substance was on the floor and was the cause of the fall. In *Ingles Markets* v *Rhodes* the plaintiff slipped on cooking oil that had fallen on the floor. Approximately 10 minutes before her fall, a store employee had inspected the aisle and saw no oil or other substance on the floor. After the fall, the employee inspected the floor where the plaintiff had fallen and saw cooking oil "clearly visible "on the floor. In reversing the trial court's denial of summary judgment, the appellate court held that as a matter of law, the plaintiff could not show constructive knowledge of the hazard because the area was inspected a short time before the fall and there was no showing that the store's inspection procedures were inadequate.[7]

Likewise, in *Youngblood v All American Quality Foods, Inc*., the appellate court affirmed summary judgment in favor of the store where the area where the plaintiff fell because of a puddle of water had been inspected 20 minutes before the fall. The court held that because of the

[4] OCGA § 51–3-25
[5] 337 Ga.App.467, 788 S.E.2d 110
[6] 340 Ga.App. 388, 797 S.E.2d 254
[7] 340 Ga.App. 769, 798 S.E.2d 340

short period between the fall and the inspection, the plaintiff could not establish constructive knowledge on the part of the store.[8]

However, the appellate courts have not articulated a bright line test as to whether a store's inspection procedures are adequate and will support a motion for summary judgment. In *Johnson* v *All American Quality Foods Inc*., the court in a full bench opinion reversed the trial court's grant of summary judgment to the store and held that the adequacy of the store's inspection procedures was a jury issue. There, the store's procedures called for an hourly inspection. The last inspection occurred 38 minutes before the fall. However, the majority opinion held that because of the "nature of a supermarket's business", a jury must determine whether an inspection procedure is adequate.[9] However, a very short time period between the creation of the hazard and a plaintiff's fall will defeat a constructive knowledge argument without regard to the adequacy of inspection procedures.[10]

Rainy day cases continue to be a challenge for plaintiffs to get past summary judgment. In *Diaz* v *MARTA* the court of appeals affirmed the trial court's grant of summary judgment where on a rainy day, the plaintiff slipped and fell while walking across a parking deck owned by MARTA. The court gave the usual "rainy day" rational, i.e. the plaintiff had equal knowledge of the rain and the possibility of water accumulation.[11]

The courts continue to deal harshly with plaintiffs who cannot articulate a specific reason for their fall. In *Richardson* v *Mapoles* the court deemed the plaintiff's account of what caused her fall "mere speculation" in affirming the trial court's granting of defendant's motion for summary judgment. Plaintiff fell as she was entering defendant's restaurant and felt that her fall was related to the door she was entering through. However, at her deposition, she could not articulate a specific defect with the door that caused the fall.[12]

However, at times, the court may allow other testimony to support a plaintiff's faulty recollection of what caused the fall. In *Pipkin* v *Azalealand Nursing Home*, the plaintiff whose husband was a resident of the nursing home, slipped and fell on "something slick" on the floor. She could not identify what the substance was. The plaintiff's son, at his deposition, stated he was outside the nursing home when he was told his mother had fallen. When he went to her and knelt down to help her up, he noticed his knee was wet. He also testified he saw employees mopping up a clear liquid on the floor near his mother. The trial court granted the defendant's motion for summary judgment based on the plaintiff's failure to clearly identify what caused her fall and the deposition testimony of nursing home employees that said the floor was clean and

[8] 338 Ga.App.817, 792 S.E.2d 417.
[9] 340 Ga.App. 664, 798 S.E.2d 274.
[10] See *All American Quality Foods, Inc*. v *Smith*, 340 Ga.App.393, 797 S.E.2d 259 where video indicated the spill that caused the fall occurred 6-7 minutes before the fall.
[11] 341 Ga.App.1
[12] Richardson v Mapoles, 339 Ga.App. 870, 794 S.E.2d 669.

dry. The appellate court reversed and held that a review of all deposition testimony by witnesses who were present revealed too many discrepancies to allow for summary judgment.[13]

A showing that a defendant's property where the fall occurred was in violation of a code provision will not trump the defense that the plaintiff had equal knowledge of the defect. In *Charter Communications, Inc.* v. *Berwick* the plaintiff was injured when she fell over cable that had been placed in her driveway by the defendant. The placement of the cable by the defendant violated a county code ordinance. The plaintiff was aware of the cable before she fell over it. The court in reversing the trial court's denial of summary judgment held: "However, even if the appellants violated that county ordinance, '[n]egligence per se does not equal liability per se, and [Berwick's] equal knowledge of the hazard would still entitle [the appellants] to summary judgment."[14]

Landlord-Tenant Relationship/Out of Possession Landlord

The courts strictly construe the requirements of holding an out of possession landlord liable in tort for faulty construction or failure to repair as set out in OCGA § 44-7-14.[15] In *Aldredge* v *Byrd* the plaintiffs were attending a party at a single-family house when the deck where everyone was gathered collapsed. The house was owned by the defendant but leased to another individual. The deck collapse was the result of faulty construction. The defendant had hired an independent contractor to build the deck. In reversing the trial court's denial of defendant's motion for summary judgment, the appellate court found that the defendant was an out of possession landlord and therefore, the plaintiffs only source of recovery was OCGA § 44-7-14. Since an independent contractor had built the deck, the court held that the defendant could not be liable for negligent construction. Further, the court held that there was no evidence in the record showing the defendant was on notice of any problem with the deck prior to its collapse. The court held that such notice was a prerequisite for holding an out of possession landlord liable for failure to repair.[16]

Third Party Criminal Act Liability

There is simply no bright line test that courts follow to determine if prior crimes on a property are "substantially similar" to the crime committed on the plaintiff. For example, where

[13] 339 Ga.App.390, 793 S.E.2d 568.
[14] 338 Ga.App. 427, 790 S.E.2d 340 (citations omitted)
[15] OCGA § 44-7-14 provides "Having fully parted with possession and the right of possession ... the landlord is responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair."
[16] 341 Ga.App. 300.

the plaintiff was mugged and robbed in the parking lot of a retail store which had 65 crimes in the lot over a year period, two of which involved robbery, the court held the prior crimes were not substantially similar: "These incidents occurred too remote in time from Mrs. Padgett's attack–the first, more than five years prior, and the second, more than eighteen months prior. The second incident was also dissimilar in type to the attack on Mrs. Padgett, as there is no indication that the thief threatened, assaulted, or injured the victim when he stole her purse."[17]

The Supreme Court in the *Six Flags* case affirmed in part and reversed in part the Court of Appeals' decision. The Supreme Court first held that the gang attack on the plaintiff was foreseeable by Six Flags. Second, the Court held that under O.C.G.A. § 51-3-1 Six Flags could be held responsible for the attack which began on its property even though the actual assault and resulting injuries to the plaintiff occurred off of its property.[18] Third, the Court disagreed with the Court of Appeals' conclusion that the bus stop adjacent to Six Flags' property where the actual assault began and concluded would be an "approach" to Six Flag's property within the meaning of § 51-3-1.[19] The Court held that to be an "approach" within this code section, the property in question had to be "within the last few steps taken by an invitee as they enter the premises, or, the property owner."[20] The Court further held: "In addition, property not otherwise comprising the approach to a landowner's premises may be deemed part of the premises and approaches where the landowner has taken affirmative steps, for its own particular benefit, to exercise control and dominion over the public way or the property of another."[21] The Court stated that the evidence presented at trial did not show that Six Flags exercised the requisite degree of control over the bus stop property, and therefore, this property could not be considered an "approach". Fourth, the Court disagreed with the Court of Appeals' holding that because the trial court did in fact commit error in declining Six Flags' request to submit to the jury the question of apportionment to non-parties, a new trial on all issues was required.[22] The Court held that only a retrial on the apportionment issue was required: "In sum, and as a general matter, where correction of an apportionment error involves only the identification of tortfeasors and assessment of relative shares of fault among them, there is no sound reason to disturb the jury's findings on liability or its calculation of damages sustained by the plaintiff".[23]

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[17] 2016 WL 6802482, USDC, S.D. GA.

[18] "We now expressly adopt this narrow principle, and hold that although the landowner's duty is to maintain safety and security within its premises and approaches, liability may arise from a breach of that duty that proximately causes injuries even if the resulting injury ultimately is completed beyond that territorial sphere" 2017 WL 2414685 *4{3}

[19] 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.

[20] 2017 WL 2414685 *6{9}.

[21] 2017 WL 2414685 *6 {10} [11] [12].

[22] OCGA § 51-12-33 is the apportionment statute.

[23] 2017 WL 2414685 *9[18] [19].

The courts continue to strictly enforce the "mutual combatant rule" in third party criminal assault cases. Thus, it is irrelevant if prior to the altercation, the plaintiff was not aware the perpetrator had a weapon or the perpetrator had friends that would join the altercation. Further, the prior criminal history of the property is also irrelevant. If the plaintiff was to any degree engaged in an altercation with the perpetrator, he is barred from a recovery against the property owner.[24]

Home Owner Liability

All homeowner policies under liability coverage cover "accidents" but exclude coverage for "intentional acts". The question presented to the court in *Allstate P&C Insurance Co v Kim Roberts et al* was whether an "accident" is determined from the perspective of the actor or from the perspective of the insured. Defendant Bobby Roberts intentionally shot the plaintiff. Bobby Roberts was married to defendant Kim Roberts. Kim had no idea Bobby was going to shoot the plaintiff. Kim had homeowners insurance with Allstate. Allstate's position was from the standpoint of Bobby, the shooting was an intentional act. Kim's position was from her standpoint, as the insured, the shooting was an "accident". The court agreed with Kim. Under Georgia law, the issue of whether an occurrence is an accident or an intentional act is from the standpoint of the insured.[25]

[24] See *Fair* v *CV Underground, LLC et al*, 340 Ga.App. 798, 798 S.E.2nd 358.
[25] 2017 WL 2683996.

Developing A Credible Closing Argument – Plaintiff Perspective – Putting A Positive Spin On Adverse Testimony/Evidence

Presented By:

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Developing A Credible Closing Argument
Plaintiff Perspective

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I. INTRODUCTION.

Closing argument is the culmination of the work which began the day you first met with your client. Closings are the ultimate advocacy for your client and your opportunity to finally tell a jury why your client is entitled to compensation for his or her injuries and suggest how much that compensation should be.

Closing arguments generally follow a pattern of thanking the jury for their service, reviewing the testimony presented during trial, discussing the relevant law and how it applies to the case, and arguing reasonable conclusions from the facts and the law in your client's favor. Closing argument should follow the same themes developed with the jury in voir dire and carried through opening statements, testimony and the evidence. Any loose ends should be closed at this time, weak points of the case should be addressed and explained, and the jury should be focused on evidence which is significant to your case.

II. THE LAW OF CLOSING ARGUMENTS.

A. Generally.

Counsel is given wide latitude to argue the case during closing arguments and the range of argument is within the sound discretion of the trial court. *Adkins v. Flagg*, 147 Ga. 136, 93 S.E. 74 (1902). Arguments are limited to the applicable law and the facts of the case. Counsel may not refer to facts not in evidence or inject prejudicial matters, although counsel may freely discuss and argue all reasonable inferences and deductions from the evidence. *Lassiter v. Poss*, 85 Ga. App. 785, 70 S.E.2d 411 (1952). Counsel is also forbidden from making misrepresentations and appeals to jury prejudices.

Attorneys frequently disfavor making objections during closing arguments, however counsel must raise objections during closings to preserve error during closing arguments. *Garner v. Victory Express, Inc.*, 264 Ga. 171, 442 S.E.2d 455 (1994) (clarifying that Georgia Law permits counsel to merely object to argument as improper, for whatever reasons, and rest on that objection rather than specifically request other forms of relief).

B. Right to open and conclude.

Generally the party bearing the burden of proof has the right to both open and conclude closing arguments. Plaintiff's counsel should take advantage of this opportunity to argue both before and after the defendant's closings. There are several exceptions, the most common of which is when the defense presents no evidence. *Uniform Superior Court Rule* 13.4.

C. Arguments by more than one attorney in closing.

Often more than one attorney appear as trial counsel for the Plaintiff, and jurors will usually want to hear from both attorneys during closing. Pursuant to O.C.G.A. § 9-10-182, no more than two attorneys are permitted to argue in any case and only one attorney is permitted in conclusion, except by leave of court. As it applies to plaintiffs, the Court of Appeals has held that the phrase "in conclusion" refers to the concluding portion of the plaintiff's right to open and conclude final arguments. Thus, one attorney can handle the first portion of closing, with another attorney concluding. *Goforth v. Wigley*, 178 Ga. App. 558, 343 S.E.2d 788 (1986)

D. Time.

Counsel are limited in their closing arguments to two hours per side. O.C.G.A. § 9-10-180. However, the local rules have shortened this considerably to one hour per side. *Uniform Superior Court Rule* 13.1(D). Requests for additional time may be made prior to the start of

closing arguments, upon a showing justice cannot be done for the client within the given time limitations, and the decision on such a request is within the discretion of the trial judge. O.C.G.A. § 9-10-181. Should you choose to open and close, you will want to watch your time carefully during the opening portion of your argument so as to not limit your all-important concluding arguments.

III. ASKING FOR A SPECIFIC AWARD.

Often the most difficult decision in preparing closing arguments is how to go about asking the jury for a specific amount. Georgia Law permits counsel to argue the monetary value of pain and suffering to the jury in closings, provided such arguments conform to the evidence and reasonable deductions from the evidence. O.C.G.A. § 9-10-184. In a severe injury case, voir dire should have established that you are going to present a case where the plaintiff suffered severe injuries. You should now be able to close the loop on the theme and ask the jury to return an award that is appropriate for the damages suffered by your client.

Opinions vary on how to present the damages to the jury. Some attorneys favor suggesting an "at least" amount, arguing that the jury should return at least a certain amount of damages for the plaintiff. Another method is to specify a specific amount and argue the reasonability of such a figure in light of the damages suffered by the plaintiff. Another popular method is to argue a time or unit valuation of damages, and this method has been approved by the Courts. *Mullis v. Chaika*, 118 Ga. App. 11, 162 S.E.2d 448 (1968). This argument asks the jury to place a value on each hour or day that the plaintiff has or will suffer with the injury at issue and to calculate the damages based on such a figure. A creative argument utilizing this method can make a large figure sound very reasonable, as an hourly rate quickly adds up over a

number of months, years or even the life of the plaintiff. If using this approach, it is best to introduce the Mortality Table during the evidence phase of the trial.

Closings are also the time to remind jurors that this is the plaintiff's "one day in court" and that your client cannot come back for more money if necessary. Jurors may not understand that their decision is final and they should be aware of the importance of their verdict to the plaintiff.

IV. RECENT APPLICATION IN *WELLS V. ASLAN COMMONS, LLC, et al.*

A. Plaintiff's contentions.

This negligence action arose out of a gas explosion occurring on May 31, 2010 caused by an uncapped gas line in an apartment owned and managed by Defendants. That day, Defendants owned and managed the "Edgewater at Sandy Springs" apartment complex. Plaintiff was an invitee and resident at the premises, and was in the process of moving from apartment 906 to apartment 1703.

Although Plaintiff's lease on apartment 1703 was set to begin on June 1, 2010, Defendants' leasing specialist gave Plaintiff a key to the apartment three days early and advised that Plaintiff could begin moving his things into the new apartment. Plaintiff claimed Defendants did not adequately inspect apartment 1703 before giving Plaintiff a key, nor inspect the apartment's gas dryer line to determine whether it was capped after the previous tenant left 5 to 6 months earlier. No warning was provided to Plaintiff regarding the gas line in his new apartment, or that Defendants had not had the gas "made ready" and the apartment could not be safely occupied until Tuesday, June 1.

On May 29, 2010, Plaintiff advised Defendants that the HVAC and water heater units in apartment 1703 were not working. Defendants created an internal work order for the apartment, which work order was given to Defendants' maintenance man. The maintenance man checked out a key to apartment 1703 and remained on duty and in possession of the key at the time of the subject explosion on May 31, 2010, in violation of Defendants' rules.

On the morning of May 31, 2010, Plaintiff left apartment 1703 to return to his former unit to shower. As he was leaving, a maintenance man entered apartment 1703 and stated he was there to work on the HVAC unit. While Plaintiff was away from apartment 1703, gas began flowing into the apartment, per the gas company's records. In fact, tenant(s) complained to management before the explosion about the smell of gas, but Defendants failed to evacuate or take other safety precautions. When Plaintiff later returned to the apartment, he entered through the front door, turned on the light, and gas in the apartment immediately ignited, sending a fireball through the apartment and injuring Plaintiff.

Following the explosion, the gas shut off valve to the unused gas dryer line in the apartment was found in the "on" position and the gas dryer line was uncapped. Turning the gas shut off valve from the "off" to "on" position would require the use of a tool, such as a wrench, yet no tools were found at the scene after the explosion. The responding city fire investigator determined that the explosion was the result of the uncapped gas dryer line in the laundry room area of apartment 1703, and that if the gas line had been properly capped, as state and federal building and/or fire safety codes require, the explosion would not have happened even with the gas turned on. The gas line was expressly required to be capped by the apartment owners/managers per building and/or fire codes adopted by the City of Sandy Springs, including

City of Sandy Springs Ordinance(s) 2005-12-04, 2006-09-68, and/or 2008-10-53, NFPA 54, National Fuel Gas Code 7.7.2, and International Fuel Gas Code 404.12.

Thereafter, the City of Sandy Springs fire investigator required all 620 apartment units in Defendants' apartment complex to be inspected for the condition of their gas lines. In this process, uncapped gas lines were discovered in 57 other apartments at the premises. Defendants did not have any policies or inspection procedures in place prior to the explosion to identify and correct uncapped gas lines at the premises; nor did Defendants have policies or procedures in place for capping a gas line when an apartment resident left and removed a gas dryer. Moreover, Defendants did not train or supervise their employees on inspecting or capping gas lines prior to a new tenant moving into a unit.

Plaintiff claimed Defendants controlled the management, inspection, and maintenance of the premises, and had the legal duty to keep the premises in a state consistent with the due regard for the safety of their residents and invitees, including Plaintiff. Prior to and on May 31, 2010, Defendants negligently managed, inspected, and maintained the premises and the subject apartment. More specifically, Plaintiff claimed Defendants were negligent in failing to properly inspect Defendants' equipment and the subject apartment unit, and in failing to take appropriate precautionary measures and procedures to prevent injuries to invitees, including Plaintiff. On the date of the incident, Defendants negligently created a hazardous and dangerous condition by failing to cap or recap the subject gas valve, and by subsequently allowing gas to leak in the subject apartment.

Plaintiff further claimed Defendants were *negligent per se*. Defendants had actual knowledge of, or in the exercise of reasonable care should have had knowledge of, the

negligence discussed herein and the dangerous and hazardous condition of the subject apartment. Defendants' failure to cap or recap the gas line in the subject apartment was in direct violation of building and/or fire codes adopted by the City of Sandy Springs, including City of Sandy Springs Ordinance(s) 2005-12-04, 2006-09-68, and/or 2008-10-53, NFPA 54, National Fuel Gas Code 7.7.2, and International Fuel Gas Code 404.12.

Plaintiff contended Defendants were liable for the negligent supervision, hiring, training, and retention of their employees and the entrustment of said property to their agents and employees. Defendants were also liable for their negligent failure to promulgate and enforce company policies, procedures, and rules for the protection of the public, including, but not limited to, Plaintiff. Defendants were further liable for their failure to take appropriate action to remedy or reduce the danger to their residents and invitees, including Plaintiff, and for allowing the dangerous condition on the subject property to exist unabated.

Defendants' negligence was the cause in fact and proximate cause of Plaintiff's injuries and damages. As a result of Defendants' negligence, Plaintiff's counsel argued Plaintiff was entitled to recover for the injuries sustained, physical and mental pain and suffering, the expenses of treatment, property damages, and all other elements of damages as are allowed under the laws of the State of Georgia, including, but not limited to, special damages, compensatory damages, consequential damages, economic damages, and punitive damages. Plaintiff contended Defendants were jointly and severally liable for all such damages, and Defendants were liable to Plaintiff directly, as well as under theories of *respondeat superior* and agency principles.

Plaintiff asserted he was entitled to an award of punitive damages, without limitation or cap, because the actions of Defendants and their agents and employees showed willful

misconduct, malice, fraud, wantonness, oppression, and an entire want of care, which would raise the presumption of conscious indifference to consequences and/or a specific intent to cause harm. Because Defendants' actions evidenced a species of bad faith, were stubbornly litigious, and caused Plaintiff undue expense, Plaintiff sought to recover his necessary expenses of litigation, including an award of reasonable attorneys' fees and expenses required by this action. (O.C.G.A. § 13-6-11). Furthermore, Plaintiff was entitled to all expenses of litigation and attorneys' fees pursuant to all other Georgia statutory and common laws.

B. Defendant's contentions[1].

Defendants claimed the explosion occurred just after noon on Memorial Day (May 31), 2010 at the Edgewater at Sandy Springs apartment complex (the "Edgewater). At the time, the Edgewater was owned by Defendant Aslan Commons, LLC ("Aslan") and managed by Defendant WSE, LLC ("WSE").

Defendants asserted Plaintiff began residing at the Edgewater on March 7, 2009, after entering into a rental contract for one of the complex's two bedroom units. After a little over a year on the property, Plaintiff decided that he wanted a lower rent payment and he chose to downsize to a one bedroom unit at the Edgewater. Plaintiff signed a new rental contract for his one bedroom unit on May 27, 2010. Though the rental period for the new unit began on June 1, 2010, Plaintiff asked WSE management if he could have the keys over Memorial Day weekend so he could begin the process of moving his belongings from his old apartment to his new apartment. WSE accommodated Plaintiff's request and gave him the keys on Friday, May 28, 2010. At this time, Plaintiff took possession of his new apartment – unit number 1703.

[1] The facts are taken from Defendants' version of the Pretrial Order.

Defendants claimed Apartment 1703, like several (but not all) other units at the Edgewater, was equipped with a gas line servicing the laundry room. This gas line terminated in a nozzle to which, should the tenant so desire, one could attach a gas-powered clothes dryer. This gas line was controlled by a gas-tight valve which was located in the apartment's utility closet, which also housed the water heater and the HVAC unit. When the valve was closed, as it was prior to the day of the explosion, no gas escaped the nozzle in the laundry room. To open the valve, one would need a wrench, or pliers or tool of some kind (in other words, it was not a "thumb valve" or one that could be opened with one's bare hands). The laundry room gas nozzle in unit 1703 did not have a cap on it.

Plaintiff began moving his belongings into his new apartment on Friday, May 28, 2010, and continued to do so over the balance of the weekend. Defendants claimed Plaintiff effectively began living in the new unit, sleeping there Saturday and Sunday nights (May 29 and 30, 2010). At some point during the weekend, Plaintiff discovered that his hot water heater was not working. According to Defendants, Plaintiff admitted that, upon discovering that he had no hot water, he attempted to light the water heater's pilot light on at least one occasion – Saturday (May 29th). Plaintiff was ultimately unsuccessful, and he claims that he did not attempt to light the water heater on any other day. However, Defendants believed the evidence would prove otherwise. On the morning of Monday, May 31, 2010, Plaintiff woke up in his new apartment. Defendants claimed that Plaintiff attempted to light the water heater pilot light one more time. Defendants further claimed that, during this final attempt, Plaintiff opened the valve to the dryer line. When Plaintiff was unsuccessful in lighting the water heater, he went back to his old

apartment, leaving the valve open and gas flowing into unit 1703. When Plaintiff returned, an unknown source ignited the gas and caused an explosion as he entered the apartment.

C. Damages.

Steve Wells was burned on approximately 22 percent of his body, including 1st, 2nd and 3rd degree burns. The burns required skin grafts, and Plaintiff underwent several surgeries. Steve spent 15 days in the Grady Burn Unit. Plaintiff could not speak for a month after the accident due to the damage of his vocal chords. Plaintiff's medical expenses totaled $226,396.52.

Plaintiff also claimed a diminished capacity to labor. Plaintiff was a teacher and the head of IT at the McGinnis Day School, but had to give up his teaching career as a result of the incident.

D. The trial.

The trial began on January 12, 2015 before Judge Eric Richardson in Fulton County State Court. After a four day trial, on January 15, 2015, the 12 person jury returned a verdict in favor of Plaintiff in the amount of $72,960,000.00, consisting of $17,900,000.00 in compensatory damages, $7,160,000.00 in attorney's fees, and $47,900,000.00 in punitive damages. The jury apportioned 0% of the fault to Plaintiff and 100% of the fault to Defendants. Both parties appealed, and based upon post-trial motions filed by Defendants, the Court reduced the punitive verdict to $250,000.00, citing Georgia's statutory cap on punitive damages, entering final judgment in the amount of $25,871,640.96, including $561,640.96 awarded to Plaintiff in pre-judgment interest. Judge Richardson also awarded costs of this action and post-judgment interest in his final judgment. Plaintiff challenged the constitutionality of the punitive damages cap in

the Supreme Court of Georgia, and Defendants filed a post-trial motion for JNOV, remittitur, and/or new trial. The Defendants maintained adequate insurance to cover the judgment, and the case later settled at mediation while on appeal.

E. Unique aspects to the case.

The case took 3 to 4 days to try. Although there had been a seven-figure offer prior to trial, there was not much discussion regarding settlement during trial. Interestingly, during voir dire, the Defendants asked if they could show Plaintiff's surgical video reflecting burn grafting, and as a result, many favorable jurors were lost for cause. One of Plaintiff's strategies was to get as many jurors with higher education as possible, due to a few complexities with understanding the applicability of codes, and how it related to both negligence and contributory negligence.

In explaining the case to various non-lawyers, they often had difficulty understanding how anyone could not see or discover that the gas pipe was not capped, and therefore we decided to reconstruct pertinent parts of the apartment in a manner that could be assembled quickly in court and reflect the piping from the various gas lines going into different rooms, along with the toggle switches turning the lines on. Simplifying the explanation to the jury and showing the walls with 30 x 40 pieces of foam board made the case very simple to understand.

As far as liability witnesses, Plaintiff called a variety of witnesses proving that the apartment complex was negligent in the preparation of the apartment, inspection of it, and in accessing the hot water heater and dryer line at issue without making it safe. Although Defendants' theory was to blame Plaintiff for potentially trying to light the hot water heater and therefore turning on the gas, Fire Chief Cheryl Walls testified that she found evidence of what appeared to be the repair packages and parts reflecting that somebody had been there working on

the hot water heater immediately before the fire. Ms. Walls testified that upon requesting maintenance logs at the fire scene, the head maintenance man indicated they were not in writing, at which point she ordered the entire complex checked for uncapped lines and found 57 other units with similarly neglected gas lines. Importantly, the gas lines, although uncapped, were not leaking in other units because the shutoff valves were in the off position, which is a violation of code because inadvertently turning it on would allow gas to flow out the end of the line. This is what happened with Steve Wells' unit.

The primary damages witness was Dr. Walter Ingram of the Grady Burn Unit, who testified for about 40 minutes, which was also supported with the testimony of Plaintiff's family members. Though witness testimony began after lunch on Monday, all liability and damages witnesses were completed on Wednesday, and Defendants put up their case and rested Wednesday afternoon. Defense counsel was very experienced and did a great job with a difficult case.

Post-closing arguments but pre-verdict, there was a very interesting situation that arose that neither the Court, nor counsel, had ever dealt with. After deliberations had gone on for a period of time, we realized that the alternate juror had not been released and 13 jurors were deliberating. Initially, defense counsel had indicated they were fine letting the alternate juror continue to deliberate, but both sides decided to discuss the issue. Plaintiff then moved the Court to dismiss the alternate juror and reinstruct the jury on the law and to begin deliberations over. Defendants moved for a mistrial. The Court correctly decided that dismissing the alternate juror and asking for deliberations to begin again was the proper course of action. Under Georgia law, we were certain that Defendants had a right to a 12 person jury, and Defendants had no

obligation to consent to an 11 or 13 person jury, which is not provided for under our law. Judge Richardson wisely asked the jurors if they could put aside anything that the alternate juror had contributed, and they all answered in the affirmative. The Court gave the jury a copy of the charges and suggested they reread it if they need to and reconsider the evidence. This later became a focal point of Defendants' appeal, and Plaintiff felt the issue had been appropriately handled.

Perhaps one of the aspects of the case that garnered the most discussion after the verdict among other lawyers was the award of $7,160,000.00 of attorney's fees. Under Georgia law, a jury is entitled to determine whether attorney's fees are appropriate and what amount. Once the jury checked the box for both punitive damages and attorney's fees, we began the second part of what was to be the trifurcated trial. During the second part, lead counsel (Pete Law) took the stand and Mike Moran examined counsel as to the nature of their practice, the nature of the fee charged, the amount of work, effort and expenses the firm had expended on the entirety of the case. Our contingency fee was a 40% contingency fee, and Plaintiff put in both the contingency fee amount and a basis for which the jury could determine an hourly rate. Counsel for Plaintiff acknowledged that the fee seemed significant, but of the $17,900,000.00 compensatory award, that was the amount that Steve Wells would be paying for the legal services. Ultimately, the jury felt like that was a standard contingency fee rate and awarded the full amount. This issue was also a topic for post-trial motions and Defendants' anticipated appeal, but again the case was resolved at mediation prior to any such decisions being made. This issue was heavily briefed by both sides, and the briefs are of course available if any counsel needs a copy.

Another unique aspect to the case was the $47,900,000.00 punitive damages award, which the judge determined was statutorily capped at $250,000.00. Plaintiff filed a brief with the trial court and appealed to the Supreme Court of Georgia on a variety of grounds that the cap was unconstitutional, and considerable effort was expended by both sides on whether the punitive damages cap would be overturned. Although the case was settled before the issue was addressed by the Supreme Court, Plaintiff asserted strong arguments as to the cap's unconstitutionality.

Though the primary case and appeals have been dismissed, the insurance companies, to include various layers of excess, continue the litigation in Federal Court – suing each other, blaming one another for the significant verdict and subsequent settlement.

V. CLOSING IN *WELLS V. ASLAN COMMONS, LLC, et al.*

The application of these principles in *Wells* resulted in a powerful closing argument for the plaintiff. Our closing began by thanking the jury and members of the court, and broadly reviewing liability, confirming what had come up in voir dire, opening and with the evidence in a consistent theme. The case carried its own significance and import, and reminding the jury about the civil justice system and things of that nature was pertinent to the closing.

It has become very commonplace for lawyers to discuss the specific charges the judge will give the court. Picking one or two and emphasizing them is particularly helpful, especially since the judge in our case gave the jury a copy of the charges. Thereafter, applying that law to what the specific witnesses said was persuasive. When discussing what the witnesses or documents said, it is preferable to only discuss one or two things. Juries are smart, they saw the evidence, and most take very good notes. One area that can be greatly effective in this regard, however, is the amount of a verdict if you represent the plaintiff. Spending time discussing the

import of the verdict, the significance and effect of the particular harm or injury, and any permanency is critical. Again, this is an area where counsel can often have the greatest effect in closing.

As is the case with voir dire, opening, and the evidence, we often directly confront weaknesses with the case. For example, in the *Wells* case, our client had attempted to light the hot water heater two days before the explosion, and the defendants claimed he likely was trying to light it again when the apartment exploded and he should not have done so according to them. However, the fact that he told everyone that he had tried to light the hot water heater two days before, when likely no one would have known, was a significant asset to his credibility. Moreover, the hot water heater did not blow up, and those were issues we talked about with the jury.

Many lawyers like to feel they empower the jury with an approach of "outrage" or other negative insinuations against the defendants or defense counsel. We tend to take the opposite approach, trying to keep a professional and logical tone without insulting anyone in the courtroom.

Finally, this case presented punitive damages. We generally do not discuss punitive damages at all throughout a trial, and let the facts speak for themselves. Toward the end of closing, we will typically raise the issue of punitive damages in one or two sentences, and suggest the jury is permitted to consider same. In the end, however, it is the facts as to liability and damages that will carry the day, and twelve jurors are always smarter than any one or two people in the courtroom, and they overwhelmingly get the result correct.

VI. CONCLUSION.

Closing argument is the stage that plaintiff's lawyers work toward every day. When your closing argument is well prepared and effectively presented, you will put your client in the best position to obtain a favorable verdict.

Dealing With Daubert – Premises Liability Experts Are In The Crosshairs

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Pursuing A Premises Case Against A Landlord Or Out Of Possession Owner – Different Rules May Apply

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PURSUING A CASE AGAINST AN OUT OF POSSESSION LANDLORD

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Introduction

Under O.C.G.A. §51-3-1, et seq., a property owner has a statutory non-delegable duty to keep his premises safe and in good repair. However, despite the "non-delegable" language of the statute, there are certain exceptions to landowner liability that all attorneys must be aware of when looking at a premises case. One such exception, which will be the focus of this paper, arises in the context of a landowner who is an out of possession landlord (i.e. rents his property out to another for use). In these cases, it isn't as simple as following the 51-3-1 statute, rather, there is a special statute that controls for out of possession landlords, and all attorneys need to be aware and familiar with that statute (and the cases interpreting that statute) before tackling one of these cases.

Out of Possession Landlord Statute

O.C.G.A. §44-7-14 states that "[h]aving 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." While there is a statute found at O.C.G.A. §44-7-13, which states "[t]he landlord must keep the premises in repair…He shall be liable for all substantial improvements placed upon the premises by his consent", Georgia courts have consistently held that §44-7-13 only provides a remedy in contract, not in tort. See Colquitt v. Rowland, 265 Ga.905 (1995). Therefore, for tort cases, attorneys are required to use §44-7-14, which is more restrictive (from a Plaintiff's perspective) than . §44-7-13 or . §51-3-1. So, when dealing with these type cases, the first question that must be answered is: what determines "in possession" vs. "out of possession"?

In Possession v. Out of Possession

What constitutes delivery of full and complete possession of the premises is not always easy to define. Custody and control are the commonly accepted and generally understood incidents of possession."[1] And much like "ministerial" vs. "discretionary" acts in sovereign immunity cases, there is no bright line rule as to what constitutes surrender of control, but there are cases that are illustrative of what the courts have considered when looking at in possession vs. out of possession:

- Hiring a company to paint your house is not considered surrendering control, even on a temporary basis.[2]
- Where a landowner hired an independent contractor to replace water meters in shopping center, the landowner has not surrendered control even when contractor had to dig up

[1] Towles v. Cox, 181 Ga. App. 194, 196, 351 S.E.2d 718, 720 (1986)
[2] *See* Supra note 38 (Johnson v. Kimberly Clark)

various parts of the shopping center parking lot with a backhoe, jackhammer, and other construction equipment.[3]

- A landowner who retains a limited right of periodic inspection is still considered an out of possession landlord. Lake v. APH Enters., LLC, 306 Ga. App. 317, 702 S.E.2d 654 (2010).

Defective Construction

As stated earlier, one of the two exceptions to the protections afford to an out of possession owner arise when there is defective construction on the property. The language in the statute suggests that any and all instance of defective construction could lead to owner liabilty, however, that is not the case. The liability of a landlord for defective construction exists only in cases where "the structure is built by him in person or under his supervision or direction."[4]

In Martin v. Johnson-Lemon, the case which established the "built by . . . or under his supervision or direction" exception, the defendant owned a rental home that had an in-ground swimming pool. The plaintiff brought an action for the wrongful death of her husband, who drowned in the pool after diving head first into the shallow end. The plaintiff alleged that the pool was defectively constructed and that the landlord (Martin) was responsible under O.C.G.A. § 44-7-14 for the defective construction.

The court held that Martin's involvement in the construction and installation of the swimming pool was so minimal that he could not have been considered to be in supervision or

[3] Towles v. Cox, 181 Ga. App. 194, 194, 351 S.E.2d 718, 719 (1986)
[4] Martin v. Johnson-Lemon, 271 Ga. 120, 124, 516 S.E.2d 66, 69 (1999)

direction of the construction. Martin simply selected a standard pool design that was presented to him and then hired and paid an independent contractor to install the pool. In the decision, it was noted that "Martin did not retain for himself any powers of oversight, approval or supervisory direction" of the installation of the pool. Further, the decision noted that the "method and means of constructing the pool were left entirely to the independent contractor's discretion."

This case is an example of the necessary circumstances an out-of-possession landlord needs to show for him to not be held liable for negligent construction. He cannot have any direction, supervision, input, etc. at all. While this is one example of a situation when an out-of-possession landlord is not involved in the construction, "our case law does not define to what degree of involvement is required before an out-of-possession landlord will be deemed to have 'supervised or directed' construction on the leased premises, thereby subjecting him or herself to liability under O.C.G.A. § 44-7-14." Because case law does not define what degree of involvement is required, each case "will be factually unique and thus inquiries must be conducted on a case-by-case basis."

However, a limited exception exists to the rule requiring owners to have either built or supervised construction, and that exception arises in cases where a structure was constructed by a predecessor in title, and the landlord knew or by the existence of reasonable diligence could have known of its improper construction. See Flagler Co v. Savage, 258 Ga. 335 (1988); Pajaro v. South Georgia Bank, 339 Ga.App. 334 (2016). In Pajaro, the Court gave a good history of this exception and noted that while at first glance the exception would seem to contradict the precise terms of O.C.G.A. § 44-7-14, "a purchaser of rental property has unparalleled opportunities to

discover defects in structures erected by predecessors-in-title." The Court went on to state "[w]hile there is no absolute duty of inspection upon a landlord to discover defects in the premises prior to leasing them…the landlord may be liable if the alleged defect constitutes the type of structural defect that would be discovered during a pre-purchase building inspection."

Duty to Keep Premises in Good Repair

A "repair" as it applies to O.C.G.A. § 44-7-14 "contemplates an existing structure . . . which has become imperfect, and means to supply in the original structure that which is lost or destroyed, and thereby restore it to the condition in which it originally existed, as near may be."[5] Accordingly, there must be evidence that the physical condition on the property that gave rise to the injury was in need of restoration to its original condition "due to loss or destruction."[6] If no evidence supports the allegation that the physical condition on the property was in need of restoration to its original condition, a landlord cannot be held liable under his statutory duty as an out-of-possession landlord for failing to keep the premises in repair.[7] However, if there is evidence that supports an allegation that the physical condition on the property was in need of restoration, the landlord *will* be held liable if they do not make the necessary repairs. In Georgia, the policy that a landlord *must* make repairs and *shall* be liable for physical harm caused a tenant by the landlord's failure to exercise care to repair a known dangerous condition—is so strong that

[5] Martin v. Johnson-Lemon, 271 Ga. 120, 123, 516 S.E.2d 66, 69 (1999)
[6] Id.
[7] Id.

the Georgia legislature has made it a point to not even allow a tenant to waive his right to damages for a breach of the landlord's duty through a provision in a lease.[8]

Georgia Courts have held that the duty imposed on an out-of-possession landlord to repair a condition on his premises is not synonymous with the duty to "maintain" the premises.[9] By its plain and unambiguous terms, O.C.G.A. § 44-7-14 does not impose a duty of maintenance on an out-of-possession landlord, only a duty of repair.[10] The duty to repair arises only when the landlord is put on notice of the latent defect, either by constructive notice or by notice from the tenant.[11] Once the landlord is notified that there is a condition on the premises that warrants a repair, it becomes his duty to inspect and investigate the condition in order to make such repairs as the safety of the tenant requires.[12] Placing the duty of continual inspection and maintenance of the premises on out-of-possession landlords would be overly burdensome and would go beyond the scope of O.C.G.A. § 44-7-14.

Other Pointers

- The violation of a building code is negligence per se, and evidence of nonconformity with the code standards may be proof of a landowner's superior knowledge of a defect.[13]
- A landowner of a dwelling cannot contract away the duties imposed on him by O.C.G.A. §44-7-14.[14]

[8] Country Club Apartments v. Scott, 246 Ga. 443, 271 S.E.2d 841 (1980); OCGA § 44–7–2
[9] Id.
[10] Id.
[11] Davis v. All-State Homes & Properties, 233 Ga. App. 60, 61, 503 S.E.2d 331, 333 (1998)
[12] Id.
[13] *See* Hicks v. Walker, 262 Ga. App. 216, 585 S.E.2d 83 (2003)
[14] O.C.G.A. §44-7-2

- Apportionment does not apply to premises liability cases in which the landowner is found to be vicariously liable.[15] This is also clear from the statutory language in O.C.G.A. § 51-12-33, which modifies only the common law rule of "joint liability," but does not affect single or vicarious liability.[16] Further, it is clear from Georgia's case law that Georgia's apportionment statute does not apply to cases of vicarious liability.[17]
- Tenant's family, tenant's guests, servants, employees, or others present by the tenant's express or implied invitation, stand in his shoes and are controlled by the rules governing the right to recover for injuries arising from a landlord's failure to keep the premises in repair. Black v. New Holland Baptist Church, 122 Ga.App. 606 (1970).
- Landlord liability is predicated on actual or constructive knowledge.

Conclusion

Georgia's laws on premises liability are very complex. Know the statutes, know the cases, know the facts of your case. As stated earlier in this paper, each case is so factually dependent on how courts rule on the duties and liabilities of out of possession landlords. Do as much investigation as you can before filing suit, make sure you talk to any and all witnesses, and take thorough depositions. These cases are geared to protect landowners, and if you know that going into the case (and understand what you need to prove) you at least stand a fighting chance.

[15] *See* Peachtree-Cain Co. v. McBee, 254 Ga. 91, 93 (1985) ("Because that duty was personal and nondelegable, a recovery based upon a breach of that duty would not constitute imposition of liability without fault.").
[16] O.C.G.A. § 51-12-33 (b).
[17] *See* Dist. Owners Ass'n v. AMEC Envtl. & Infrastructure, Inc., 322 Ga. App. 713 (2013) ("Despite the enactment of O.C.G.A. § 51-12-33, it is well settled that Georgia law continues to recognize . . . vicarious liability.")

Georgia's Dram Shop Law – Extension Of Liability For Premises' Owners

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DRAM SHOP LIABILITY

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I. DRAM SHOP LIABILITY

STATUTE: O.C.G.A. §51-1-40

(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

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subsection (d) of Code Section 3-3-23 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.

II. EXCEPTIONS

- Georgia's Dram Shop Act is codified at O.C.G.A. § 51-1-40. Generally, this statute favors proprietors and serves to restrict liability. There are exceptions to this general rule, however, chiefly with regard to:
- Service to **under-aged** persons;
- Service to **noticeably intoxicated** persons.

III. ELEMENTS OF CLAIM

The elements of a claim for dram shop liability are as follows:

1. The Defendant sold, furnished, or served alcohol to a person;
2. The Defendant knew the recipient of the alcohol was underage or in a state of noticeable intoxication;
3. The Defendant knew the recipient would soon be driving a motor vehicle; and
4. The recipient of the alcohol caused an injury to a third party that was proximately caused by the consumption of alcohol.

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- With regard to the first prong of this analysis, the term "furnish" has been defined to mean providing and owning the alcohol at issue.
- The knowledge requirement of the second prong of this analysis can be actual or constructive. Failing to verify a minor's age could serve as the basis for constructive knowledge. The standard for ascribing actual or constructive knowledge to the proprietor is the proprietor's exercise of "reasonable care" in assessing both age and level of intoxication. "If provider in the exercise of reasonable care should have known both that the recipient of the alcohol was noticeably intoxicated and that the recipient would be driving soon, the provider would be deemed to have knowledge of that fact." Baxley v. Hakiel Industries, Inc., 280 Ga.App. 94, 633 S.E.2d 360 (2006). Importantly, "[t]he Dram Shop Act does not place an affirmative duty on the providers of alcohol to determine the method by which a patron plans to depart the business establishment and how that patron eventually plans to get home." Sugarloaf Café, Inc. v. Willbanks, 279 Ga. 255, 612 S.E.2d 279 (2005).
- With regard to the knowledge requirement of the third prong of this analysis, a duty is assumed—the duty to make a reasonable investigation by the provider of alcohol into whether or not the patron will soon be driving.

IV. DEFENSES

1. Reliance on false identification (Fake I.D.).
2. In the absence of, and without the consent of, the owner/occupier, no liability for alcohol consumed on the premises, unless the premises has a liquor license.
3. Injuries to the consumer-driver, as opposed to a passenger or the occupant of another vehicle, when a motor vehicle is involved.

V. PRACTICAL CONSIDERATIONS

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- The Dram Shop Act is largely limited to incidents involving motor vehicle accidents, not other torts. For example, torts of assault, battery, etc. do not fall within the ambit of dram shop liability.
- Test results showing a blood alcohol content in excess of the legal limit ***may*** be sufficient to overcome testimony and other evidence that a patron was ***not*** visibly intoxicated for purposes of summary judgment. Northside Equities, Inc. v. Hulsey, 275 Ga. 364, 567 S.E.2d 4 (2002). A forensic toxicologist can opine on the relationship between the blood alcohol content and height, weight, and other factors of the consumer in addressing behaviors likely exhibited by the consumer in support of the argument that the consumer was noticeably intoxicated.
- Further, a refusal to consent to a blood alcohol test may be considered by a jury as evidence of intoxication.
- A guilty conviction for driving under the influence may be admitted into evidence if the subject driver is a party to the lawsuit.
- There is no liability where there is no direct connection between the defendant and the consumer of alcohol. For example, there is no liability for providing alcohol to an underage or noticeably intoxicated person who ***then*** provides the alcohol to another underage or noticeably intoxicated person who later drives and causes injury.
- Ordinary defenses such as assumption of risk and contributory or comparative negligence apply to the driver's negligence, ***not*** the willful provision of alcohol. For this reason, a driver's own negligence can be considered by a jury.

VI. INSURANCE CONSIDERATIONS

- Liquor Liability Exclusions in insurance policies are permissible and enforceable.
- In the absence of waiver or estoppel, a Liquor Liability Exclusion will almost always be upheld.

Lunch Presentation - Forensic Investigation Of The Premises

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INSPECTION OF APARTMENT COMPLEXES FOR PRIOR CRIME.

The traditional method of determining prior crime at an apartment complex has been to request a list of *call for services* from a local police department. This is commonly referred to as a *crime grid.* This list will show all calls made to the main address of the apartment complex and may or may not include individual apartment unit numbers. The list will most often not indicate beyond a heading title, what type of crime if any actually took place. Entries on a crime grid indicating *assault* may actually be domestic disturbances occurring behind closed doors. However, some assaults may turn out to be crimes against persons in public areas such as parking lots or hallways. At best the crime grid gives an overall impression of the volume of calls and crime at a given location. It is important to note not all crimes occurring on the property are reported. And some of those are reported by the victim to the police department but not to apartment management. Unless one obtains a copy of individual police reports and the attached narratives, one cannot determine if management was aware of the incident, at least on paper. If management is mentioned in the report or is listed as the reporting party than obviously they are aware of the incident. Management may be put on notice of criminal or undesirable behavior through incident reports completed by security/courtesy officers. Additionally, emails or personal complaints documented at the office would also show management's knowledge of criminal behavior. *Work orders* generated to fix items damaged as a result of criminal behavior is another area to be examined. Often these work orders address damaged property owned by the apartment complex and did not result in a police report being made. Management may file work orders by specific area or apartment number which would give one insight as to the criminal activity in a particular apartment or building. Another document which may show management's knowledge of criminal activity is the *capital expenditure proposals* submitted by management companies to owners. This document generally reflects the amount of expenditures for the upcoming year that exceed the discretionary spending authority of a management company. While a management company may have a $5,000.00 discretionary spending limit, CEPs will show proposed expenditures in the tens if not hundreds of thousands of dollars that need to be budgeted for. These CEP documents may include items for security patrols, increase of lighting, closed circuit television installation, or other security related items.

INSPECTING THE PROPERTY

When inspecting a property for security or crime related issues, one should start at the main entrance. This may be a free-flowing driveway or a system of gates which restrict traffic onto the property. The condition of the gates, their mechanical operation and timing should be examined. Whether or not the gates work with a key fob or push button code may also be important as the system may record the entry of specific vehicles. The perimeter of the property

should be walked and the fence line if any should be closely inspected. Conditions such as holes in the fence, multiple attempts to fix a fence or well-worn trails leading to or from adjacent properties are of interest. Plant growth, especially vines growing through the fence fabric may indicate years of neglect or a series of repairs depending on the thickness of the plants. Other items such as liquor bottles, drug bags, broken drug paraphernalia may be found in some areas where trespassing readily occurs.

Walking behind each building and examining the window frames of ground floor apartments may show repair or replacement of the windows due to prior forced entries. These conditions will often match up to work orders but not police reports. Signs of gang activity such as *tagging* or graffiti may also help identify past or current gang activity on the property. Most police departments have a gang unit and they may be able to help you identify the gangs by their tagging and provide information concerning their activity on the property. The hallways of the apartments should be walked to examine the door locks and general condition of the door frames and locking mechanism area. Often there will be evidence of multiple forced entries into apartments. Depending on how the damage is repaired. The inspection may clearly indicate how the damage occurred such kick-ins, or if the lock and deadbolt had been manipulated. The kind and manufacturer of deadbolt systems should be examined. Some of these are of the cheapest quality and cannot be depended on to function reliably. The key system must be examined to determine if *key control systems* are working and if *master keys* are used on the property. If master keys are used then special attention must be given to the ability to duplicate these keys as well as their storage. Laundry rooms and playgrounds should be inspected for evidence of criminal activity. This may include signs of forced entries in the laundry rooms or accumulation of drug paraphernalia or alcohol containers in playground areas. Air conditioning units behind buildings or in other secluded areas are frequent targets for theft and note should be taken when a series of air conditioners have been replaced in a secluded area. This may be an indication of ongoing criminal activity. Lighting surveys of grounds, parking lots, walkways and hallways may be of value.

SECURITY/COURTESY OFFICERS

If the apartment complex is using security or courtesy officers, an examination of their job descriptions, post orders, and incident reports and contracts should be done. *Security management and/or security officers* should be interviewed to determine what they know about criminal activity on the property and whether or not they feel they were given the adequate resources and staffing to do their job. *Courtesy officers* are often police officers who live at the complex rent free or at a reduced rent rate. Some of them patrol grounds on an infrequent basis and others do virtually nothing at all. Apartment complexes have tried repeatedly to say they don't have any security officers but have a courtesy officer. It is interesting to determine what courtesy the officer provides and why they invariably must be a police officer armed with a gun in order to provide those courtesies.

The above list should not be considered all inclusive. It is a guideline for use by plaintiff and defense concerns to evaluate the loss prevention activities and criminal activities at an apartment complex.

Defending A Sexual Assault Negligent Security Case

Presented By:

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DEFENDING A SEXUAL ASSAULT NEGLIGENT SECURITY CASE

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October 6, 2017
ICLE Premises Liability Seminar

DEFENDING A SEXUAL ASSAULT NEGLIGENT SECURITY CASE

I. Introduction

A. The Basics

- The most common venues sued in premises sexual assault cases are: Apartment Complexes, Condominiums, Hotels, Healthcare Facilities (Nursing Homes, Assisted Living Facilities), Shopping Malls, Bars and Nightclubs, and Parking Lots.[1]
- Premises security cases are typically more complex, more expert intensive, and more time consuming than typical premises liability cases. Premises security cases are sometimes compared to medical malpractice cases, in that there is typically proof of the existence of a security standard of care, proof of a breach of that standard, and proof that the breach was a proximate cause of the damages alleged.
- Premises security cases are particularly difficult from a plaintiff's perspective because the perpetrator of the crime is typically not a defendant. The jury is permitted to apportion fault at trial between the property owner (who is allegedly a negligent actor) and the perpetrator (who is an intentional actor).

B. Why Are Civil Proceedings Pursued In Sexual Assault Cases?

- Money damages to the victim are available in a civil proceeding; they are not available in a criminal proceeding.
- Only a small fraction of rape cases are prosecuted, and an even small number result in conviction.[2]
- Even if a conviction is obtained, jail time for the perpetrator does not address losses to the victim.
- There is a lower burden of proof in civil cases (preponderance of the evidence= "more likely than not" vs. "beyond a reasonable doubt" for criminal cases.)
- The victim has control over the "prosecution" of the civil case. The victim has a voice, if not complete control over the progression of the civil case.
- The victim can remain anonymous ("Jane Doe" or "J.D.") in the style of a civil case.
- In a criminal case, the prosecution represents "the state," not the victim, so interests are not always aligned.

C. Why Are Premises Owners or Managers Sued For The Actions of a Third Party Attacker?

[1] Thomas Anderson and Norman Bates, "Laying Down the Law: A Review of Trends in Liability Lawsuits," Security Management Vol. 26. No. 10 (October 2002).
[2] Ellen M. Bublick, Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies, 59 SMU L Rev. 55 (2006).

- A criminal case provides no opportunity for "justice" against a negligent property owner, it is only concerned with convicting the attacker.
- Oftentimes, when a civil case is filed, the perpetrator is already incarcerated and "justice" has been obtained against him/her.
- The perpetrator is typically "judgment proof" so targeting property owners is the only source of financial recovery for the victim.
- In some cases the perpetrator is unknown and there is no opportunity for "justice" against the perpetrator.

D. The Potential Exposure to Premises Owners Is Significant

i. High Exposure and Nationwide Averages

Due to the nature of the crimes and the damage to victims, sexual assault premises security cases have the potential for very high verdicts and settlements. These cases can also result in extremely negative publicity for a property, which can damage the underlying business. Sexual assault premises security cases should typically be treated as "high exposure" cases for clients. Correspondingly, these cases are costly and time consuming to defend due to the volume of documents, the number of witness interviews and depositions, and the likely need for liability and medical experts.

- As of 2010, nationwide, the average settlement in a rape security case was reported at $600,000, with the average verdict at $1.75M.[3]

ii. Georgia verdicts and settlements demonstrate the potential exposure in these cases:

$2,500,000. Settlement ||RAPE AND ASSAULT AT APARTMENT COMPLEX|| Maintenance man at apartment complex assaults disabled female resident in her apartment. The plaintiff filed suit in the State Court of Fulton County, Georgia for premises liability, accusing the defendant apartment complex of negligent security on their property, resulting in her sexual assault. Specifically, the defendant was accused of violating industry standards through allowing the maintenance man to make the copy of plaintiff's apartment key, after complaints were made about him. Jane Doe v. Apartment Complex, State Court of Fulton County (2014)

$2,500,000. Settlement ||RAPE AND ASSAULT AT APARTMENT COMPLEX|| A 24 y.o. woman visiting her sister at her apartment was raped in the parking lot of the apartment complex. Plaintiff claimed that there was an extensive history of crime at

[3] John Leighton, Faulty Doors Can Leave You in a Legal Jam, August 1, 2010, http://www.buildings.com/article-details/articleid/10370/title/faulty-doors-can-leave-you-in-a-legal-jam.

the complex and the security measures were inadequate, L.B. v. Huntington Farms, State Court of Fulton County, GA (2008).

$9,091,548. Verdict ||RAPE AND ASSAULT AT APARTMENT|| A 33 y.o. woman was raped in her apartment by a nonparty male. Plaintiff contended that Defendant failed to maintain the property in safe condition. Defendant countered by arguing that there had never been prior incidents at the property and the doors, windows, and locks were in working order. Plaintiff v. Spring Chase, Inc., Housing Authority of DeKalb County, State Court of DeKalb County, GA (2008)

$9,000,000. Verdict. ||RAPE AND ASSAULT AT APARTMENT COMPLEX|| A 22 y.o. female alleged that she suffered PTSD and multiple contusions when she was beaten, robbed, and raped by two unknown assailants at the defendant's apartment complex where she resided. The plaintiff contended that the defendant failed to routinely inspect and properly maintain its premises, failed to provide adequate lighting, and failed to provide proper measures of security to ensure the safety of its residents. Plaintiff v. EPT Management, Superior Court of Fulton County, Georgia (2005);

$1,000,000. Settlement ||RAPE AND ASSAULT AT APARTMENT|| A 20 y.o. female suffered emotional distress when she was raped by a nonparty assailant inside of her apartment that was owned and maintained by the defendants. The plaintiff contended that the defendants failed to provide a safe housing facility, including failing to repair the missing window pane on the ground floor of her apartment, which allowed the non-party assailant to gain access. Banks v. Bouve d/b/a Creekside and Spring Valley Apartments, State Court of Fulton County, GA (2001);

$1,500,000.Verdict ||ASSAULT AT APARTMENT COMPLEX|| A 20 y.o. female suffered a stroke, moderate brain damage, amnesia, and hemiplegia to her right side when she was assaulted, stabbed, and raped in her apartment. The plaintiff contended the defendant was negligent in failing to warn of previous criminal activity within the apartment complex and even in the plaintiff's own apartment, committing fraud by not telling the plaintiff of criminal activity when asked about the apartment's safety, and failing to maintain the apartment in safe condition. Bagneski v. Clover Appreciation Properties, Superior Court of Fulton County (1995).

II. LEGAL BASIS FOR PREMISES SECURITY LIABILITY CLAIMS IN GEORGIA

A. Statute of Limitations

O.C.G.A. 9-3-33 (2010) "Actions for injuries to the person shall be brought within two years after the right of action accrues."

B. Premises Liability Statute for Invitees

O.C.G.A. 51-3-1(2010): "Where an owner or occupier of land, by express and 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.*"

C. Case Law and Statutory Basis for Georgia Premises Security Claims

Under Georgia law, landlords/proprietors generally are not liable for crimes committed against their tenants by third parties. However, landlords are required to take reasonable precautions to prevent those crimes which are foreseeable under the circumstances. Agnes Scott College, Inc. v. Clark, 273 Ga.App. 619, 621 (2005); O.C.G.A. § 51-3-1.

i. Landlord/Proprietor Knowledge of Prior Crimes

Proprietors may be held liable for third party criminal attacks where he or she has "reasonable grounds to apprehend" that a criminal act would be committed in the future; the proprietor need not have actual knowledge of prior crimes. TGM Ashley Lakes v. Jennings, 264 Ga. App. 456, 462 (2003). Also, when an employee of the proprietor, such as a security guard, has knowledge of prior crimes such knowledge is sufficient to notify the proprietor that crimes have been committed on the property. See generally id. Accordingly, constructive knowledge of the crime is enough to notify proprietor. Jennings, 264 Ga. App. at 462 (holding victim's injures were foreseeable because the landowner failed to take reasonable precautions to prevent criminal activity). In order for the Defendant to be liable, the Plaintiff must show that there were prior crimes and the Defendant had knowledge of the prior crimes.

ii. Similarity of Prior Crimes

Georgia courts consider crimes against an invitee foreseeable when the landlord/proprietor is aware of similar crimes committed that should put the landlord/proprietor on notice that another crime is likely to occur. However, there is no requirement that the crimes committed previously be identical to the crime in question. Drayton v. Kroger Co., 297 Ga. App. 484, 485-86 (2009). Courts consider three factors to determine whether a crime was foreseeable: (1) location of the crimes; (2) nature of the crimes; and (3) extent of previous crimes. Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 547 (2008); Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786 (1997).

a. Location of previous crimes

Previous crimes must be at or near the same location as crimes involved in a lawsuit. Baker v. Simon Property Group, 273 Ga. App. 406, 407 (2005). In Baker, the subject crime was committed in a commercial parking lot. The court considered known crimes committed in that parking lot for similarity to the subject crime. Id. Crime in the surrounding area is also relevant to the foreseeability issue. Matt, supra, 212 Ga.App. at 794 ("evidence of criminal activity in the area in which the hotel is located may be considered on this issue").

b. Nature of previous crimes

This element of the review often receives the most attention. Georgia courts require similarity in the nature of the crimes committed to trigger a duty to protect the tenant. Prior crimes do not have to be identical to the incident at issue in order to qualify as substantially similar. Matt v. Days Inns of America, Inc., 212 Ga.App. 792, 793, 794 (1994). In Baker v. Simon, prior property crimes were insufficient to make violent crime foreseeable to a landlord. The landlord was aware of multiple instances of theft, criminal vandalism and auto theft. These crimes were not sufficiently similar in nature to a shooting to make the shooting crime foreseeable. Id. Prior thefts do not necessarily make it likely that violent criminal acts will occur. Doe v. Prudential-Back/A.G. Spanos Realty Partners, 269 Ga. 604, 606 (1997). However, there is no rule that property crimes and other nonviolent crimes cannot make future violent crimes foreseeable. Walker v. Aderhold Properties, Inc. 303 Ga.App. 710 (2010). Burglaries of homes, while not violent themselves, present such a threat of violence that they can indicate that violent crime is likely to occur in the future. In Walker v. Aderhold, the Court of Appeals concluded that multiple burglaries along with other nonviolent crimes and several threats of violence created a jury issue as to whether a shooting was foreseeable. Id. In Piggly Wiggly Southern, Inc. v. Snowden, 219 Ga.App. 148, 149 (1995), the Court of Appeals held that a customer's stabbing, robbing, and sexual assault in a grocery store parking was foreseeable because 17 prior purse snatchings and incidents of loiterers threatening customers were similar enough to put the grocery store on notice that another confrontational criminal attack could occur: "Although the attack on plaintiff was far more serious, these prior incidents outside defendant's store also involved confrontational attacks on persons, and thus, were sufficiently similar to put defendant on notice of the unreasonable danger of criminal attack; the differences were merely of degree." Piggly Wiggly, supra, 219 Ga.App. at 149. In Sturbridge Partners v. Walker, 267 Ga. 785 (1997), the Supreme Court held that property crimes are sufficient to establish foreseeability. In Sturbridge, burglaries of vacant apartments were held to be substantially similar to a subsequent rape in an apartment because "the very nature of burglary suggests that personal injury may occur." Id. at fn. 1.

c. Extent of prior crimes

Courts do not apply a hard-and-fast rule for determining how much crime is enough to place a landlord on notice that future violent crime is likely to occur. See Walker, supra 303 Ga. App 710. Courts consider all crimes about which the landlord knew or should have known. Id. The prior crimes are extensive enough to present a jury issue as to foreseeability if they draw the landlord's attention to the possibility of violent crime. Id at 4. Courts will consider crimes occurring in the years leading up to the incident. For example, in reversing a grant of summary judgment on foreseeability grounds, the Court of Appeals considered evidence of prior crimes that occurred during the three years preceding the criminal attack on the plaintiff. Matt, supra, 212 Ga.App. at 792.

iii. Causation

A plaintiff must also establish that a defendant's lack of action in providing security or some other omission somehow led to his shooting. Walker, 303 Ga.App. 710, 715. Specifically, plaintiff must do more than speculate as to whether certain security measures would have prevented his attack. Id. Guess and speculation as to the possibility of an attack being prevented cannot avoid summary judgment on the issue. Post Properties, Inc. v. Doe, 230 Ga. App. 34, 39 (1997). In Walker, evidence as to the method of entry into the apartment complex was sufficient to show that security measures impeding entrance to the complex may have prevented an attack. Walker, supra. The Georgia Court of Appeals has recently held that expert testimony may be required to prove proximate cause in a negligent security case. George v. Hercules Real Estate Servs., 339 Ga. App. 843. (2016). The George court also examined the actions of the plaintiff who was shot "after voluntarily opening his door to an unknown person after midnight." Merely pointing criminal activity and a suggestion for more security does not establish that a lack of security caused the alleged harm without affirmative evidence of causation.

iv. Superior Knowledge

Another aspect of Georgia law regarding premises liability arising from third party criminal attacks is "a tenant will be precluded from recovery as a matter of law against a landlord when he or she has equal or superior knowledge of the risk and fails to exercise ordinary care for his or her own safety." Davis v. Krum, 263 Ga. App. 682, 684 (2003) The Davis Court stated that "the superior/equal knowledge rule presumes the plaintiff, knowing of the danger, could have avoided the consequences of defendant's negligence with the exercise of ordinary care. In other words, the condition even if created by third parties must be such that the invitee can indeed have equal knowledge and either assumes the risk or can avoid the danger with ordinary care." Id. at 684. In cases involving fights or altercations among claimants, Georgia Courts have found that when a person "voluntarily enter[s] into a fight" and has superior knowledge of the assailant due to a prior pre-existing relationship, a defendant may be cleared of liability. Where someone inserts himself into a fight, the superior knowledge remains with the combatants. Hansen v. Etheridge, 232 Ga.App. 408, S.E. 2d 517. Likewise, when there is a pre-existing personal animosity between the victim and his assailant, it can be utilized to demonstrate that the victim had equal or superior knowledge of the danger and could have avoided the danger by the exercise of ordinary care. Reid v. Augusta-Richmond County Coliseum Authority, 203 Ga. App 235, 416 S.E. 2d 776 (1992).

v. Failure to Warn

Another potential claim is failure to warn. A landlord has a duty to warn tenants or users of the property regarding dangers known to the landlord and dangers that should be known to the landlord though the exercise of ordinary care. Clemmons v. Griffin, 230 Ga. App. 721, 722 (1998). The key to a failure to warn claim is the "owner's superior knowledge of the peril and the danger therefrom." Id. If the landlord has superior knowledge about a certain danger or

should have had knowledge of such a danger, the landlord is required to warn tenants or known users of the property. Id.

vi. Nuisance

According to O.C.G.A. § 41-1-1, "[a] nuisance is anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man. A private nuisance is one limited in its injurious effects to one or a few individuals. O.C.G.A. § 41-1-2. The O.C.G.A. defines a nuisance very broadly as "anything that causes hurt, inconvenience, or damage to another [,]." Nuisance law is based on the premise that everyone has the right to use his or her property as he or she sees fit, provided that in so doing the owner or occupier does not unreasonably invade the corresponding right of others to use their own property as they see fit. Wilson v. Evans Hotel Co., 188 Ga. 498, 501(1) (1939); Holman v. Athens Empire Laundry Co., 149 Ga. 345 (1919).

An additional statute addressing nuisance is found in the Georgia Street Gang Terrorism and Prevention Act. O.C.G.A. § 16-5-7 provides that: "Any real property which is erected, established, maintained, owned, leased, or used by any criminal street gang for the purpose of conducting criminal gang activity shall constitute a public nuisance and may be abated as provided by Title 41, relating to nuisances…Any person who is injured by reason of criminal gang activity shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages;… attorney's fees in the trial and appellate court and costs of investigation and litigation reasonably incurred." The application of this provision to non-gang affiliated property owners has not been definitively addressed by the Court of Appeals. Gang nuisance claims are an emerging trend in cases with a gang element.

vii. Negligent Supervision/Hiring/Training/Retention

Employers have a duty not to hire and retain employees that employers know possess tendencies that could cause harm to a plaintiff. Dowdell v. Krystal Co., 291 Ga. App. 469, 472 (2008). In other words, defendants must exercise ordinary care in the hiring and management of employees so that the employees do not cause harm to others. Id.

III. INVESTIGATIVE AND DISCOVERY MATERIALS TO REQUEST FROM PREMISES OWNER/MANAGER

A. Time Sensitive Matters to Obtain from Premises Owner/Manager

Soon after defense counsel learns of the case (or the potential case), the client should be advised to save time-sensitive materials. Purge cycles, archive processes, and overwrites should be suspended regarding any pertinent information. These measures should help minimize the potential for a spoliation claim against the property.

Spoliation "refers to the destruction or failure to preserve evidence necessary for contemplated or pending litigation." Bridgestone/Firestone North American Tire v. Campbell, 258 Ga. App. 767, 769 (2002). Penalties for spoliation can range from sanctions to the striking of an answer. Kroger Co. v. Walters, 319 Ga. App. 52, 735 S.E.2d 99 (2012).

- **Time Sensitive Materials to preserve include:**

  - Video surveillance systems. These systems have limited storage capacity and may "overwrite" themselves, which can result in an irretrievable loss of information. Some systems overwrite daily and some overwrite on a weekly or monthly basis depending on the storage capabilities of the system. Oftentimes, law enforcement may confiscate the hard drives or computer where the video information is stored during their investigation. It is important to request a copy of the information from them and to document a request to preserve in that request.
  - Emails and electronic information pertaining to the property may also be on a scheduled purge cycle which can result in the loss of important information. Client IT personnel or vendors should be advised to retain pertinent information.
  - Credit card information and receipts should be obtained early because names or other identifying information from the electronic credit card records may not be retained in credit card machines or POS systems.
  - Key Control information (for apartments, hotels, dormitories) which demonstrates who had access to keys, logs for key checkout, policies and procedures for key access should be requested before it is purged.
  - BOLO (be on the lookout), criminal trespass lists, entry/exit sign in sheets, no entry lists, security photos of intruders, or other information used by security services at the property should be immediately requested. This information is often in paper only form (sometimes a binder or bulletin board kept in a guardhouse) and can be misplaced or "updated" before its importance is recognized by the premises owner.
  - Electronic door lock information (for example hotel electronic locks) may have an internal recording system that needs to be "interrogated" in order to find out access information. It is important to obtain this information before the lock is changed, replaced, repaired, or before it is moved to another location.
  - Security guard tracking systems (GPS based, bar code scan, or "Deggy"-type systems) which confirm guard patrols should be requested from the client or vendor immediately.

B. Additional Information To Obtain From Premises Owner/Manager

After requesting time-sensitive information from the client, Defense Counsel should request additional materials and information from the client property. These materials will likely be requested in Plaintiff's written discovery and it is beneficial to request them before the time-crunch of written discovery begins.

- **<u>Additional Materials to Request from Client (a non-exhaustive list)</u>:**

    - Corporate structure information for all owners and managers (this is important for the answer, determining if the proper party has been sued and served, and for identifying insurance policy information).
    - Statutory agent information and Secretary of State filings (available online).
    - Property leases, management agreements, purchase agreements.
    - All insurance information for policies potentially applicable to the claim.
    - Franchise agreements.
    - Contracts with all partners, managers, employees, vendors.
    - Liquor license information and applications.
    - Lease records.
    - "Rent roll" (tenant listing) for the time in question.
    - Maintenance records (internal requests, external vendor records)
    - Work orders.
    - Invoices for repairs, upgrades, renovations.
    - Records of tenant or patron complaints.
    - Information regarding model numbers, install dates, repair records for security measures (locks, peepholes, alarms, cameras, gates, DVR systems).
    - Written security plans, post orders, diagrams, scope of duties.
    - Security contracts and all correspondence with the security company.
    - Security proposals (for guard services, equipment upgrades, repairs) whether implemented or not.
    - Daily Security Logs, daily reports, incident reports, security guard notes.
    - Personnel files for all pertinent employees and/or contractors.
    - Payroll records.
    - Property budgets, financial information, accounting records and ledgers.
    - All computerized records from the property (YARDI, Property Management, POS Systems)
    - Employee time card records, punch-in/punch-out records, all records addressing who was on duty on day(s) in question.
    - Alarm Company records.
    - Gate access records.
    - All security company, bouncer, contractor records.
    - Corporate policies and procedures, training materials, employee handbooks.

- All email correspondence relating to security, past incidents, crimes, budgeting, interactions with contractors, any correspondence mentioning the victim, the perpetrator, or the response.
- Advertisements (print, posters, TV, radio, flyers, Internet advertising) for the property.

C. Investigation and Interviews

The investigation of the alleged incident should commence as soon as Defense Counsel becomes aware of the claim. Elements of the investigation will vary case by case, but will likely include:

i. Social Media and Internet Research

- Research and obtain all social media information regarding the claimant/plaintiff/victim, their spouse, and any pertinent witnesses. Do the same regarding the perpetrator.

    - In 2017 it is rare for an event to happen without some kind of social media documentation of the incident or its aftermath.
    - This can be outsourced to a social media search vendor, but Defense Counsel may have more success conducting this search in-house, or at least supplementing the vendor search with in-house research.

- Obtain social media, Internet, and news media information regarding the property, the property owners, employees, and other events that occurred on the property.

    - In Atlanta properties may be mentioned in Hip-Hop lyrics or shown in Hip-Hop videos. This is true of apartment complexes, nightclubs, and other venues. A Google search or YouTube search may reveal this information.
    - Properties and crimes may appear on reality television shows set in Atlanta (e.g. COPS, the First 48)
    - Properties may have a hashtag or identifying name which appears on Instagram, Facebook, YouTube, or Twitter. It may be a slang name. e.g. “Blackacre Apartments” may be “#dablack or #crackacre”. Identifying the slang name may lead to more information.
    - Obtain Yelp, Facebook, and Apartment Finder comments and reviews for the property.

Check publicly available databases for employees, the plaintiff, and the perpetrator. (e.g. Mugshots.com, inmate search websites, court dockets, sex offender registries, etc.)

ii. <u>Background Checks and Personnel Files</u>

- Conduct background checks of your own employees and contractors. Ideally the premises owner or manager has done this, but it may have only been pre-employment. Witnesses may not be honest or may forget important information in deposition prep. Cross witnesses with background information in depo prep.

- Obtain and review personnel files for employees. Negligent hiring and retention may be an issue from the outset or may be added to the case at a later date.

iii. <u>Interviews and Site Visits</u>

- Thoroughly interview all employees regarding their experience on the property, past crimes and incidents, knowledge of the victim and/or perpetrator.
- As part of the investigation, survey the scene and determine if any neighboring businesses have surveillance cameras which may have captured pertinent events. Surveillance cameras are everywhere and neighboring businesses (even homeowners) may have information on their systems.
- Canvas neighbors, businesses, employees to obtain information about the property and the events of the case. Old fashioned door-to-door methods can be very useful and can turn up information about the events of the crime, past incidents on the property, and the victim.
- Contact crime victims and research prior crimes and possible prosecutions for events that happened on the property.
- Personally visit the site and conduct an inspection of its particulars.
- Conduct a site visit with your expert witness (preferably at the same time of day as the incident or the best approximation of light conditions at the time of the incident).

iv. <u>Medical Records and Qualified Protective Order</u>

- Obtain all medical, psychiatric, counseling, rape crisis, and social work records for the Plaintiff.
- Consider obtaining a qualified protective order (QPO) which allows for interviews with medical providers outside the presence of Plaintiff's counsel. This can allow for candid conversation with medical providers for purposes of information

gathering, it can also streamline the discovery process by allowing counsel to target for deposition only those providers who are necessary.[4]

v. Police and DA Investigative Materials

Request the complete police and DA investigative file for the criminal investigation:

- This information may be blocked from discovery if the investigation is determined to be "open" and the agency asserts its rights under O.C.G.A. 50-18-72(a)(4). Under this statutory provision, records of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity, other than initial police arrest reports and initial incident reports, are not required to be released. However, an investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving said investigation and prosecution has become final or otherwise terminated. The Georgia Supreme Court has interpreted "pending investigations" as applying until the investigation is concluded and the file is closed. Records from investigation of cases that are unsolved, but otherwise closed, are subject to the Act's disclosure requirements.
- A prosecution is deemed to be pending until such time as all direct appeals of conviction, including writs of certiorari to the United States Supreme Court, have been exhausted. Habeas Corpus actions are not considered to be part of the direct appeal process.[5]

Monitor any criminal proceedings and request transcripts from the criminal trial.

Consider filing a Motion to Stay the civil proceedings pending the outcome of the criminal trial. Bloomfield v. Liggett & Myers, Inc., 129 Ga. App. 141, 198 S.E.2d 906 (1973)

Don't Rely on the police investigation or assume that the police have covered all the bases for you:

- The police are undermanned and under-resourced. They may not have been as thorough in their investigation as a civil attorney would be.
- The police and DA's office are looking for information pertinent to the crime against the victim. Their motivations and goals are not aligned with the defense of the property owner.

[4] See Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.S. § 1320 et seq. (2008); 45 C.F.R. §103 et seq. (2008); 45 C.F.R. § 164.500 et seq. (2008); O.C.G.A. § 24-12-1 (2013); Moreland v. Austin, 284 Ga. 730 (2008).

[5] Georgia Law Enforcement and the Open Records Act: A Law Enforcement Officer's Guide to Open Records in Georgia, Third Edition 2014, http://gfaf.org/files/2014/07/GFAF-BlueBook2014-Third-edition1.pdf.

- In a criminal setting, the fault of the victim is irrelevant to the prosecution of the attacker, so the victim's failures in taking ordinary care are likely not investigated or pursued.

vi. Conduct Legal Research

- Review case law on premises security issues in Georgia. This is a rapidly changing area of the law and there are frequent appellate decisions addressing liability, causation, damages, expert qualifications, apportionment of fault, etc.
- Research and statutes/codes, local ordinances, industry regulations, or internal policies and procedures that may have been violated. (American Society for Industrial Security, American National Standards Institute, American Society for Testing and Materials, etc). These may be used to establish a negligence *per se* claim or may be used to set the standard of care.

IV. COMPARATIVE NEGLIGENCE

A. Apportionment of Fault

i. Apportionment Statutory Basis

Apportionment of Fault to the attacker(s) is typically **the strongest defense** in a premises security sexual assault case. O.C.G.A. § 51-12-33 (2010) holds that a jury may allocate fault among all persons contributing to an injury (including parties and non-parties):

> "In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

ii. Filing the Notice of Non-Party Fault

The Notice of Non-Party Fault must be filed 120 days prior to trial in order to include non-parties on the verdict form. The Notice of Non-Party Fault must: (1) designate the nonparty, (2) set forth the nonparty's name and last known address (or the best identification of the nonparty that is possible under the circumstances), and (3) provide a brief statement of the basis for believing the nonparty to be at fault. O.C.G.A. 51-12-33 (2010).

- It is a good practice to file your Notice of Non-Party Fault early, perhaps even with the answer.
- There is a 120 day deadline for filing the Notice.
- The Notice can be amended at a later date (keeping in mind 120 day deadline).

- The Notice can be withdrawn at a later date, so it is better to err on the side of naming more potential non-parties at fault.

B. Comparative Negligence of The Plaintiff

i. Comparative Negligence Statutory Basis

A plaintiff who is determined to be 50% or more at fault is barred from recovery. O.C.G.A. § 51-12-33(g):

> "Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed."

ii. Victim Blaming vs. Failure to Exercise Ordinary Care

In a sexual assault case, defense attorneys walk a fine line between "victim blaming," which can enrage a jury, especially in a sexual assault case, and pointing out a plaintiff's failure to use ordinary care for their own safety.

- Establish any actions or omissions that may have made the victim vulnerable to attack.
- Was it a targeted event or a crime of opportunity?
  - What did the victim do to warrant targeting?
  - Was the targeting reported to anyone else at the premises?
  - For a crime of opportunity, what did the victim do to make them a more attractive target?
- The Defense Attorney cannot shy away from asking the tough questions about the Plaintiff's own conduct.
  - Demonstrate the Plaintiff's lack of care for his/her own safety.
  - Establishing past sexual history, actions surrounding the sexual assault, and past sexual conduct of the Plaintiff may be important to establish, but should be handled very carefully.
- Be aware of cultural attitudes towards rape and their potential impact on juror evaluation of a case.
  - "Traditionally, successful rape allegations involved a virtuous, ideally virginal woman, who is attacked by a creepy stranger." The stereotype of the "real" rape victim involves "a woman who is behaving cautiously and who stays where she is supposed to be- in a good neighborhood at a reasonable hour. The more the facts deviate from this paradigm- if the woman is sexually promiscuous, behaves incautiously, or intemperately,

or perhaps, most importantly, knew her assailant, the more she is seen as precipitating her own rape, and therefore culpable."[6]

- While modern juries don't expect chastity, they may blame victims for "asking for it" by drinking, using drugs, attending parties, being out late, being sexually promiscuous, having multiple partners, living a non-traditional lifestyle.[7]
- While defense counsel should avoid overt "victim blaming," exploration of these issues should be considered as part of the thorough workup of the case.

V. DEFENSE EXPERTS TO CONSIDER

A. Premises Security Expert to address:

- Standard of care (guards, physical security, adequacy of security, training, etc.)
- Establish Reasonableness of security measures.
- Proximate cause.

C. "Management" Expert (apartment management, bar operations, hotel management expert, etc.) to address:

- Management practices, staffing, training, budgeting.
- Reasonableness of security measures and expenditures in light of overall business operations and circumstances.

D. Criminologist to address:

- Crime grid, security practices, similarity of prior crimes, foreseeability
- Statistical analysis of crime trends.

E. Medical and Mental Health witnesses to address:

- Damages, trauma, PTSD, possible contributing or pre-existing issues.
- Rape Trauma Syndrome.

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[6] Aviva Orenstein, Special Issues Raised by Rape Trial, 76 Fordham L. Rev. 1585 (2007); Lisa Frohmann, Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking, 31 Law & Soc'y Rev. 531.

[7] Id.

F. Profiler/Forensic Psychologist to address:

- Perpetrator mindset, determination, deterability. "No matter what security was implemented, it would not have deterred the offender." (Note: There are Daubert concerns regarding admissibility of this testimony).
- Information to obtain for profiler: Past criminal record of perpetrator; school records, employment records, any information regarding mindset of the perpetrator or the targeting of this victim; criminals generally don't want to get caught, obtain any information that shows disregard for the consequences; police interviews, criminal trial testimony, statements by perpetrator; inmate/jail records (misbehavior while incarcerated with the threat of immediate discovery and punishment can show a disregard for consequences).

VI. DEPOSITIONS

A. The Deposition of The Victim

i. Special Considerations for Victim Questioning in Sexual Assault Cases

- Preparation on the part of the questioner is especially critical due to the sensitive nature of the allegations, the damages, and the emotions involved-
- The deposition of the Plaintiff will be emotional, uncomfortable, and tedious for all involved.
- Leave plenty of time as frequent breaks and/or deponent emotions may make for difficulty in answering questions.
- Question the victim regarding knowledge of the assailant, past contact, past relationship.
- Question the victim regarding knowledge of the property, the presence of crime, specific dangers anticipated on the date in question or at the location in question.
- Even though it is uncomfortable, defense counsel must thoroughly explore past history, past experiences with sexual assault/rape, past crimes, other accusations, past emotional trauma.
- Walk through events in question step-by-step.
- Consider giving the victim a "heads up" that you are approaching an uncomfortable portion of the questioning can lead to a more effective exchange of information during deposition.

- Consider giving the victim a "heads up" if you are using graphic photos, videos, crime scene materials, or images of the perpetrator.
- Be prepared to ask uncomfortable questions regarding the details of the event. A useful strategy can be to let the victim describe the incident entirely in a narrative and then go back with follow-up questions.
- Be respectful and courteous, but you cannot be a "prude" or shy away from uncomfortable terms or details. Need to be prepared to address extent of touching, force used, penetration, length of encounter, touching of genitals, bruising to genitals, depositing of DNA, feelings and perceptions of the victim, FEAR felt by the victim.
- Show extra COMPASSION in the sensitive areas of questioning- 1. Because you are a good human being, 2. Because you will not get the information you need by being aggressive during this part of the questioning, 3. You don't want to upset the jury with your demeanor or aggressiveness.
- Obtain all medical and psychiatric records prior to the deposition. Examine records for past diagnosis of psychological issues (PTSD, Rape Trauma Syndrome, Anxiety, etc.).
- Obtain credit card records, bar tabs, evidence of alcohol purchases for the time in question if alcohol is a factor.
- Question regarding past experiences with alcohol or drugs. Past experiences with "blacking out" or behaving inappropriately.
- Examine medical records and investigative materials for any post-incident alcohol testing or toxicology.
- It is important to inquire about post-rape medical treatment, evaluation, and investigation. The rape kit process includes invasive medical procedures which will be mentioned as an element of damages (DNA samples, vaginal scraping, gynecological examination). There are also measures taken to prevent pregnancy and to address the potential for STDs. A victim may be given medications to prevent HIV, which have uncomfortable side effects. The victim will also be tested for HIV, likely several times following the rape. It is important to question about fear of STDs and AIDs.
- Be prepared to ask questions about physical injuries, emotional injuries, abnormal sexual patterns impact upon relationships, loss of consortium, lost wages, medical and psychological expenses.
- Reporting of rape. When did you go to the police? When did you report it to the property?
- Contrast the victim's reporting of the rape with other instances of reporting by the victim, auto accident reporting, insurance claims.
- Examine details which were not included in initial reporting and statements, but which have been included at the deposition.

- Examine delays and inconsistencies in reporting.
- Examine issues of force, violence, coercion, incapacitation which occurred in the open vs. behind closed doors.

ii. The Limits of Victim Questioning In Sexual Assault Cases

The purpose of "rape shield" statutes is to protect victims of sexual crimes from character attacks which do not contribute materially to the evaluation of the guilt or innocence of the accused. This includes what is commonly known as "slut shaming" or victim blaming (marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards).

a. The Georgia Rape Shield Statute Does Not Apply to Civil Cases

O.C.G.A. § 24-4-412 (2014):

> (a) In any prosecution for rape in violation of Code Section 16-6-1; aggravated assault with the intent to rape in violation of Code Section 16-5-21; aggravated sodomy or sodomy in violation of Code Section 16-6-2; statutory rape in violation of Code Section 16-6-3; aggravated child molestation or child molestation in violation of Code Section 16-6-4; incest in violation of Code Section 16-6-22; sexual battery in violation of Code Section 16-6-22.1; or aggravated sexual battery in violation of Code Section 16-6-22.2, evidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards.
>
> (b) In any prosecution for rape in violation of Code Section 16-6-1; aggravated assault with the intent to rape in violation of Code Section 16-5-21; aggravated sodomy or sodomy in violation of Code Section 16-6-2; statutory rape in violation of Code Section 16-6-3; aggravated child molestation or child molestation in violation of Code Section 16-6-4; incest in violation of Code Section 16-6-22; sexual battery in violation of Code Section 16-6-22.1; or aggravated sexual battery in violation of Code Section 16-6-22.2, evidence relating to the past sexual behavior of the complaining witness may be introduced if the court, following the procedure described in subsection (c) of this Code section, finds that the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably

believed that the complaining witness consented to the conduct complained of in the prosecution.

b. <u>The Federal Rape Shield Statute Applies to Civil Cases</u>

Evidence Rule 412. Sex-Offense Cases: The Victim

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

c. <u>Other Rules May Be Used To Limit Discovery and Admission of of "Rape Shield Type Evidence"</u>

- If Defense Counsel intends to tread into the waters of past sexual history, predilections, emails, text messages, social media postings/exchanges, etc. be prepared to explain the relevance.
- Plaintiff's counsel may utilize these provisions to attempt to limit the scope of discovery and the admissibility of evidence:

- *Discovery*- O.C.G.A. § 9-11-26(c)(1) can be used to limit discovery intended to annoy or embarrass.
- *Admissibility*- O.C.G.A. § 24-4-403 Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.403, probative value outweighed by prejudicial effect.

B. <u>The Deposition of the Perpetrator</u>

- The perpetrator is often incarcerated, which presents several logistical challenges:
  - May take weeks or months to arrange if the perpetrator is incarcerated.
  - Need the permission of the prison warden to conduct.
  - If there is an active case (including appeal), need to contact perpetrator's attorney.
  - Consider videotaping for use at trial.
  - May need an order from the trial judge for your case asking that the prisoner be produced for deposition (and for trial). This may assist with dealing with the warden.
  - Consult with the prison, contact the warden about logistics, e.g. required ID, who can come to deposition, what can you bring in, can you bring in video equipment?
- Will the perp "take the fifth"? If so, be prepared to ask all questions and obtain a "take the fifth" response to each question.
- You can be very aggressive in questioning the perpetrator, he/she should be the target for anger and retribution in the case.
- Don't "beat around the bush" or waste time on preliminaries in the perp's deposition, get to the point quickly.
- The perpetrator's deposition can be critically important for purposes of apportionment of fault.
  - Trial theme is typically some form of "the perpetrator is the true party responsible for the event," so the testimony is important to the trial presentation. Even the refusal to participate by the perp can be useful.
- Be prepared that the perpetrator may be critical of the security measures at the property and/or may provide support for plaintiff's standard of care and proximate cause arguments.

C. DEPOSITIONS OF PREMISES WITNESSES (Employees, Contractors)

Prepare witnesses to address concerns about premises security at the property. Issues to cover in deposition prep (a non-exhaustive list):

- Locks- door and window
- Lighting- bright and adequate in all spaces.
- Landscaping – remove potential hiding spaces.
- Guards – courtesy officers, patrols, police patrols.
- Gates- type, function, visitor policies, tailgating/piggybacking issues
- Surveillance Cameras
- Policies and Procedures- preventing loitering, evicting offenders, tolerance for breaking "house rules"
- Training details for all employees.
- Purpose content of employee background checks
    - Tenant background checks.
    - Staff-to-Patron ratio.
- Issues with fencing, gates, unauthorized entry.
- Hotel leasing information, room rate information, occupancy information, clientele information (local clientele or travelers).
- Prior and subsequent incident reports.
- Police Reports for the property and neighboring property.
- Email correspondence to tenants or patrons.
- Text Messages (among employees, to tenants/patrons).
- Tenant alerts regarding crimes.
- Tenant newsletter, crime alerts or updates.
- Neighborhood watch and police communication.
- Providing safety information and tips in lease documents.
- Signage at the property.
- Obtain and review budgeting documents for the property. Prepare witnesses for budget discussions and "profits over people" arguments. Security is a "cost" on the balance sheet and may be trimmed in a down year or to increase profitability.
- Review any other documentation about the property (code enforcement, HUD documentation, state liquor documentation, etc.).
- Review crime grid, CAD reports, 911 calls, all police reports for the property for a period of 5 years before the event, until the present time.
    - How long to go back?- Typically obtain 5 years prior.
    - What distance to go from property?- Case-by-case basis, be sure to obtain calls for the specific address, some cases

the focus will be a 1+ mile radius, others it will be a few blocks.

- Compare crimes and events on the property to the surrounding area, neighboring businesses, other properties owned or managed by your defendant.
- The security measures used by neighboring properties or by other properties operated by the defendant may be factors in setting the "standard of care" for your property.
- Subsequent remedial measures are inadmissible, but there may be an exception to counter claims of feasibility or control, be prepared to address events after the crime.
- Review crime grid with witness and train them to review details of crimes during questioning (confirm location of crimes, eliminate domestic incidents).
- Address crime rates on the property (increasing or decreasing) following the increase or decrease in security measures.
- Safety of tenants and protection of property is a paramount concern, but is bound by reasonableness.
- What knowledge did the employee have of prior incidents?
- What was done to investigate crimes or incidents on the property?
- What was the security "plan", who established it, was it frequently evaluated, updated?
- The goal of security is to deter/prevent crimes from happening.

D. POLICE AND INVESTIGATIVE WITNESSES

- Obtain all statements, reports, police and DA investigative files prior to deposition.
- Meet with (or at least have a phone call with) law enforcement before depositions.
- Recognize that law enforcement and social workers, particularly those who work in the area of sex crimes, are victim advocates and may have entered that line of work out of a strong desire to protect victims of sex crimes. They may have a bias towards believing the victim and blaming the property owner as well as the perpetrator. These witnesses may be critical of the property and/or may not easily concede elements of your personal responsibility defense.
- The primary function of investigators is to discover and apprehend criminals. The primary function of the security measures at a property is to deter and prevent crime on the property. The goals of the police in

investigating the case and the DA in prosecuting the case are not aligned with the property.

- Be prepared to counter or follow-up on any examination regarding past crimes on the property.

E. MEDICAL WITNESSES/DAMAGES WITNESSES

- Obtain medical and psych records prior to depositions of treaters or medical witnesses.
- Obtain a qualified protective order (QPO), which allows for ex parte conversations with medical providers.
- Review all records, research conditions alleged in records.
- Request and review any testing or assessments performed by medical or mental health providers that may not be considered part of the "medical record"
- Target specific non-party requests for production of documents and/or records requests beyond simply "medical records" or "chart", to include any and all materials, including testing, evaluations, assessments, notes, and any document or electronic record of any kind related to the victim and his/her claims.
- Evaluate and probe regarding provider's knowledge of past incidents of trauma or pre-existing diagnosis.
- Obtain provider's version of factual events.
- Obtain prognosis information and concessions regarding ability for victim to live a normal life.

F. EXPERT WITNESSES (LIABILITY)

- The process for deposing expert witnesses is not specific to sexual assault cases, use the same evaluation and preparation method as other premises cases.
- Conduct typical intelligence gathering on experts prior to deposition.
- Obtain information on all criticisms of security at the premises.
- Seek concessions on Plaintiff's actions as contributing towards the outcome.

- Explore and probe proximate cause.
- Examine credentials and challenge opinions outside the expert's area of expertise.
- Test scientific basis for opinions with an eye towards a Daubert challenge.
- Examine literature cited and testimony in prior cases.
- Examine the "quality" of the underlying literature or studies.
- Obtain commitments to industry standards.
- Challenge opinions based on personal observations (site visit time and length, independent interviews or investigation).

VII. MOTION FOR SUMMARY JUDGMENT

Consider possible grounds based on facts and circumstances of the particular case:

- Foreseeability.
- Failure to Identify Standard of Care Breach
- Exculpatory Clause in Lease
- Lack of Duty:
  - Status of plaintiff (invitee, licensee, trespasser)
  - Status of defendant (property owner, not in possession)
  - If you are representing a security contractor, consider an MSJ based upon the lack of a legal duty to a third party beneficiary (Brown v. All-Tech Inv. Group. Inc., 265 Ga. App. 889, 897 (2004)).

- Actions of the Plaintiff:

  - -Comparative Negligence (O.C.G.A. § 51-12-33(g)).
  - -Equal/Greater Knowledge (Dolphin Realty v. Headley, 271 Ga. App. 479 (2005).
  - -Failure to Exercise Ordinary Care (Fernandez v. Georgia Theatre Company II, 261 Ga. App. 892 (2003); Landings Ass'n, Inc. v. Williams, 291 Ga. 397, 399 (2012)
  - -Assumption of the Risk- Vaughn v. Pleasant, 266 Ga. 862 (1996)
  - -Mutual Participation In Altercation- Howell v. Three Rivers Security, 216 Ga. App. 890, 891, 456 S.E.2d 278 (1995).

- Lack of Proximate Cause

  - Analyze and test Plaintiff's proximate cause case. "A mere possibility of such causation is not enough; and when the matter remains one of pure

speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to grant summary judgment for the defendant." *George v. Hercules Real Estate Servs*., 339 Ga. App. 843. (2016). In the wake of *George*, expert testimony may be required to prove proximate cause in a negligent security case. The George court also examined the actions of the plaintiff who was shot "after voluntarily opening his door to an unknown person after midnight." Merely pointing criminal activity and a suggestion for more security does not establish that a lack of security caused the alleged harm.

- Targeted crimes typically present a very strong proximate cause defense. There is a strong line of Georgia case law which supports summary judgment in cases where the crime is targeted. *Griffin v. AAA Auto Club South*, 221 Ga. App. 1 (1996); *Britt v. Kelly & Picerne*, 258 Ga. App. 843 (2002), and *Johnson v. Holiday Food*, 238 Ga. App. 822 (1999). The Court of Appeals has distinguished acquaintance-perpetrated crimes from those in which a jury could find a legal failure to keep the premises and approaches safe, so that its invitees in general are not subjected to the risk of foreseeable attacks by unknown assailants:

  > This was not a random stranger attack but rather grew out of a specific private relationship which had no connection with employment whatsoever. The place chosen by the boyfriend for the attack just happened to be the employer's parking lot. The employer did not create or allow to exist an environment which placed Griffin at risk any more than if she had been at home or on the street. *Cook v. Micro Craft Inc.*, 262 Ga. App. 434 (2003), cert. denied, quoting *Griffin v. AAA Auto Club*, 221 Ga. App. at 2.

  Note:

  - Targeted crimes are extremely hard to prevent or deter.
  - The targeted crime could arguably take place anywhere.
  - In a targeting situation, obtain evidence demonstrating a relationship between the victim and the attacker.

VIII. CONSIDERATIONS FOR SETTLEMENT/MEDIATION

A. Privacy and Confidentiality

- Settlement can avoid further negative publicity for client.
- The victim may have concerns about the lack of privacy confidentiality associated with bringing a civil suit and answering questions in deposition or in a public trial.

B. Timing

- For purposes of evaluating a case for settlement, timing can be everything. Consideration of the drawbacks/cons of a civil case from a victim's perspective can provide opportunities for settlement.
- The victim may want to "move on" or put the events behind him/her. The potentially long, drawn out process involved with a civil case (discovery, trial, appeal) may make early resolution appealing.
- The victim may be terrified of the deposition and motivated to settle before having to "re-live" the events of the rape. Depending on the circumstance, reliving the events may not only be painful and uncomfortable, it may also be detrimental to the healing process.
- On the other hand, the victim may be motivated by the opportunity to tell his/her story at deposition because it is an opportunity to "fight back."
- Obtain prior police interviews, written discovery responses, medical records, and other pertinent records prior to deposing the plaintiff.

C. Mediation

- Select a mediator who can relate to the victim, but who can firmly and clearly explain the case and set realistic goals and expectations for all parties.
- Mediation provides the opportunity for the victim and his/her attorney to "tell their story" and achieve some catharsis in a confidential setting.
- At mediation, it is critical for the Defendants to have a representative present who will listen to the story, and who has the authority and position to apologize and possibly to represent that changes can or have been made to make sure the events do not happen to anyone else.
- An expression of sympathy or an apology that the event happened to the plaintiff can be important at mediation.
- The scope, aggressiveness, and extent of the opening statement at mediation should be determined after careful consideration of the facts and circumstances of each case. Consultation with the mediator and the plaintiff's attorney regarding opening statements should be considered.
- Confidentiality and should be included in a settlement release.

IX. TRIAL

A. Special Jury Selection Considerations For Sexual Abuse Cases

i. General Considerations

- The jury selection process can take longer in a sexual abuse case due to questioning about individual juror experience with sexual abuse or sex crimes.
- Address delicate issues in sexual assault cases head on in voir dire.
- Familiarize jury with the uncomfortable nature of the allegations from the outset.
- Consider filing a motion to allow the potential jurors to see graphic videos or images during voir dire in order to defuse shock value.
- Prepare the jury for the emotion of the trial, including crying witnesses. Acknowledge the emotion and prepare the jury to for hearing it.
- Ask if the individual jurors can treat the victim like any other witness and assess them for credibility and whether they are providing accurate facts.
- Try to objectify the crime and remove emotion from it during the voir dire process.
- Advise the jury that it is not your intention to be mean or aggressive with the victim, but that you have to explore difficult issues and facts about the case.
- Humanize your corporate clients. They were upset, mortified, disgusted, appalled by the actions of the perpetrator.
- Focus the anger and desire to punish on the perpetrator, not the property owner.
- Women jurors may be especially critical of another woman for failing to take adequate safety precautions.

ii. Millennial Juror Considerations (now the largest section of the population)[8]

- Fifteen percent of millennial women report that they themselves have been sexually assaulted, and more than twice that number (34%) report that this has happened to a close friend or family member. There are large disparities in experiences with sexual assault by race and ethnicity. Rates are highest among black millennial women, among whom nearly one in five (19%) report being the

[8] As of April 2016, Millennials, whom are defined as those ages 18-34 in 2015, now number 75.4 million, surpassing the 74.9 million Baby Boomers (ages 51-69). Richard Fry, "Millennials overtake Baby Boomers as America's largest generation", Pew Research Center, April 25, 2016, http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/

victim of sexual assault and twice as many (38%) say a close friend or family member has experienced sexual assault.

- Six in ten (60%) millennials, including 63% of women and 56% of men, say colleges or universities are not doing enough to address the problem of sexual assault. A majority (53%) of millennials, including nearly six in ten (59%) women but only 47% of men, say that high schools are not doing enough to address the issue of sexual assault.
- Nearly three-quarters (73%) of millennials, including 71% of men and 75% of women, say sexual assault is somewhat or very common on college and university campuses. More than eight in ten (81%) black millennials say sexual assault is somewhat or very common in colleges and universities, compared to less than three-quarters of white (74%), Hispanic (70%), and API millennials (63%).
- Nearly one in five (18%) millennial women report having used emergency contraception at some point, and roughly three in ten (29%) say a close friend or family member has used this form of birth control. Less than one in ten (7%) millennial women report having an unintended pregnancy, although this experience is common within their social network—42% report that this has happened to a close friend or family member.
- Eight percent of millennial women report that they themselves have had an abortion, but four times as many (36%) say a close friend or family member has had an abortion. A similar number of millennial women (9%) report that they became a parent as a teenager, while nearly half (46%) of millennial women say that a close friend or family member became a parent as a teenager. The sexual health experiences of millennial women vary considerably by race and ethnicity. Hispanic millennial women report higher usage of emergency contraception than millennial women overall. Black millennial women are more likely than other millennial women to know someone who has had an abortion.
- Only one percent of millennials overall report that they themselves are HIV positive or have AIDS, but 13% report that they have a close friend or family member living with HIV or AIDS. Black (23%) and Hispanic millennials (21%) are more than twice as likely as white (8%) or API millennials (9%) to say they have a close friend or family member who is HIV positive or has AIDS.[9] (foot note for previous 6 bullet points).

[9] Jones, Robert P., and Daniel Cox. "How Race and Religion Shape Millennial Attitudes on Sexuality and Reproductive Health." PRRI. 2015. http://www.prri.org/research/survey-how-race-and-religion-shape-millennial-attitudes-on-sexuality-and-reproductive-health/.

- Centers for Disease Control and Prevention- the number of high school students who have had sex plunged last year to 41.2 percent after declining steadily from 54.1 percent in 1991 and 46.8 percent in 2013.[10]
- Millennial Jurors expect more of corporations, but also expect more of plaintiffs.
- Millennials/Generation Y (born between 1980 and 1995) – 83.1 million millenials in the U.S. per the 2014 census. Now the largest generation. Have been having an impact on juries. Millennials have higher expectations of governments and corporations, but also have higher expectations for personal responsibility.[11]
- "Millennials appear to have greater expectations of businesses than to simply run their businesses. Instead, millennial jurors are looking for businesses to use their power and influence for being a positive influence in society. Millennials are attuned to social concerns, and are likely to link the story of a given case to the bigger societal issue they perceive within that story. For example, in a mock trial regarding a serious injury case, strong millennials on the panel expressed concern about whether the large corporate defendant in the case "set the precedent" for the rest of the industry regarding safety practice and oversight. Deciding that it did, these jurors evaluated the defendant based on the precedent they felt should be set as opposed to the industry standards already in place."
    - 50 percent of millennials believe most corporations are more interested in profits than safety compared to 40 percent of older jurors.
    - 50 percent of millennials believe companies should be held responsible for accidents that happen on their property, regardless of the circumstances compared to 43 percent of older jurors.[12]

- Millenials have looser sexual boundaries-

    - U.S. Adults in 2000–2012 vs. the 1970s and 1980s had more sexual partners, were more likely to have had sex with a casual date or pickup or an

[10] Kann L, McManus T, Harris WA, et al. Youth Risk Behavior Surveillance — United States, 2015. MMWR Surveill Summ 2016;65(No. SS-6):1–174. DOI: http://dx.doi.org/10.15585/mmwr.ss6506a1.

[11] Stacy Greenwell, Meet the Millennial Juror: Effectively Communicating With "The Narcissistic Generation" at Trial, Thompson Hine Product Liability Newsletter Summer 2016; "Millennials in Adulthood: Detached from Institutions, Networked with Friends," The Pew Res. Center (2014). http://www.pewsocialtrends.org/files/2014/03/2014-03-07_generations-report-version-for-web.pdf; "Millennials: Confident. Connected. Open to Change," The Pew Res. Center (2010), http://www.pewsocialtrends.org/files/2010/10/millennials-confident-connected-opento-change.pdf.

[12] Melissa M. Gomez,PhD, Keeping Up With the Modern Jury as a Corporate Litigant, The Legal Intelligencer, August 30, 2017.

acquaintance, and were more accepting of most non-marital sex (premarital sex, teen sex, and same-sex sexual activity, but not extramarital sex).[13]

- The percentage who believed premarital sex among adults was "not wrong at all" was 29 % in the early 1970s, 42 % in the 1980s and 1990s, 49 % in the 2000s, and 58 % between 2010 and 2012. Acceptance of non-marital sex rose steadily between the G.I. generation (born 1901–1924) and Boomers (born 1946–1964), dipped slightly among early Generation X'ers (born 1965–1981), and then rose so that Millennials (also known as Gen Y or Generation Me, born 1982–1999) were the most accepting of non-marital sex. Number of sexual partners increased steadily between the G.I.s and 1960s-born GenX'ers and then dipped among Millennials to return to Boomer levels.[14]
- Younger Millennials — those born in the early 1990s and sometimes referred to as "the Snapchat Generation" — are 41 percent more likely to be sexually inactive than their Millennial peers born in the 1980s and more than twice as likely to be sexually inactive in their early 20s than 1960s-born Generation X'ers. The last generation to demonstrate such a high rate of sexual inactivity was young people in the 1920s.[15]

B. RAPE "MYTHS" TO BE AWARE OF DURING DISCOVERY AND TRIAL

i. Jury Pool May Hold Rape "Myth" Opinions

A significant percentage of the jury pool may hold these beliefs

1. A rape victim will try to fight off their attacker. NOT TRUE.
    - Victims in rape situations are often legitimately afraid of being killed or seriously injured and so co-operate with the rapist to save their lives
    - The victim's perception of threat influences their behavior often leading them to freeze or go limp
    - Rapists use many manipulative techniques to intimidate and coerce their victims
    - Non-consensual intercourse doesn't always leave visible signs on the body or the genitals.
2. Rape occurs between strangers in dark alleys. NOT TRUE.

[13] Twenge, J.M., Sherman, R.A. & Wells, B.E. Arch Sex Behav (2015) 44: 2273. https://doi.org/10.1007/s10508-015-0540-2
[14] Id.
[15] Gina Vivinetto, What 'Hookup Culture'? Millennials Having Less Sex Than Their Parents, NBC News, August 3, 2016, https://www.nbcnews.com/health/sexual-health/what-hookup-culture-millennials-having-less-sex-their-parents-n621746.

- The majority of rapes (66%) are committed by persons known to the victim.

3. You can tell if she's 'really' been raped by how she acts
    - Reactions to rape are highly varied and individual
    - Many women experience a form of shock after a rape that leaves them emotionally numb or flat - and apparently calm.

4. If the victim didn't complain immediately it wasn't rape

    - The vast majority (estimated at 90%) of victims never report the rape to the police.
    - Trauma, feelings of shame, confusion, or fear of the consequences can all delay reporting to the police.[16]

ii. Older Jurors Are More Likely to Believe Rape Myths

When looking at differences in rape myths across different age groups in general McGee et al (2011) found that older participants were more likely to agree with rape myths than younger participants.[17]

iii. Studies Have Shown That Women Are More Likely To Blame Rape Victims

An online survey, titled Wake Up To Rape, polled 1,061 people in the UK aged 18 to 50, comprised of 712 women and 349 men and found that "a majority of women believe some rape victims should take responsibility for what happened…[a]lmost three quarters of the women who believed this said if a victim got into bed with the assailant before an attack they should accept some responsibility. One-third blamed victims who had dressed provocatively or gone back to the attacker's house for a drink…"[18]

C. Possible Trial Themes and Presentation

- Extreme variance in themes based on facts and circumstances of each case.
- Most common trial theme is typically some form of "the perpetrator is the true party responsible for the event."
- The perpetrator has been punished and is serving his/her time in jail.

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[16]Burrowes, N. (2013). Responding to the challenge of rape myths in court. NB Research: London. [Online]. Available: http://www.nb-research.co.uk/index.php/projects-2/

[17] McGee, H., O'Higgins, M., Garavan, R., & Conroy, R. (2011). Rape and child sexual abuse: What beliefs persist about motives, perpetrators, and survivors? Journal of Interpersonal Violence, 26(17), 3580-3593. Anderson, K. B., Cooper, H., & Okamura, L. (1997). Individual differences and attitudes toward rape: A meta analytic review. Personality and Social Psychology Bulletin, 23(3), 295-315.

[18] "Women say some rape victims should take blame," BBC News.com, February 15, 2010, http://www.slate.com/blogs/xx_factor/2010/02/16/women_are_more_likely_to_blame_rape_victims_for_their_own_rapes_than_men.html

- The property owner/manager is incredibly sympathetic about the terrible event that happened to the victim, but there is nothing the property owner could have reasonably done to prevent it.
- The property was also victimized and taken advantage of by the perpetrator.
- The property is disgusted by the actions of the perpetrator, but no reasonable measures would have prevent the terrible crime.
- Plaintiff's security expert proposes ridiculous, onerous, and expensive measures to improve security on the property. Even these would not have prevented the crime.
- The plaintiff ignored more "safety rules" than the property and has responsibility for failing to use "ordinary care" to protect himself/herself.
- Work with clients and experts to demonstrate that they acted reasonably in implementing security measures.
- Utilize technology, demonstratives, video testimony, and visual aids in the courtroom to accompany messages and sound bites.
- Demonstrate sympathy in questioning the victim and discussing the uncomfortable circumstance of the case. The crying victim (especially if it is a child), is an incredibly powerful witness in a sexual assault case and must be handled extremely carefully on cross-examination.

X. CONCLUSION

Premises security cases involving sexual assault are typically factually complicated cases that require significant investment of time and attorney resources. The potential exposure for clients and insurers in these cases is significant, as is borne out by numerous reported verdicts and settlements exceeding $1,000,000. The nature of the claims and damages in these cases injects a strong emotional element that must be recognized at all stages of the investigation and litigation. A thorough investigation and extensive discovery is required from the outset. Investigation and discovery includes exploring sensitive issues of the plaintiff/victim's own conduct and potential failure to exercise ordinary care. The entire work-up of the case should be conducted aggressively, but the Defense Attorney should tread carefully on the sensitive issues in the case to avoid angering the judge and the jury or thwarting the opportunity for settlement with the plaintiff.

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Defending Slip And Fall Static Defect Cases

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PREMISES LIABILITY
DEFENDING CASES INVOLVING STATIC DEFECTS

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October 6, 2017

PREMISES LIABILITY
DEFENDING CASES INVOLVING STATIC DEFECTS

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TYPICAL STATIC DEFECTS

- Curbs
- Stairs
- Ramps
- Cracks
- Potholes
- Uneven pavement

ELEMENTS OF A SLIP AND FALL CLAIM

- Assume we have all the requisite elements satisfied – i.e., there are no issues regarding the Plaintiff's status (invitee vs. licensee vs. trespasser). It has also already established that the case involves the Defendant's "premises or approaches."

- First, the Plaintiff must prove that the **Defendant had actual** or **constructive knowledge** of the hazard.

- Second, the **Plaintiff** must establish that he or she **lacked knowledge of the hazard despite the exercise of ordinary care** or due to actions or conditions within the control of the owner/occupier.

- Robison v. Kroger, 268 Ga. 735, 493 S.E.2d 403 (1997)

    - Robinson helps to clarify the respective the shifting burdens relative to these two elements –

        - The Plaintiff must establish the first element – that is, that the Defendant had actual or constructive knowledge of the hazard.
        - The Defendant may then offer evidence that the Plaintiff's injuries were proximately caused by the Plaintiff's own negligence – i.e., the Plaintiff intentionally or unreasonably exposed his/her self to harm, or the Plaintiff failed to exercise ordinary care for his/her own safety.
        - Only then does the Plaintiff bear the burden of establishing that he or she lacked knowledge of the hazard (the second element).

    - According to Robinson, the fact that the Plaintiff did not look before they stepped is not enough to establish a lack of ordinary care as a matter of law (though it might be in some circumstances).

    - Instead, the standard under Robinson is "[w]hether, taking into account all the circumstances existing at the time and place of the fall, the [Plaintiff] exercised the prudence the ordinarily careful person would use in a like situation."

- A Plaintiff can meet their burden under the second element (lack of knowledge despite the exercise of ordinary care) at the summary judgment stage if they establish that something in the control of the Defendant distracted the Plaintiff and that the Defendant knew or should have known of the distraction.

    - Example: Stephens v. Kmart Corp., 336 Ga. App. 332, 785 S.E.2d 21 (2016). The Plaintiff tripped on a curb outside of Defendant's store. Though the Plaintiff admitted she did not look where she was walking, she also testified that the Defendant had set up several clothing racks along the curb, which distracted her and obstructed her view of the curb. This testimony was sufficient to reverse summary judgment.

DEFENSES TO STATIC DEFECT CLAIMS

- **Prior Traverse**
    - Example: Norwich v. Shrimp Factory, Inc., 332 Ga. App. 159, 770 S.E.2d 357 (2015). Plaintiff was injured while leaving a restroom stall at the Defendant's restaurant. The evidence showed that the stall was on a platform which required walking up two steps. The Court rejected Plaintiff's expert testimony that the steps were irregular in depth and lacked appropriate handrails, instead affirming summary judgment.

    - However, be mindful if there is evidence of prior traverse but the static condition changed or if it combined with other factors to produce injury –
        - I.e. the steps used to have a handrail but it was removed, or recent rainfall or a spill caused the steps to be wet.

- **Open and Obvious / Plain View**
    - Example: Jeter v. Edwards, 180 Ga. App. 283, 349 S.E.2d 28 (1986). Plaintiff fell and injured herself on the cracked and uneven sidewalk outside of Defendant's store. She argued that while she had been to the store many time before, on this occasion she had to park farther than usual from the entrance and walk along a portion of the sidewalk she had never traveled. Therefore, the prior traverse defense did not apply. However, the Court nevertheless granted summary judgment, finding that the condition of the sidewalk was "clearly visible if one but look[ed] at it."

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PRACTICAL CONSIDERATIONS FOR STATIC DEFECT CLAIMS

- **Spoliation of evidence**
  - This is a critically important concern even prior to receiving a spoliation letter

    Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596 (2015)
    - "[T]he duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence and is triggered not only when litigation is pending but when it is reasonably foreseeable to that party."

  - Advise institutional clients of this rule and its potential ramifications

- **Identify and interview any defense witnesses**
  - Obtain inspection schedules, related policies, and employee time cards / logs, which may establish constructive knowledge
  - Look into and discuss prior incidents and prior law suits related to slip and fall accidents
  - Note that a Defendant's general knowledge of prior accidents is probably not sufficient to satisfy the first element (actual or constructive knowledge) unless the prior incidents involve the same relative location

- **Surveillance videos**
  - Consider providing copies of surveillance videos to Plaintiff's counsel in an effort to avoid frivolous lawsuits

- **Obtain photographs of the accident scene as it appeared at the time of the accident**
  - Time of day, lighting conditions, warning signs, potential distractions, and non-static defects such as water, ice, or altered features (i.e. a broken rail or uncovered manhole) can all alter the analysis of a static defect claim.
  - If applicable, obtain accurate weather reports from the date and time of the accident

- **Use discovery to establish potential defenses and evidentiary issues**
  - Remember the basic defenses to static defect claims, particularly "prior traverse" and how witness testimony may develop these defenses
  - Who are the relevant witnesses and what do they know about this incident or prior visits to the same location?
  - Was the Plaintiff distracted? Were they talking on a cell phone, texting, or having a conversation with a companion?

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- **Be mindful of the scope of discovery**
    - Attorneys must ask themselves what is relevant to establishing the elements of or defenses in their case. For example, where exactly on the premises did the fall occur? This will help govern the scope of discovery into prior incidents. Be sure to watch for discovery requests which are overly broad or irrelevant.

Apportionment Of Fault To A Non Party – Defense Perspective

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APPORTIONMENT FOR NEGLIGENT SECURITY CASES FROM THE DEFENSE PERSPECTIVE

Introduction

The case law interpreting the "apportionment" statute is dynamic and shifting. Since this Seminar was held last year, the Georgia Supreme Court issued opinions reversing (in part or in whole) two 2015 apportionment decisions of the Georgia Court of Appeals: Six Flags Over Georgia II, L.P. v. Martin[1] and Goldstein, Garber & Salama, LLC v. J.B.[2]. In addition, the Georgia Court of Appeals issued decisions in Camelot Club Condo. Ass'n, Inc. v. Afari-Opoku, 340 Ga. App. 618, 621, 798 S.E.2d 241, 245 (2017) (addressing apportionment in the negligent security premises liability context) and Hosp. Auth. of Valdosta/Lowndes Cty. v. Fender, 342 Ga. App. 13, 802 S.E.2d 346 (2017) (addressing the question of when apportionment is permitted).

This area of the law remains in flux and rewards creative legal thinking. In short, to defend a negligent security case, you should try to apportion fault to as many culpable nonparties as possible, but be ready to prove the specific tort that each nonparty committed and be able to prove the elements of each tort by a preponderance of the evidence. Finally, if your jury apportions one hundred percent of the fault to your client and none to the criminal assailant, be sure to challenge the verdict before the jury is released.

The "Apportionment" Statute

The text of the apportionment statute follows:

§ 51-12-33. Apportionment of damages in actions against more than one person according to the percentage of fault of each person[3]

> (a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the

[1] 335 Ga. App. 350, 780 S.E.2d 796 (2015) (Judgment Affirmed in Part, Reversed in Part by Martin v. Six Flags Over Georgia II, L.P., 301 Ga. 323, 801 S.E.2d 24. See discussion infra in Section 5.
[2] 335 Ga. App. 416, 779 S.E.2d 484 (2015) (Judgment Reversed by Goldstein, Garber & Salama, LLC v. J.B., 300 Ga. 840, 797 S.E.2d 87 (decided Feb. 27, 2017, reconsideration denied Mar. 30, 2017))
[3] Ga. Code. Ann., § 51-12-33 (2005), enacted via Laws 2005, Act 1, ¶ 12, eff. Feb. 16, 2005.

injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

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

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(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.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

The Law Governing Negligent Security Claims

The purpose of the apportionment statute is to ensure that each tortfeasor responsible for the plaintiff's harm, including the plaintiff himself, be held responsible only for his or her respective share of the harm. Wade v. Allstate Fire and Cas. Co., 324 Ga. App. 491, 494, 751 S.E.2d 153 (2013). Apportionment is required even if the plaintiff bears no fault. McReynolds v. Krebs, 307 Ga. App. 330, 333, 705 S.E.2d 214 (2010)[4]. The apportionment statute does not limit its scope to cases in which plaintiffs and defendants are negligent, but instead looks to the parties' "percentages of fault." See O.C.G.A. § 51-12-33(b). A nonparty against whom fault is assessed is not subject to actual liability nor can evidence of such assessment be introduced as evidence of liability in any action. See O.C.G.A. § 51-12-33(f)(2).

A landowner has a duty to exercise ordinary care to keep its premises safe, but it is not an insurer of an invitee's safety. Generally, an intervening criminal act by a third party insulates a landowner from liability unless such criminal act was *reasonably foreseeable*. Agnes Scott College v. Clark, 273 Ga. App. 619, 621(1), 616 S.E.2d 468 (2005); accord Walker v. Aderhold Props., Inc., 303 Ga.App. 710, 712(1), 694 S.E.2d 119 (2010).

In the Georgia Court of Appeals' pre-Martin decision in Agnes Scott College (and in the Georgia Supreme Court's seminal Sturbridge Partners decision), the rule on foreseeability of crime was stated in the imperative: in order for the crime to be reasonably foreseeable, "it must be substantially similar to previous criminal activities occurring on or near the premises such that a reasonable person would take ordinary precautions to protect invitees from the risk posed by the criminal activity." Agnes Scott College, supra, at 621(1), 616 S.E.2d 468 (emphasis supplied) (citing Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339 (1997).

[4] Judgment of the Court of Appeals affirmed by McReynolds v. Krebs, 290 Ga. 850, 725 S.E.2d 584 (2012).

The Georgia Supreme Court in Martin stated that "the foreseeability of future criminal acts may be established by evidence of prior criminal acts of a "substantially similar" nature to those at issue, such that 'a reasonable person would take ordinary precautions to protect his or her customers ... against the risk posed by that type of activity.'" 301 Ga. 323, 801 S.E.2d at 32 (2017) (citing Sturbridge Partners, Inc., supra, at 786, 482 S.E.2d 339 and Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 492 (1), 405 S.E.2d 474 (1991)). "[T]he word 'may' must be read in context to determine if it means an act is optional or mandatory, for it may be an imperative."[5] The context of the Supreme Court's emphasis on the word "may" in Martin signals that Georgia courts have the option to consider substantially similar criminal activities on or near the premises *as well as* other evidentiary bases, in analyzing foreseeability:

> An establishment's location in a high crime area may also support the finding of a duty on the part of the landowner to guard against criminal attacks. And evidence that the landowner had knowledge of a volatile situation brewing on the premises can establish foreseeability as well. See, e.g., Good Ol' Days Downtown, Inc. v. Yancey, 209 Ga.App. 696, 697 (2), 434 S.E.2d 740 (1993) (summary judgment improper where bar owner's employees witnessed escalation of hostile behavior for more than five minutes prior to assault on patron).

Martin, 301 Ga. 323, 801 S.E.2d at 32 (internal citations omitted).[6]

The phrase "must be substantially similar" originates in Sturbridge Partners, 267 Ga. at 786 and is repeated in at least one post-Martin decision[7] and in at least thirty cases

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[5] Law.com, Legal Definition of 'May,' www.dictionary.law.com, http://dictionary.law.com/Default.aspx?selected=1229 (last visited August 28, 2017). And see MAY, Black's Law Dictionary (10th ed. 2014) ("may vb. (bef. 12c) 1. To be permitted to <the plaintiff may close>. 2. To be a possibility <we may win on appeal>. Cf. can. 3. Loosely, is required to; shall; must <if two or more defendants are jointly indicted, any defendant who so requests may be tried separately>. • In dozens of cases, courts have held may to be synonymous with shall or must, usu. in an effort to effectuate what is said to be legislative intent.")

[6] Martin's discussion about an "establishment's location in a high crime area" as potentially supporting the finding of a duty on the part of the landowner to guard against criminal attacks is prefigured by McNeal v. Days Inn of Am., Inc., 230 Ga. App. 786, 788, 498 S.E.2d 294, 297 (1998) ("The jury is the best judge of whether the hotel is located in an area which was such that a criminal assault on a hotel guest in the parking lot at night before the security guard arrived at 11:00 p.m. was reasonably foreseeable to defendants[.]")

[7] Camelot Club, supra, 340 Ga. App. at 621, 798 S.E.2d 241, 245. .

decided prior to Martin.[8] The emphasis on this modification of this seminal standard in Martin is a result of the "hybrid" nature of the underlying events in that case, where the ultimate criminal act resulting in the injury giving rise to the suit occurred away from the defendant's premises, but was found to be a continuation of criminal activity that commenced on the premises.

To determine whether the prior criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, Georgia courts examine the location, nature, and extent of the prior criminal activities and their likeness, proximity, or other relationship to the crime in question. Sturbridge Partners, supra, at 786, 482 S.E.2d 389. "Substantially similar" does not mean "identical." Id. "What is required is that the prior incident be sufficient to attract the landowner's attention to the dangerous condition which resulted in the litigated incident." Id. Questions about the "reasonable foreseeability" of a criminal attack are generally for the jury's determination rather than summary adjudication by the courts. Camelot Club, supra, at 621, 798 S.E.2d 241.

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[8] E.g., Six Flags Over Georgia II, L.P. v. Martin, 335 Ga. App. 350, 360, 780 S.E.2d 796, 806 (2015), aff'd in part, rev'd in part, 301 Ga. 323, 801 S.E.2d 24 (2017); Little-Thomas v. Select Specialty Hosp.-Augusta, Inc., 333 Ga. App. 362, 367, 773 S.E.2d 480, 484 (2015); Med. Ctr. Hosp. Auth. v. Cavender, 331 Ga. App. 469, 474, 771 S.E.2d 153, 158 (2015); Ratliff v. McDonald, 326 Ga. App. 306, 312, 756 S.E.2d 569, 576 (2014); Whitfield v. Tequila Mexican Rest. No. 1, 323 Ga. App. 801, 804, 748 S.E.2d 281, 285 (2013) disapproved of by Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596 (2015); Tomsic v. Marriott Int'l, Inc., 321 Ga. App. 374, 384, 739 S.E.2d 521, 531 (2013); Doe I v. Young Women's Christian Ass'n of Greater Atlanta, Inc., 321 Ga. App. 403, 408, 740 S.E.2d 453, 457 (2013); Bethany Grp., LLC v. Grobman, 315 Ga. App. 298, 301, 727 S.E.2d 147, 150 (2012); Walker v. Aderhold Properties, Inc., 303 Ga. App. 710, 712, 694 S.E.2d 119, 121 (2010); Johns v. Hous. Auth. for City of Douglas, 297 Ga. App. 869, 871, 678 S.E.2d 571, 573 (2009); Drayton v. Kroger Co., 297 Ga. App. 484, 485, 677 S.E.2d 316, 317 (2009); Vega v. La Movida, Inc., 294 Ga. App. 311, 312, 670 S.E.2d 116, 119 (2008); Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 547, 659 S.E.2d 905, 910 (2008); Love v. Morehouse Coll., Inc., 287 Ga. App. 743, 745, 652 S.E.2d 624, 626 (2007); Norby v. Heritage Bank, 284 Ga. App. 360, 365, 644 S.E.2d 185, 190 (2007); Wojcik v. Windmill Lake Apartments, Inc., 284 Ga. App. 766, 768, 645 S.E.2d 1, 3 (2007); McAfee v. ETS Payphones, Inc., 283 Ga. App. 756, 758, 642 S.E.2d 422, 425 (2007); Mason v. Chateau Communities, Inc., 280 Ga. App. 106, 112, 633 S.E.2d 426, 431 (2006); Agnes Scott Coll., Inc. v. Clark, 273 Ga. App. 619, 621, 616 S.E.2d 468, 470 (2005); Baker v. Simon Prop. Grp., 273 Ga. App. 406, 408, 614 S.E.2d 793, 795 (2005); Rice v. Six Flags Over Georgia, LLC, 257 Ga. App. 864, 867, 572 S.E.2d 322, 326 (2002); Wade v. Findlay Mgmt., Inc., 253 Ga. App. 688, 689, 560 S.E.2d 283, 285 (2002); McDaniel v. Lawless, 257 Ga. App. 187, 189, 570 S.E.2d 631, 633 (2002) (citing Aldridge v. Tillman, 237 Ga.App. 600, 603(2), 516 S.E.2d 303 (1999), not Sturbridge Partners); FPI Atlanta, L.P. v. Seaton, 240 Ga. App. 880, 882, 524 S.E.2d 524, 528 (1999); Woodall v. Rivermont Apartments Ltd. P'ship, 239 Ga. App. 36, 37, 520 S.E.2d 741, 743 (1999); McNeal v. Days Inn of Am., Inc., 230 Ga. App. 786, 788, 498 S.E.2d 294, 296 (1998); Doe v. Prudential-Bache/A.G. Spanos Realty Partners, L.P., 268 Ga. 604, 605, 492 S.E.2d 865, 867 (1997); Doe v. Briargate Apartments, Inc., 227 Ga. App. 408, 409, 489 S.E.2d 170, 173 (1997); and Walker v. St. Paul Apartments, Inc., 227 Ga. App. 298, 300, 489 S.E.2d 317, 319 (1997).

1. To whom may the jury apportion liability or nonparty fault?[9]

In 2012, the Georgia Supreme Court answered two certified questions from the Northern District of Georgia regarding apportionment. See Couch v. Red Roof Inns, Inc., 291 Ga. 359, 729 S.E.2d 378 (2012). There, the Georgia Supreme Court held that (1) a jury is allowed to apportion damages among the property owner and a criminal assailant, and that (2) instructions or a special verdict form requiring such apportionment would not violate the plaintiff's constitutional rights. See id. at 379. The Court rejected the argument that allowing a jury to apportion fault to a nonparty criminal assailant nullifies a property owner's duty to keep its premises safe.

In 2015, the Georgia Supreme Court decided the case of Zaldivar v. Prickett, 297 Ga. 589, 774 S.E.2d 688 (2015).[10] In Zaldivar, the defendant had given notice under the apportionment statute of her intent to ask the trier of fact to assign some responsibility to the plaintiff's nonparty employer for negligently entrusting the employer's company vehicle to the plaintiff. In response, the plaintiff filed a motion for partial summary

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[9] An important corollary: To whom may the jury NOT apportion fault? As applied to negligent security claims, the Georgia Court of Appeals recently explained that where there are additional and independent acts of negligence alleged against a security company, the jury is authorized to apportion liability to it. See generally, Camelot Club, 340 Ga.App. at 626-629; and see id. at 628:

> [T]he jury could have imposed liability on Alliance [the security company hired by the landlord, Camelot] independently for common law negligence arising out of its assumption of the duty to provide security. See Kelley, 230 Ga.App. at 509 (1), 496 S.E.2d 732 (even though the independent contractor may have no liability under OCGA § 51-3-1, it could breach an independent duty of failing to perform its work properly); FPI Atlanta, LP v. Seaton, 240 Ga.App. 880, 890, 524 S.E.2d 524 (1999) (physical precedent only) (Pope, J., concurring specially) (same). Thus, based on the jury instructions provided, the jury could have found liability because of Camelot's negligence (premises liability and common law negligence), Camelot's maintenance of a nuisance, Alliance's negligence in providing security, or some combination of these based on vicarious liability principles.

In the even more recent decision in Hosp. Auth. of Valdosta/Lowndes Cty. v. Fender, 342 Ga.App. 13, 802 S.E.2d 346, 355 (2017), the plaintiffs argued that the Respondeat Superior Rule [the rule that theories of recovery such as negligent supervision are subject to dismissal where respondeat superior liability has been admitted, and the plaintiff has no valid claim for punitive damages against the employer for its own, independent negligence] has been superseded by Georgia's apportionment statute, OCGA § 51–12–33 (b). The Court of Appeals commented:

> Our courts have not directly addressed this argument, but in a different context, we have held that the apportionment statute does **not** apply where a defendant employer faces only vicarious liability under the doctrine of respondeat superior because the employer and employee "are regarded as a single tortfeasor." PN Express v. Zegel, 304 Ga. App. 672, 680 (5), 697 S.E.2d 226 (2010). See also Camelot Club Condo. Assoc. v. Afari–Opoku, 340 Ga. App. 618, 626 (2) (b), 798 S.E.2d 241 (2017)."

(internal footnotes omitted, emphasis supplied).

[10] The Georgia Supreme Court granted certiorari on Zaldivar v. Prickett, 328 Ga. App. 359, 762 S.E.2d 166 (2014), and reversed the Court of Appeals decision (297 Ga. 589, 774 S.E.2d 688 (2015). The Court of Appeals decision from 2014 was ultimately vacated and the Court of Appeals adopted the opinion of the Supreme Court, 337 Ga. App. 173, 786 S.E.2d 560 (2016).

judgment, asserting that the apportionment statute did not require any assignment of responsibility to the nonparty employer because Georgia case law held that negligent entrustment of an instrumentality could not be a proximate cause of injury to the person to whom the instrumentality was entrusted. The Court applied the statute, holding that it:

> [R]equires the trier of fact in cases to which the statute applies to "consider the fault of all persons or entities who contributed to the alleged injury or damages," meaning all persons or entities who have breached a legal duty in tort that is owed with respect to the plaintiff, the breach of which is a proximate cause of the injury sustained by the plaintiff. That includes not only the plaintiff himself and defendants with liability to the plaintiff, but also every other tortfeasor whose commission of a tort as against the plaintiff was a proximate cause of his injury, **regardless of whether such tortfeasor would have actual liability in tort to the plaintiff**.

Zaldivar, 297 Ga. at 600 (emphasis supplied); accord Martin, 301 Ga. 323, 801 S.E.2d at 36. The Supreme Court in Zaldivar held that the apportionment statute permitted the attribution of "fault" to a nonparty only to the extent that the nonparty committed a tort that was a proximate cause of the injury to the plaintiff. See id. The Court noted that it "is axiomatic that liability in tort requires proof that the defendant owed a legal duty, that she breached that duty, and that her breach was a proximate cause of the injury sustained by the plaintiff." Id. at 595.[11] In rejecting the plaintiff's argument (and countering Judge Branch's similar concern, see id. at 364 (Branch, J., dissenting)), the Court observed:

> Proof of these essential elements is a necessary condition for tort liability, but it does not lead inevitably to liability. Not every tortfeasor can be held liable for his torts. A tortfeasor may have an affirmative defense or immunity that admits the commission of a tort that is the proximate cause of the injury in question. Although such a defense or immunity may cut off liability, a tortfeasor is still is a tortfeasor, and nothing about his defense or immunity means that he cannot be said to have committed a tort that was a proximate cause of the injury to the plaintiff. See, e.g., Shekhawat v. Jones, 293 Ga. 468, 470–471(1), 746 S.E.2d 89 (2013) (state employee may have statutory immunity under the Georgia Tort Claims Act

[11] As discussed, *infra*, the Georgia Supreme Court affirmed this holding in Walker v. Tensor Machinery Ltd., 298 Ga. 297, 779 S.E.2d 651 (2015).

> when the employee "commits a tort while acting within the scope of his employment with the State"). What happened, happened, and affirmative defenses and immunities do not change what happened, only what the consequences will be. As such, the apportionment statute permits consideration, generally speaking, of the "fault" of a tortfeasor, notwithstanding that he may have a meritorious affirmative defense or claim of immunity against any liability to the plaintiff. We note that this understanding of "fault" is consistent with OCGA § 51–12–33(e), which makes clear that "[n]othing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section."

Zaldivar, 297 Ga. at 597–98, 774 S.E.2d 688 (internal footnote omitted). See also Walker v. Tensor Machinery, 298 Ga. 297, 304, 779 S.E.2d 651 (2015) (allowing apportionment to nonparty employer who is immune from liability pursuant to the exclusive remedy provisions of the Worker's Compensation Act). Zaldivar also reversed prior Georgia case law to the extent that it held that negligent entrustment of an instrumentality could not be a proximate cause of an injury to the person to whom the instrumentality was entrusted.

In order to apportion fault to a nonparty, Zaldivar requires the defendant to prove the elements of the tort that the nonparty committed against the plaintiff. In a negligent security case, proving fault as to the third-party criminal would typically be a straightforward affair.

Camelot Club, supra, at 628, 798 S.E.2d 241, appears to have answered the question of whether a landowner can apportion fault to a security company that it hires to provide security services on its premises in the affirmative. In Camelot Club, the landlord argued on appeal that the evidence did not support a finding that it had the requisite control under O.C.G.A. 51-2-5(5) to impose liability for the actions of its security company, and "significantly, Camelot asserted that the evidence supported **a separate and independent claim of negligence** against the [the security company] as a party to the case." Id. at 625 (emphasis supplied). The trial court entered judgment against Camelot based on the fault the jury assigned to the security company.[12] On appeal, the Georgia Court of Appeals first considered the language of the apportionment statute, O.C.G.A. 51-12-33(b), observing that this "provision addresses liability, not

[12] The jury apportioned 25% of fault to Camelot, 25% to Alliance, and the remaining 50% against three non-party assailants. Following a hearing, the trial court issued judgment against Camelot for 50% of the total damages, "which constitute[d] the 25% fault the jury assigned to Camelot plus the 25% fault the jury assigned to Alliance," and 25% of the total damages against Alliance. 340 Ga.App. at 618. The decision does not illuminate how the trial court reduced the 50% fault assigned to the nonparties to 25%, but held that the trial court erred in imposing liability on Camelot for Alliance's share of fault.

merely fault, and by defining the liability of each person against whom damages are awarded and prohibiting joint liability, it seems generally to preclude any post-verdict reassignment of damages based on the jury's apportionment of fault." Id. at 626. Ultimately, the Court of Appeals decision was based on the principle that the evidence supported the jury's assignment of 25% of the fault to the security company because the jury could have imposed liability on the company "independently for common law negligence arising out of its assumption of the duty to provide security." 340 Ga.App. 628.[13]

Any party defendant or nonparty which has breached an independently-owed duty to a plaintiff is fair game for apportionment.

Arguably, Zaldivar left some important questions unanswered. For instance:

- In seeking to apportion fault to a nonparty, what is the defendant's burden of proof?
- In seeking to apportion fault to a nonparty, can the plaintiff's evidence be used to prove the tort of the nonparty?
- If a defendant proves the tort of a nonparty, but the jury does not apportion any fault to the nonparty, what should the defense do?

2. In seeking to apportion fault to a nonparty, what is the defendant's burden of proof?

In Brown v. Tucker, 337 Ga.App. 704, 788 S.E.2d 810 (2016), the Georgia Court of Appeals established that a defendant must prove the negligence of a nonparty by a "preponderance of the evidence" in order for the nonparty to appear on the verdict form for the jury's consideration. In Brown, the plaintiff rode shotgun in the defendant's car when it struck a parked tractor-trailer rig. The defendant sought to apportion fault to the non-party rig. The defendant argued that it only had to show a "rational basis" for apportioning fault to the non-party rig, but the plaintiff argued that the defendant had to prove by a preponderance of the evidence that the negligence of the nonparty rig was the proximate cause of the injuries to the plaintiff.[14] The trial court adopted the

[13] "[T]he consolidated pretrial order listed Alliance as a party with a right to participate in the trial and described the claims against the defendants collectively as failing to provide adequate security, failing to keep the premises safe, and maintaining a private nuisance. At trial, the jury was charged on the principles of common law negligence and undertaking a duty without specifying the theories of liability against the defendants, as well as nuisance. The jury was also generally charged on vicarious liability principles[.]" 340 Ga.App. at 627.

[14] The defendant did not provide a written request to charge, so the appellate court reviewed the final jury charge for "substantial error." The appellate court held that it was not substantial error to give the apportionment charge as requested by the plaintiff.

plaintiff's proposed jury instruction and instructed the jury on apportionment as follows: "Now, for you to consider the negligence of the nonparty [rig], the Defendant must prove by a preponderance of the evidence that the negligence of [the rig], if any, was a proximate cause of the injuries to the Plaintiff."[15]

The Georgia Court of Appeals reviewed the jury charge for "substantial error" and held that the trial court did not commit substantial error by giving the requested jury instruction.

Interestingly, the Brown opinion did not cite or analyze the Zaldivar opinion. Instead, the Court observed that a defendant's claim that a nonparty is liable for all or some of the plaintiff's damages is an assertion of fact, the existence of which would be essential to the defense. As an affirmative defense, the defendant bears the burden of proving her assertion of fact.

The Court of Appeals in Brown deemed that apportionment urged by the defense was an affirmative defense, analytically the same as the defense of contributory negligence:

> The burden of proof generally lies upon the party who is asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. O.C.G.A. § 24–14–1. A defendant's claim that a nonparty is liable for all or some of the plaintiff's damages is an assertion of fact, the existence of which is essential to the defense. As an affirmative defense, the defendant bears the burden of proving her assertion of fact.
>
> Generally, a defendant raising an affirmative defense admits the essential facts of a plaintiff's complaint, but then sets up other facts in justification or avoidance, or other special matters not merely elaborating or explaining a general denial, the burden of proving which by a preponderance of the evidence will rest on the defendants.
>
> A defendant need not necessarily concede the essential facts of the plaintiff's claim to raise a burden-shifting affirmative defense, however. A defendant may deny the essential facts asserted and also claim in the alternative that, if the plaintiff had been injured, the injury was due to causes other than the defendant's actions. For example, when a plaintiff sued the driver of a car for her son's wrongful death, the defendants denied liability but also contended that the child's death was proximately

[15] The jury apportioned 40 percent fault to the nonparty rig and 60 percent fault to the defendant driver.

> caused by him dashing into the street. This defense was more than a simple denial of negligence, causation, and damages, and once the plaintiff had made out her prima facie case, the burden rested upon the defendants to show by a preponderance of the evidence, in order to sustain their plea, that the plaintiff's injuries were caused by her own negligence.
>
> The trial court properly charged the jury that when the defendants deny an allegation made by the plaintiff, the burden rests upon the plaintiff to establish the truth of such allegations as may be denied by the defendant; but where the defendants set up an affirmative defense, the burden rests upon the defendants to establish the truth of such affirmative defense by a preponderance of evidence.
>
> The affirmative defense that the jury should apportion fault against someone other than the defendant is no different analytically from the defense of contributory negligence. Once the plaintiff establishes her prima facie case, the defendant seeking to establish that someone else bears responsibility for the damages has the burden of proving that defense.
>
> In sum, Brown's apportionment claim was an affirmative defense. She therefore had the burden of showing by a preponderance of the evidence that the nonparty tractor-trailer driver was negligent and that his negligence proximately caused all or some portion of damages to the plaintiff. Accordingly, the trial court committed no error in charging the jury to that effect."

Brown, supra, at 717, 788 S.E.2d 810, 821–22 (internal citations and punctuation omitted).

3. In seeking to apportion fault to a nonparty, can the plaintiff's evidence be used to prove the tort of a nonparty?

In Double View Ventures, LLC v. Polite, 326 Ga. App. 555, 757 S.E.2d 172 (2014)[16], the plaintiff walked along a dirt path leading from the parking lot in front of his apartment to the Chevron gas station located adjacent to the apartment complex. It was

[16] Overruled on other grounds by Martin v. Six Flags Over Georgia II, L.P., 301 Ga. 323, 801 S.E.2d 24 (2017): "To the extent that Double View Ventures can be construed as adopting a categorical rule requiring a full retrial as the result of any apportionment error—a reading we do not necessarily adopt, given the absence of any analysis of the issue in the opinion—it is overruled as to this issue." Martin, 301 Ga. 323, 801 S.E.2d 24, 38 (2017) (footnote 12).

well documented that residents of the apartment complex and their guests would use that path to go to the Chevron store. The path went up a small hill to a wooden fence, which served as a boundary between the two properties, and the wooden fence had an opening that allowed for access back and forth across the properties. Id. at 555. On the night of the incident, two assailants attacked the plaintiff after he walked through a wooden fence.[17]

A security expert and former security guard for the apartment complex testified about how the wooden fence was a security violation. Id. at 556. Further, about two weeks before the plaintiff's attack, another resident was attacked shortly after he passed through the fence on his way to back to the apartment complex. Id. In addition, there were many prior violent crimes on both the property of the apartment complex and the property of the Chevron gas station. Id. at 557. It was unknown whether the attackers came from the Chevron station or the apartment complex. Following the close of evidence, the trial court considered the plaintiff's motion for a directed verdict on the issue of putting the Chevron station on the verdict form for an apportionment of fault. Id. The trial court ruled in favor of the plaintiff and determined that the gas station would not appear on the verdict form because the defendant failed to produce "any evidence" creating a jury question as to whether the gas station was responsible for any of the repairs or had knowledge of the existing fence. Id.

The Georgia Court of Appeals reversed, holding that it could not say that there was "no evidence" supporting the defense claim that the gas station may have been liable for the plaintiff's injuries. Id. at 560. Because there was "some evidence" that the Chevron station may have contributed to the plaintiff's injuries, the jury should have been given the opportunity to consider apportioning fault to the Chevron station. Id. at 559. The Court of Appeals noted that the defendants had a "burden to establish a rational basis" for apportioning fault to a nonparty. Id. at 562.[18] The court further observed that, even though the defendants did not did not call any witnesses, the plaintiff's own evidence created a question of fact that precluded a directed verdict. Id. at 561. The principle that the plaintiff's own evidence may support apportionment to a nonparty, established in Double View, is consistent with Camelot Club and Brown v. Tucker; so long as there has been a properly articulated assertion of nonparty fault, and so long as the evidence supports the verdict, a jury's apportionment to the nonparty should withstand scrutiny as any jury verdict otherwise would. The preponderance of evidence of nonparty fault should be a determination reserved for the jury.

[17] The jury determined that the apartment complex and the apartment complex manager were 87 percent at fault and the plaintiff was 13 percent at fault. Id. at 557.

[18] Double View's "rational basis" standard was rejected by Brown v. Tucker, and Double View was itself overruled by Martin.

The Double View plaintiff was attacked while on a strip of land that was located on the border between the Chevron gas station and the plaintiff's apartment complex; the Chevron gas station experienced substantially similar crime on its property before the plaintiff's attack; and Chevron owned the wooden fence where the plaintiff was attacked. Under a preponderance of the evidence standard, the defendant there could probably have established that the Chevron gas station proximately caused the plaintiff's injuries by not protecting the plaintiff against reasonably foreseeable crime. See Murray v. State, 269 Ga. 871, 873(2), 505 S.E.2d 746 (1998) ("The [preponderance of the evidence] standard requires only that the finder of fact be inclined by the evidence toward one side or the other.").

Notwithstanding its negative treatment by the Georgia Supreme Court in Martin, the key lesson of Double View is that the defense should look for opportunities to use the plaintiff's evidence against the plaintiff to apportion fault to any nonparty, including adjoining landowners.[19]

4. If a defendant proves the tort of a nonparty, but the jury does not apportion fault to the nonparty, what should the defense do?

In Goldstein Garber & Salama, LLC v. J.B., the Georgia Supreme Court granted certiorari on the Court of Appeals decision[20] and reversed on other grounds, holding in Division 3 of its decision that "[i]n light of the foregoing [holdings in Divisions 1 and 2], we need not address whether [the defendant] waived any objection to the jury's apportionment of fault." In that case, the plaintiff sued a dental practice because an employee of the practice molested the plaintiff while the plaintiff was under anesthesia. The employee subsequently pled guilty to numerous criminal charges and received a life a sentence in prison. 335 Ga.App. 416, 779 S.E.2d at 488. The employee/criminal was a named party to the action, but the plaintiff dismissed him before trial. At trial, the jury awarded the plaintiff $3.7 million in damages and apportioned one hundred percent of the fault to the dental practice and none to the employee/criminal. The defense argued that it was entitled to a new trial because the jury's verdict allocated no

[19] See also Georgia-Pacific, LLC v. Fields, 293 Ga. 499, 748 S.E.2d 407 (2013) (holding that plaintiff's allegations of fact and admissions in original pleading identifying nonparty entities responsible for producing or distributing asbestos-containing products to which plaintiff was exposed were "admissions in judicio" that named defendants could rely on to establish potential fault of nonparty entities for purposes of apportioning damages); but see McReynolds v. Krebs, 290 Ga. 850, 853 725 S.E.2d 584 (2012) (holding that defendant was not entitled to set-off against nonparty car manufacturer when the only evidence of the nonparty's potential liability came from the plaintiff's complaint).
[20] Goldstein, Garber & Salama, LLC v. J.B., 335 Ga.App. 416, 779 S.E.2d 484 (2015)

fault to the employee/criminal, and they argued that such apportionment was required by the language of O.C.G.A. 51-12-33(c).[21]

The Court of Appeals noted that one possibility for the jury's decision to not assign fault to the employee/criminal may have been its determination that the dental practice's liability would not be offset on the basis of the employee/criminal's fault. And if it were clear that the jury had made that determination, the Court observed that it would have "been faced with the difficult question whether, under O.C.G.A. § 51-12-33(c), the jury was required not only to 'consider the fault' of 'persons or entities' not party to the action 'who contributed to the alleged injury and damages' but also . . . to reduce the liability of the named defendant by some amount." Id.

The Court of Appeals avoided the potentially difficult question because it determined that the defendant waived appellate review by failing to challenge the jury's verdict before the jury was dispersed. In this regard, the Court of Appeals in Goldstein noted that, had the defendant objected to the verdict before the court dismissed the jury, the trial court "could have given the jury additional instruction and permitted them to consider the matter again." Id. at 493. In Camelot Club, the Court of Appeals held that the plaintiff had waived any appeal from the denial of her motion at trial to disallow apportionment by the jury between the landlord and the security company the landlord hired because her counsel ultimately agreed to the verdict form allowing apportionment. Camelot Club, 340 Ga.App. at 625-626.

In short, the appellate courts continue to vigorously apply the principle of waiver of appealable issues where said issues were not preserved during the trial phase. E.g., Camelot Club, 340 Ga.App. at 625 (plaintiff held to have waived objection to apportionment because she eventually agreed to a verdict form submitting the issue of apportionment to the jury). For the defense, the lesson from Goldstein is clear: if the jury does not apportion fault to the underlying criminal assailant in your negligent security case, then you should object to the verdict and seek relief before the court dismisses the jury. Camelot Club reinforces the same principle whether it is the defendant or the plaintiff who has an issue it wishes to preserve for appeal.

5. Apportionment after Martin

On June 5, 2017, the Georgia Supreme Court issued its ruling in Martin v. Six Flags Over Georgia II, L.P., 301 Ga. 323, 801 S.E.2d 24 (2017), holding inter alia that the issues of Six Flags' liability and the calculation of damages sustained by Martin were distinct from the issues of apportionment of fault among park and gang members, and

thus, trial court's error in declining to allow apportionment among non-party gang members required retrial only as to apportionment. In this holding, the Georgia Supreme Court overruled Double View Ventures, LLC v. Polite, supra, 326 Ga.App. 555, 757 S.E.2d 172. After affirming Six Flags' liability (in Divisions 1 and 2, on grounds different than in the Court of Appeals' affirmation of same), the Martin Court addressed apportionment. By way of background, the Supreme Court explained:

> The jury assessed its verdict 92% to Six Flags and 2% to each of the four named defendants, all of whom had criminal convictions in connection with the attack on Martin. Six Flags has argued throughout the proceedings that the jury should be entitled to apportion damages not just among the named defendants but also among other individuals who, though not named as defendants, were alleged to have been involved in the attack on Martin. The trial court rejected Six Flags' request to allow apportionment among the non-parties, finding that, given the absence of a criminal conviction against any of these individuals, the evidence was insufficient to permit apportionment against them.
>
> On appeal, the Court of Appeals concluded that the trial court had imposed too high an evidentiary burden for the inclusion of non-parties in the apportionment determination. Six Flags, 335 Ga.App. at 365, 780 S.E.2d 796. It then considered Martin's argument that Six Flags had failed to preserve this alleged error on appeal and held that Six Flags had preserved the issue, but only as to two individuals, both of whom (a) were the subject of trial testimony supporting their involvement in the attack and (b) were specifically named by Six Flags in its appellate filings as having been improperly excluded from consideration for apportionment. Id. at 364-365, 780 S.E.2d 796. After identifying this apportionment error, the Court of Appeals concluded that the jury's verdict was infirm in its entirety and ordered the judgment reversed and the case remanded for a new trial. Id. at 365, 780 S.E.2d 796. In granting certiorari, we asked the parties to address whether the Court of Appeals had erred in determining that the trial court's apportionment error would require a full retrial. Implicit in the framing of this question were the understandings (1) that the trial court did in fact commit error in declining Six Flags' request to submit to the jury the question of apportionment to non-parties and (2) that Six Flags had properly preserved the apportionment issue for appellate review, at least as to the two non-parties identified by the Court of Appeals. Having declined to grant certiorari on these preliminary issues, we do not belabor them here, and instead proceed to determine whether, given that the two non-parties—Ander Cowart and

> "Mr. Black"—must be added to the verdict form, a complete retrial is necessary, as opposed to a partial trial limited to apportionment.

Martin, 301 Ga. 323, 801 S.E.2d at 35. The Supreme Court first noted that the "text of the apportionment statute does not prescribe a means of correcting a trial court's apportionment error," but found that Georgia "common law ... adheres to certain general principles in the correction of trial errors that affect less than the whole of a judgment":

> [W]here a judgment is entire and indivisible, it cannot be affirmed in part and reversed in part, but the whole must be set aside if there is reversible error therein. But where a judgment appealed from can be segregated, so that the correct portions can be separated from the erroneous, the court will not set aside the entire judgment, but only that portion which is erroneous.

Martin, 301 Ga. 323, 801 S.E.2d at 36 (internal citation omitted). The Court noted the general principle established by prior Georgia decisions that "[l]imiting the scope of retrial to only those distinct portions of the judgment that are infirm serves the dual objectives of judicial economy and respect for the jury's verdict," further observing

> This general principle is readily adaptable to the apportionment context. The apportionment statute requires that, once liability has been established and the damages sustained by the plaintiff have been calculated, the trier of fact must then assess the relative fault of all those who contributed to the plaintiff's injury—including the plaintiff himself—and apportion the damages based on this assessment of relative fault.... [T]he jury must take the total amount of damages sustained by the plaintiff, identify the persons who are at fault, and award damages according to each person's percentage of fault.... Thus, once liability has been established, the calculation of total damages sustained by the plaintiff is the first step, and the allocation of relative fault and award of damages according to that allocation is a distinct second step. There is no reason these two steps cannot be segregated for purposes of retrial.

Id. at 36–37 (internal citations omitted). The Supreme Court rejected Six Flags' contention that "the text of the statute requires a single trier of fact to make the determination of liability, damages sustained, and apportionment" and held that "relative fault among tortfeasors will not in all cases be 'inextricably joined' with the issues of liability and damages so as to preclude a retrial on apportionment

only." Id. at 37-38. The Martin Court concluded that where "correction of an apportionment error involves only the identification of tortfeasors and assessment of relative shares of fault among them, there is no sound reason to disturb the jury's findings on liability or its calculation of damages sustained by the plaintiff." Id. at 38. The Court noted that

> Though there may be instances in which the particular circumstances of the case or the nature of the apportionment error militate otherwise, in the ordinary case, the issue of apportionment among tortfeasors will be sufficiently distinct from the issue of liability and calculation of damages that the correction of an error in apportionment will not require a full retrial."[22]

Id. at 37-38. Furthermore,

> The existence and degree of responsibility of alleged tortfeasors not appearing on the verdict form are issues that are entirely separate from the questions of whether Six Flags and the other defendants breached their respective duties to Martin and whether those breaches proximately caused Martin's injuries. The relative fault of those individuals likewise would have no effect on the total amount of damages Martin has sustained as a result of the injuries he suffered in the attack. We thus conclude that the apportionment error here requires a retrial only as to apportionment, and we reverse the judgment of the Court of Appeals to the extent it ordered this case be retried in its entirety.

Id. at 38. The Supreme Court thus remanded the case with direction for retrial on the limited issues noted above.

Martin espouses the general principle that a jury verdict should not be disturbed on appeal, unless circumstances of the underlying case demand it. It remains to be seen to what extent this holding is bound to the facts and posture of the underlying case against Six Flags, as alluded to by the Court in footnote 13:

> We acknowledge that a retrial on apportionment may require the presentation of much (if not all) of the same evidence as was presented at the first trial on the question of liability. That the issues of liability and apportionment are distinct does not mean that the proof relevant to those

[22] "In fact, where the issue of apportionment is distinct from the issues of liability and damages sustained, our 'law of the case' doctrine will in most instances preclude the re-litigation of these issues once the jury's verdict on them has been affirmed." Martin, 301 Ga. 323, 801 S.E.2d at 38.

issues is substantially different. The scope of evidence to be presented on retrial is, of course, an issue to be addressed in the trial court.

How this holding will be applied by the trial court following remand remains to be seen.

Conclusion

If the defendant wants to apportion fault to a nonparty, the Zaldivar opinion requires that the defendant prove that the nonparty committed a tort against the plaintiff.[23] Brown v. Tucker established that the defendant urging apportionment must prove the fault of a nonparty by a preponderance of the evidence. Defendants should seek to apportion fault to any nonparty that could be responsible for the plaintiff's injuries and be prepared to prove by a preponderance of the evidence that any nonparty committed a tort against the plaintiff that proximately caused the plaintiff's injuries. Any party that seeks to challenge apportionment must be sure to preserve the issue for appeal. And remember to think creatively about apportioning fault and consider using the plaintiff's evidence against the plaintiff to establish the fault of nonparties. However, given the Martin holding discussed supra, parties should not expect a full retrial of all issues to follow a successful appeal of an apportionment error made by the trial court.

[23] The Georgia Supreme Court reaffirmed this holding in Walker v. Tensor Machinery, Ltd., 298 Ga. 297, 779 S.E.2d 651 (2015).

Professionalism

Presented By:

Hon. Clyde L. Reese, III
Georgia Court of Appeals
Atlanta, GA

ETHICS AND PROFESSIONALISM

The Honorable Clyde L. Reese III
Judge, Georgia Court of Appeals

Distinction Between Ethics and Professionalism.

Our profession demands that its practitioners exhibit both ethical behavior and professionalism in their daily endeavors on behalf of their clients. Although ethics and professionalism have a lot in common, ethics rules are mandated by the state bar while professionalism is a standard that judges, other lawyers, and the general public expect lawyers to maintain. Ethics and professionalism come into play in all areas of the practice of law. However, because of its adversarial nature, the litigation process seems to attract ethical and professionalism issues not encountered in other practice areas. Although the distinction between ethics and professionalism may not be critical for an individual lawyer in carrying out her day to day role as a lawyer, some understanding of any distinction may be useful in interacting with judges, other lawyers, and serving on bar committees.

Three states discern some distinction between Ethics and Professionalism. Georgia, Louisiana and Ohio have adopted separate CLE requirements for each.[1] Former Georgia Chief Justice Harold Clarke described the distinction between ethics and professionalism as: " …the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers." The Georgia Chief Justice's Commission on Professionalism states that the "term Ethics commonly is understood in the CLE context to mean 'the law of lawyering' and the rules by which lawyers must abide in order to remain in good standing before the bar." Professionalism, on the other hand, seeks to rise above the mere threshold of ethical behavior

[1] ETHICS and PROFESSIONALISM: A DISTINCTION WITH A DIFFERENCE?
A. McArthur Irvin, ABA Section of Employment Law (2012)

demanded by state bar rules. “It would seem clear that authentic professionalism must rise to a higher level than the mere minimum standard for preserving the right to practice law.”[2]

Justice Sandra Day O’ Connor who had a passion for speaking on this topic described professionalism as follows:

> To me, the essence of professionalism is a commitment to develop one's skills to the fullest and to apply that responsibly to the problems at hand. Professionalism requires adherence to the highest ethical standards of conduct and a willingness to subordinate narrow self-interest in pursuit of the more fundamental goal of public service. Because of the tremendous power they wield in our system, lawyers must never forget that their duty to serve their clients fairly and skillfully takes priority over the personal accumulation of wealth. At the same time, lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system which strives, however imperfectly, to provide justice for all.[3]

ETHICS AND PROFESSIONALISM ON THE BATTLE FIELD

Within the litigation context, the discovery process seems to breed ethical and professionalism missteps by attorneys. Although the purpose of discovery is to facilitate fact finding in a dispute, often times the norm of discovery is to “make the other side work” by responding to discovery requests in a narrow and evasive fashion for the purpose of withholding relevant information. As one judge put it: “Discovery rules are supposed to facilitate truth seeking, but in practice that is the last thing they are. They are a cash-cow for lawyers for whom discovery is about hiding the pea.”[4] The term “Rambo litigation” covers a wide variety of misconduct ranging from relentless filing of motions and use of discovery as a weapon of mass destruction to a complete disdain for courtesy, often aimed at making litigation a miserable experience for one’s opponent. As one author put it in describing the behavioral characteristics of the Rambo approach to litigation:

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[2] Id.
[3] Court of Appeals of Maryland Professionalism Course,” Professionalism Above and Beyond Ethics” p. 15 (1992).
[4] ENACTMENTS OF PROFESSIONALISM: A STUDY OF JUDGES’ AND LAWYERS’ ACCOUNTS OF ETHICS AND CIVILITY IN LITIGATION. 67 Fordham L.Rev. 809.

• a mindset that litigation is war, describing trial practice in military terms;
• a conviction that it is invariably in your interest to make life miserable for your opponent;
• a disdain for common courtesy and civility, assuming that such are illsuited for the true warrior;
• a facility for manipulating facts and engaging in revisionist history;
• a hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact finding; and
• an urge to put the trial lawyer on center stage rather than the client or his or her cause.[5]

Without regard to ethical or professionalism concerns, such conduct is simply not in the best interest of the client. We have all read about the harsh sanctions handed down by trial judges for discovery abuses which are not client friendly for the lawyer tagged with the abuse. In the protracted litigation process, the truth normally comes to light at some stage. Therefore, the proper role for the lawyer is not to "hide the pea" with respect to prejudicial documents or information in the client's file, but to neutralize, as much as possible, the adverse effect. Lawyers, before responding to discovery, should counsel their clients about disclosure obligations in discovery as well as the lawyer's own obligation of candor.

Witness preparation is another area that many lawyers test the bounds of ethics and professionalism. There is a fine line between "coaching" a witness which has an unfavorable connotation, and "educating 'or "preparing" a witness for deposition or trial testimony.[6] Witness preparation is certainly a required skill for litigators; however, the overriding principle is that the witness understands that he or she must answer questions truthfully. The gray area involves how broadly a witness is to interpret a question. Is it ethical for a lawyer to instruct a witness to tell

[5] Joseph J. Ortego and Lindsay Maleson, "Incivility: An Insult to the Professional and the Profession," The ABA Brief, Vol. 37, Spring 2008.
[6] ABA Connection-Stephen Francis Ward-November 1st, 2007.

only that part of the truth which is necessary to be responsive to a particular question? Should a lawyer instruct a witness that it's "okay to say you don't remember" in response to a question? Again, the default position should be that while recognizing litigation is an adversarial engagement, and the lawyer has an obligation to advocate his/her client's interest zealously, the discovery process is about seeking, not obscuring, the truth.

Many times litigation lawyers fall into ethical dilemmas without even realizing it at the time. These "ethic traps" involve situations that arise in everyday practice.[7] The first is the inadvertent lawyer-client relationship. The Restatement (Third) of the Law Governing Lawyers provides in §14 that an attorney-client relationship is formed when a person manifests an intent that a lawyer provide legal services, and the lawyer either (a) manifests consent or (b) fails to manifest lack of consent and knows or reasonably should know the person reasonably relied on the person to provide the services. A common situation is where a lawyer is hired to represent a corporation in a lawsuit filed against the corporation. In the process, the lawyer may meet with the corporation's employees involved in the specific dispute. The employees may share confidential information with the lawyer, and the lawyer may prepare them for depositions. If during the discovery process information comes to light that may implicate an employee personally in the dispute, does the lawyer represent the employee as well as the corporation? If so, does this create a conflict? The solution is for the lawyer, at the beginning of the process, to set the parameters of the relationship with the employees she will be interacting with. Once a person becomes a client- even inadvertently- it triggers all the obligations of the attorney client relationship including loyalty, competence, diligence and confidentiality. Further, under ABA Model Rule

[7] Id.

1.10, an inadvertent client relationship imputes the lawyer's firm and not just the lawyer.[8]

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A second "trap" primarily involves young lawyers who are associates at a firm and who are instructed by a superior to perform a function that is ethically inappropriate. Rule 5.2 of the ABA Model Rules of Professional Conduct states: "A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." A corollary to this Rule is ABA Model Rule 8.3 that would require an associate to report their supervisor to an appropriate disciplinary agency if he or she "knows" that a lawyer has commented an ethics violation that raises a "substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." Obviously, the lesson here is to make sure that associates engage in open and frank discussions with supervising lawyers regarding instructions that may involve questionable ethical actions.

A third" trap" involves the lack of communicating and updating a client on litigation status. By necessity, litigation attorneys must focus on the "pots that are boiling" in their inventory of cases, and oftentimes, they fail to keep all of their clients updated on their cases. However, the duty to communicate is important and a requirement of the fiduciary duty a lawyer owes to the client. The duty assures the client's interests are properly identified and well served by the lawyer. Communication is especially important in the following areas: Decisions requiring client consent such as the decision to settle or appeal; decisions requiring client consent about the matters to be

[8] Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (1980 Minn.) the Court upheld nearly $650,000.00 in judgments against a firm that had thought it declined a representation. The court ruled that an inadvertent lawyer client relationship had been created.

used to accomplish client objectives such as whether to litigate, arbitrate or mediate a matter or whether to stipulate to a set of facts; updating clients on the status of the matters, especially information about recent developments that may affect the outcome of the litigation.

With specific reference to professionalism issues specific to litigation, although there are very few bright line demarcations that separate professional from unprofessional conduct, there are some general principles that, if followed, allow professionalism to occur more naturally.[9] First, always promote the most efficient path to the resolution of disputes. Consider the availability of mediation, arbitration and other appropriate methods for resolving disputes outside the courtroom and advise the client of these. Although some matters can be resolved only through litigation, if a dispute can be resolved in a timely manner with minimal cost through another medium, the attorney should advise and recommend this to the client. Also, even in the litigation process, attorneys should try to resolve pretrial disputes without involving the court.

Second, counsel the client early on as to the rules and obligations involved in the litigation process. Clients may not know what is and is not right. Clients are usually not familiar with the professionalism standards that guide lawyers when working on cases with one another. Many times, clients expect you to dislike the opposing party and the lawyer and they expect you to make the opposition's life miserable. A "scorched earth" or "take no prisoners" approach to litigation usually works to your client's disadvantage.

[9] Professionalism For Litigation And Courtroom Practice-Hon. Daniel L. Harris and John V. Acosta-Oregon State Bar Bulletin-August/September 2007.

Third, say what you mean, mean what you say, and keep your word. In the daily practice of litigation a lot of routine business by necessity is accomplished verbally. Therefore, your success at the practice of law will depend to a large degree on whether opposing counsel, co-counsel, and the judge trust you. A little candor goes a long way.

The fourth principle is an extension of the third. Don't exaggerate or understate the facts or the law. Maintaining credibility over the long haul is important. A fast track to losing credibility is to overstate the facts in a case, misrepresent the holding in a case, or misstate the position of the opposing party. This is not zealously representing your client. Instead, you are doing a disservice to the client. Credibility and reputation will allow you to advance the ball for your client during litigation and especially in the courtroom more than any other aspect of your practice.

The fifth principle is to be agreeable even when you disagree. Disagreements between lawyers are common and expected, but they should not disintegrate into something more. It is inevitable that lawyers will disagree on the facts, legal precedent, procedural issues, or the credibility of a party or witness. Lawyers should recognize that such disagreements are a legitimate difference of opinion and not personalize the issue.

The sixth principle is that a lawyer will be judged as much by his writings as by his other skills. A lawyer's written communications in the form of letters and briefs will comprise the majority of his contact with the judge, your opponent and your client. Each time you compose a pleading, brief, letter or email, your professional reputation is on the line. There are many successful writing styles, however, you should think twice before you insert sarcasm in you final product. In communicating with opposing counsel, threats are never a good idea.

The seventh principle applies mainly to seasoned trial veterans. It is simply not professional and completely unnecessary to take unfair advantage of younger lawyers. While advocacy requires a lawyer to capitalize on his opponent's mistakes and inexperience, it is not necessary to deliberately embarrass or humiliate a less skilled opponent.

The eighth principle comes from a quote from Justice Potter Stewart: “Ethics is knowing the difference between what you have the right to do and what is right to do.”[10] Neither the Georgia State Bar Rules nor any model act ethic rules prohibit lawyers from yelling at their opponents or engaging in intimidating acts. However, at the end of the day, very few individuals in the legal community believe this is appropriate behavior. Little effort is required to be cordial to your opponent and that small investment of good will pays large dividends in the years to come.

Finally, don’t be over impressed with yourself or take yourself too seriously. The case you are litigating is not about you. It’s about your client. Litigation lawyers many times overestimate the impact they have in the cases they try. The jury should be focused on the facts and finding the truth. If the jury becomes focused on a lawyer, it is usually because of his inappropriate conduct as opposed to a captive personality trait.

[10] Justice Stewart’s most famous quote is from the Jacobellis v Ohio case where he conceded he could not define “hard core pornography” but offered “I know it when I see it.”

Appendix

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