FOREWORD

The Institute is especially grateful to our outstanding Seminar Chairperson, Michael J. Gorby, for providing the necessary leadership, organization and supervision that has brought this program into a reality. Indeed a debt of gratitude is particularly due our articulate and knowledgeable faculty without whose untiring efforts and dedication in the preparation of papers and in appearing on the program as speakers, this program would not have been possible. Their names are listed on the program at page iv of this book and their contributions to the success of this seminar are immeasurable.

I would be remiss if I 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 hope your attendance will be most beneficial as well as enjoyable. Your comments and suggestions are always welcome.

March, 2010

Lawrence F. Jones
Executive Director
Institute of Continuing Legal Education in Georgia
8:30  REGISTRATION (All attendees must check in upon arrival. A removable jacket or sweater is recommended.)

8:55  WELCOME AND PROGRAM OVERVIEW
     Michael J. Gorby

9:00  THIRD PARTY CRIMINAL ACT LITIGATION—Establishing Liability Against the Property Owner
     Nicholas C. Moraitakis, Moraitakis, Kushel, Pearson & Gardner LLP, Atlanta

9:45  DEFENDING A NEGLIGENT SECURITY CASE—Preparing a Case for Summary Judgment and Trial
     Lynn Roberson, Swift, Currie, McGhee & Heirs, LLP, Atlanta

10:30 BREAK

10:45 DAUBERT CHALLENGES—Yes, They Apply to Premises Liability Experts
     Mary Donne Peters, Author, “Expert Testimony in Georgia”; Gorby, Peters & Associates, LLC, Atlanta

11:30 THE SLIP AND FALL CASE—Pitfalls Encountered by Plaintiff and Defense Counsel
     James R. Doyle, Lewis Brisbois Bisgaard & Smith LLP, Atlanta

12:15 LUNCH

1:15  ESTABLISHING DAMAGES IN A PREMISES CASE—How To Reconcile and Deal with Georgia’s Apportionment Statute
     Gilbert H. Deitch, Deitch & Rogers LLC, Atlanta

2:15  UPDATES ON PREMISES LIABILITY LAW—New Decisions Handed Down
     Michael J. Gorby

2:45 BREAK

3:00 ETHICAL CONSIDERATIONS IN THE LITIGATION OF A PREMISES CASE
     Hon. Anne Elizabeth Barnes, Chief Judge, Georgia Court of Appeals, Atlanta

3:45 THE EXPERT’S ROLE IN A PREMISES LIABILITY CASE—Plaintiff and Defense Perspective
     Jeffrey H. Gross, Premises Liability Expert, Jeffrey H. Gross Consulting, Atlanta

4:30 ADJOURN
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PREMISES LIABILITY

THIRD PARTY CRIMINAL ACT LITIGATION
ESTABLISHING LIABILITY AGAINST THE PROPERTY OWNER

Nicholas C. Moraitakis
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Atlanta, Georgia
THIRD PARTY CRIMINAL ACT LITIGATION – ESTABLISHING LIABILITY AGAINST THE PROPERTY OWNER

OUTLINE

PRELIMINARY GROUND WORK

- Plaintiff – Learn, Understand
  - Psychological Status – Treatment
  - Post-traumatic Stress

- Investigation
  - Crime Specific Investigation
    -- Authorities
    -- Reports
    -- Photographs
    -- Witnesses
    -- Forensics
    -- News Sources
  - General/Historic Investigation
    -- Maintained Incident Reports
    -- Crime Grid
    -- On-Site / General Area
    -- Neighboring Business Owners
    -- Ex-Employees

- Property View
  -- Photographs
  -- Charts & Surveys
PLEADINGS

- Complaint
  - File Early
  - All Parties Accounted For: Management, Owner, Security Personnel
  - Leave Time To Amend

- Written Discovery
  - Tailored Interrogatories & Request For Production of Documents
    -- Ownership/Management
    -- Personnel: Current & Former, Request for years leading up to incident
    -- Ownership & Management Of Other Properties
    -- Security Budgets/Comparisons
    -- Lighting
    -- Cameras
    -- Surveillance
    -- Guards
    -- Manuals, Policies & Procedures
    -- Training/Supervision
    -- Chain of Reporting Incidents
    -- Newsletters/Tenant Communications
    -- Promotional Material
    -- Crime Warnings
    -- Prior Criminal Incident Reports
• Depositions
  - Employees
  - Owners
  - Management Personnel
  - Police Officials, Investigative Officials (Supportive Of Defendant)
  - Independent Witnesses
  - Neighbors & Neighboring Business Owners
  - Experts
    -- Prior Testimony
    -- Published Articles

• Motion For Summary Judgment
  - Foreseeability:
    O.C.G.A. § 51-3-1  “If the proprietor has reason to anticipate a criminal act, he or she then has a duty to exercise ordinary care to guard against injury from dangerous characters.”

**TRIAL**

• Pre-Trial
  - Identify Playing Field On Substantially Similar Incidents

• Jury Selection (See David Ball On Damages: The Essential Update 2005)
- “Voir Dire” – “to see speaking”
- Drop Question & Listen
- Less Than 10% Rule
- Open Ended Questions
- Recognize Juror’s Discomfort
- Common Talk
- Jury Involvement
- Leaders

- Opening (See David Ball On Damages: The Essential Update 2005)
  - No Credibility – Tort Reform
  - Rules
  - Consequences
  - Story
  - Blame
  - Damages
  - Money

- Witness Order
  - Narrator as Opening Witness
    -- Independent
    -- Credible on Cross
  - Liability/Damage Balance
  - Expert
    -- Method

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Steps to Opinions

- Expert Cross-Examination
  - Crime Rate Analysis
  - Foreseeability
  - Deterrability
  - Impulsivity

Closing

- Jurors Duties
- Arm Friends
- Rely on Law/Explain Instructions
- Answer Questions
- Preponderance
- Rules
- Breaches
- Harms
- Damages
DEFENDING A NEGLIGENT SECURITY CASE – PREPARING A CASE FOR SUMMARY JUDGMENT AND TRIAL

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DEFENDING A NEGLIGENT SECURITY CASE -  
PREPARING A CASE FOR SUMMARY JUDGMENT AND TRIAL

A. Pursuing discovery with an eye toward summary judgment. What summary judgment standard applies? How is that different from trial?

B. Prepare for trial just in case.

C. Claim for Failure to Keep the Premises and Approaches Reasonably Safe and/or Failure to Provide Adequate Security Pursuant to O.C.G.A. § 51-3-1

1. Plaintiff’s Status on the Property
2. O.C.G.A. § 51-3-1 Only Applies to Owners/Occupiers
3. Duty/Foreseeability - “Premises or Approaches” and No Direct Claim Against Independent Contractors
4. Breach of Duty
5. Causation

D. Claim for Failure to Warn Pursuant to O.C.G.A. § 51-3-1

E. Claim for Failure to Repair Pursuant to O.C.G.A. § 44-7-14

F. Claim for Fraud Pursuant to O.C.G.A. § 51-6-1, et seq.

G. Claim for Negligent Misrepresentation Pursuant to Restatement (Second) of Torts §311

H. Claim for Nuisance Pursuant to O.C.G.A. § 41-1-1

I. Claim Based on Negligent Hiring or Retention

J. Claim for Punitive Damages Pursuant to O.C.G.A. § 51-12-5.1

K. Necessity of Proving Proximate Cause

L. Difficulties for Plaintiff Where Victim Possessed Equal or Superior Knowledge of the Risk

M. No Recovery Where Plaintiff Voluntarily Participates in Altercation Or Where Plaintiff Failed to Exercise Ordinary Care for His/Her Own Safety

N. Other Defenses - Plaintiff’s Status on the Property

O. Other Defenses

P. Issues Arising from Dram Shop related Actions
Q. Issues Arising From Various Attack Sites

1. ATMs
2. Hotels/Motels
3. Parking lots/
4. Malls
5. Convenience Stores and Fast Food Restaurants
6. Apartments
7. Condominiums
8. Employee turnover and disgruntled ex-employees
9. Security guards and courtesy officers

R. Damages

1. Limiting Damages by Motion
2. Damages at Trial
3. Cross-Examination of the Victim in the Discovery Deposition
4. Cross-Examining the Victim at Trial
5. Cross-Examination of the Plaintiff’s Security Expert

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Lynn M. Roberson is a senior partner at Swift, Currie, McGhee & Hiers, LLP and has been practicing litigation for over 30 years, particularly in the areas of premises liability and other personal injury law, as well as insurance coverage matters. Ms. Roberson has completed over 75 jury trials. She is former chair of the Premises Liability committee for the Georgia Defense Lawyers Association and serves on its Board of Directors, currently as a vice president and chair of the annual Trial Academy. Ms. Roberson is past Chair of the Litigation Section of the Atlanta Bar Association and past Chair for the Atlanta Bar CLE Board of Trustees. Lynn currently serves as Treasurer on the Atlanta Bar Board. She is past Chair of the Defense Research Institute’s Trial Tactics committee. Lynn is also a member of DRI’s Insurance Law committee. Lynn is a certified mediator and was certified as a civil trial advocate in 1990. She was named as a Georgia Super Lawyer in 2004 - 2009. Only 5% of Georgia lawyers received this distinction. She was selected as one of the top 50 women lawyers in Georgia in 2007 and 2009.
Pursuing discovery with an eye toward summary judgment

◆ What is the standard on summary judgment and at trial?
◆ Prepare for trial just in case
Claim Based on § 51-3-1

- Plaintiff’s Status on the Property
- § 51-3-1 Only Applies to Owners/Occupiers
- Duty/Foreseeability - “Premises or Approaches” No Direct Claim Against Independent Contractors
- Breach of Duty
- Causation

Owners/Occupiers Only

Duty/Foreseeability


Foreseeability

O.C.G.A. § 51-3-1

- Breach of the standard of care
  - "undertaking measures to protect patrons does not heighten the standard of care; and taking some measures does not ordinarily constitute evidence that further measures might be required." Lau's

Proximate Cause
Claim for Failure to Warn

No such duty according to Lau’s

Equal Knowledge

Claim for Failure to Repair

- O.C.G.A.§ 44-7-14
  - leased premises
  - common areas
Claim for Fraud
O.C.G.A. § 51-6-1

- Hearsay
- Reliance
- Causation
- Statement that the garage is “patrolled and secured” mere sales puffery

Claim for Negligent Misrepresentation

- Killebrew v. Sun Trust Banks, Inc
- Constructive fraud under OCGA §§ 23-2-51 through 23-2-53, no allow for monetary recovery
Claim for Nuisance
§ 41-1-1

Claim for Negligent Hiring or Retention
Claim for Negligent Hiring or Retention


Claim for Punitive Damages

- Buckhead rapist
- Walker v. Sturbridge Partners
Necessity of Proving Proximate Cause

◆ Post Properties, Inc. v. Doe
◆ Barnes v. St. Stephen's Missionary Baptist Church

Victim Possesses Equal or Superior Knowledge

◆ Most security experts agree domestic disputes very difficult to deter
◆ Courts disfavor holding proprietor liable for violence between known persons
Victim Possesses "Superior Knowledge"


“Voluntary” Participation in Altercation

- Habersham Venture, Ltd. v. Breedlove
- Hansen v. Etheridge
- Johnson v. AHA - i.e., assumption of the risk for living in public housing?
- Fernandez v. Georgia Theatre Co. II
Other Defenses

- Security.
- “The Association may from time to time, provide measures of security on the condominium property; however, the Association is not a provider of security and shall have no duty to provide any security on the condominium property. The obligation to provide security lies solely with each unit owner individually.

- “The Association shall not be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken.”
- Recreational Property Act, OCGA § 51-3-20 et seq.
- Determination of the purpose for which the public was permitted on the property is a question of fact for the jury

**Issues Arising From Various Attack Sites**
ATM

- Lighting
- Shrubbery
- Panic button
- Guarding
- O.C.G.A. §7-8-1, et seq.

Hotel/motel
Locks

- Type and effectiveness
- lock changes
- repair

Keys and key control
Parking lot/deck

Access control/Lighting
Surveillance cameras/CCTV

Malls
Convenience stores

Fast Food Restaurant

- OSHA Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments
Apartment/condominium

Security guards/courtesy officers

- How many?
- Training?
- Hours and areas covered
- Background checks?
- Armed v. unarmed
- Private v. off-duty police
- Equipment provided
Damages

Limiting Damages by Motion

AIDS
Damages at Trial

Cross-Examination of the Victim in the Discovery Deposition
Cross-Examining the Victim at Trial
DAUBERT CHALLENGES: YES, THEY APPLY TO PREMISES LIABILITY EXPERTS

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Daubert Challenges: Yes, They Apply to Premises Liability Experts

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Michael J. Gorby
Gorby, Peters & Associates, LLC
Atlanta, Georgia

Cross Examination of Expert Testimony in Premises Liability Cases


After this threshold determination is made, an expert may testify so long as a judge determines that three criteria are met. See, Mary Donne Peters, The Admissibility of Expert Testimony in Georgia, (2009-2010 ed.). First, the testimony must be based on sufficient facts or data. O.C.G.A. § 24-9-67.1(b)(1). Such facts do not have to be admitted into evidence. Mason v. The Home Depot U.S.A., Inc., 283 Ga. 271, 274, 658 S.E.2d 603, 606(7) (2008). Second, the testimony must be the product of reliable principles and methods. To aid in this determination, courts of this state may draw from the opinions of Daubert v. Merrell Dow Pharmaceuticals, Inc. and its progeny. O.C.G.A. § 24-9-67.1. A court may look to these federal cases without violating the separation of powers doctrine. Mason v. The Home Depot U.S.A., Inc., 283 Ga. 271, 274, 658 S.E.2d 603, 606(7) (2008). Under Daubert, the factors a trial judge may use to determine the reliability of the principle are: 1) whether the theory has been or can be tested; 2) whether the principle has been subjected to peer review; 3) the rate of error for the principle; and 4) the general acceptance of the principle in the relevant scientific community. See, Mary Donne Peters, The Admissibility of Expert Testimony in Georgia, (2009-2010 ed.). Lastly, the expert must have applied the principles reliability to the facts of the case. O.C.G.A. § 24-9-67.1(b)(3).

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1 This material is from Premises Liability In Georgia, Second Edition by Michael J. Gorby and published by Thompson West, 2008
After a judge determines an expert is both qualified and offering reliable testimony, the expert may rely on admissible facts or data in forming his/her opinion as well as inadmissible facts or data, so long as the facts or data are of the type reasonably relied upon by experts in the particular field. O.C.G.A. § 24-9-67.1(a).

Evidentiary Issues:

A. Slip and Fall:

a. Taylor v. American Fabritech, Inc., 132 S.W. 3d 613, 620 (TX Ct. App. 2004): The plaintiff’s safety expert offered reliable testimony because his testimony relied on established principles of safety engineering, his management and his investigative technique was widely accepted in the field, and the witness cited to several articles and regulations he relied upon to opine on the subject.

b. Brown v. Wal-Mart Stores, Inc., 402 F.Supp.2d 303 (D. Maine 2005): Plaintiff became injured in retail store when merchandise fell off of the shelf and struck Plaintiff. The Court granted the defendant’s motion in limine for plaintiff’s proffered expert on engineering that wanted to opine that the injuries occurred because the merchandise was improperly stacked. The court reasoned that the testimony failed to satisfy Rule 702 because the opinion did not disclose any scientific methodology and the witness failed to show how his experience was a sufficient basis for his opinion nor that his experience was reliably applied to the facts.

c. Ascher v. Target Corp., 522 F.Supp.2d 452 (E.D.N.Y. 2007): First, the court rejected the plaintiff’s witness as an expert in retail safety because the witness, although a civil engineer, lacked sufficient training and experience in the retail area. Second, the court concludes that even if the witness is assumed to qualify as an expert, his testimony would be excluded because his opinion (that a pot slid off the lectern and fell on plaintiff’s foot) was not based on sufficient facts or data. The witness relied solely on the facts found in the complaint; the
witness did not even talk to the plaintiff nor read the plaintiff’s deposition transcript.

d. **Burns v. Baylor Health Care System**, 125 S.W.3d 589, 593(4) (TX Ct. App. 2003) (applying a Daubert-type standard): held that Plaintiff’s expert qualified to testify. Plaintiff brought a premises liability action alleging that Plaintiff’s fall was caused by the same coloring on the Defendant’s garage floor and curb, which created an optical illusion that no curb was there. The witness’s qualifications included: (1) that he owned and consulted with an Engineering Consulting firm; (2) he held a Bachelor’s degree in Industrial Engineering; (3) he held a Master’s degree in Safety Engineering; (4) he was a board certified safety professional; and (5) he had extensive work related to safety engineering.

e. **Kraft v. Ezo-Groten, USA, Inc.**, 2002 WL 31769242, *3 (Tenn. Ct. App. 2002): Plaintiff became injured when she traversed the front steps of a restaurant. The first six risers measured six inches high while the top riser measured 7 inches. Court held expert qualified to give part of his opinion (that because of the inconsistencies in the steps, a person cannot establish a rhythm from one riser to the next) where the witness was an experienced architect that had designed hotels, restaurants, office buildings, and shopping centers. Pedestrian flow is an essential part of the designing of these types of structures.

f. **Reliable Consultants, Inc v. Jaquez**, 25 S.W.3d 336, 345(6) (TX Ct. App. 2000) (Daubert-type statute): Held witness qualified as an expert in a premises liability case where a customer fell from the raised area in the store when she failed to notice the step. The witness (1) had at least 20 years professional experience working as a property inspector and loss control consultant; (2) often made health and safety recommendations; (3) was certified and qualified as a field safety expert; and (4) constantly took examinations to stay current on his field safety certifications. Accordingly, the witness could testify about this possible trip and fall hazard.
g. Allison v. Nibco, Inc., 2003 WL 25685229, *3 (E.D.Tex. 2003) held plaintiff’s witness qualified as a safety expert where the witness was a safety consultant for 29 years, he was a member of several safety engineering groups, and was an Accredited OSHA instructor.

h. Couch v. Astec Ind., Inc., 132 N.M. 631, 635 53 P.3d 398, 402 (NM Ct. App. 2002): held witness qualified as a safety expert. Witness had a master’s degree in occupational safety and health; he worked as a safety expert in the field of safety analysis, which included analyzing work place injuries and determining ways of controlling hazards; as well as he researched, published, and taught in the area.

B. Third Party Criminal Acts:

a. Rogers v. DE State Univ., 2007 WL 625060, *2-*3 (DE 2007): First, held that the witness qualified as an expert on security; his qualifications included: over 40 years working as the director security for corporations, a director of public safety for universities, and serving as a police offer; a masters in criminal justice and his bachelor’s in police administration; and a certification as a protection professional. Second, the witness’s testimony is reliable. The witness examined the university’s reported crime and incident data and the current University security program. There, the plaintiff, a student at Delaware state, received a housing assignment to an off-campus Inn because the lack of available housing on campus. While sitting in his car in the Inn’s parking lot, Plaintiff was shot.

C. Dram Shop Cases: How to Qualify a Witness in a Dram Shop Case:

a. Education:

A witness that qualifies as an expert in toxicology or chemistry via education will probably have a bachelor’s degree in either field and maybe even a masters or PhD in forensic science or chemistry. See O.C.C.A. § 24-9-67.1; Jenkins v. State, 253 Ga. App. 8, 9, 557 S.E.2d 470, 472 (Ct. App. 2001); Colon v. The State, 256 Ga. App. 505, 568 S.E.2d 811 (Ct. App. 2002). Additionally, a witness can also take pharmacology classes, where

b. Training:

A witness may qualify as an expert in toxicology or chemistry by completing training with the GBI on the pharmacology of drugs and alcohol. See O.C.C.A. § 24-9-67.1; Jenkins v. State, 253 Ga. App. 8, 9, 557 S.E.2d 470, 472 (Ct. App. 2001).

c. Knowledge or Experience:

The statute provides that a witness can qualify as an expert by either knowledge or experience. O.C.G.A. § 24-9-67.1(b). Because through experience a witness acquires knowledge, these elements will be addressed in the same section.

A witness may qualify as expert through his/her knowledge or experience by working for a number of years serving as a researcher for the state crime lab. See O.C.C.A. § 24-9-67.1; Colon v. The State, 256 Ga. App. 505, 568 S.E.2d 811 (Ct. App. 2002). Also, through this experience, if the researcher publishes a number of articles in this area, this may be enough to qualify as an expert. See O.C.C.A. § 24-9-67.1(b); Colon v. The State, 256 Ga. App. 505, 568 S.E.2d 811 (Ct. App. 2002).

d. Reliable methods:

When a witness plans to testify about the reliability of a BAC test, the witness probably needs to use a method approved by the Georgia Bureau of Investigation, Department of Forensics. See O.C.C.A. § 24-9-67.1(b); Colon v. The State, 256 Ga. App. 505, 568 S.E.2d 811 (Ct. App. 2002).

e. Other Jurisdictions:

Evans v. Toyota Motor Corp., 2005 WL 3844071, *3 (S.D. TX 2005): held under Daubert the Plaintiff’s toxicologist qualified where the witness authored and coauthored numerous publications, has been a toxicologist for over 30 years, was the Chief Toxicologist at the Southwestern Institute for
12 years, and had been on the editorial board of four different journals dealing with toxicology and forensic science.

*Com. v. Senior*, 433 Mass. 453, 458-462 744 N.E.2d 614, 619-620 (Mass. 2001): held retrograde extrapolation evidence reliable; this theory determines a person’s blood alcohol level at the time of the incident. The court reasoned that general acceptance in the scientific community is just one factor to be used. A proponent of expert evidence can prove reliability by showing whether the theory has been or can be tested and whether the theory has been subject to peer review and publication. Accordingly, by assessing the proffered testimony, the court held the theory reliable and admissible.
PITFALLS ENCOUNTERED BY PLAINTIFF AND DEFENSE COUNSEL

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I. INTRODUCTION

Upon first glance, premises liability litigation seems basic. However, due to the myriad of ways that premises liability claims can arise and the fact patterns associated with them, maneuvering around these issues can be difficult.

II. THE HISTORY OF SLIP AND FALL LAW IN GEORGIA

Long before the Georgia Supreme Court pronounced its ruling in Robinson v. Kroger, 268 Ga. 735, 493 S.E.2d 403 (1997), there was a different law in this state. Alterman Foods v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980) ruled the day. The Georgia Supreme Court’s 1980 decision in Alterman Foods established the first true criteria for slip and fall litigation. Under the Alterman Foods test, the plaintiff was required to show: (1) that the defendant had actual or constructive knowledge of the foreign substance; and (2) that the plaintiff was without knowledge of the substance or for some reason attributable to the defendant was prevented from discovering the foreign substance. This pronouncement by the Georgia Supreme Court in 1980 set off a litany of motions for summary judgments that contended that the plaintiff’s case failed as a matter of law because the plaintiff failed to exercise ordinary care for her own safety or because the proprietor did not have actual or constructive knowledge of the foreign substance.

For the next 17 years, the Georgia Court of Appeals dealt with thousands of slip and fall cases where a plaintiff was appealing the trial court’s grant of summary judgment to the defendant. In 1991, the Georgia Court of Appeals ruled on the case of Smith v. Wal-Mart Store, 199 Ga.App. 808, 406 S.E.2d 234 (1991). In Smith, the Georgia Court of Appeals ruled that if the plaintiff admitted that he could have seen the substance in which he slipped, had he just looked down prior to his fall, that plaintiff was bounced on summary judgment.
If we step out of the legal context for a moment and think about a fictional plaintiff who steps in a puddle of water on a grocery store floor and falls. Can any of us in this room give sworn testimony that you could not have seen the puddle of water in which you stepped now that you are sitting in the puddle of water? Simply put, every person who slips and falls is ultimately able to discern what it was that caused them to fall as they sit in it. As such, truthful plaintiffs in the early 1990’s would admit that they did not look down at the floor immediately prior to their fall – as not many people do. Additionally, the truthful plaintiff would admit that as they were sitting in the puddle of water, they were able to see the puddle of water on the floor. In the early 1990’s this equaled a win for the defendant. It got to a point in 1996 when virtually every Court of Appeals’ opinion pertaining to a slip and fall case would call for the Georgia Supreme Court to deal with the apparent problem with status of slip and fall law.

Finally, in 1997 the Georgia Supreme Court took up the case of Robinson v. Kroger in order to evaluate the current status of slip and fall law and determine if it was fair to litigants. Some thought that Alterman Foods test should be thrown out altogether and a rule of comparative negligence be inserted in its place. (See Justice Hunstein’s dissent in Robinson v. Kroger.) This would have all but eliminated the ability to file a motion for summary judgment in a slip and fall case. Fortunately for us litigators, the Georgia Supreme Court did not throw out the Alterman Foods test in the Robinson v. Kroger decision. Rather, the Georgia Supreme Court tinkered with the 1980 Georgia Supreme Court ruling in Alterman Foods and gave Judges and attorneys alike a tutorial on what was required to establish a proper slip and fall case.

Shortly after the decision by the Georgia Supreme Court in Robinson v. Kroger, many attorneys believed that summary judgment would never be granted again in a slip and fall case. Once the dust settled, however, everyone recognized that the Georgia Supreme Court in Robinson v.
Kroger kept the Altermans Foods test alive and well. The Georgia Supreme Court did discourage trial court judges from ruling that a plaintiff failed to exercise ordinary care as a matter of law simply because the Plaintiff admitted that he could have seen the hazard had he just looked down. The Georgia Supreme Court in Robinson v. Kroger basically stated that this issue was most often a jury question and was hard to be determined at summary judgment.

Importantly, the Georgia Supreme Court in Robinson v. Kroger did not state that there was no way that a Defendant could prove that the plaintiff failed to exercise ordinary care. In this regard, the Georgia Supreme Court held that a defendant could still prevail on summary judgment arguing the plaintiff’s failure to exercise ordinary care where the plaintiff intentionally and unreasonably exposed self to a hazard of which the plaintiff knew or, in the exercise of ordinary care, should have known. Cases since Robinson v. Kroger that have granted summary judgment based on plaintiff’s equal knowledge of the hazard are Dickerson v. Guest Services, 279 Ga.App. 753, 632, S.E.2d 416 (2006) (where the Georgia Court of Appeals held that a pedestrian who was a licensee had equal knowledge of the pothole because the Plaintiff had admitted that she was aware of potholes in the parking area, having seen them in the past on her many visits to the business area, previously parked in the same parking space where her fall occurred and that nothing obstructed her view of potholes in that area); Means v. Marshalls, 243 Ga.App. 419, 532 S.E.2d 740 (2000) (where the Georgia Court of Appeals held that plaintiff’s admission that she had actual knowledge of the debris in plain view on the floor before her fall precluded her from recovering for her injuries); and Hall v. J.H. Harvey Company, 242 Ga.App. 315, 529 S.E.2d 444 (2000) (where the Georgia Court of Appeals held that plaintiff was barred from recovery because she had equal knowledge of the hazard by testifying that she pushed her grocery cart around boxes in order to get to the butter and eggs. While placing the butter in her cart, she fell over the box she had previously stepped around.)
After Robinson, most defendants realized that the best way to get summary judgment was to argue that the proprietor did not have actual or constructive knowledge of the hazardous condition which caused the plaintiff to fall. This method for obtaining summary judgment was very successful after Robinson in light of the fact that the Robinson decision did not impact this prong of the Alterman Foods test.

Unfortunately, this run by the defense was restricted in 1998 with a whole Court of Appeals decision in Straughter v. JH Harvey, 232 Ga.App. 29, 500 S.E.2d 353 (1998). In this case, a ten judge panel affirmed the denial of summary judgment to the defendant, holding that a presumption of constructive knowledge arises where defendant cannot come forward with evidence of an inspection procedure. Justice Andrews dissented and argued that the Court of Appeals was changing the law of the State of Georgia without the Supreme Court’s approval. Since the Georgia Supreme Court’s decision in Lau’s Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991) was not being disturbed by the Robinson decision, Judge Andrews stated that requiring a defendant to come forward with affirmative evidence of an inspection procedure was inconsistent with the Georgia Supreme Court’s decision in Lau’s Corp. v. Haskins (where the Georgia Supreme Court ruled that a defendant on a motion for summary judgment need not produce affirmative evidence to disprove the plaintiff’s case.)

The pendulum has not yet swung back. Not much has changed since the Supreme Court’s decision in 1997 in Robinson v. Kroger. It is still tough for a defendant to obtain a summary judgment if that defendant is arguing that the plaintiff failed to exercise ordinary care for his or her own safety. If trying to win on this prong of the Alterman Foods test, it might be best to argue that the plaintiff had equal knowledge of the hazard instead of arguing that plaintiff failed to exercise ordinary care. The Court of Appeal’s decision in Straughter in 1998 further limited a defendant’s
ability to obtain summary judgment if a defendant is arguing no actual or constructive knowledge. Again, not much has changed. The Court of Appeals is still requiring defendants to produce affirmative evidence of an inspection procedure in order to prevail on this prong of Alterman Foods test.

Looking to the future, it will be interesting to see if the Georgia Supreme Court will review another slip and fall case to determine if the Court of Appeals decision in Straughter is inconsistent with Georgia Supreme Court’s decision in Lau’s Corp. Otherwise, defendants need to keep producing affidavits confirming compliance with inspection procedures if they want to prevail on this prong of the Alterman Foods test.

III. DISCOVERY

In light of the Georgia Supreme Court’s decision in Robinson v. Kroger, which requires that a defendant in a slip and fall case produce affirmative evidence of the existence of inspection procedures that were followed prior to the plaintiff’s injury, many proprietors have put in place inspection procedures which require their employees to conduct inspections on a periodic basis and to document said inspections. This allows the proprietor to defend the claim at summary judgment on the grounds that the proprietor had no actual or constructive knowledge of the hazard at the time of the plaintiff’s injury. While these procedures can be helpful to defendants in premises liability claims, these very same procedures can be of particular benefit to plaintiff’s counsel. Specifically, employees of the proprietors do not abide by the strict letter of the inspection procedures. Often inspections do not take place as timely as they are required or are not documented.

During discovery, both plaintiff and defense counsel should be particularly familiar with the inspection procedures promulgated by the proprietor and any evidence that the inspection procedures were adhered to.
IV.  NEW TORT REFORM

Based on Georgia’s tort reform of 2005, parties can request that the court have the jury determine the percentage of fault of non-parties in causing the plaintiff’s injury in a premises liability claim. O.C.G.A. § 51-12-33(c) There is a 120-day statutory notice requirement if counsel is going to use this provision. As such, make sure that your notice is timely and that you conduct the appropriate discovery to substantiate blaming other non-parties. For plaintiff’s counsel, it is important to put into their game plan a method in which to defend an assertion that other non-parties are responsible for the plaintiff’s injuries.

V.  SPOLIATION

In this day of video cameras and computers, the possibility that the accident or some piece of evidence involving the accident was recorded or placed on a computer is extremely high. Courts have become very serious about the spoliation issue. (See Bridgestone/Firestone v. Campbell, 258 Ga.App. 769 (2002); Baxley v. Hakiel Industries, 282 Ga. 312 (2007)). It has become the strategy of certain counsel to open the opposing party up to discovery violations. If evidence is lost or destroyed, your opponent can seek an order striking the answer of the defendant or to have the spoliation charge read to the jury.

Both plaintiff and defense counsel alike should be very aware of the possibility of video evidence or computer stored evidence, and should take affirmative steps early on in the litigation in order to procure these items.

VI.  DUTY TO EXERCISE REASONABLE CARE TO KEEP THE PREMISES SAFE/EQUAL KNOWLEDGE

One of the tough principles to understand in the premises liability field is the dance between the proprietors’ duty to exercise ordinary care to keep the premises safe and the plaintiff’s inability to recover if the plaintiff has equal knowledge of the hazard which caused the fall. It is important to
remember that a proprietor is not the insurer of the customer’s safety, and, thus, is not required to repair every hazardous condition existing on the property. However, the proprietor will be responsible for injury to any plaintiff who comes upon the property as an invitee and has less knowledge of the hazardous condition than the proprietor.

A recent trend with defendants in premises liability claims is to assert that the plaintiff had equal knowledge of the hazardous condition, and, thus, is barred from recovery. This argument has gained favor over the argument that the plaintiff failed to exercise ordinary care for his/her own safety. After Robinson, trial courts have been less likely to grant summary judgment where the defendant is arguing that the plaintiff failed to exercise ordinary care for his/her own safety. However, the courts have been more inclined to grant summary judgment where it is established that the plaintiff had equal knowledge of the hazardous condition. (See Mears v. Marshalls, 243 Ga.App. 419, 532 S.E.2d 740 (2000)).

As such, the plaintiff and defendant should prepare during depositions to ask/respond to these questions appropriately. Plaintiff’s counsel should prepare their client for the equal knowledge questions just as thoroughly as plaintiff’s counsel generally prepare their client for questions regarding the failure to exercise ordinary care.
ESTABLISHING DAMAGES IN A PREMISES CASE
HOW TO RECONCILE AND DEAL WITH GEORGIA’S APPORTIONMENT STATUTE

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**A. DEFENDANT'S LIABILITY FOR COMPENSATORY DAMAGES**

Criminal attacks, including assault, battery, and sexual attack, involve severe psychological and emotional injury to victims. These claims are a species of mental pain and suffering. And as with all pain and suffering claims where there is the absence of blood and broken bones, there is the difficulty of proving what cannot be seen.

Giving substance to these injuries that is comprehensible to a jury is the purpose of proving psychological damages. Damages in sexual assault actions are difficult to assess, and judgments have been rendered ranging from a few thousand dollars if any, to in excess of a million dollars in compensatory damages.

Rape is one of the fastest growing crimes with experts estimating that from one in four to one in six women will be raped at some time in their lifetime. Victims of sexual assault for the most part have only recently begun to seek redress through the court system.

These cases are complicated by the fact that victims of sexual assault frequently experience extensive shame, guilt, and a desire to conceal the assault, fearing adverse reaction from family, friends and others. Certainly, the legal proceeding itself is highly
stressful emotionally by subjecting the victim to re-experience of the attack. However, changing societal attitudes concerning sexual assault and the diminishing of women's inhibitions about declaring their abuse supports a trend for this type of litigation.

1. Legal Standards

Certainly, mental pain and anxiety is a proper element of damages for pain and suffering any time there is a physical impact or injury caused by negligence or other tort. See Chambley v. Apple Restaurants, Inc., 233 Ga. App. 498 (1998). Mental pain and anxiety includes fright, shock, anxiety, and all mental suffering. Although more difficult to show where there is no physical disfigurement or disability, there can be no question that a person suffers from the unseen mental and emotional trauma of being assaulted.

The measure of mental pain and suffering is the enlightened conscience of fair and impartial jurors. O.C.G.A. § 51-12-12; Atlanta Transit System v. Robinson, 134 Ga. App. 170 (1985). The trial court should charge the jury that questions of whether, how much, and how long plaintiff has suffered or will suffer are for the jury to decide. Redd v. Peters, 100 Ga. App. 316 (1959). Remember to prove permancy and submit the mortality table into evidence. See O.C.G.A. § 24-4-45 and mortality table.


An important aspect of emotional and mental pain and suffering is the existence of preexisting injuries. This will be discussed in more detail below. It is a standard charge to the jury that a plaintiff may not recover for injuries that are not connected with the acts of the defendant. On the other hand, the acts of the defendant that result in

2. The Impact Rule Applied To Criminal Attacks

The Court of Appeals, in the context of premises liability and criminal attacks, has addressed the impact rule, that requires a physical injury to support emotional damages. Intruders bashed in an apartment door, terrorized a mother and her children, grabbed the mother's hair and threatened her with a gun. Jordan v. Atlanta Affordable Housing Fund, Ltd., 230 Ga. App. 734 (1998). The evidence showed serious emotional harm to the children. The Court held that damages were recoverable and summary judgment must be denied as to the mother as she suffered injury to her scalp and this physical injury allowed recovery for emotional injury. But summary judgment must be granted against the children as they suffered no physical contact or impact. The Court noted an exception to the rule if a defendant acted toward a plaintiff with specific intent, or reckless and wanton disregard. The Court held that there was evidence of such intent by the intruders but there was no evidence to show such intent by the defendant landlord's agents that was directed specifically to the children. Also, see Owens v. Gateway Management Co., 227 Ga. App. 815 (1997).

As to another possible exception, where emotional injury led to physical impairment, the Court found this to be very narrow, if not entirely abrogated. Id., p. 739.

3. Elements of Psychological Injury

Psychological and emotional injury caused by a criminal attack can be profound. The pain of being abused and assaulted is exacerbated by the fact that the perpetrator is intentionally causing the harm and showing absolutely no regard for the victim. Injuries can be long lasting and difficult to treat. Victims may chronically suffer from depression,
anxiety and hyper alertness, with irritability, mood swings, nightmares, insomnia and flashbacks of the attack. Such chronic mental suffering impacts every aspect of a victim's life. They impair the ability to work, to get along with family and others, and fundamentally impair the ability to enjoy life. There maybe a specific fear of certain circumstances, certain places, and certain types of people. None of this inner turmoil can be seen by a juror.

Victims of sexual assault suffer a variety of psychological manifestations. They suffer embarrassment, humiliation, feelings of powerlessness and vulnerability, shame, disgrace, indignity and degradation. The attack has subjected them to grief, terror, shock, fear, anxiety, disgust, apprehension and worry. Specific and well founded fears of pregnancy, venereal disease, and AIDS substantially add to mental suffering. There may be sleep disturbances including nightmares and insomnia as well as depression, phobias and neurosis. Victims may suffer personality changes, moodiness, irritability, deterioration of personal relationships and the inability to have sexual relations.

4. Sources of Proof

Proof of psychological injury comes from three primary sources. First, a plaintiff must describe the horror of the attack, and then give a detailed description of his/her life before and after the attack. The second area of testimony comes from family, friends and acquaintances to substantiate plaintiff's story. And third, experts may give medical descriptions of the validity of the injury suffered, its recognition by medical professionals, and the probable prognosis.
5. Fear and Apprehension

Fear and apprehension result from virtually every sexual attack. Detailed testimony by a plaintiff of the circumstances and her feelings at the time and subsequently is of great importance. All events of reporting the case to police and family members, and medical examinations should be described in detail. As to the attack itself, there is great difficulty and likelihood that the plaintiff may block out portions of the event, or if she recalls it, may describe it with a flat and disassociated testimony, with which a jury may find difficult to empathize. Attempts to authenticate and reconstruct the details of the attack maybe made through police reports, hospital records, and other evidence.

Specific fears that may develop in the long term include fear of being alone, and a constant feeling of not being safe. Victims may be fearful of strangers, and be fearful of specific persons who have some resemblance by race, age, hair style and so forth to her attacker. Any situations with some connection to the situation of the attack may evoke great fear and apprehension.

Victims frequently have an exaggerated startle response for a period of time, and a victim will react as if there was a great deal of danger in a situation where there is none. Such instances should be apparent to friends and family who are close to the victim.

6. Anxiety

Anxiety and worry may be manifested by physical symptoms including dizziness, light headedness, various body pains, restlessness, worrying and ruminating, difficulty in concentrating and insomnia. There may be general feelings of anxiety, as well as specific anxiety as to the dangers of pregnancy, venereal disease and AIDS. Certainly,
actual contraction of these diseases substantially increase the injuries suffered by the victim. Pregnancy may lead to anti-pregnancy medication, abortion or the birth of a child from such a horrifying event. Worrying and anxiety may actually impair a victim's ability to work or care for her family.

7. Shame and Humiliation

In spite of their clear status as a victim, many women may experience feelings of humiliation and shame. Certainly, there is a societal element of placing blame on a sexual victim. In premises liability cases, the victim and perpetrator are generally strangers and this factor is much diminished, but a victim nevertheless suffers this type of mental distress. A detailed description of the events should certainly convince any judge or jury that sexual assault is not motivated by any true sexual desire but is based upon intent to brutalize, humiliate and degrade.

A victim's family and friends may react variously, sometimes supporting and other times withdrawing from the victim or abandoning her. Such response further causes injury.

8. Damage to Family and Friends

A natural response to sexual assault is the inability to enjoy sexual relations. Certainly, there is serious impact upon the full spectrum of the relationship with one's husband. There are statistics that eighty percent of primary relationships terminate within a year of a rape.

9. Post-Traumatic Stress Syndrome and Rape Trauma Syndrome

Psychiatrists and other emotional and psychological counselors diagnose psychological injuries and conditions pursuant to the criteria of the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th Ed.
(1994), commonly referred to as DSM-IV. A common disorder suffered by rape victims is post-traumatic stress disorder, which is found at Item 309.81 of the DSM-IV. This disorder arises from highly psychologically stressful events that are outside common experiences and the trauma of rape or assault is specifically viewed as a causing event. Review of the criteria discusses those types of injury that have been discussed herein. This condition frequently does not arise until some months after the traumatic event. See "Post-Traumatic Stress Disorder: Litigation Strategies", Trial Magazine, September 2000.

Other psychological aspects include loss of self confidence and intense anger. This anger may be directed at family, coworkers and any persons in general. Other victims suffer emotional detachment. It is common for victims to suffer from intrusive recollection of the incident or terrifying flashbacks.

10. Use Of Experts

A plaintiff suffering psychological disorders has a more difficult task in presenting experts as many jurors may hold psychiatrists and psychologists in low self-esteem. They may view counseling and therapy as merely "talking about personal problems", instead of specific clinical injury and treatment.

It cannot be overstated that the importance that one's experts not look remotely like an off-the-wall character sporting a Sigmund Freud beard or other unconventional appearance. It is important that a victim's injury be discussed with medical terminology, but such terminology must be made comprehensible to the average person.

Specific experts may include rape crises professionals, police officers, particularly sex crime detectives, medical doctors who examined the victim, and a psychiatrist, psychologist or social worker who provides counseling and therapy over a period of time.
with the victim.

Special effort and attention must be made to overcome many people's distrust of psychiatric witnesses by careful voir dire, opening statement, and qualification of the expert. The soundness of the diagnosis and the connection of the injury to the attack must be carefully addressed.

11. Prior Condition: An Issue of Causation Or Character Assassination?

In defense of psychological injury claims, defense attorneys frequently make discovery inquiry and stress preexisting problems in a plaintiff’s life. See Cook v. Partain, 224 Ga. App. 251 (1997). There is really no end to finding other parties or conditions to be blamed for what has happened in a plaintiff’s life. Although it is certainly arguable that conditions may be preexisting, or caused by other events, the line between causation and character assassination is vague.

This issue must be addressed firmly from the early interviews of the plaintiff all the way through the trial. All prior conditions should be brought out from your client, disclosed to opposing counsel, and first addressed to the jury by plaintiff. The problems should be described, explained, and distinguished from the injury at issue. A careful examination of preexisting conditions and the extent of problems and the existence of other problems after the injury should be carefully compared so that a rational connection of the attack to the injury suffered may be shown.

It is always to be remembered that a victim with existing problems is subject to the "thin skull" concept of a wrong-doer who takes his victim as found. Multiple causation is frequently involved and wrong doers must be held fully responsible for the consequences of their misconduct.

For instance, for a plaintiff who has suffered depression prior to the attack and
may have undergone psychological therapy, counsel should demonstrate that the attack changed plaintiffs symptoms and abilities for the worse. Expert testimony in such circumstances can be very important in showing that the symptoms of sexual assault and are distinguished from general depression with other symptoms.

Demonstrating psychological injury to recover actual dollars is a substantial challenge to any plaintiff’s attorney. However, focusing upon the details and issues can convey to a jury the horror suffered by such a victim and result in a substantial verdict.

B. DEFENDANT'S LIABILITY FOR PUNITIVE DAMAGES

The Courts have addressed exemplary or punitive damages in the context of premises liability and criminal attacks. See TGM Ashley Lakes, Inc. v. Jennings, Supra. for a good analysis.

Georgia law provides:

"Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that a defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to the consequences." O.C.G.A. § 51-12-5.1(b).

Where there is some evidence to support conscious indifference to the consequence, the courts have clearly held that punitive damages may be recovered. Such is a matter for the jury. Read v. Benedict, 200 Ga. App. 4, 7 (1991).

In one case, an apartment tenant was raped and she had been the victim of a prior robbery and assault. This constituted notice to defendant and the issue of punitive damages could proceed to a jury as the landlord had taken no action after notice of the prior attack. Doe v. Briargate Apartments, Inc., Supra. In another decision, the landlord of a shopping center, K-Mart, had knowledge of prior crimes, and provided security to K-Mart employees, but not to its tenant Cub Foods and its customers, and this could be
found to show conscious indifference to the consequences. Carlock v. Kmart Corp., Supra.

In FPI Atlanta, Supra at 886, the Court ruled there was evidence of conscious indifference. Defendants had security patrols that "merely exhibited a physical presence but took no active security measures to protect tenants." Thus, a jury should determine punitive damages.

Punitive damages were found not appropriate where a woman was brutally attacked at a hotel lobby entrance, but there was insufficient evidence to support punitive damages, as the innkeeper provided security on weekends, as that was when there were the most problems, and it had taken other action to address crime, even though it had no security during the week. Roberts v. Forte Hotels, Inc., 227 Ga. App. 471 (1997). See also the Court of Appeals decision in Walker v. Sturbridge Partners, Ltd., 221 Ga. App. 36 (1996).

In Colonial Pipeline Company v. Brown, 258 Ga. 115 (1988), the Supreme Court ruled that the first step in the analysis was to separate claims for personal injury from claims for property damages. The Court stated that the second step was to determine if there was any willful misconduct, malice, fraud, wantonness, oppression or other conduct demonstrating an entire want of care that would raise the presumption of conscious indifference to the consequences. Id. The evidence shows this element is met.

A defendant's reckless indifference to a continuing or repeated problem is sufficient to support an award of exemplary damages. In Crow v. Evans, 183 Ga. App. 581 (1987), a plaintiff was injured when an apartment bathroom floor collapsed. The court found that indication of prior plumbing problems, and another fall through a bathroom floor was sufficient to show aggravating circumstances.
In McWilliams v. Hayes, 190 Ga. App. 709 (1989), the court found an award to be appropriate where children were harmed by unsanitary conditions in an apartment where there was evidence that such condition was nothing new. Similarly, in the case at bar, said Defendants and their agents had specific notice of the condition at the Shopping Center and on the Premises.

In Windermere, Ltd. v. Bettes, 211 Ga. App. 177 (1993), the Court of Appeals affirmed a jury award for compensatory and punitive damages to tenants in a tort action for personal injury and property damage when fire destroyed their home in a residential apartment building. The Court of Appeals held that the failure of the landlord to comply with safety requirements for providing isolated exits from fire justified an award for punitive damages, "[a] landlord cannot avoid duties created by housing codes, building codes, or other regulatory provisions affecting the safety of the premises." 211 Ga. App. at 178.

The Court held that the failure to comply with duties created by housing codes, building codes, or any other regulatory provision affecting the safety of the premises demonstrated that entire want of care evidencing conscious indifference to the consequences:

"Although the landlord vigorously contested the applicability of the fire and building exit codes and denied that the building was in violation of any provision thereunder, the evidence on these issues was in conflict and ultimately was a jury issue."
C. O.C.G.A. § 51-12-33
Impact of Tort Reform (2005 Senate Bill 3)

Introduction

In a premises liability case where a third party causes injury or death to an invitee, the issues arise whether O.C.G.A. § 51-12-33, as amended in 2005, can be interpreted to allow a defendant to rely on the ostensible fault of persons other than itself who committed the criminal act.

In the alternative, to the extent the statute does allow such a defense, a plaintiff must challenge whether O.C.G.A. § 51-12-33 is unconstitutional as written or applied.

1. History of Joint Liability

Common Law

The concept of joint liability dates back to England almost 400 years ago. Originally, joint liability applied where there was a concert of action or breach of a common duty by tortfeasors, "all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present." Sir John Heydon's Case, 77 Eng. Rep. 1150, 1151 (1613). Initially, the rule was applied strictly, and the plaintiff was limited to bringing a single action against only one of the tortfeasors even where two tortfeasors acted independently to create one indivisible injury; this led to untenable results. W. PAGE KEETON, ETAL., PROSSER AND KEETON ON THE LAW OF TORTS § 47 at 325 (5th Ed. 1984).

Although American courts followed the English rule initially, the States adopted a more practical approach over time. After the Virginia Supreme Court held that joint liability included cases involving multiple tortfeasors whose actions or inactions
combined to cause an indivisible injury in *Carolina, Clinchfield & Ohio Ry. Co. v. Hill*, 89 S.E. 901 (Va. 1916), the Georgia Court of Appeals followed suit two years later in the case of *Bonner v. Standard Oil Co.*, 22 Ga. App. 532, 96 S.E. 573 (1918), stating that "the principle of law is well settled that, where two concurrent causes operate in causing an injury, there can be a recovery against both or either one of the parties responsible for the concurrent causes." (Emphasis added).

Significantly, it was improper to apportion liability or damages among joint tortfeasors because they were said to be jointly and severally liable. *MARTA v. Tuck*, 163 Ga. App. 132, 137, 292 S.E.2d 878 (1982). Further, it was improper to consider the fault of non-parties. *Schriever v. Maddox*, 259 Ga. App. 558, 561, 578 S.E.2d 210 (2003). However, a party who perceives that it has been required to pay more than its "share" has always had the right to seek contribution from another party at "fault." Still, to do so, it must be established that the other party was "jointly" responsible for the injury. The common law rule was that one cannot apportion compensatory damages as far as the injured victim was concerned. Georgia followed that rule until the 2005 passage of SB3 and the changes it made to O.C.G.A. §§ 51-12-31 and 33.

**Georgia's Joint Liability Statutes**

Georgia's codification of joint and several liability and contribution among jointly liable defendants found at O.C.G.A. §§ 51-12-31 through 33, was significantly altered in 2005.¹ This was ostensibly done to eliminate the common law that preceded the founding of this Country. The 2005 Amendment changed O.C.G.A. § 51-12-31 as follows:

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¹ O.C.G.A. § 51-12-32, which provides for contribution between or among joint tortfeasors, was not amended.
Except as provided in Code Section 51-12-33, where an action is brought jointly against several trespassers persons, the plaintiff may recover damages for the greatest injury done an injury caused by any of the defendants against all of them only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

The 2005 Legislature also significantly altered O.C.G.A. § 51-12-33 which now provides:

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

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

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of 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 non-party 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 non-party 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 non-party 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 non-parties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against non-parties pursuant to this Code section, findings of fault shall not subject non-party 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. (Emphasis added)

**O.C.G.A.§ 51-12-33 Does Not Allow Apportionment Between Negligence and Intentional Acts**

1. **Apportionment of Damages Between Defendant and Non-Parties**

   If the egregious criminal behavior was foreseeable to a defendant, it had a legal duty to take reasonable steps to prevent it. *FPI Atlanta, Ltd v. Seaton*, 240 Ga. App. 880 (1999) ("The duty to guard against injury from dangerous characters arises when `the [landlord] has reason to anticipate a criminal act,' from prior experience with substantially similar types of crimes.")

   It is no defense for a defendant to blame non-parties for their criminal acts. Nothing in the 2005 tort reform bill changes the longstanding rule of law. Since defendant started the chain of events which would not have occurred but for its original negligence, it is liable for all of the harm that resulted from its negligence as the original wrongdoer. Apportionment, even if authorized in this case, would not reduce its liability since it is responsible for the entire amount.
addresses and answers the issue that a defendant cannot seek apportionment from the intentional acts perpetrated on its invitee:

§ 14. Tortfeasors Liable for Failure to Protect the Plaintiff from the Specific Risk of an Intentional Tort

A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.

Comment:

a. Scope. The rule in this Section applies only when a person is negligent because of the failure to take reasonable precautions to protect against the specific risk created by an intentional tortfeasor. Negligence (or strict liability) is determined in accordance with governing rules about tortuous conduct, but this Section only applies if the risk that makes the tortfeasor negligent or strictly liable is the failure to take precautions against an intentional tort. When a person’s unrelated tortious conduct and an intentional tortfeasor’s acts concur to cause harm to another, the rules of joint and several liability provided in the applicable Track (A-E) govern. For reasons explained in Comment b, this Section is limited to instances in which the person is liable because of the risk of an intentional tort and does not extend to duties to protect against another’s negligence. This Section does not determine when a party who fails to protect against the risk of an intentional tort is liable for failing to do so. Rather, the rule in this Section applies only when the governing law provides for such liability.

(See attached Exhibit "B")

In Strahin v. Cleavenger, 216 W.Va. 175, 603 S.E. 2d 197 (2004), the West Virginia Supreme Court disapproved apportionment and recognized that joint and several liability applies to situations in which both a negligent actor and an intentional

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2 Apportionment statutes across the nation fall with one of five different "Tracks" depending on the variations in their language. The apportionment statute like the one we have here in Georgia is found in Track B.
actor bear responsibility for the injury incurred. Evidence was presented that a shooting resulted from a strained personal relationship, a love triangle. The jury returned a verdict for plaintiff, apportioning thirty percent liability to the landowner based on negligence and seventy percent liability to the intentional actor. The lower court, through its judgment order, directed the landowner to pay the entire amount of the verdict based upon the doctrine of joint and several liability. On appeal, the court held:

We simply cannot agree with such a myopic reading of [appellants'] cases, especially since the cases did not involve a combination of intentional and negligent acts. (fn9) We find Appellee’s direction to Restatement (Third) of Torts § 14 (1999) far more apposite to our deliberations considering the facts in the case before us. Said authority provides:

A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.

Moreover, "[i]t is not necessary that an original wrongdoer shall anticipate or foresee the details of a possible injury that may result from [its] negligence. It is sufficient if [it] should anticipate from the nature and character of the negligent act committed by [it] that injury might result as a natural and reasonable consequence of [it's] negligence. `In order that a party may be held liable in negligence, it is not necessary that [it] should have been contemplated or even been able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient, if, by exercise of reasonable care, the defendant might have foreseen that some injury would result from [its] act or omission, or that consequences of a generally injurious nature might have been expected.'" (Punctuation and citations omitted.)

Coleman v. Atlanta Obstetrics, etc., 194 Ga. App. 508, 510(1) (1990), affd, Atlanta

Compelling public policy reasons support this position. If a defendant is allowed to compare its negligence with the violent intentional criminal conduct of the assailant(s), it would be able to diminish or defeat its liability by shifting it to the very intentional actor(s) whose conduct it had a duty to prevent. Slawson v. Fast Food Enterprises, 671 So. 2d 255, at 258 (Fla. 1996) (it is a perverse and irreconcilable anomaly for the property owner to owe a duty to protect a patron from foreseeable intentional harm and, at the same time, contend it can diminish its liability by transferring it to the intentional wrongdoer); Merrill Crossings v. McDonald, 705 So. 2d 560 (Fla. 1997) (apportionment to unknown assailant not allowed where plaintiff was shot and injured in the parking lot because "the harm was a directly foreseeable result of [defendants'] negligence."); Kansas State Bank & Trust Co. v. Specialized Transp. Services, Inc., 819 P.2d 587, 606 (Kan. 1991) (negligent tortfeasor should not be allowed to reduce its fault by the intentional fault of another that the negligent tortfeasor had a duty to prevent); Gould v. Taco Bell, 722 P.2d 511, 517 (Kan. 1986) (business had a duty to protect its invitees from known danger of criminal assault and could not reduce its fault by intentional act of assailant); Veazey v. Elmwood Plantation Assoc. Ltd., 650 So. 2d 712, 719 (La. 1995) (in an attack victim's negligence case, a comparison of fault between defendant/apartment manager and non-party rapist was not allowed -- manager's duty to victim encompassed the exact risk of occurrence which caused damage to plaintiff); Bach v. Florida R/S, Inc., 838 F. Supp. 559, 560-61 (M.D. Fla. 1993) (allocation of fault between intentional and negligent tortfeasors would defeat
cause of action for landlord's failure to provide adequate security). If a property owner is negligently liable for failing to protect its customer and invitee from a criminal attack, it should not be allowed to reduce its responsibility because the foreseeable attack has actually taken place.

If it was a defendant's negligent conduct itself which exposed its invitee to the intentional tort, and but for that conduct, its invitee would not have been harmed, it is neither unfair nor irrational for an innocent victim to collect full damages from a negligent defendant who knew, or should have known, that an injury would be intentionally inflicted and failed in its duty to take reasonable steps to prevent it. Restatement (Second) of the Law of Torts § 433A, Comment i (1965) (certain kinds of harm are incapable of logical division -- when a defendant creates a situation upon which another may later act to cause harm, if the defendant is liable at all, the defendant is liable for the entire indivisible harm).

Moreover, if apportionment of liability were allowed in these circumstances, any rational fact-finder would probably apportion the bulk of liability to the criminal intentional tortfeasor, and the negligent tortfeasor who failed to take reasonable steps to prevent that criminal and intentional tort would be partially or totally insulated from liability. As stated by one court concerning a case where a plaintiff was raped in the garage of her apartment building and she sued her landlord contending inadequate security caused her rape: "... in such a comparison, how can a rapist (or virtually any intentional tortfeasor) not be 100% liable for his actions." Veazey, 660 So. 2d at 719, n.11. Insulating that negligent defendant from liability would serve as a disincentive for that tortfeasor to meet its duty to provide reasonable care to prevent intentional harm from occurring. Restatement (Second) of the Law of Torts § 449, Comment b (1965) ("...
To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.

"... A negligent actor is assessed blame partially upon the degree to which it is foreseeable that his breach of duty will result in harm to the plaintiff. 'Where a reasonable man would believe that a particular result was substantially certain to follow, he will be held in the eyes of the law as though he had intended it.' Spivey v. Battaglia, 258 So. 2d 815, 817 (Fla. 1972). It is not always 100 percent foreseeable that a victim of a breach of some duty will be injured by that breach. On the other hand, a criminal wrongdoer, by the very nature of his criminal act, intends to harm his victim. It is always 100 percent foreseeable that the victim will be harmed by a completed crime.

... The difference between a negligent act and an intentional act such as the crime of rape or assault lies in the mental state of the actor. 'This different-in-kind argument is rooted in the moral culpability involved in intentional acts, which is objectively absent from the mind of a negligent actor.' B. Scott Andrews, Comment, Premises Liability - The Comparison of Fault Between Negligent and Intentional Actors, 55 La. L. Rev. 1149, 1152 (1995). A criminal assailant 'must either desire to bring about the physical results of his act or believe they are substantially certain to follow from his act. Acting with actual desire or with substantial certainty that harm will occur is much different than failing to act as a reasonably prudent person under the circumstances.' Id. at 1159.

The variance in moral culpability is recognized by the criminal justice system, by which the State prosecutes and punishes those accused of crimes that carry elements of intent, or in some cases reckless disregard for the rights of others. Tort law, however, was designed around the principles that 'injuries are to be compensated, and anti-social behavior is to be discouraged.' W. Page Keeton, Prosser and Keeton on the Law of Torts § 1 at 3 (5th ed. 1984). '[T]he duty underlying an action in negligence or strict products liability is to avoid causing, be it by conduct or by product, an unreasonable risk of harm to others within the range of proximate cause foreseeability. These distinct worlds of culpability cannot be reconciled.' Andrews, supra at 1159, (citing Michael B. Gallub, Assessing Culpability in the Law of Torts: A Call for Judicial Scrutiny in Comparing Culpable Conduct Under New York's CPLR 1411, 37 Syracuse L. Rev. 1079, 1112 (1987).
Id. at 944--945 (Jorgenson, J., dissenting). A jury simply cannot logically compare negligent conduct with a criminal and intentional tort, Veazey, 650 So. 2d at 720 (Watson, J., concurring) (the fault of a rapist cannot be compared logically with the negligence of a party that facilitates that crime as appealing as the theoretical concept may be) (Watson, J., concurring).

Other jurisdictions have also determined that there are fundamental differences between intentional and negligent torts which would make it impossible to compare the two. Veazey, 650 So. 2d at 719-720 (intentional torts are fundamentally different than negligent torts and comparisons between the two, in many circumstances, are not possible); Flood v. Southland Corp., 616 N.E.2d 1068, 1071 (Mass. 1993) (intentional tortious conduct cannot be negligent conduct under Massachusetts' comparative negligence statute); Burke v. 12 Rothschild's Liquor Mart, Inc., 593 N.E.2 522, 532 (Ill. 1992) (willful and wanton conduct carries a degree of opprobrium not found in merely negligent behavior, and a plaintiff's negligence cannot be compared with a defendant's willful and wanton conduct.); Jenkins v. North Carolina Dept. of Motor Vehicles, 94 S.E.2d 577, 580 (N.C. 1956) (negligence is an outgrowth of the action of trespass on the case and does not include intentional acts of violence).

Former Chief Justice Rehnquist has written persuasively of the significant distinction between negligent and intentional conduct. Addressing that issue, Justice Rehnquist stated:

"... This distinction between acts that are intentionally harmful and those that are very negligent, or unreasonable, involves a basic difference of kind, not just a variation of degree. W. Prosser, Law of Torts § 34, p. X85 (4th ed. 1971); Restatement (Second) of Torts § 500, Comment f (1965). The former typically demands inquiry into
the actor's subjective motive and purpose, while the latter ordinarily requires only an objective determination of the relative risks and advantages accruing to society from particular behavior. See § 282 . . ."


He went on to quote from Oliver Wendell Holmes, who explained the distinction between intentionally injurious conduct and careless conduct as follows:

"Vengence imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. [E]ven a dog distinguishes between being stumbled over and being kicked." O. Holmes, The Common Law 3 (1881).

It is impossible for a neutral fact-finder to rationally weigh the conduct of an intentional tortfeasor with the negligent conduct of another. And there is nothing unfair or irrational about holding that negligent actor fully liable when that actor's negligence creates the conditions which directly lead to the occurrence of that intentional tort.

**Issues Whether O.C.G.A. § 51-12-33 Applies**

1. **If Only One Defendant In The Case**

A defendant's reliance upon O.C.G.A. § 51-12-33(d) as supportive of its ability to have the jury apportion damages to a non-party is misplaced if it is not an action against more than one person and if plaintiff was in no way responsible for the injuries or damages claimed. The Court should dismiss a Notice pursuant to the Court's inherent authority under Georgia law to control this litigation and pursuant to O.C.G.A. § 9-11-12.

The invitee sustained a single and indivisible injury, for which he/she claims defendant is liable. There can be no apportionment. As observed in Gay v. Piggly Wiggly Southern, Inc., 183 Ga. App. 175, 181 (1987), "[w]hile it does not take concert of action to make joint tortfeasors, some injuries....are single and cannot be apportioned." See also,
Aretz v. U.S., 503 F.Supp. 260, 301-02 (1977) ("Under Georgia law..., [t]here may be a recovery against either or both of the responsible parties where their separate and independent acts concur to produce a single injury. This is true although the injury may not have happened had only one of the acts of negligence occurred and although the duty owed by each defendant may not be the same."). "Georgia follows the common law rule against apportionment of damages among joint and several tortfeasors....It has often been held that a verdict which seeks to apportion damages among joint tortfeasors in violation of this rule is ‘illegal.’” Walker v. Bishop, 169 Ga.App. 236, 240 (1984).

A statute in derogation of the common law must be strictly construed and thereby limited in strict accordance with the statutory language used therein, and such language can never be extended beyond its plain and ordinary meaning. The express language of the statute will be followed literally and no exceptions to the requirements of the statute will be read into the statute by the courts. King v. Goodwin, 277 Ga. App. 188, 189 (2006).

With the sole exception of the case brought against more than one person and "where the plaintiff is himself to some degree responsible for the injury or damages claimed," (O.C.G.A. § 51-12-33), there has been no abrogation in this State of the common law rule against the apportionment of damages against joint and several tortfeasors. Joint and several liability (O.C.G.A. § 51-12-31), as well as the right of contribution (O.C.G.A. § 51-12-32), are still alive and well in this State.³

O.C.G.A. § 51-12-33 was enacted in 1987, and for the first time allowed damages

³ To the extent that a defendant contends that its fault was somehow less than that of invitee's attacker(s) its argument is misguided. "Where one is injured by the concurring negligence of two tortfeasors, each is liable for the whole injury although the other defendant may have contributed thereto in greater degree....Even where the negligence of one tortfeasor is only 3% and that of the other is 97%, the former is jointly and severally liable under Georgia law for the entire verdict." Aretz, 503 F.Supp. at 302.
to be apportioned "among the persons who are liable and whose degree of fault is
greater than that of the injured party according to the degree of fault of each person."
Ga. Laws 1987, p. 915, § 8. However, this Code section only applied in an action (1)
"brought against more than one person for injury to person or property," and (2) where
"the plaintiff is himself to some degree responsible for the injuries or damages claimed."
Id. See also, Schriever v. Maddox, 259 Ga. App. 558, 561 (2003) ("§ 51-12-33(a) applies
only where an action is brought against more than one person...."); Rust Int'l Corp. v.
Greystone Power Corp., 133 F.3d 1378, 1382 (11th Cir.1998) ("Under Georgia law,
liability may be apportioned among joint tortfeasors only if the plaintiff was negligent
and was therefore partly responsible for the injury. [Citing § 51-12-33]. If the plaintiff is
not partly responsible for the injury, joint tortfeasors are equally liable for the judgment,
regardless of their relative degree of responsibility."). The 1987 version of § 51-12-33 did
not provide for apportionment of damages as between defendants and persons who
were not parties to the action. See, e.g., Fraker v. C.W. Matthews Contracting Co., Inc.,
272 Ga. App. 807, 810 (2005) ("[W]e have consistently held that O.C.G.A. § 51-12-33(a)
does not authorize a jury to apportion damages against a nonparty."). § 51-12-33 was
amended in 2005 to purportedly allow non-party fault to be apportioned by the jury. Ga.
Laws 2005, Act 1, § 12. However, the General Assembly did not eliminate the express
dual requirements under the statute that such apportionment is authorized only (1)
"where an action is brought against more than one person..." (Subsection (b)), and (2)
where "the plaintiff is to some degree responsible for the injury or damages claimed."
(Subsection (a)). Indeed, the very title of the statute remains "Apportionment of
damages in actions against more than one person where plaintiff is to some
degree responsible for injury or damages claimed." (Emphasis added).4 Because § 51-12-33 is in derogation of common law, it must be strictly construed and its express terms must be followed literally; exceptions cannot be read into the statute by courts. King, 277 Ga. App. at 189.

Although the 2005 amendment to § 51-12-33 purports to allow a jury to apportion damages among defendants and persons not named as parties, the specific portion of the Code section that would allow for such apportionment (subsection (b)) is by its explicit terms only applicable "where an action is brought against more than one person...." O.C.G.A. § 51-12-33(b) (Emphasis added); See also, Schriever, 259 Ga. App. at 561. Strictly construing, this statute according to its express terms, and giving said terms their plain and ordinary meaning, the only reasonable construction of the statute is that it applies only where a plaintiff brings an action against more than one defendant (as it has since its original enactment in 1987, and as plainly stated in the very title of the statute). "Where the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden." Six Flags Over Ga. II v. Kull, 276 Ga. 210, 211 (2003).

2. If Plaintiff Is Not Partially At Fault

By seeking apportionment, defendant will submit that the 2005 amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 effectively abolished joint and several liability in Georgia and mandate apportionment in this case. A careful reading of the applicable

4 The title of the statute is not, technically speaking, part of the statute itself. However, Georgia's appellate courts have instructed that "[i]n construing legislation, nothing is more pertinent, towards ascertaining the true intention of the legislative mind in the passage of an enactment, than the legislature's own interpretation of the scope and purpose of the act, as contained in the caption." Lamad Ministries, Inc. v. Dougherty Co. Bd. of Tax Assessors, 268 Ga. App. 798, 803 (2004).
statutes reveals this position to be without merit.

In the context of statutory construction, a court must "look diligently for the intention of the General Assembly." O.C.G.A. § 1-3-1(a) (2006); Clark v. Wade, 273 Ga. 587 (2001). Any statute in derogation of common law must be strictly construed and is thereby limited in strict accordance with the statutory language used therein, and such language can never be extended beyond its plain and ordinary meaning. King v. Goodwin, 277 Ga. App. 188 (2006); Bienert v. Dickerson, 276 Ga. App. 621(2005). "Statutes must be construed . . . so as to square with common sense and sound reasoning." City of Brunswick v. Atlanta Journal & Constitution, 214 Ga. App. 150, 153 (1994). "In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter...". O.C.G.A. § 1-3-1(b). To successfully abrogate the common law, the General Assembly must act "by express statutory enactment." Fortner v. Town of Register, 278 Ga. 625 (2004).

O.C.G.A. § 51-12-31 provides that:

Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally. (Emphasis added)

This code section does not mandate that the jury must specify the amount of damages assessed against each defendant; it merely states that the jury "may" do so. Although the language authorizing the jury to take this discretionary step existed in this statute prior to the 2005 amendment, the courts applied this provision only to claims involving property damage. See Union Camp Corp. v. Helmy, 258 Ga. App. 263, 268
Even in cases involving property damages, this language was interpreted so as not to require apportionment and did not abolish joint and several liability. See Branch v. Alliance Syndicate, Inc., 220 Ga. App. 561, 564 (1996); See also Thyssen Elevator Co. v. Drayton-Bryan Co., 106 F.Supp.2d 1342, 1348 (HM (2000).

O.C.G.A. § 51-12-32 explicitly addresses the right of a joint trespasser to contribution from another or others, providing that "contribution among several trespassers may be enforced just as if an action had been brought against them jointly." O.C.G.A. § 51-12-32(b) specifically envisions a right of contribution when "a judgment is entered jointly against several trespassers and is paid by one of them."

The only situation in which Georgia law proscribes joint liability is delineated in O.C.G.A. § 51-12-33, entitled: "§ 51-12-33. Apportionment of damages in actions against more than one person where plaintiff is to some degree responsible for injury or damages claimed." A review of the language contained in subsections (a) and (b) make clear that the only circumstance where apportionment is authorized is when the plaintiff is to some degree responsible for the injury or damage claimed. Those sections provide:

(a) Where an action is brought against more than one person for injury to person or property and the plaintiff is to some degree responsible for the injury or damage 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. (Emphasis added).

(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. (Emphasis added).

Only if a jury determines that a plaintiff is partly at fault for an injury that the jury must award damages severally, and not jointly, "among the persons who are liable according to the percentages of fault of each person." O.C.G.A. § 51-12-33(b). This is done only after the award to the plaintiff is reduced according to the plaintiff’s degree of fault. O.C.G.A. § 51-12-33(a).

Prior to 2005, O.C.G.A. § 51-12-33 only applied if a plaintiff was found to be partly at fault. Nothing contained in the 2005 amendments to this statute changed the fact that its application is only triggered by a plaintiffs fault (as is clearly evidenced by the title of the statute). The amendments to O.C.G.A. § 51-12-33 only changed the procedure for reducing a negligent plaintiffs damages and introduced a procedure for the conduct of non-parties to be considered by the jury if the plaintiff is to some degree at fault for causing his own injury.

In other words, the fault of non-parties cannot be considered if a plaintiff is not at fault. If the legislature had intended the conduct of non-parties to be considered in cases where a plaintiff is not at fault, it would have amended O.C.G.A. § 51-12-31 to provide a mechanism for the jury to consider this sort of conduct. However, the General Assembly chose not to do so and only authorizes the conduct of non-parties to be considered and listed on the verdict form when the jury is authorized to apportion fault.

Therefore, the General Assembly in amending O.C.G.A. § 51.12-33 left the longstanding public policy of placing the risk of insolvency of a tortfeasor upon those found to have negligently caused the injury rather than upon the shoulders of an
innocent plaintiff and his family.

A court should construe all statutes relating to the same subject matter together to ascertain the legislative intent. *Shorter College v. Baptist Convention*, 279 Ga. 466 (2005). Reading O.C.G.A. § 51-12-31, O.C.G.A. § 51-12-32, and O.C.G.A. § 51-12-33(b) together, it is impossible to find that joint and several liability has been abolished. To do so would require reading words into the statute which are not there and were not legislated or voted on by members of the General Assembly. The joint liability provisions of O.C.G.A. § 51-12-32 are meaningless if one takes O.C.G.A. § 51-12-33(b) to mean that joint liability no longer exists. Consequently, if this Court were to determine that the legislature intended to abolish joint liability when it amended O.C.G.A. § 51-12-33(b), the Court would also be required to determine that the legislature intended to render O.C.G.A. § 51-12-32 a nullity. Plaintiff respectfully shows that this Court is unable and should be unwilling to make such a determination.

3. **No Admissible Evidence of Negligence By Plaintiff**

In order for the statute to apply, the invitee must be "to some degree responsible for the injury or damages claimed...," which again has been the case since this Code section was first enacted. See *Rust Int'l Corp.*, 133 F.3d at 1382. Accord, *Thyssen Elevator Co. v. Drayton-Bryan Co.*, 106 F.Supp.2d 1342, 1348 (S.D.Ga. 2000). If invitee was not at fault to any degree, the liability between joint tortfeasors is - as it has always been in this State - joint and several. Thus, on its face, O.C.G.A. § 51-12-33 is inapplicable in this action, and defendant's notice pursuant to this Code section is ineffectual.

As recognized in a Mercer Law Review article examining § 51-12-33, "Prior to [2005], Georgia law distinguished between two scenarios: (1) **if the plaintiff was not**
at fault, liability among multiple defendants was joint and several, and (2) if the plaintiff was, to some degree, at fault for causing his injuries, liability among multiple defendants was several, not joint. **Scenario number one was, and still is, controlled by O.C.G.A. section 51-12-31,** while scenario number two is controlled by O.C.G.A. section 51.12-33." Annual Survey of Georgia Law - Trial Practice and Procedure, 57 Mercer L. Rev. 381 (2005) (Emphasis added).

O.C.G.A. § 51-12-33 changes nothing under the facts of this action because it did not – and does not - apply where the invitee was not at fault.

4. No Evidence Plaintiff Knew and Assumed The Risk

In Vaughn v. Pleasant, 266 Ga. 862 (1996), Justice Sears, writing for the Court, reiterated the requirements of assumption of the risk:

"'Knowledge of the risk is the watchword of assumption of risk," and means both actual and subjective knowledge on the plaintiffs part. The knowledge that a plaintiff who assumes a risk must subjectively possess is that of the specific, particular risk of harm associated with the activity or condition that proximately causes injury. The knowledge requirement does not refer to a plaintiffs comprehension of general, non-specific risks that might be associated with such conditions or activities. As stated by Dean Prosser:

In its simplest and primary sense, assumption of the risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone.

5. Deceased Invitee Cannot Be Inferred To Have Known and Assumed the Risk Because His/Her Testimony is Not Available

In Spivey, et al v. Vaughn, 182 Ga. App. 91 (1987), the decedent was fatally injured when he struck a piling while waterskiing. The trial court denied the motion for

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summary judgment based upon assumption of the risk.

On Appeal, the Court affirmed the trial court:

"In the case at bar, the threshold question is whether the decedent had actual knowledge of the pilings. In his deposition, appellant/driver testified that it appeared to him that the decedent was aware of the pilings. . . . While appellants have presented evidence from which a jury could conclude that the decedent was aware of the existence of the pilings, they have not been able to prove that plainly, palpably, and indisputably the decedent was in fact aware of the pilings.

. . .

We cannot, as a matter of law, charge the decedent with actual knowledge of the hazard on evidence that appellant/driver and his passenger saw it and the driver believed the decedent to be aware of the hazard. Again, while a fact-finder is entitled to conclude from this evidence that the decedent had knowledge, the same determination cannot be made as a matter of law.

. . .

While entitlement to summary adjudication may be more difficult to prove when the alleged risk assumer is dead, the defense itself is not vitiated. Instead, it is then up to a fact-finder to determine whether the facts are such as to conclude that the victim assumed the risk. We point out that assumption of the risk has been found to exist as a matter of law in several cases in which the victim died as a result of injuries sustained while assuming the risk. See, e.g., Mann v. Hart County Elec. &c. Corp., supra; Pertilla v. Farley, 141 Ga. App. 620 (234 SE2d 125) (1977). However, more often than not, whether a now deceased victim assumed the risk is a matter for jury determination. See Rainey v. City of East Point, 173 Ga. App. 893 (328 SE2d 567) (1985); Malvarez v. Ga. Power Co., Supra; Stern v. Wyatt, 140 Ga. App. 704 (231 SE2d 519) (1976). Such is the situation in the case at bar."

York v. Winn Dixie, 217 Ga. App. 839 (1995), demonstrates that the risk must be known for a plaintiff to assume it. The Full Court reversed Summary Judgment:

"The doctrine of the assumption of the risk of danger applies only where the plaintiff, with a full appreciation of the danger involved and without restriction from his freedom of choice either by the circumstances or by coercion, deliberately chooses an obviously perilous course of conduct so that it can be said as a matter of law he has assumed all risk of injury" (Citations and punctuation

"This court has explained it similarly: 'Assumption of risk . . . assumes that the actor, without coercion of circumstances, chooses a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not.' Whitehead v. Seymour, 120 Ga. App. 25, 28 (169 SE2d 369); Myers v. Boleman, 151 Ga. App. 506, 509 (3) (260 SE2d 359) (1979).

In Borders v. Board of Trustees, Veterans of Foreign Wars Clubs 2875, Inc., 231 Ga. App. 880 (1998), the Full Court reversed Summary Judgment in a premises liability case where plaintiff was knocked down by a drunk in a bar. The Court found there is evidence of constructive knowledge of the hazard on the part of the defendants and plaintiff did not assume the risk:

....the trial court erred in determining (I) that Borders' general awareness of the possibility that drunken patrons may be present' at the VFW gave her equal knowledge of the specific hazard presented by an intoxicated Hawkins staggering into her and knocking her to the floor, and (2) that Borders had the burden to negate an assumption of the risk defense prior to such being raised by the VFW through the introduction of evidence."

Apportionment should not be allowed if there is no evidence that decedent was partly at fault for the injuries and damages claimed.

**O.C.G.A. § 51-12-83 Must Be Strictly Construed**

Because the statutory changes affected by Senate Bill 3 - allowing a jury to divide and apportion "fault" among parties and non-parties whose joint actions caused an indivisible harm -- are in derogation of common law, they must be strictly construed. Heard v. Neighbor Newspaper, Inc., 259 Ga. 458, 383 S.E.2d 553 (1989). If the General Assembly intended to change settled doctrines of joint and several liability and joint negligence, as well as principles that depend on these doctrines, then the legislature was
required to do so carefully and explicitly. Strictly construing the new apportionment statute, O.C.G.A. § 51-12-33, reveals that its stated purpose cannot be accomplished due to vagueness and internal inconsistencies.

O.C.G.A. § 51-12-33(b) is the only provision of the statute addressing apportionment. Section 51-12-33(a) contemplates that the jury must first determine the total amount of damages to be awarded and must also determine the percentage of the plaintiff's fault, after which the Court shall then reduce the amount of damages in proportion to the plaintiff's negligence. Subsection (b) then requires that the award of damages be apportioned; however, this subsection allows an apportionment of damages only "among the persons who are liable...". This subsection further provides the apportionment of damages, "shall be the liability of each person against whom they are awarded." Non-parties are not "persons who are liable" therefore, they cannot have "liability" as contemplated by O.C.G.A. § 51-12-33 (b). Subsection (f) prevents any apportionment of damages to non-parties by providing that "assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties." Although O.C.G.A. § 51-12-33 (C), (d) & (f) purport to require consideration of the fault of non-parties, this action would be pointless because the "damages to be awarded" are to be apportioned only "among the persons who are liable," under O.C.G.A, § 51-12-33 (b).

If the legislature had intended for some portion of a plaintiffs' damages to be attributable to non-parties, then it would have identified the first required jury finding under (a) as "the total amount of damages incurred by the Plaintiff" and then required apportionment of those damages under (b), "among all parties or entities who contributed to the alleged injury or damages," which is the language of subsection (c).
However, strictly construing subsections (a) and (b) together as written, "[t]he jury allocates the total amount of damages to be awarded among the persons who are liable." Significantly, this does not include non-parties.

This Statute requires only that the jury "consider" the fault of non-parties under subsection (c). It does not tell the jury what to do with the consideration of fault. Strictly construing this Statute as is required, the jury must apportion damages only among the "persons who are liable". There is no provision in O.C.G.A. § 51-12-33 that either requires or even permits the jury to apportion fault to a non-party; the jury is only permitted to "consider" its fault. Thus, a party can tell a jury they do not have to apportion any liability to the non-party under Georgia law; instead, they only have to consider it.

**O.C.G.A. § 51-12-33 Unconstitutionality As Written or As Applied**

1. **O.C.G.A. § 51-12-33 is Impermissibly Vague in Violation of the Due Process Clause of the Georgia Constitution (Art. 1, § 1, ¶ 1)**

   In *Jekyll Island State Park Auth. v. Jekyll Island Citizens Assoc.*, 266 Ga. 152, 153, 464 S.E.2d 808 (1996), the Supreme Court stated the test for determining whether a statute is unconstitutionally vague:

   A statute must be definite and certain to be valid, and when it is "so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law." [Cit.] *Hartrampf v. Ga. Real Estate Comm.*, 256 Ga. 45-46 (1) (343 SE2d 485) (1986). To withstand an attack of vagueness or indefiniteness, a civil statute must provide fair notice to those to whom the statute is directed and its provisions must enable them to determine the legislative intent. *Hartrampf, supra* at 45; *Bryan v. Ga. Public Svc. Comm.*, 238 Ga. 572, 574 (234 SE2d 784) (1977).

   Applying this standard, O.C.G.A. § 51-12-33 is unconstitutionally vague.
2. O.C.G.A. § 51-12-33 Conflicts with O.C.G.A. §§ 51-12-31 and 32

O.C.G.A. § 51-12-33 must be read in conjunction with O.C.G.A. §§ 51-12-31 and 51-12-32. Prior to the SB3 amendments, O.C.G.A. § 51-12-31 provided for apportionment only in cases where (1) there was property damage, and (2) the plaintiff was not at fault. Any apportionment under pre-SB3 O.C.G.A. § 51-12-31 was at the jurors' discretion. U.S. Fidelity & Guar. Co., Inc. v. Paul & Associates, Inc., 230 Ga. App. 243, 496 S.E.2d 283 (1998). Former O.C.G.A. § 51-12-33 provided for apportionment at the jury's discretion ("may") only where the plaintiff was partially at fault. Thyssen Elevator Co. v. Drayton-Bryan Co., 106 F. Supp.2d 1342 (2000). The statute applied to both personal injury and property damage cases. As amended, however, O.C.G.A. § 51-12-33 (a) and (b) purportedly requires the jury to apportion damages in all cases regardless of whether the plaintiff is negligent.

In requiring apportionment in all cases, O.C.G.A. § 51-12-33 conflicts with O.C.G.A. § 51-12-31, which states that "[U]ntil its verdict, the jury may specify the particular damages to be recovered of each defendant." It also conflicts with O.C.G.A. § 51-12-32, which provides for contribution among joint tortfeasors. While both of these statutes retain the language "except as provided in O.C.G.A. § 51-12-33," the exception - § 51-12-33 -- swallows the rule. Why would the legislature amend O.C.G.A. § 51-12-31 if its true intent was to repeal it? There is simply no way to harmonize all three of these statutes without ignoring inconvenient portions of § 51-12-32, eviscerating § 51-12-31, and violating the basic rule of construction that a statute or constitutional provision should be construed to make all its parts harmonize, and to give a sensible and intelligent effect to each part, as it is not presumed that the legislature intended that any part would be without meaning.
There is simply no scenario where O.C.G.A. § 51-12-31 would be left to apply, as O.C.G.A. § 51.12-33 purports to cover any and all conceivable tort actions. Because men of common intelligence must necessarily guess at its meaning and differ as to its application, O.C.G.A. § 51-12-33 violates the first essential tenet of due process of law.

3. O.C.G.A. § 51-12-33 Is Internally Inconsistent and Unclear

The language in O.C.G.A. § 51-12-33 is irrational and paradoxical, and because it defies construction, it is unconstitutionally vague. Specifically, subsections (b) and (c) are irreconcilably contradictory and fail to provide clear standards. Section (b) of the statute states in relevant part, "...the trier of fact ...shall... 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..." O.C.G.A. § 51-12-33 (b) (emphasis added). According to Black's Law Dictionary, "liable" means:

1. Bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution. 2. Obligated; accountable for or chargeable with. Condition of being bound to respond because a wrong has occurred. Condition out of which a legal liability might arise. 3. Justly or legally responsible or answerable.

"Liability" is defined in Black's as:

Legal responsibility; responsibility for torts; that which one is under obligation to pay, or for which one is liable; the state of being bound or obliged in law or justice to do, pay, or make good something; the state of one who is bound in law and justice to do something which may be enforced by action.

In contrast, subsection (c) of the statute states: "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." O.C.G.A. § 51-12-33 (c).
Unlike subsection (b), subsection (c) throws liability out the window and inserts a new standard - fault. This sloppy drafting has resulted in a statute that with conflicting terms that can be applied in inconsistent ways to the same set of facts. It simply is not subject to statutory construction. How is a jury to be charged as to a non-party? Is it the non-party's purported liability under Georgia law or his fault that controls the jury's inquiry? Non-parties who could never be held liable because of statutory protections, or for practical reasons, could nevertheless be found to have "fault".

The end result of SB3 was apparently to reduce a plaintiff's ability to get full and fair compensation in the courtroom, but O.C.G.A. § 51-12-33 is poorly drafted, cannot be applied consistently, and as a result, it is an impermissibly and unconstitutionally vague statute.

4. O.C.G.A. § 51-12-33 Does Not Allow a Jury to Assess Percentages of Fault

As set forth in detail above, at common law, defendants were jointly responsible for the entire amount of damages. In fact, in a case where a plaintiff seeks to recover for personal injuries, "a several verdict against the defendants is illegal." MARTA v. Tuck, 163 Ga. App. 132, 137, 292 S.E.2d 878 (1982) (holding that "the jury's apportionment of damages between MARTA and [co-defendant] Rucker was an illegality.") (citing McCarthy v. Combs, 78 Ga. App. 426, 427, 50 S.E.2d 805 (1948)). Because O.C.G.A. § 51-12-33 purports to change the common law, it, "`must be strictly limited to the meaning of the language used, and not extended beyond plain and explicit statutory terms.' Baylis v. Daryani, 2008 WL 47$2444 (Ga. App. 2008) (quoting Kirsch v.
Meredith, 211 Ga. App. 823, 825, 440 S.E.2d 702 (1994)). In other words, a court cannot read something into a statute that is not there.

There is nothing in O.C.G.A. § 51-12-33 that requires or even allows a jury to assess percentage of fault amongst defendants or amongst defendants and non-parties. Although subsection (a) does specifically authorize a jury to assess fault of the plaintiff when it provides the trier of fact "shall determine the percentage of fault of the plaintiff," it says nothing about what the jury is to do with respect to the defendants or any non-parties. By way of comparison, an Arizona statute, which was part of its "tort reform" and purportedly abolished joint and several liability, provides: "The relative degree of fault of the claimant, and the relative degrees of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact." A.R.S. §12-2506 (C). Again, nothing in O.C.G.A. § 51-12-33 requires or even permits a jury to engage in apportionment of fault between defendants or defendants and non-parties. Subsection (b) only provides that a jury "shall...apportion its award of damages among the persons who are liable according to the percentage of fault of each such party." Clearly, this subsection is speaking only to named defendants, as they are the only "persons who are liable," and because it goes onto state that "[d]amages apportioned by the trier of fact as provided in this Code section shall be the liability of each person....," a non-party cannot have liability under this Code section. While subsection (c) does tell the jury to consider non-parties when assessing fault, there is nothing in the entire Code section that permits such an assessment by providing standards, procedures, or criteria for assessing such fault, and the longstanding tenets of statutory construction do not allow this Court to write something into the Statute in order to fill in that missing piece.

apply it properly.
Strictly construing O.C.G.A. § 51-12-33 as required under Georgia law, there is simply no vehicle for a jury to assess fault amongst defendants or defendants and non-parties. If the legislature truly intended to change the common law and require or allow a jury to apportion fault, then it needed to do so explicitly. O.C.G.A. § 51-12-33 was hastily drafted and poorly written, and a court cannot create a right of the jury to apportion fault in contravention of Georgia law.

5. O.C.G.A. § 51-12-33 Denies Substantive Due Process

The essence of substantive due process is that the State cannot use its power to take unreasonable, arbitrary or capricious action against an individual. Statutes must be reasonably related to a permissible legislative purpose. Hayward v. Ramick, 248 Ga. 841, 843, 285 S.E.2d 697 (1982).

O.C.G.A. § 51-12-33 (c), (d) (1) and (2) violate substantive due process because these subsections are not reasonably related to the needs of the state, and they irrationally punish plaintiffs. O.C.G.A. §51-12-33(c), (d) (1) and (2) serve to protect wrongdoers at the expense of society at large. The statute creates no enforceable judgment against nonparties on the verdict form. It permits neither contribution nor indemnity. It precludes neither claims nor issues as to any person or party. It simply diminishes the amount of dollars ,the wrongdoer must pay in relation to the total damage the Plaintiff should be awarded. The new law accomplishes this by allowing skilled lawyers to attribute fault without any burden of evidentiary proof to persons who are necessarily defenseless - people who have no one present in court to speak for them and have no opportunity or right to conduct discovery or compel witnesses to testify on their behalf.

Furthermore, the statute fails to accomplish its goal. It is simply irrational to
believe that a defendant's "fair" share of negligence can be determined where defenseless non-parties float in and out of the evidence and arguments and then appear on the verdict form. There is no provision for discovery, no statute of limitations, and the non-party cannot even request a hearing, file a motion, or put up a defense. If held to be constitutional, it seems O.C.G.A. § 51-12-33 requires plaintiffs claiming negligence to sue everyone and settle with no one. Section 51-12-33 requires the trier of fact to allocate "fault" or "liability" to unrepresented parties. These features of O.C.G.A. § 51-12-33 are arbitrary and capricious, and they have the effect of denying a fair trial. A fair trial in a fair tribunal is the basic requirement of due process. This Court should hold that O.C.G.A. § 51-12-33 arbitrarily denies a fair trial to both litigants and the alleged nonparty.

6. O.C.G.A. § 51-12-33 Unconstitutionally Denies Procedural Due Process to Unrepresented "Non-Parties"

The requirements for procedural due process delineated in both the Georgia and Federal Constitutions are notice and an adequate hearing. See, U.S.C.A. Const.Amend.14; See also, Ga.Const. Art. 1, § 1, Par. 1. Due process under the Georgia Constitution requires that civil statutes "must provide fair notice to those to whom the statute is directed and its provisions must enable them to determine the legislative intent." Bell v. Austin, 278 Ga. 844, 607 S.E.2d 569, 574, (2005).

Georgia Const. Art. I, § 1, ¶ 1 provides that "kilo person shall be deprived of life, liberty, or property except by due process of law." Procedural due process requires that persons forced to settle their claims through the judicial process must be given a meaningful opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

Standing exists where the infringement of third party rights could cause potential
economic injury to the litigant. The only prerequisite to attacking the constitutionality of a statute "is a showing that it is hurtful to the attacker." Bo Fancy Productions v. Rabun County Board of Commissioners, et al, 267 Ga. 341(2)(a), 478 S.E.2d 373 (1996). A party has standing to challenge the constitutionality of a statute if the statute adversely impacts that party's rights. Ambles v. State, 259 Ga. 406(1), 383 S.E.2d 555 (1989). This actual and potential economic loss establishes Plaintiffs standing to challenge the constitutionality of O.C.G.A. § 51-12-33, not only in her own right, but also on behalf of unrepresented non-parties whose rights are infringed through application of this statute.

O.C.G.A. § 51-12-33 (c),(d)(1) and (2) overtly violate the notice requirement of procedural due process. Unfortunately, the 2005 Legislature made no provision for notice to the nonparty or opportunity for the nonparty to be heard when it enacted O.C.G.A. § 51-12-33. Instead, Section 51-12-33(c),(d)(1) and (2) permit random findings of negligence or "fault" against these strangers to the courtroom, findings which these strangers may never even know about.6

Section 51-12-33 (c), (d)(1) and (2) are also violative under the balancing test applied to determine the adequacy of hearings and other procedures. The test, to

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6 Although not directly pertinent to the issues here, it is difficult to discern how a jury would ever be able - practically or legally - to apportion fault as to an unrepresented non-party who is not before the Court, has been provided no legal notice of the claim, and is completely unable to defend itself/himself/herself/themselves against such a claim or to offer contrary proof. Such a procedure, which essentially allows a non-party's fault to be determined in absentia and completely without any notice, representation or opportunity to be heard, would appear to violate the most basic precepts of procedural due process. See, e.g., Smith v. State, 2009 WL 656822 (Ga.App.2009) ("The `central meaning' of procedural due process is that parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.").
determine "what process is due" was set out in Mathews v. Eldridge, 424 U.S. 319 (1976):

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail. (emphasis added).

Id. at 335. As discussed throughout this Brief, Sections 51-12-33 (c), (d)(1) and (2) present an enormous risk of erroneous deprivation of interests -- the interest of plaintiffs in receiving full compensation for their injuries, the interests of unrepresented non-parties in their privacy and reputation, and in their right to be fairly heard.

The Court in Logan v. Zimmerman Brush Co., 458 U.S. 422 (1982), assessed the balancing test in much this fashion, as applied to an Illinois statute fixing procedures for tort litigation. The Court observed:

A system or procedure that deprives persons of their claims in a random manner necessarily presents an unjustifiably high risk that meritorious claims will be terminated. Id. at 434-435.

Since the statute does not provide adequate notice or a right to be heard by the non-parties, it does not pass constitutional muster.

7. O.C.G.A. § 51-12-33 Denies Equal Protection Among Classes of Both Plaintiffs and Defendants

Equal protection analysis focuses on the manner in which a statute makes classifications among persons. A classification will be sustained if it is "rationally related to a legitimate state interest." Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 81 (1988); Ciak v. State, 278 Ga. 27, 597 S.E.2d 392 (2004). This test is very broad, but it
is not without limitations. Lindsey v. Normet, 405 U.S. 56 (1972), involved civil litigation procedures in which the Court struck down appellate bonding requirements imposed on one class of litigants by state law. The Court noted that states are not required to grant appellate review to civil litigants in the first place. Yet, once that procedure is established, the Court said: "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." Lindsey, 405 U.S. at 77. The Court concluded that the bonding requirement "heavily burdens" the rights of the class of litigants in question, without any reasonable justification. Id. at 78-79.

Likewise, in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981), the Court struck down civil litigation procedures that capriciously burdened some claimants. The Court took note that states have broad power to define the rules of tort law. Yet, once state law creates a right to redress, that right cannot be taken away in an arbitrary fashion. In Logan, the state's procedures prejudiced some claimants arbitrarily and denied them equal protection.

The Georgia Const. Art. I § 1, ¶ 2 provides that "[p]rotection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be deprived of equal protection of the laws." Equal protection requires that all persons be treated alike under like circumstances and conditions. Blackmon v.  

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Monroe, 233 Ga. 656, 212 S.E.2d 827 (1975). Inherent in that guarantee is that the legislature is barred from enacting special or class legislation. Id. In fact, the Georgia Supreme Court has stated:

> Our state Constitution only requires a law to have uniform operation; and that means that it shall apply to all persons, matters, or things which it is intended to affect. If it operates alike on all who come within the scope of its provisions, constitutionality is secured...This constitutional provision is complied with when the law operates uniformly upon all persons who are brought within the relations and circumstances provided by it.

Cooper v. Rollins, 152 Ga. 588, 592; 110 S.E. 726 (1922). See also, Crovatt v. Mason, 101 Ga. 246, 28 S.E. 891 (1897); Murphy v. West, 205 Ga. 116, 52 S.E.2d 600 (1949).

Under an equal protection analysis, a classification by the Georgia legislature is permitted "when the classification is based on rational distinctions and...bears a direct and real relation to the legitimate object or purpose of the legislation. Atlanta v. Watson, 267 Ga. 185, 188, 475 S.E.2d 896 (1996). Here, as in Lindsey and Logan, supra, the procedures established in O.C.G.A. § 51-12-33 (c), (d)(1) and (2) arbitrarily prejudice both plaintiffs and unrepresented nonparties without any reasonable basis. Several aspects of this prejudice have been discussed above with respect to substantive due process. Among other matters, individuals are exposed to formal considerations of "fault" without any right to appear and be heard, or to present evidence in their favor. Plaintiffs likewise are burdened with having to defend nonparties, to the prejudice of their own cases.

Georgia has permitted the joinder of persons needed for just adjudication under O. C.G.A. § 9-11-19. O.C.G.A. § 9-11-19 enables any party in a negligence case the power and means to assure that others thought to be negligent can be joined in an action. However, under O.C.G.A. § 51-12-33, the Legislature arguably requires (by stating the
trier of fact shall consider the fault of all persons or entities) that everyone who may conceivably have some involvement be considered in allocating fault, even though they are not and never have been parties to the action - and in fact could not legally be brought into the action as parties (as long as the Defendant files a Notice of Non-party Fault within 120 days prior to trial). This imposes a heavy burden on the injured party. The unfortunate plaintiff who finds himself embroiled in a O.C.G.A. § 51-12-33 scenario must mount a defense for the non-party, based on the minimal information he is given in the "brief statement of the basis for believing the non-party to be at fault" required under Section 51-12-33(d)(2), with as little as 120 days notice prior to trial.

Ordinarily, a defendant has the burden of proof on any defenses; however, under this Statute, a defendant can assert a nebulous theory regarding a third party's responsibility and the burden instantly shifts to the plaintiff to defend such a claim. Clearly, a defendant and a plaintiff are treated differently for no apparent rational reason, and a plaintiff bears a much heavier burden than does the defendant to bring the particular nonparty into the suit. If the defendant need not prove its defense of fault against this other person or entity who allegedly contributed to the injury to the same extent a plaintiff must prove his case, the defendant is held to a different standard - and that constitutes a denial of equal protection. Consequently, in many cases a plaintiff will be faced with "defending" an unwilling and uncooperative "client" or may not even be able to locate such non-party. All Georgians who suffer injury or death due to the negligence of others are entitled to receive the same evenhanded treatment. Our statutes must assure that burdens are imposed equally upon every person within the class.

As stated in Lindsey, supra, "[procedural benefits] cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal
Protection Clause." 405 U.S. at 77. O.C.G.A. § 51-12-33 arbitrarily results in such denials. It classifies persons (including both plaintiffs and unrepresented non-parties) in ways not rationally related to any legitimate state interest.
UPDATE ON PREMISES LIABILITY

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UPDATE ON PREMISES LIABILITY

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The Court of Appeals has recently pointed out that in Georgia, there does not appear to be much, if any, difference between the legal duty owed to a licensee and the legal duty owed to a trespasser by a property owner. An owner of property owes to a licensee no duty as to the condition of the premises “save that he should not knowingly let him (licensee) run upon a hidden peril or willfully cause him harm. To the licensee, as to the trespasser, no duty arises of keeping the usual condition of premises up to any given standard of safety, except that it may not contain pitfalls, mantraps and things of that character.”

In *Jarrell vs. JDC and Associates, LLC*, the Plaintiff fell into a hole on Defendant’s property which was covered by pine straw. The Plaintiff was on the property at the direction of Plaintiff’s employer, Bellsouth Technologies, to inspect ground cables that had been laid by Bellsouth. The Court of Appeals first held that Plaintiff was a licensee, and not an invitee on the property. The record reflected that the property owner was not aware that the Plaintiff was on his property. Further, the property owner had not requested the Plaintiff to inspect the cable that had been placed there by Bellsouth Technologies. After concluding that the Plaintiff was a licensee, the Court went on to state the standard that a property owner owes a licensee and made the point that this legal duty would be the same whether the Plaintiff was licensee or a trespasser.

An exception to the duty owed by a landowner to a trespasser is the Attractive Nuisance Doctrine. Under this doctrine, a landowner is subject to liability for physical harm to children trespassing on the property caused by an artificial condition on the land if: (a) the place where the condition exists is one upon which the landowner knows or had to reason to know that children are likely to trespass; (b) the condition is one of which the landowner knows or had reason to know and realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children; (c) the children, because of their youth, do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it; (d) the utility to the landowner of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk of children involved; (e) the landowner fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

The Georgia Supreme Court has adopted the Restatement (2nd) test as to whether an artificial condition can be classified as an attractive nuisance. Although Georgia has adopted the attractive nuisance doctrine, the courts apply it very sparingly. It would appear that in Georgia, the courts will not allow the doctrine of attractive nuisance to establish liability in cases

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2 Restatement (2nd) of Torts, Section 339, Artificial Conditions Highly Dangerous to Trespassing Children
where a child is the victim of drowning in a lake, pond, or similar bodies of water, either natural or manmade.

In *Brazier vs. Phoenix Group Management*, the Court of Appeals held that the parents of a deceased 13 year old boy who drowned in a lake maintained by the county could not employ the attractive nuisance doctrine to establish liability against the county. Even though the parents established that the county was required to erect a fence around the lake, the Court held that “lakes, ponds, and similar bodies of water, either natural or manmade, are open and obvious hazards, even to small children”. The attractive nuisance doctrine applies only to children and may not be extended, in any measure, to adults.

In the slip and fall arena, the Court of Appeals in *Cocklin vs. J.C. Penney Corporation* modified the prior traversal rule by holding that in cases where the Defendant shows the Plaintiff successfully traversed the area where the static defect existed must also show, in order to prevail on summary judgment, that the static condition was “readily discernible”.

In *Cocklin*, the Plaintiff was going to Defendant’s hair salon when her shoe caught in a crevice in the ceramic tile floor. The trial court granted Defendant’s motion for summary judgment holding that because Plaintiff had been to the salon in the past and because she had negotiated the area where the static defect was located, it was presumed she had knowledge of the static condition, and therefore, under the prior traversal rule, she was not entitled to recover.

On appeal, the Court of Appeals reversed. The Court noted that the Plaintiff, at her deposition, testified that on the day of the fall, she was looking where she was going and although she had walked over the area where the static condition was located in the past, she had never observed the crevice and, in fact, the crevice was not discernable unless someone conducted a close visual inspection of the area. Plaintiff also had an Affidavit from a flooring expert who opined that the crevice was not readily observable for someone simply walking over the area. The Court held that the prior traversal rule only applies where the Defendant can show that the static defect was “readily discernable to a person exercising reasonable care for his own safety.”

Although not required, if a party chooses to use an expert in a slip and fall case, it must be remembered that such expert testimony must comply with the *Daubert* standards which now

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5 *Smith vs. Chemtura Corporation*, 297 Ga App 287, 676 SE 2d 756 (2009)
apply in Georgia to all expert testimony. For instance in *Brady vs. Elevator Specialists, Inc.*, Plaintiff retained an elevator maintenance expert who opined that had the Defendant followed a more aggressive maintenance schedule that the condition in the elevator that led to a mis-leveling would have been discovered and corrected before the Plaintiff was injured. The Plaintiff, a paraplegic, was injured when he fell backwards in his wheelchair while exiting the building’s elevator because of the mis-leveling of the elevator.

The trial court held that the testimony of the elevator maintenance expert was admissible. The Court of Appeals reversed and held that although the maintenance expert, based on his experience and training, could be qualified as an expert in elevator maintenance, his opinion was not admissible under *Daubert*. The expert could not point to any study or publication which would support his hypothesis that a more aggressive elevator maintenance schedule would have increased the likelihood that the mis-leveling condition would have been recognized and remedied. Therefore, it is important to remember that under *Daubert*, experts in slip and fall cases must not only show they have the experience and training to qualify as an expert, but their specific opinions must be based on methodology that has been tested and found credible.

In the area of negligent security cases, even assuming a plaintiff can show the defendant failed to implement appropriate security measures to protect the tenant, unless the plaintiff can establish a nexus between this failure and the specific injury to the plaintiff, the defendant’s failure to establish appropriate security measures will be deemed too remote to allow the plaintiff to recover. In *Johns vs. Housing Authority for the City of Douglas*, the Plaintiff was assaulted and raped in her apartment by an unknown assailant. The Plaintiff had placed an air conditioning window unit in her kitchen window creating a gap which the Plaintiff filled by placing a piece of cardboard in the space. After the assault, the Plaintiff discovered that the cardboard was gone and the air conditioning unit had been moved to one side. The Plaintiff concluded that the intruder gained entrance by removing the cardboard, shoving the air conditioning unit to the side and reaching through the opening to unlock the adjacent back door.

The Plaintiff showed that there had been numerous crimes against persons at the complex over the five years preceding her attack. Plaintiff also showed that the landlord had allowed holes in the exterior fencing to go unrepaired and the exterior lighting in the common areas at the complex was below industry standard. The Court of Appeals held that even assuming the landlord was negligent in failing to improve security at the complex, there was no evidence to establish that the breach of the Defendant’s duties had lead to the Plaintiff’s injuries. The Court pointed out there was no evidence as to how the assailant entered the apartment complex or whether he was on the grounds as a resident, guest, or trespasser.

In another interesting negligent security case, the Court of Appeals in *Vega vs. La Movida, Inc.* reaffirmed the importance of the location on the premises that a prior criminal act occurred. In *Vega*, the Plaintiff was shot while inside Defendant’s bar. The Plaintiff had evidence of 14 prior criminal attacks upon patrons, however, all of these attacks occurred either

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8 O.C.G.A. §24-9-67.1(b); *Daubert vs. Merrell Dow Pharmaceuticals*, 509 US 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)
9 287 Ga App. 304, 653 SE 2d 59 (2007)
10 297 Ga App 469, 678 SE 2d 571 (2009)
in the parking lot or a location outside the interior of the bar. The Court affirmed the trial court’s exclusion of the 14 prior criminal attacks holding that the attacks which occurred outside the bar would not have put the defendant on notice that a dangerous condition existed inside the bar. Therefore, these attacks would not establish foreseeability as a matter of law.11

When trying to establish notice in a negligent security case, it is important for Plaintiff’s counsel to know that incident reports of prior criminal activity must be certified to be admissible either at trial or in opposing a motion for summary judgment.

In Drayton vs. Kroger Company, the Plaintiff had numerous incident reports showing that patrons of Defendant’s business had called and requested police assistance and also had incident reports showing several crimes against persons that had occurred at Defendant’s business. However, The Court of Appeals held that the trial Court properly disregarded these incident reports at the summary judgment hearing because the reports were not certified or authenticated.12 The practitioner should realize that the rules for the admissibility of incident reports, police reports, or other such material are the same at a summary judgment hearing as at trial. In order to have the court consider these reports, the reports must be certified either by the actual police officer(s) who generated the report, or at a minimum, by the person who is the proper custodian of the reports.

O.C.G.A. §51-12-33(d)(1) allows a defendant to ask a jury to apportion fault to a non-party. Therefore, in a third-party criminal act case where the plaintiff seeks to hold the defendant property owner liable for the plaintiff’s injuries caused by a third party criminal assailant, this Code Section allows the defendant to ask the jury to compare and apportion the property owner’s negligence with the actions of the assailant. In most, if not all, situations, the proportion of “fault” of the perpetrator for causing the plaintiff’s injuries will far exceed any “fault” of the property owner in failing to implement appropriate security precautions.

In a dram shop case, (liquor liability) it is questionable whether a Plaintiff can assert a claim for punitive damages against the provider of the alcohol under the Dram Shop Act. The Court of Appeals in Capp vs. Carlito’s Mexican Bar and Grill, seems to suggest that a provider of alcohol under the Georgia Dram Shop Act could not be liable for punitive damages.13

In Capp, the Court of Appeals reversed the trial court’s ruling that the Defendant bar could not be held liable under the Georgia Dram Shop Act as a provider of alcohol. The Court of Appeals stated there was evidence for a jury to consider as to whether or not the Defendant’s employee served the driver of the automobile alcohol at a time when the driver was noticeably intoxicated. However, the Court held that the trial court correctly dismissed the claim for punitive damages against the Defendant.

12 297 Ga App 484, 677 SE 2d 316 (2009)
The Court reasoned that punitive damages in tort actions are governed by O.C.G.A. §51-12-5.1 which provides that there is no cap on punitive damages if “the Defendant acted or failed to act while under the influence of alcohol”. The Court went on to hold that this section applied only to the active tortfeasor. The legislative history of this section, according to the Court, supported the proposition that the statute was not meant to apply to other third parties who might be considered joint tortfeasors. Therefore, the Court held that under the Dram Shop Act, the Plaintiff could not seek punitive damages against the Defendant provider.

However, the Court of Appeals has made it clear that the Dram Shop Act does not preclude the assertion of a premises liability action against a bar owner grounded in established Georgia premises liability law. In the Standfield case, a patron of a bar was struck in the face during an altercation between two other patrons. The Plaintiff asserted that the patrons involved in the altercation had a prior history of trouble-making in the bar, had been banned from the bar on previous occasions, and on the night in question, because the patrons had been drinking heavily, the management should have known that there was a likelihood of an altercation between the two patrons and that an innocent bystander could be hurt.

The Defendant bar owner argued that the Dram Shop Act was the exclusive remedy against a bar with respect to injuries growing out of an intoxicated patron, and the Dram Shop Act did not apply unless the injury grew out of the operation of an automobile. The Court of Appeals disagreed and stated that the Dram Shop Act was not meant to limit the liability of bar owners with respect to traditional premises liability cases. The Court held that bar owners, like all other property owners, had an obligation to make their premises safe for patrons. The Court went on to hold that there was a jury issue as to whether the bar owner was on notice that the two intoxicated patrons could become involved in an altercation in which an innocent bystander could be injured.

In the area of environmental premises liability, the U.S. Supreme Court in Burlington Northern and Santa Fe Railroad Company vs. United States, narrowed the scope of the definition of an “arranger” under CERCLA. In the Burlington Northern case, Shell Oil Company (Shell) had been designated as a PRP (Potential Responsible Party) by the district court. The court determined that Shell had “arranged for disposal” of D/D, a toxic pesticide. Shell sold D/D to Brown and Bryant, an agricultural chemical distributor located in Arvin, California. Shell would arrange for the transport of D/D to Brown, via common carrier, F.O.B. destination. Over the years, Brown, as it was downloading D/D into its storage tanks and uploading D/D to delivery trucks, encountered numerous spills of D/D resulting in ground water contamination.

The district court found Shell to be an “arranger” for the disposal of a hazardous substance, even though Shell only sold D/D and was not involved, at all, with the disposal of D/D. The district court’s reasoning was that Shell, over the years, was aware of the spills occurring on the Brown property and, therefore, could be classified as an “arranger”. The U.S. Supreme Court reversed and held that Shell, by simply selling the D/D and not being involved, at

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14 O.C.G.A. §51-12-5.1(f)
15 Mulligan’s Bar & Grill et al v. Stanfield, 294 Ga App 250, 668 SE 2d 874
16 548 US 53; 126 S. Ct. 2405
all, in the unloading or distribution of D/D, could not be classified as an “arranger” within the meaning of CERCLA.

It is important for the practitioner to remember that appellate review of a trial court’s determination to either accept or reject expert testimony under *Daubert* is an “abuse of discretion” standard. In *Mason vs. Home Depot, Inc.* the Georgia Supreme Court was reviewing the correctness of a trial Court’s exclusion of a labeling expert presented by the Plaintiff. 17

The trial court excluded the testimony of the expert based on the trial court’s perception that the expert based his opinions on generalized data concerning toxicity of a product without regard to the quantity of each chemical in the product in question or other factors such as evaporation rates, etc. Without much discussion of the specific nature of the expert’s deposition testimony concerning his methodology, the Supreme Court simply noted that the exclusion of the expert by the trial court was not an abuse of discretion. Therefore, the practitioner should be on notice that it will be extremely difficult to obtain an appellate court reversal of a trial court’s exclusion of an expert witness under the *Daubert* standards.

17 283 GA 271, 658 SE 2d 603 (2008)
ETHICAL CONSIDERATIONS IN THE LITIGATION OF A PREMISES LIABILITY CASE: SELECTED APPLICABLE RULES AND OPINIONS

Honorable Anne Elizabeth Barnes
Georgia Court of Appeals
Atlanta, Georgia
I. GEORGIA RULES OF PROFESSIONAL CONDUCT

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:
   (1) make a false statement of material fact or law to a tribunal;

   (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

   (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

   (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, other than grand jury proceedings, a lawyer shall
inform the tribunal of all material facts known to the lawyer that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] The advocate’s task is to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate’s duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[2] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. Compare Rule 3.1: Meritorious Claims and Contentions. However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably
diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. Whether disclosure is necessary shall be considered in light of all of the relevant circumstances. The obligation prescribed in Rule 1.2(d): Scope of Representation not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d): Scope of Representation, see the Comment to that Rule. See also the Comment to Rule 8.4(b): Misconduct.

Misleading Legal Argument

[3] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client’s wishes.
[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer’s duty to keep the client’s revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[6] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client’s deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d): Scope of Representation. Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent.
Refusing to Offer Proof Believed to Be False

[14] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer’s ability to discriminate in the quality of evidence and thus impair the lawyer’s effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.
RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to
avoid assisting a criminal or fraudulent act by a client, unless disclosure is
prohibited by Rule 1.6.

The maximum penalty for a violation of this Rule is disbarment.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client’s
behalf, but generally has no affirmative duty to inform an opposing party of
relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms
a statement of another person that the lawyer knows is false. Misrepresentations
can also occur by failure to act.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be
regarded as one of fact can depend on the circumstances. Under generally accepted
conventions in negotiation, certain types of statements ordinarily are not taken as
statements of material fact. Comments which fall under the general category of
“puffing” do not violate this rule. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

_Fraud by Client_

[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client’s crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6: Confidentiality of Information.

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II.  STATE DISCIPLINARY BOARD ADVISORY OPINION NO. 40,

SEPTEMBER 21, 1984: MISUSE OF SUBPOENAS

Pursuant to the provisions of Rule 4-217 of the Rules and Regulations for the Organization and Government of the State Bar of Georgia (219 Ga. 873, as amended), the State Disciplinary Board, after a proper request for such, renders its opinion concerning the proper interpretation of the Standards of Conduct of the Disciplinary Rules of the State Bar of Georgia.

Question Presented: Whether or not it is a violation of Standard 4 of the Disciplinary Rules of the State Bar of Georgia for an attorney to issue a subpoena
for the Production of Documents pursuant to OCGA § 24-10-22(a), directing the witness to appear at a lawyer’s office or some other location, when in fact no hearing or trial is taking place and no notice of such subpoena is served upon opposing counsel?

Whether or not it is a violation of Standard 4 of the Disciplinary Rules of the State Bar of Georgia for an attorney to issue a subpoena pursuant to OCGA § 9-11-45 when no notice of deposition has been filed and served upon all parties and when no deposition has in fact been scheduled?

Discussion: Disciplinary Standard 4 of the State Bar of Georgia provides as follows:

A lawyer shall not engage in professional conduct involving dishonesty, fraud, deceit or willful misrepresentation. A violation of this Standard may be punished by disbarment.

A subpoena is a judicial writ issued in the name of the court by the clerk when attendance is required at court. (See Agnor’s Georgia Evidence § 2-3). In the case of White v. Gulf States Paper, 119 Ga. App. 271, 273 (1969), it was stated that our subpoena statutes were limited only to producing documentary evidence at a hearing or trial. In the White decision, the court noted that the old Georgia Code Section 38-8 and 38-9 dealt only with the production of documentary
evidence at a hearing or trial and that the new Act (1966 which constitutes our present subpoena law) did not enlarge the provisions of the repealed law to allow use of a Notice to Produce at depositions. This particular case brought about the amendment to Rule 45 of the Civil Practice Act.

OCGA § 9-11-45 provides that a subpoena shall issue for persons sought to be deposed and may command the person to produce documents. OCGA § 9-11-30(b)(1) requires notice to every other party of all depositions. Reading Rule 30 and Rule 45 together, it is obvious that before a subpoena can be issued, notice of the deposition must be given to all parties.

In consideration of the above, a subpoena issued pursuant to OCGA § 24-10-22(a) should only be issued for actual hearings and trials and should not be requested when in fact no hearing or trial has been scheduled. Likewise, a subpoena issued pursuant to Rule 45 of the Civil Practice Act should be requested and issued only for depositions which have been actually scheduled by agreement between parties or where a notice of deposition has been filed and served upon all parties, and should not be issued when no deposition has been scheduled.

The Board is concerned with the misuse of subpoenas as presented in the two situations discussed because subpoenas are court documents. Non-party witnesses would be misled by such court process into releasing confidential or
privileged material without the party having a chance to contest the relevancy, confidentiality or privilege of the material contained in the file because the subpoena is sent without notice to any other party or their counsel. Notice is a concept embraced by the Civil Practice Act. There is no need for notice of a subpoena issue pursuant to OCGA § 24-10-22(a) because all parties receive notice of hearings and trials, so long as they are real hearings and real trials.

Conclusion: In the opinion of the Board, the use of subpoenas as described herein is a willful misrepresentation to and fraud upon:

(1) The issuing court;
(2) The issuing clerk;
(3) The person or entities to whom the subpoena is directed; and,
(4) The opposing party and counsel, with the purview of Disciplinary Standard 4.

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III. FEDERAL RULE OF CIVIL PROCEDURE 11 SIGNING PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO THE COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney’s name--or by a party personally if the party is unrepresented. The paper must state the signer’s address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The
court must strike an unsigned paper unless the omission is promptly corrected after
being called to the attorney’s or party’s attention.

(b) Representations to the Court. By presenting to the court a pleading, written
motion, or other paper—whether by signing, filing, submitting, or later advocating
it—an attorney or unrepresented party certifies that to the best of the person’s
knowledge, information, and belief, formed after an inquiry reasonable under the
circumstances:

(1) it is not being presented for any improper purpose, such as to harass,
cause unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims, defenses, and other legal contentions are warranted by
existing law or by a nonfrivolous argument for extending, modifying, or reversing
existing law or for establishing new law;
(3) the factual contentions have evidentiary support or, if specifically so
identified, will likely have evidentiary support after a reasonable opportunity for
further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if
specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the
court determines that Rule 11(b) has been violated, the court may impose an
appropriate sanction on any attorney, law firm, or party that violated the rule or is
responsible for the violation. Absent exceptional circumstances, a law firm must
be held jointly responsible for a violation committed by its partner, associate, or
employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney’s fees, incurred for the motion.

(3) On the Court’s Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b). (4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney’s fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a
monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.
THE EXPERT’S ROLE IN A PREMISES LIABILITY CASE
PLAINTIFF AND DEFENSE PERSPECTIVE

Jeffrey H. Gross
Jeffrey H. Gross Consulting
Atlanta, Georgia
THE EXPERT'S ROLE IN A PREMISE LIABILITY CASE

PLAINTIFF AND DEFENSE PERSPECTIVE

Jeffrey H. Gross  Premise Liability Expert.
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The reasons for using expert witnesses in premise liability cases can be divided into several categories. The benefit, as we'll see is almost identical for both plaintiff and defense concerns. These categories are: pre-suit investigation, assistance in drafting or responding to complaints, assistance in developing discovery, analysis of discovery, aiding in the preparation of depositions, identifying appropriate codes or standards, assisting in the creation of demonstrative evidence, educating the attorney on technical or other specialized subjects. At trial the expert's role should be largely that of a teacher, aiding the jury in understanding a complex or specialized subject. An important item which reduces an expert's ability to help plaintiff or defense is being asked to become involved in the case too late. It is not unusual for experts to be first called when one is facing a motion for summary judgment. As this call may occur years after the incident has taken place, the expert may need to rely on discovery or evidence obtained by third parties. This may not be in keeping with the expert's previous methods for developing evidence. Certain investigative standards and protocols are often not used when evidence is produced without expert assistance.

Consider the following case in which involvement of an expert as a consultant was beneficial to the defense. The case involves a non-forced entry to commit a sexual assault at an apartment complex. Both the victim and perpetrator were residents of the same complex. As there was no forced entry and the victim insisted that her door was locked and in fact dead-bolted, the apartment’s complex's key control system came into question. Plaintiff’s counsel hired a locksmith to review the key control procedures at the complex and upon review could offer no criticisms. Defense expert not only reviewed the key control procedures but conducted an inspection of the actual door locks in question. This inspection revealed the apartment complex system was master-keyed by the previous owner. The current management team did not know the system was master-keyed nor were they aware of the location of the master keys. Additionally defense expert determined the key-ways of the system were so worn down that multiple doors could be opened by a given key, even though that particular key was not a master key or intended to open additional doors. In short the entire system was compromised both by the lack of master keys and its worn out condition. The value of the case was significantly reduced by plaintiff not having this information.

In this next case plaintiff's expert inspected a hotel key control system which was operated electrically. Perpetrator entered the room with a card key and sexually assaulted the victim. This key system allowed for interrogation of the lock at the room door. The printout of this interrogation revealed all cards used to open the door. Only the room keys and a maid's master key had been used to open the door. The maid's master key being used some six hours prior to the event. The immediate defense conclusion was, that no key had in fact been used to open the door. A review of the printout by plaintiff's expert resulted in the expert opining the printout
was not original nor accurate and that in fact it had been faked. This in turn resulted in a deposition of a representative from the lock company which revealed the printout was indeed false and not only had defense counsel not received an accurate information, the report had been changed prior to being given to the local police department. The discovery of this fraud resulted in the case being quickly settled. There was no evidence to suggest the defense attorney knew of the fraudulent document. Defense would have know they were being lied to had a qualified expert reviewed this discovery.

In this last case, plaintiff's attorney facing summary judgment in two weeks contacted an expert concerning an alleged handicap ramp defect. The accident occurred during new construction at an existing building a year and a half prior to when the expert was contacted. Photographs provided to the expert showed the ramp surface to be of plywood construction with other lumber for support. No measurements of the wood were taken and no photographs or documentation of the failed area of the ramp were produced. The design criteria for the ramp was unknown as was its designer or builder. No testing concerning the surface and its stability was conducted. This and other problems led the expert to opine it would be best to dismiss and re-file the case.

Attorneys should consider using experts as early in the case as possible. Not only can the expert assist in understanding codes, standards or causation, the experts' experience may have involved many dozens of similar cases. Whereas many attorneys have very little experience in a given kind of premise liability matter.
It is usual for plaintiff’s attorneys to request a large amount of information in premise liability cases. When the case concerns a deficiency in security, the requests are generally for police and incident reports, security policies and procedures, information on prior crimes, information concerning perpetrators or other suspects, closed circuit television recordings and many other items. Often the requested information will be compiled at the attorney’s office and only delivered to the expert when no more discovery is available. Consider supplying your expert with the discovery as it arrives in your office. Often your expert will be able to identify additional items that are referred to in a given piece of discovery. In one case a review of policies and procedures found references to other policies and procedure that were not provided in discovery. As the defense was unaware of these references, they too were surprised when the information was ultimately revealed and did not work to their advantage. Your expert can also provide value in helping you to prepare for the deposition of a 30b6 witness. When one considers that the 30b6 witness may have important information concerning a company’s security or loss prevention function, it is useful to have your expert construct questions that only another loss prevention or security professional would know to ask. In defense cases an expert can identify questions that should be asked by plaintiff’s attorney. Experienced experts can predict which direction plaintiff’s discovery is taking and may help defense to identify weaknesses in the company’s loss prevention or security function. This in turn will aid in accurate reporting to claims or insurance personnel.

Under ideal conditions an expert should be retained as soon after the incident has occurred as possible. While it is understood that significant delays can occur in some cases, there are many where defense or plaintiff’s attorneys receive the case soon. Often plaintiff’s attorneys will use an expert to memorialize an incident or accident scene, and conduct a preliminary investigation prior to suit. Some insurance companies and claims representatives do not wait to receive notice of a suit, but rather anticipate the need for a proper investigation to help properly reserve the claim. The use of insurance or claims investigators can be coordinated along with the use of consultants or expert witnesses to provide more accurate reporting. Only qualified evidence photographers or other persons with proper training in accident investigation should be involved in memorializing accident and incident scenes. Photographs without proper measuring devices to show scale may result in a return visit to the accident scene for the purpose of taking proper pictures. This assumes the accident scene still exists.

Your expert should also be considered for presenting information at mediation. This may be the only time a claims representative will be meeting face to face with all parties. This is an outstanding opportunity to have part of the liability portion of your case presented in a professional manner by your expert using demonstrative evidence if necessary. This has shown to be an effective tool appreciated by both sides.

In conclusion, an expert or consultant brought in to your case early can have a significant impact in the outcome of your case. The Number 1 rule from an expert’s perspective in premise liability cases is: Crime scenes and accident scenes are highly perishable; act quickly to preserve them.
APPENDIX
The State Bar of Georgia and the Law Schools of The University of Georgia, Emory University and Mercer University established the Institute of Continuing Legal Education in Georgia in August 1965. In 1984, Georgia State University College of Law was added to the consortium, and in 2005, John Marshall Law School was added. The purpose of the Institute is to provide an outstanding continuing legal education program so that members of the legal profession are afforded a means of enhancing their skills and keeping abreast of developments of the law. The Institute is governed by a Board of Trustees composed of twenty-eight members consisting of the Immediate Past President, the President, the President-elect, the Secretary, and the Treasurer, all of the State Bar of Georgia; the President, President-elect and the Immediate Past President of the Young Lawyers Division; nine members to be appointed by the President of the State Bar of Georgia, each for a term of three years (the President has three appointments each year); two representatives of each of the participating law schools; and the Immediate Past Chairperson of the Institute. The Immediate Past President of the State Bar of Georgia serves as Chairperson of the Board of Trustees of the Institute.

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<tr>
<th>Name</th>
<th>Position</th>
<th>Term Expires</th>
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<td>Gerald M. Edenfield</td>
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<td>2009</td>
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<tr>
<td>J. Ralph Beaird</td>
<td>Immediate Past President, State Bar of Georgia</td>
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<td>Immediate Past Chairperson, ICLE</td>
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<tr>
<td>A. James Elliott</td>
<td>Professor, Emory University School of Law</td>
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Daniel U. White
Director of Projects
GEORGIA MANDATORY CLE FACT SHEET

• Every “active” attorney in Georgia must attend 12 “approved” CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an “accredited” provider of “approved” CLE instruction.

• Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year.

• A portion of your ICLE name tag is your ATTENDANCE CONFIRMATION which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. DO NOT SEND THIS CARD TO THE COMMISSION!

• ICLE will electronically transmit computerized CLE attendance records directly into the Official State Bar Membership computer records for recording on the attendee’s Bar record. Attendees at ICLE programs need do nothing more as their attendance will be recorded in their Bar record.

• The Commission on Continuing Lawyer Competency staff will mail a prescribed affidavit form to each active attorney at the end of the year. The form will show the CLE courses attended and the number of credit hours that are entered in the Bar records. Each attorney will swear or affirm that the CLE credits claimed on the affidavit were ACTUALLY ATTENDED. Attorneys who are late attending or have to leave a seminar for a period of time will have to strike the CLE hours shown on the affidavit and enter the hours actually attended and claimed; or inform the ICLE staff at the seminar to reduce the hours in the ICLE records before transmitting the credit hours in the ICLE record!

• If the affidavit is correct, the member need only sign the form confirming actual attendance and return it to the Commission.

• If the affidavit is incorrect, the member should enter the corrections, sign the form, and return it to the Commission.

• Do not mail anything to the Commission other than the affidavit. No receipts or other evidence of attendance are required to support the affidavit unless requested by the Commission.

• Should you need CLE credit in a state other than Georgia, please inquire as to the procedure at the registration desk. ICLE does not guarantee credit in any state other than Georgia.

• Any questions concerning attendance credit at ICLE seminars should be directed to Linda Howard Toll Free: 1-800-422-0893 x306; Athens Area: 706-369-5664 x306; Atlanta Area: 770-466-0886 x306
TO: ICLE Seminar Attendee

Thank you for attending this seminar. We hope that these program materials will provide a great initial reference and resource for you in the particular subject matter area. There is a chance, however, that you might find an error(s) in these materials, like a wrong case citation or a typographical mistake that results in an obvious misstatement of black-letter law, such as an incorrect length for the applicable statute of limitations.

In an effort to make them as correct as possible, should you discover a significant substantive error(s), please note it (them) on the Errata Sheet below. Then, please detach the sheet and mail it to ICLE, P.O. Box 1885, Athens, GA 30603-1885 or fax it to (706) 369-5899. We will collect all the errata sheets and, after a reasonable time mail a correction to all seminar attendees and those attorneys who have ordered the book.

Should you have a different legal interpretation or opinion from the author’s, the appropriate way to address this is by giving him or her a call, which by the very nature of our seminars is always welcome.

Thank you for your help. It is truly appreciated.

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ICLE ERRATA SHEET

Seminar Title: ______________________ Seminar Date: _________

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