PREMISES LIABILITY SEMINAR

6 CLE Hours, Including
1 Ethics Hour | 5 Trial Practice Hours
Who are we?

SOLACE is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced some significant, potentially life-changing event in their lives. SOLACE is voluntary, simple and straightforward. SOLACE does not solicit monetary contributions but accepts assistance or donations in kind.

How does SOLACE work?

If you or someone in the legal community is in need of help, simply email SOLACE@gabar.org. Those emails are then reviewed by the SOLACE Committee. If the need fits within the parameters of the program, an email with the pertinent information is sent to members of the State Bar.

What needs are addressed?

Needs addressed by the SOLACE program can range from unique medical conditions requiring specialized referrals to a fire loss requiring help with clothing, food or housing. Some other examples of assistance include gift cards, food, meals, a rare blood type donation, assistance with transportation in a medical crisis or building a wheelchair ramp at a residence.

Contact SOLACE@gabar.org for help.
A solo practitioner’s quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

A Louisiana lawyer was in need of a CPAP machine, but didn’t have insurance or the means to purchase one. Multiple members offered to help.

A Bar member was dealing with a serious illness and in the midst of brain surgery, her mortgage company scheduled a foreclosure on her home. Several members of the Bar were able to negotiate with the mortgage company and avoided the pending foreclosure.

Working with the South Carolina Bar, a former paralegal’s son was flown from Cyprus to Atlanta (and then to South Carolina) for cancer treatment. Members of the Georgia and South Carolina bars worked together to get Gabriel and his family home from their long-term mission work.

The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

TESTIMONIALS

In each of the Georgia SOLACE requests made to date, Bar members have graciously stepped up and used their resources to help find solutions for those in need.

Contact SOLACE@gabar.org for help.
Dear ICLE Seminar Attendee,

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

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

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

Your comments and suggestions are always welcome.

Sincerely,
Your ICLE Staff

Jeffrey R. Davis  
Executive Director, State Bar of Georgia

Tangela S. King  
Director, ICLE

Rebecca A. Hall  
Associate Director, ICLE
AGENDA

Presiding:

Michael J. Gorby, Program Chair; Author, Premises Liability in Georgia;
Gorby Peters & Associates LLC, Atlanta, GA
Andrew T. Rogers, Program Co-Chair; Deitch & Rogers LLC, Atlanta, GA

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

8:05 WELCOME AND PROGRAM OVERVIEW
Michael J. Gorby, Program Chair; Author, Premises Liability in Georgia;
Gorby Peters & Associates LLC, Atlanta, GA

8:15 VOIR DIRE, OPENING STATEMENT, CLOSING ARGUMENT: PLAINTIFF’S
PERSPECTIVE IN THE TRIAL OF A NEGLIGENT SECURITY CASE
Gilbert H. Deitch, Deitch & Rogers LLC, Atlanta, GA
Andrew T. Rogers, Program Co-Chair; Deitch & Rogers LLC, Atlanta, GA

9:00 UPDATE ON PREMISES LIABILITY CASES
Michael J. Gorby, Program Chair; Author, Premises Liability in Georgia;
Gorby Peters & Associates LLC, Atlanta, GA

9:40 BREAK

9:50 MAXIMIZING DAMAGES IN A PREMISES LIABILITY CASE
Peter A. “Pete” Law, Law & Moran, Atlanta, GA
E. Michael “Mike” Moran, Law & Moran, Atlanta, GA

10:30 PRACTICE POINTERS IN DEFENDING A PREMISES LIABILITY CASE
Jeffrey M. “Jeff” Wasick, Gray Rust St. Amund Moffett & Brieske LLP, Atlanta, GA

11:00 DAUBERT APPLIES TO PREMISES EXPERTS: DEALING WITH IT
Mary Donne Peters, Author, Expert Testimony in Georgia; Gorby
Peters & Associates LLC, Atlanta

11:45 LUNCH
Panel Discussion of common evidentiary problems in a premises liability case.
12:25  **SLIP AND FALL LAW: THE BASICS**  
*Tony C. Jones*, Galloway Johnson Tompkins Burr & Smith PLC, Atlanta, GA

12:55  **SOVEREIGN IMMUNITY ISSUES IN PROSECUTING A PREMISES LIABILITY CASE AGAINST A GOVERNMENTAL ENTITY**  
*Matthew A. Cathey*, Cathey & Strain LLC, Cornelia, GA

1:25  **COMMON AND NOT SO COMMON CODE VIOLATIONS IN A PREMISES LIABILITY CASE – WHAT TO LOOK FOR AT THE SCENE**  
*Jeffrey H. Gross*, Jeffrey Gross Premises Liability Consultant, Powder Springs, GA

1:55  **BREAK**

2:05  **PROFESSIONALISM IN THE APPEAL OF A PREMISES CASE**  
*Hon. Carla Wong McMillian*, Judge, Georgia Court of Appeals, Atlanta, GA

3:05  **ADJOURN**
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Appendix:

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Voir Dire, Opening Statement, Closing Argument: Plaintiff’s Perspective In The Trial Of A Negligent Security Case

Presented By:

Gilbert H. Deitch  
Deitch & Rogers LLC  
Atlanta, GA

Andrew T. Rogers  
Deitch & Rogers LLC  
Atlanta, GA
813 S.E.2d 441
Court of Appeals of Georgia.
LANGLEY
v.
MP SPRING LAKE, LLC.
A18A0193
| May 1, 2018 |
Reconsideration Denied May 15, 2018

Synopsis
Background: Tenant brought personal-injury action against landlord based on tenant's fall in a common area when her foot became caught and slid on a crumbling portion of curb. The Superior Court, Clayton County, Mack, J., entered summary judgment for landlord. Tenant appealed.

[Holding] The Court of Appeals, Dillard, C.J., held that the one-year limitation period specified in lease applied to action.

Affirmed.

*442 Contract; limitation of action. Clayton Superior Court. Before Judge Mack.

Attorneys and Law Firms
Gebhardt Law Firm, Matthew G. Gebhardt, for appellant.
Freeman, Mathis & Gary, Jacob E. Daly, Sun S. Choy, Atlanta, for appellee.

Opinion
Dillard, Chief Judge.

Pamela Langley appeals from the trial court's grant of summary judgment in favor of MP Spring Lake, LLC (“Spring Lake”) on her suit for premises liability due to personal injuries she sustained as a tenant of an apartment complex that, at the time, was owned by Spring Lake.

Langley's sole argument on appeal is that the trial court erred in granting summary judgment to Spring Lake after concluding that her lease shortened the time to bring personal-injury actions against the apartment complex from two years to one year. For the reasons set forth infra, we affirm.

Viewed in the light most favorable to Langley (i.e., the nonmoving party), the record shows that she filed suit against Spring Lake on March 3, 2016, alleging that on March 3, 2014, while a lawful tenant of Spring Lake Apartments in Morrow, Georgia, she fell in a common area of the complex when her foot got caught and slid on a crumbling portion of curb. She later made claims of negligence and negligence per se due to Spring Lake's alleged failure to repair the curb despite being aware of its disrepair.

Spring Lake asserted, as one of its defenses, that Langley's claims were barred by a contractual limitation period contained within her lease. Spring Lake then moved for summary judgment on this basis, arguing that, because Langley's lease contained a one-year limitation period for legal actions and she filed her complaint two years after the injury occurred, her claim was time-barred. More specifically, Spring Lake argued that because Langley's claims accrued on March 3, 2014, when she fell, she was required by her lease to file suit on or before March 3, 2015.

Spring Lake also asserted, alternatively, that Langley's claims were barred by the statute of limitation and her failure to perfect service within the limitation period or a reasonable time thereafter. Spring Lake abandoned this alternative ground in exchange for Langley waiving her right to renewal under OCGA § 9-2-61. As a result, this alternative argument is not at issue on appeal.

The lease at issue was entered into on May 7, 2013, with an effective period of June 5, 2013, to June 4, 2014. In the thirty-third paragraph of the lease, the agreement provides:

Limitation on Actions. To the extent allowed by law, Resident also agrees and understands that any
legal action against Management or Owner must be instituted within one year of the date any claim or cause of action arises and that any action filed after one year from such date shall be time barred as a matter of law.

In response to Spring Lake’s motion for summary judgment, Langley argued that (1) the limitation-on-actions clause was too ambiguous to be enforceable; (2) the clause was only applicable to actions that arose from the contract itself, not an unrelated personal-injury action; (3) Spring Lake was estopped from relying upon the provision due to statements made by representatives of Spring Lake’s insurance carrier both before and after the expiration of the one-year period; and (4) it was fundamentally unfair to enforce the clause because neither party was even aware of its existence.

The trial court rejected Langley’s arguments and granted Spring Lake’s motion for summary judgment, concluding that the provision was enforceable. Specifically, the court found that Langley’s personal-injury claims were time-barred because she filed suit after the expiration of the one-year contractual limitation period. This appeal follows.

Summary judgment is, of course, proper when “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” And we review a grant or denial of summary judgment de novo, construing “the evidence in the light most favorable to the nonmovant.” With these guiding principles in mind, we will now address Langley’s contention on appeal.

In considering Langley’s argument, our analysis necessarily begins with the contractual language at issue. The cardinal rule of construction is, of course, to “ascertain the intention of the parties, as set out in the language of the contract.” In this regard, contract disputes are “particularly well suited for adjudication by summary judgment because construction of contracts is ordinarily a matter of law for the court.” And it is well established that contract construction entails a three-step process, beginning with the trial court’s determination as to “whether the language is clear and unambiguous.” If no construction is required because the language is plain, the court then enforces the contract according to its terms. But if there is any ambiguity, the court proceeds to the second step, which is to “apply the rules of contract construction to resolve the ambiguity.” Finally, in the third step, “if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.”

Langley argues the trial court’s conclusion is erroneous because a contractual limitation period should not apply to claims that do not arise out of the agreement. She contends the subject clause “may be ‘all-inclusive’ for causes of action based upon the lease contract, but it is overly broad and improper to interpret the lease contract clause as limiting an action derived solely from a statutory right unrelated to the contract.”

In response to Langley’s argument, our analysis necessarily begins with the contractual language at issue. The cardinal rule of construction is, of course, to “ascertain the intention of the parties, as set out in the language of the contract.” In this regard, contract disputes are “particularly well suited for adjudication by summary judgment because construction of contracts is ordinarily a matter of law for the court.” And it is well established that contract construction entails a three-step process, beginning with the trial court’s determination as to “whether the language is clear and unambiguous.” If no construction is required because the language is plain, the court then enforces the contract according to its terms. But if there is any ambiguity, the court proceeds to the second step, which is to “apply the rules of contract construction to resolve the ambiguity.” Finally, in the third step, “if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.”

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Evans, 336 Ga. App. at 638 (1), 786 S.E.2d 250 (punctuation omitted); accord Evans, 336 Ga. App. at 638 (1), 786 S.E.2d 250.


Evans, 336 Ga. App. at 638 (1), 786 S.E.2d 250.

Evans, 336 Ga. App. at 638 (1), 786 S.E.2d 250.


Here, we agree with the trial court that there is no ambiguity in the language of the relevant contractual provision. Indeed, its meaning is perfectly clear: “To the extent allowed by law, Resident also agrees and understands that any legal action against Management or Owner must be instituted within one year of the date any claim or cause of action arises and that any action filed after one year from such date shall be time barred as a matter of law.”*\(^1\) As a result, the one-year contractual limitation period encompassed by Langley’s lease with Spring Lake was applicable to any action, *\(^4\)444 not just those which arose from breaches of the lease. Accordingly, although personal-injury claims are ordinarily subject to a two-year statute of limitation, *\(^1\)1 Langley contractually agreed to bring any action against Spring Lake—including, but not limited to, personal-injury actions—within one year. And Langley failed to do this when she filed suit on March 3, 2016, seeking to recover damages for an injury that occurred on March 3, 2014.

*\(^\text{1}\)\(^*\) (Emphasis supplied).

(See OCGA § 9-3-33.)

We further reject Langley’s assertion that the provision at issue should be unenforceable as a matter of law, when contractual-limitation-period clauses are enforceable in Georgia. *\(^1\)1\(^\text{1}\)\(^*\) And Langley points us to no supporting authority that holds such provisions are inapplicable to personal-injury actions. *\(^1\)1\(^\text{2}\) Although the language of the limitation-on-actions provision is broad and does not explicitly specify that it includes personal-injury actions, *\(^1\)1\(^\text{3}\) it nevertheless encompasses any *\(^4\)445 legal action that Langley might have instituted against the owner or management of her apartment complex. Thus, Langley’s repeated assertions that her personal-injury claim is “unrelated” to the contract are of no consequence because her personal-injury claim, and any other claim that she might have brought against Spring Lake, were encompassed by this broad contractual limitation period.

(See Rain & Hail Ins. Servs., Inc. v. Vickery, 274 Ga. App. 424, 425(1), 618 S.E.2d 111 (2005) (“This Court has previously found this contractual limitation provision to be enforceable.”); Dailey v. Cotton States Mut. Ins. Co., 207 Ga. App. 139, 139, 427 S.E.2d 109 (1993) (“There is no question that contractual limitations are valid and will be enforced by the courts.”) (punctuation omitted)); see also Thornton v. Ga Farm Bureau Mut. Ins. Co., 287 Ga. 379, 380 (11), 695 S.E.2d 647 (2010) (“[Appellant] fails to recognize the distinction between a statute of limitation and its particular language and a contractual period of limitation and its particular language. They can be significantly different, as demonstrated by the fact that the statute of limitation for contract claims is six years, but the courts have nevertheless enforced much shorter contractual periods of limitation, including the one-year limitation in insurance policies like the one in this case.”) (citation omitted). Moreover, although several of our sister states admittedly disallow contractual provisions shortening statutes of limitation, they all do so only as a result of statutory prohibitions on such agreements. See S.C. CODE ANN. § 15-3-140 (“No clause ... whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations ... shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.”); FLA. STAT. § 95.03 (“Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void.”); ALA. CODE § 6-6-15 (“Any agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void.”); MISS. CODE. ANN. § 15-1-5 (“The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contracts stipulation whatsoever shall be absolutely null and void[].”). But in the absence of a statutory prohibition, other state courts have generally upheld the validity of clauses shortening a party’s time to sue. See Ceccone v. Carroll Home Servs., LLC, 165 A.3d 475, 483 (II) (B) (Md. Ct. App. 2017) (“[P]arties may agree to a provision that modifies the limitations result that would otherwise pertain provided (1) there is no controlling statute to the contrary, (2) it is reasonable, and (3) it is not subject to other defenses such as fraud, duress, or misrepresentation.”) (punctuation omitted)); Town of Crossville Hous. Auth. v. Murphy, 465 S.W.3d 574, 579 (II) (Tenn. Ct. App. 2014) (noting “Tennessee courts have long upheld contractual limitations that
reduce the statutory period for filing suit”); *Bil of Sale’s of Fairless Cty v. Savannah*, 269 S.E.2d 179, 180 (Ga. 1980) (“Parties to a contract properly may agree that a claim under the contract must be enforced within a shorter time limit than that fixed by statute if the contractual provision is not against public policy and if the agreed time is not unreasonably short.”); see also *Steele v. Safeco Ins. Co. of Am.*, Case No. COA12-266, 735 S.E.2d 451 (Table); 2012 WL 5837393, at *4 (N.C. Ct. App. 2012) (unpublished) (permitting a contractually shortened statute of limitation when North Carolina law did not specifically prohibit such an agreement between the parties). Similarly, when our General Assembly has remained silent, we are bound to follow the common law, which has consistently permitted contractual-limitation-period clauses. See *Wolf Creek Landfill, LLC v. Twinge Cty.*, 337 Ga. App. 211, 214 (1) (786 SE2d 862) (2016) (“While some states have statutory or judicial restrictions prohibiting or limiting contractual extensions of statutes of limitation, Georgia does not.” (footnotes omitted)).

14 See COURT OF APPEALS R. 25(a)(3) (“Part Three [of appellant’s brief] shall contain the argument and citation of authorities. It shall also include a concise statement of the applicable standard of review with supporting authority for each issue presented in the brief.”).

15 *Cf. Scott v. Ing Clarion Partners, LLC*, 2007 WL 1391386, at *1 (N.D. Ga. May 7, 2007) (declining to address, after reaching determinative conclusion on first two arguments, third and final argument in favor of judgment on the pleadings, which was that action was barred by contractual limitation clause providing that “Resident agrees and understands that any legal action instituted against Management or related to any claims or causes of action arising for any reason whatsoever, including personal injury, bodily injury and/or property damage, shall be filed only in the Superior Court or State Court of Cobb County, Georgia,” and that “Resident also agrees and understands that any legal action against Management must be instituted within one year of the date any claim or cause of action arises and that any action filed after one year from such date shall be time barred as a matter of law”).


Here, the provision at issue is not a contractual obligation listed in OCGA § 13-8-2 (a), which includes a non-exclusive list of contracts that our General Assembly has deemed contrary to public policy. This, combined with our Supreme Court’s explicit holding that parties to a contract have the power to “agree among themselves upon a period of time which would amount to a statute of limitations, either greater or less than the period fixed by the law,” leads us to conclude that the unambiguous provision at issue is enforceable. Accordingly, any cause of action that accrued during the duration of Langley’s lease—including a cause of action for personal injuries—was subject to the one-year contractual limitation period.

See OCGA § 13-8-2 (a) (1)-(5) (“Contracts deemed contrary to public policy include but are not limited to: (1) Contracts tending to corrupt legislation or the judiciary; (2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter; (3) Contracts to evade or oppose the revenue laws of another country; (4) Wagering contracts; or (5) Contracts of maintenance or champerty.”); see also RSN Props., Inc. v. Eng’g Consulting Servs., Ltd., 301 Ga. App. 52, 53, 686 S.E.2d 853 (2009) (holding that limitation-of-liability provision did not violate public policy and was enforceable when provision did not create a contractual obligation encompassed by OCGA § 13-8-2 (a), nor was it otherwise contrary to public policy).

For all these reasons, we affirm the trial court’s grant of summary judgment to Spring Lake.

Judgment affirmed.

Doyle, P. J., and Mercier, J., concur.

All Citations

813 S.E.2d 441
Update On Premises Liability Cases

Presented By:

*Michael J. Gorby*
Gorby Peters & Associates LLC
Atlanta, GA
Slip and Fall:


Plaintiff fell on a staircase, during a free concert hosted by Mercer University. On interlocutory appeal, Mercer contended, inter alia, that no jury questions existed as to (1) whether the Recreational Property Act (RPA) should apply to immunize Mercer from liability; (2) causation, (3) whether the Plaintiff showed that Mercer had superior knowledge, and (4) that Plaintiff had equal knowledge.

(1) The Court found that there was an issue of fact as to whether the RPA applied because, although the Plaintiff was not charged to attend the concert there was a factual dispute as to Mercer's purpose in inviting the public to the free concert. Mercer had sponsors for the concert and allowed private vendors to sell food and alcohol at profit. Further, in a grant proposal form, Mercer stated that "interaction with other local community...resources [could create] the potential for additional revenue streams for the University." This evidence could show a mixed commercial and recreational motive for the concert which would deny RPA immunity.

(2) Mercer's causation argument was rejected because it was not brought up in
(3) Court held that there was a factual issue as to Mercer's superior knowledge because Plaintiff had shown that Mercer's program director had traversed the scene of the accident multiple times and because occupiers of land are generally on constructive notice of what an inspection would reveal.

(4) The court rejected the argument of equal knowledge because it was too early in the trial process to decide on Plaintiff's own negligence and because the fact that the Plaintiff knew that the hand-rail was missing does not mean she was fully aware of the risk she talk taking the stairs.


Plaintiff slipped on ice in the parking deck. The trial court denied the defendant’s motion for summary judgment. The Court of Appeals reversed holding that under O.C.G.A. § 51-3-1, the knowledge of the generally prevailing hazardous snow and ice conditions was not sufficient to establish actual or constructive knowledge by the hospital or plaintiff of the specific piece of black ice on the upper deck which caused the slip and fall. Further, there was no evidence that the hospital had actual knowledge of the invisible ice hazard on the upper deck, despite evidence that the hospital conducted regular inspections of the premises. Finally, constructive knowledge of the hazard could not be inferred based on the lack of a reasonable inspection procedure as the hospital had round the clock patrols to look for snow
and ice, including on the day plaintiff fell where the Hospital had taken action to clear out as much ice as possible.

Mayor v. Harris 302 Ga. 853, 809 S.E.2d 806 (2018). Two adults and one child attended a football game. The child was allowed free entry because he was under six years old. The parents were charged 2 dollars to enter. The child slipped and fell between the bleachers and was seriously injured. Cert. was granted in this case to determine whether the Court of Appeals erred in concluding that a landowner would not be shielded from potential liability by the RPA where that landowner charged a fee to some people who used the landowner’s property for recreational purposes but did not charge any fee to the injured party who used the property for the same purposes. The Supreme Court reversed and concluded that the RPA shielded the stadium from liability because a plain reading of the statute did not prohibit immunity simply because "the landowner would be potentially liable to others who have paid to use the property for such purposes."

The dissent argued that precedent and O.C.G.A. § 51-3-25 do not extend RPA protection to owners who "charge a fee for admission to the property." Thus, the Dissent found that under an analysis of the use of the property (instead of whether a specific individual was charged) the stadium should not be shielded by the RPA.

contribute to hazard thereby imputing constructive knowledge of hazard to Walmart. Further, claim that mop was too saturated to dry floor because surveillance footage showed employee put some "white material" under the mop to (allegedly) dry it was mere speculation. Finally, court held that Walmart's inspection procedures were reasonable as a matter of law.

Keisha, LLC v Dundon, 344 Ga. App. 278, 809 S.E. 2d 835. Defending gas station did not have constructive knowledge of spilled fuel which led to plaintiff's slip and fall despite (1) the gas station's knowledge that nozzles could pop out of fuel tanks, (2) a customer informing the gas clerk of a "problem" outside, and (3) no recorded inspection logs. The court held that because the clerk's view to the spill was blocked by various vehicles and the gas had only been on the ground for 20 seconds at the time of the accident, no constructive knowledge.

Landlord-Tenant:

Langley v. MP Spring Lake, LLC 813 S.E.2d 441. Trial court granted summary judgment to Defendant "Apartment Complex", after Plaintiff brought suit for slip-and-fall arising from a curb that was in disrepair. The language of the contract tenant signed limited the statute of limitations to one year for any cause of action against the complex. Plaintiff argued that the language of the contract was ambiguous, did not apply to causes of actions arising outside of the contract, and violated public policy. The Court of Appeals affirmed the grant of summary
judgment, holding that the language of the contract was unambiguous, applied to "any" cause of action, and that the 1 year contractual statute of limitations did not violate public policy as listed in OCGA § 13-8-2 (a).

Sanders v. QuikTrip Corporation 2017 WL 4812361 ND Ga. Court held that out-of-possession landlord was not liable for Plaintiffs son's shooting death at an inadequately lit QuikTrip. Plaintiff argued that her negligent security claim fell under the "failure to keep the premises in repairs" portion of O.C.G.A. § 44-7-14. The court rejected the argument stating that "repair" only refers to a defect in the original structure that the landlord is made aware of. This statute gives landlords no duty to maintain adequate lighting or security. Thus, the Court dismissed the claim against the out-of-possession landlord.

Vinings Run Condo Assn, v. Stuart-Jones 342 Ga. App. 434, 802 S.E.2d 393 (2017). Plaintiff had a verbal agreement with the owner of a condominium (Defendant) to lease-purchase the home. After making a request for more lighting and handrails on the concrete stairs leading from the parking lot to her condo, Plaintiff fell and was injured ascending the stairs. This suit followed. Because the evidence showed that the Plaintiff had equal knowledge of the defects, Plaintiff relied on the "Necessity Doctrine." The court rejected the argument stating that the verbal agreement (in which Plaintiff pays the mortgage note directly to the mortgagor, did not create a landlord-tenant relationship, thus the Necessity Rule
Dissent argued that, since the animating principle of the doctrine is that a person "cannot be deemed as a matter of law to have freely and voluntarily assumed the risk of injury" if her alternative is to become "a virtual prisoner in her own apartment", there is no real difference (for the purposes of the doctrine) between a rental agreement and this rather informal lease agreement.

Mujkic v. Lam 342 Ga. App. 693, 804 S.E.2d 706 (2017). Two-year statute of limitations for personal injury claims, rather than the four-year statute of limitations for personal property claims, applied to tenants' action against landlord to recover $35,484.98 in medical expenses they incurred after their minor child was injured when a brick wall on the leased premises collapsed. The Court held that the tenants did have property interest in the recovery of medical expenses incurred for treatment of their child, but that did not convert the personal injury claim into a personal property claim.

Matta-Troncoso v. Tyner 806 S.E. 2d 10 (2017). Dog bite victim and husband filed negligence action against dog owners and dog owners' out-of-possession landlord. The trial court granted summary judgment in favor of landlord. Plaintiffs appealed. The Court of Appeals reversed finding a genuine issue of material fact as to whether Plaintiff's injuries arose from the dogs escaping their enclosure as a result of the Defendant landlord's failure to fix the latch on the
enclosure's front gate. The court rejected the argument that O.C.G.A. § 44-7-14 only applied to injuries that occurred on the leased premises, stating that a plain reading the statute showed that it applied to any damages "arising" from the defect.

Certiorari Granted on May 7, 2018.

Cottingham v. Sapp 344 Ga. App. 651 (2018). Plaintiff (tenant’s employee) filed a personal injury complaint against landlord after she slipped and fell on water, injuring her neck and hand. In affirming the trial court's grant of summary judgment to the out of possession landlord, the Court of Appeals, after applying the Prophecy Rule, held as a matter of law, the plaintiff had equal knowledge of the water issue. The Court then held that the landlord's duty to repair set out in OCGA 44-7-13 imposes only contractual, but not tort, liability on a landlord. Plaintiff argued that O.C.G.A. § 44-7-14 applied here because the landlord had failed to repair the broken gutter. The Court of Appeals rejected the argument stating that, like in normal premise liability cases, claims arising out of O.C.G.A. § 44-7-14 are defeated by the plaintiff’s equal or superior knowledge of the defect.

Simmons v. Prince 343 Ga. App. 175, 806 S.E.2d 627 (2017). The guest of a tenant fell through the balusters of a railing, was injured, and sued the landlord. Landlord filed for summary judgment, was denied, and was granted interlocutory appeal. The Court reversed holding, inter alia, that the plaintiff’s negligence per se claim failed despite the fact that the landlord had violated certain building and
safety codes in allowing the gaps between the balusters to remain so wide. Plaintiff had failed to show that these codes were either mandatory or had the force of law.


Tenant was injured by a falling tree limb that a co-tenant/on-and-off again maintenance man was dislodging. The co-tenant had previously held himself out to other tenants as the apartment complex's official maintenance man and would perform routine maintenance task without asking the landlord for permission. The court found, inter alia, that there was an issue of fact as to whether the landlord defendant had actual or constructive notice of the hazardous conditions on its property because there was evidence that showed that the maintenance man was an agent of the defendant.

*Handberry v. Stuckey Timberland, Inc.* 345 Ga. App. 191, 812 S.E.2d 547 (2018). Surviving spouse brought wrongful death action against owner of property on which hunting club member had died after falling in a well. Defendant owns and manages land in Georgia including around 500 acres in Jefferson county. Defendant leased out the land "only for fishing and hunting purposes." Decedent flipped his 4-wheeler and fell into the well while scouting out the land for hunting there at a later time. The court found that the leasor was not liable because; either the Decedent was there "hunting" and the leasor was protected by the RPA, or the decedent was not hunting, in violation of the terms of the lease, and trespassing
where the leasor would only have to "refrain from causing will and wanton injury".

**Third Party Criminal Act Liability:**

Martin v. Six Flags 301 Ga. 323, 801 S.E.2d 24 (2017). Amusement park patron brought action against Six Flags after being seriously injured when attacked by gang members at a nearby bus stop he used to access the park. The lower court found that Six Flags was liable because the bus stop was part of the "approaches" of the park. The Supreme Court found that the bus stop was not part of the approaches because it was not adjacent or contiguous with the park and because Six Flags had not taken any affirmative steps to exercise control or dominion over the bus stop and the public way leading to it. However, The Supreme Court did affirm on other grounds, stating that a landowner's liability for an invitee's injuries from an attack that originates on the premises does not dissipate as soon as the invitee steps—or flees—off the property, so long as the invitee's injuries were proximately caused by the landowner's failure to exercise ordinary care in maintaining safety and security within its premises and approaches. The Court found that the attack was foreseeable by Six Flags because of previous similar attacks (attacks started or planned on Six Flags premises but executed in the parking lot or at the bus stop) on its customers, including one on the same day. Further, Six Flags management was aware of daily gang activity and the fact that
its staff had been infiltrated by gang members. Finally, the Supreme Court agreed with the Court of Appeals that the trial judge erred in not properly instructing the jury on apportioning damages, however, the Supreme Court held this did not require a re-trial on all issues, but only on the issue of apportionment.

Ya Van v. Siv Cheng Kong 344 Ga. App. 754 (2018). Acts of homeowner's estranged son-in-law in fatally stabbing homeowner's daughter, who was staying in home, after homeowner allowed him entry, constituted an unforeseeable intervening criminal act of a third party against which homeowner had no duty to protect, even though son-in-law had stated he would get revenge in a custody battle, where he did not have a criminal record, he did not have violent propensities, he had not previously misused a knife or weapon of any kind, homeowner did not know of any prior acts of violence, and no violent crimes had been committed at the home previously.

Robles v. QuikTrip 2017 WL 6497673, 2017. Premises liability claim arising from altercation leading to the shooting and partial paralysis of the Plaintiff. Defendant argued, inter alia, that the shooting by a third party was not reasonably foreseeable because prior incidents at the QuikTrip were not substantially similar. The District Court found prior incidents in which involving the brandishing and discharge of firearms were similar enough despite Defendant's arguments that none of the prior incidents led to an actual person being shot. Further, the court rejected
the Defendant's argument that robberies inside the store cannot be similar to altercations outside the store.

**Evidentiary Issues:**

*Bartenfeld v. Chick-Fil-A, Inc* 815 S.E. 2d 273. Patron brought negligence and nuisance action against Chick-Fil-A after tripping over a concrete wheel stop in the parking lot. Patron argued that Chick-Fil-A created and maintained a dangerous condition through the use of wheel stops that were (1) identical in appearance to the painted lines designating the pedestrian path and (2) too close to the drive-through. The trial court held that these claims were for negligent design and granted summary judgment to Chick-Fil-A (CFA) because the Patron had not offered any expert testimony to back up her claims. On appeal, the Court agreed that the plaintiff’s negligence claim sounded in professional negligence, and therefore, required supporting expert testimony. The Court went on to hold that even if the plaintiff’s claim was classified as a simple negligence claim, it also failed because the “wheel stop was not a hazard as a matter of law.”

*Jones v. Med. Ctr. Of Cent. Ga. Inc.* 341 Ga. App. 888, 802 S.E.2d 286 (2017). Elevator passenger was injured when hospital elevator suddenly fell and sued the hospital and elevator maintenance contractor. One of the contractor's employees provided contradicting testimony as to whether the elevator in question was removed from service until inspection (in compliance with O.C.G.A. § 8-2-
106 (c)). Court held that the Prophecy rule did not apply here because the employee was not a party to the case nor was he acting as a representative of either the hospital or the contractor (who he worked for).

_Vineyard Industries v. Bailey 343 Ga. App. 517, 806 S.E. 2d 898 (2017)._ Mother filed negligence action against restaurant on behalf of her child who slipped and fell in front of a soda machine. She won and got damages. Restaurant appealed claiming, inter alia, that the trial court erred in granting a motion in limine against its expert. The Court found that the Defendant had not met the burden of showing that its human factors expert's testimony was admissible because the expert had failed to apply his principles and methods (which were already slim) to the facts of the case. The expert merely opined that some people react to warning signs and some do not. The expert never explained how someone in the child's position would have reacted to a warning sign in the area of the drink machine.

**Homeowner’s Liability:**

_Williams v Johnson 344 Ga. App. 311, 809 S.E.2d 839 (2018)._ Premises liability claim arising out of Plaintiff’s injury while removing a mirror in Defendant's bathroom. Defendant had hired him to do work around the house including "fram[ing] out a bathroom." Plaintiff had 18 years of experience in construction. Plaintiff was injured attempting to throw away a wooden board he
had previously removed from the mirror with a piece of sharp glass on it.

Defendant appeals after his denied summary judgment motion. The Court of Appeals reversed the trial court's holding, stating that there was undisputed evidence that Plaintiff had equal, if not superior, knowledge of the risk of handling the board. The court cited his 18 years of experience, his knowledge of the presence of the sharp glass, and the fact that it was his own decision to dispose of the wooden board in the manner that he did. The Plaintiff further argued that Defendant should have either; (1) warned him about "the way they were doing the glass" or (2) instructed him to "bust" the glass in garage before moving across the house the premises to throw out the boards. The Court rejected those arguments stating that the Plaintiff's arguments were irrelevant as the injury occurred when disposing of the board, not when it was removed from the mirror or when the Plaintiff moved the board across the premises.

Finally, the Plaintiff argued that for summary judgment to be granted to the Defendant, the evidence must show that "the [Plaintiff] had numerous occasions and ample time to inspect and recognize the dangerous condition." The court stated that this was simply not true and that the Plaintiff must show why he needed additional time or opportunities to "fully appreciate the danger posed by sharp glass."

HOA and property managers were not liable for the drowning of a 4-year-old boy at their pool because there was a sign warning that there was no lifeguard and the pool was compliant with safety regulation because even if the boy was an invitee owners of swimming pools are no liable without a showing of negligence.
Maximizing Damages In A Premises Liability Case

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I. INTRODUCTION.

Maximizing damages in a premises liability case requires an effective strategy, a thorough understanding of the applicable law, and often, years of hard work. Premises liability cases present unique challenges and opportunities, and this article will provide insight into how an attorney can effectively maximize damages at every step of the case, from the initial client meeting to closing arguments. While each case is different, and certain types of premises liability cases are more nuanced than others, adhering to some basic principles will go a long way in maximizing recovery in any premises liability case.

An effective strategy for obtaining maximum damages begins at the onset of the case and requires a thorough discovery approach that recognizes what will motivate a jury to find in your client’s favor. Thereafter, efficiency, competency and your credibility must carry over through voir dire, opening statements, evidence, witness examination, cross examination, and the demonstrative aids you choose.

II. PRE-SUIT CONSIDERATIONS.

Premises liability cases typically require substantial time, effort, and pre-suit evaluation. An attorney should closely scrutinize potential cases on the front end in order to fully evaluate merit, strengths, and weaknesses. This is especially true of negligent security cases, where the plaintiff will need to ask the jury to hold a premises owner or operator responsible for the criminal acts of another person.

It is not always possible to successfully evaluate a premises case at its onset. However, taking certain steps can minimize the risk of pursuing a case that is unlikely to be successful. Early detection of major issues with a case can save a great deal of time, money, and frustration. At the initial client meeting, do not be afraid to scrutinize the client’s version of the events.
While an attorney should not beat up on a client or prospective client, it is important to be aggressive when necessary in order to get the truth about what happened and the client’s damages.

From the onset of the case, think about what the opposing counsel will try to argue, and what evidence will prove your case and/or defeat an opposing argument. Of course, inadmissible evidence is of little value, and a lawyer should start thinking about admissibility well before filing suit. In fact, at the very first client meeting, obtaining documents and the names of fact witnesses are essential steps in identifying admissible evidence. Your immediate investigation should be directed toward the later admission of the evidence. Always visit the scene of the incident, as defendants will often make repairs and upgrades at a premises, for example, improving lighting. Look around, take pictures and videos, and to the extent allowed, talk to people and obtain recorded statements.

Shortly after the initial client meeting, an attorney should send a letter to all possible defendants asking to preserve evidence and put their insurer on notice. Make sure to ask that they put all insurers on notice, including any excess or umbrella policy carriers. Be specific with requests to preserve evidence.

**III. DRAFTING THE COMPLAINT.**

If possible, an attorney should conduct extensive legal and factual research before filing a complaint. Make sure you include all possible defendants and claims, as it is always easier to dismiss a defendant than to add a new one. Consider all possible options for venue, as it is no secret that the likelihood of obtaining verdicts varies greatly by county.

Drafting a lawsuit can also lead toward the admissibility of evidence. The wording of pleadings, or even certain causes of action, allow for additional discovery that may not have
otherwise been relevant. Be specific about allegations of negligence. Thoroughly research the case, the law, and all possible defendants well before filing.

IV. DISCOVERY.

A thorough and comprehensive discovery plan will set the stage for maximizing damages at trial and should be developed at the onset of any premises liability case. Although discovery is traditionally seen as the “fact finding” phase of the case, always approach discovery with an eye toward summary judgment and trial. From the onset of the case, determine what testimony or documents will help beat summary judgment or win an appropriate verdict. Of course, this is often easier said than done, but following certain principles will improve the likelihood of success in any premises liability case. Consider the cases a defendant will likely cite in a motion for summary judgment and determine how your case can be distinguished.

Although the Appellate Courts have clarified the burden on the plaintiff in proving premises liability cases, summary judgment and motions to exclude remain common. Accordingly, discovery and the use of experts are especially important components in preparing and presenting a premises liability case. These cases present a wide range of injuries from paralysis, brain damage, broken bones, herniated discs, physical and sexual assaults, and wrongful death. It is important to focus on the type of damages suffered by your client and present those damages to the jury in a clear and effective manner in order to maximize the recovery.

V. OPENING STATEMENTS.

Opening statements present an important opportunity to speak directly to the jurors you selected in voir dire and direct their focus to the key issues of your case. Openings are made at a
time when jurors are most attentive, and a creative and well-planned opening can establish your credibility, build trust, and prepare them to find in your client’s favor.

Articles regarding opening statements often cite to the principle of primacy – the idea that whatever is heard first will be believed or recalled best. Because the plaintiff is permitted to go first, counsel must capitalize on this opportunity because his or her version may be most readily accepted by the jury. It is also an opportunity to provide the first explanation for any weak or unfavorable portions of the case which may diffuse the defendant’s later attacks.

The purpose of an opening statement is to inform the fact finder of the contemplated evidence, so as to enable them to understand the case and to appreciate the significance of your client’s case. *Seaboard Coastline Railroad Co. v. Zeigler*, 120 Ga. App. 276, 170 S.E.2d 60 (1969). The content of opening statements is restricted to an outline or roadmap of the issues of the case, and the testimony and evidence which counsel anticipates will be introduced during trial. *See, Waits v. Hardy*, 214 Ga. 41, 102 S.E.2d 590 (1958); *Beecher v. Farley*, 104 Ga. App. 184 (1961). Counsel is limited in his opening statement to matters he expects to prove. *Smith v. Berry*, 231 Ga. 39; 200 S.E.2d 95 (1973). The opening statement should provide a logical framework or context in which the jurors can organize the case facts, since evidence is often presented out of chronological or logical order depending on witness availability.

While the Courts have established certain restrictions on the content and presentation of opening statements, the latitude given to an attorney at trial is within the sound discretion of the trial court. *Cotton States Mut. Ins. Co. v. Stephens*, 106 Ga. App. 145, 126 S.E.2d 645 (1962). Counsel may refer to and briefly read from pleadings. Counsel is usually barred from arguing the case to the jury and from referring to evidence that will be inadmissible during the trial. *Green v. State*, 172 Ga. 635, 158 S.E.2d 268 (1931). As a practical matter, most judges will
allow reasonable inferences to be drawn from the evidence and stated in your opening. Despite such restrictions, the grant of a mistrial because of improper statements during an opening is rare, and may usually be cured by instructions to the jury, and the trial court’s decision regarding the exercise of such discretion will not be disturbed unless it is manifestly abused. *Smith v. Berry*, supra.

The Courts have held that the use of a blackboard is permitted during opening statements. *Lweyn v. Motris*, 135 Ga. App. 289, 217 S.E.2d 642 (1975). The use of charts and exhibits are presumably permitted, *see* O.C.G.A. § 9-10-183. However, it is advisable to confer with the Court and even opposing counsel regarding the use of such exhibits during opening statements prior to trial. This may eliminate drawing an objection during opening or an early rebuke from a judge.

The opening statements should carry over your theme from the case which should have started during voir dire. In a severe injury case, voir dire should have established that you are going to present a case where the plaintiff suffered such severe injuries. If the jury’s attention is directed to damages from the earliest stages of the trial, the jury’s focus on damages will resonate throughout the trial.

A good theme provides the jurors with both the conceptual framework for the facts and the emotional undercurrent of the case. If you are able to develop a one or two sentence theme, it can be reinforced during witness testimony and carry through to the closing argument. The opening should introduce the jury to your theme and the important facts of your case. It should contain a complete identification of the parties, witnesses, the relationships between the witnesses, a thorough explanation of the factual situation and a detailed analysis of the facts, setting forth the plaintiff’s claim for relief.
The opening statement is typically referred to as a roadmap for the trial. There are several different methods for developing this roadmap for the jury. Simply telling the story chronologically and reviewing the witnesses in the order they will testify may be the easiest for the jury to follow. Another method, often called the “flashback,” begins with the injury complained of and then reviews events from the past to tell the story about how this injury occurred. Some attorneys favor this dramatic method for cases where the injuries are severe.

The weaknesses of the case should be revealed and explained to diffuse the defendant’s use of the adverse facts during the trial. A well-developed opening statement should not ignore problematic facts, witnesses or issues in the case. When damaging evidence is anticipated and discussed, the “sting” of this evidence may be removed by portraying it in the best light. Not only is the impact of the evidence lessened, but the attorney may gain credibility with the jury by being viewed as more open and honest.

One pitfall to avoid is telling a jury about evidence that may not ultimately be admitted. One is often surprised by the little things that a jury remembers; if you tell a jury during openings that you will prove something during the trial, and fail to do so, they will remember. Such a mistake will cost you dearly in credibility and will provide your opposing counsel ammunition for closing arguments.

You should present a detailed but realistic overview of your case. It can be detrimental to overstate your case, particularly if the opponent points out these overstatements in closing arguments to the jury. Do not discuss issues that have a significant chance of being eliminated by a directed verdict, such as punitive damages. There is usually no need to mention punitive damages in opening.
The judge will instruct the jury that statements made by counsel during the trial are not evidence. An attorney should never reiterate this instruction as there is no need to tell jurors to ignore what you have to say.

VI. WITNESS EXAMINATIONS AND DEMONSTRATIVE AIDS TO MAXIMIZE DAMAGES.

The damages sustained by premises liability plaintiffs can vary greatly from case to case. In some cases, the extent of injury will be obvious. In other cases, an attorney will need convince that jury that the plaintiff’s injuries warrant the appropriate damages verdict, even if the injuries may not initially seem so severe. Some of the most effective ways to accomplish this are through “before and after” lay witnesses, and “day in the life” videos.

The most important lay witnesses for the plaintiff may include family, friends, co-workers, employers, physical therapists and acquaintances. The witnesses who see, hear and observe the plaintiff every day can provide a view into the life of the plaintiff. These witnesses are often called “before and after” witnesses because their testimony contrasts the plaintiff’s observed behavior before and after the injury. Such witnesses generally describe specific incidents of the plaintiff’s ability in a certain area prior to the incident as contrasted to occasions of disability subsequent to the injury. Casual acquaintances can also be powerful witnesses because they have little connection to the plaintiff or the case. An example might be a person who saw the plaintiff at the gym several times a week prior to the injury and can testify that the plaintiff no longer exercises or can no longer exercise the way he or she did prior to the injury.

A very basic direct examination outline for a “before and after” lay witness may be as follows:

A. BEFORE INJURY
   a. Describe your relationship to the plaintiff and your history together;
b. Describe the plaintiff’s physical appearance, family, lifestyle from before the injury;

c. What opportunities have you had to observe the plaintiff in various circumstances;
   i. The plaintiff’s physical activities;
   ii. The plaintiff’s mental activities, memory, problem solving abilities;

d. Prior to the injury, what kind of person was the plaintiff (attitude, abilities, willingness, leadership qualities, etc.) as to:
   i. job (always on time, day’s work for a day’s pay, etc.);
   ii. family (playing with children, cleaning, lifting, mowing, gardening, etc.);
   iii. church;
   iv. civil activities;
   v. hobbies, sports, etc.;
   vi. general health.

B. AFTER INJURY

a. Describe changes in the plaintiff regarding:
   i. physical appearance;
   ii. outlook on life;
   iii. physical activities;
   iv. walking, posture, and other body movements;
   v. driving a car;
   vi. hobbies, sports, etc.;
   vii. social activities (church, clubs, trips, dancing, etc.);
   viii. attitude;
   ix. performing job duties;
   x. mental activities, memory, problem solving abilities;

b. General health;
   i. complaints of health;
   ii. complaints of discomfort and pain;
iii. complaints of surroundings;
iv. visible changes in health and physical condition.

C. EFFECT ON FAMILY
   a. Change in lifestyle;
      i. house or apartment;
      ii. vehicles;
      iii. spouse;
      1. having to go to work;
      2. or having to quit work to care for disabled spouse.

Although the above examination seems very basic, that is often all that is needed even in the most complex cases. Of course, each examination should be tailored to the individual witness. When the plaintiff no longer works or socializes because of his or her injuries, counsel will need to produce witnesses who knew the plaintiff before the injury and a different group of witnesses who know the plaintiff after the injury.

In addition to lay witness testimony, one of the most powerful ways to maximize damages is through a so-called “day in the life video.” Filming these videos typically involves a cameraman following the plaintiff through an ordinary day. Footage will show the plaintiff’s struggles with everyday tasks. Generally, these videos can be shortened from a full day of footage into a powerful 10-minute clip that gives jurors an honest and easily digestible look at the plaintiff’s daily life.

Another way to maximize damages at trial is through the use of certain demonstrative aids. Judges often have the discretionary power to permit demonstrative aids into evidence. Federal Rules of Evidence 401, 403 and 901 are good starting points to find case law addressing the admissibility of demonstrative aids. Rule 401 indicates that if the evidence tends to make the
existence of a fact more or less probable, it is admissible. Of course, exclusion of the evidence
will depend on whether it is cumulative, presents issues of unfair prejudice, or misleads the jury.

Demonstrative aids should be as simple as possible. If a demonstrative aid overloads a
jury with too much information, its effectiveness is significantly diminished. Your
demonstrative aid should not have so much information that a juror cannot write down the
pertinent points. In addition, you want the jurors listening to you, not spending their time
reading your demonstrative aids. Overkill will not emphasize what is truly important.

Specific types demonstrative aids that can be effective in maximizing damages in a
premises liability case include:

a. **Timeline** – You can effectively explain the events that transpired over a
   period of time.

b. **Storyboard** – Best used during opening statement and closing argument.

c. **Document Enlargement** – Any piece of evidence can be enlarged, whether it
   be a police report, contract, medical bill, etc.

d. **Deposition Page Enlargement** – This technique is effective to remind the
   jurors what a witness said regarding pivotal testimony. (Typically costs
   $35.00 per page.)

e. **Day in the Life Video** – Obviously very effective in catastrophic injury cases
   identifying before and after lifestyles.

f. **Models** – Can be anything from medical exhibits, such as spines, skulls, k
   ees, etc. and other types of objects.
g. Inverse X-Ray – With new technology, you can have an x-ray imprinted on a large poster size board that is readily observable without any lights. Especially effective when internal fixation hardware involved.

h. Medical Chart and Summaries – Any complex information can be summarized and enlarged.

i. Demonstrations – If an expert can recreate an event with substantially similar circumstances in the courtroom, it is often admissible in evidence.

j. Scene Visit – In one circumstance we had the jury driven to an accident scene to view the scene. Also, if vehicles or other evidence is available, most courthouses have a loading area or parking lot where evidence can be viewed.

k. ELMO – This is a projector that can be rented and permits you to put any document, deposition page, or photograph on a television screen so that it is visible to the jury.

l. Photographs – Arranging many photographs on a board can be effective. Also, Polaroids or other photos can be scanned and blown up on boards.

m. Medical Device – If your client has internal fixation, a prosthetic, pacemaker or other type of device, ask your doctor to have one available at trial for the jury to view and place in evidence.

n. Computer Recreations – Experts can often recreate the way an event happened by using sophisticated computer information.

o. Jury Charges – Put pivotal pieces of the law on a large board and argue it during closing argument.
p. **Unanswerable Questions** – An effective closing argument technique if you have a lawyer who will be speaking after you. Put some questions about the case on a board that they cannot answer and leave them up for when they begin their argument.

q. **Argument Boards** – We regularly create boards entitled “What do we Know?” or “The Changing Story” which set forth inconsistent positions or pertinent points about the case.

### VII. CLOSING AND PERSUASION.

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

Often the most difficult decision in preparing closing arguments is how to go about asking the jury for a specific amount. Georgia Law permits counsel to argue the monetary value of pain and suffering to the jury in closings, provided such arguments conform to the evidence and reasonable deductions from the evidence. O.C.G.A. § 9-10-184. In a severe injury case, voir dire should have established that you are going to present a case where the plaintiff suffered severe injuries. You should now be able to close the loop on the theme and ask the jury to return an award that is appropriate for the damages suffered by your client.
Opinions vary on how to present the damages to the jury. Some attorneys favor suggesting an “at least” amount, arguing that the jury should return at least a certain amount of damages for the plaintiff. Another method is to specify a specific amount and argue the reasonableness of such a figure in light of the damages suffered by the plaintiff. Another popular method is to argue a time or unit valuation of damages, and this method has been approved by the Courts. Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448 (1968). This argument asks the jury to place a value on each hour or day that the plaintiff has or will suffer with the injury at issue and to calculate the damages based on such a figure. A creative argument utilizing this method can make a large figure sound very reasonable, as an hourly rate quickly adds up over a number of months, years or even the life of the plaintiff. When using this approach, it is best to introduce the Mortality Table during the evidence phase of the trial.

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

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

*Garner v. Victory Express, Inc.*, 264 Ga. 171, 442 S.E.2d 455 (1994) (clarifying that Georgia Law permits counsel to merely object to argument as improper, for whatever reasons, and rest on that objection rather than specifically request other forms of relief).

i. **Right to open and conclude.**

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

ii. **Arguments by more than one attorney in closing.**

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

iii. **Time.**

Counsel are limited in their closing arguments to two hours per side. O.C.G.A. § 9-10-180. However, the local rules have shortened this considerably to one hour per side. *Uniform Superior Court Rule* 13.1(D). Requests for additional time may be made prior to the start of closing arguments, upon a showing that justice cannot be done for the client within the given
time limitations, and the decision on such a request is within the discretion of the trial judge.

O.C.G.A. § 9-10-181. Should you choose to open and close, you will want to watch your time carefully during the opening portion of your argument so as to not limit your all-important concluding arguments.

VIII. CONCLUSION.

Maximizing damages in a premises liability case requires careful strategizing, a strong understanding of the law, and effective persuasion at trial. From the initial client meeting forward, consider how you will convince a jury to award a large verdict, and think about how you will defeat opposing arguments. Request documents and track down witnesses early. Have a plan for discovery that will enable you to defeat a motion for summary judgment, and win at trial. During discovery, create a record that differentiates your case from unfavorable case law. When trying the case, use a theme from voir dire to closing that resonates with the jury. Use demonstrative aids to your advantage, and do not underestimate the importance of lay witnesses in maximizing damages. While no two cases are the same, these principles provide a basic foundation for maximizing damages in a premises liability case.
Practice Pointers In Defending A Premises Liability Case

Presented By:

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PRACTICE POINTERS IN DEFENDING A PREMISES LIABILITY CASE

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Atlanta, Georgia

One of the key differences between a premises case and a road wreck case (for example) is that in the former you typically have multiple cases with one client over time. As such you have opportunities to establish protocols for your team for that client. This article offers practical tips to make your defense of premises cases more efficient, consistent, and effective.

Know Your Client

For your newer clients, getting to know their operations and practices will be part and parcel of analyzing the initial files and the early investigations in each. For all clients, even those you’ve been representing for your years, stay up to date with corporate news, restructuring, and changes in personnel especially in key areas like safety and loss prevention.

Set up Google Alerts

Google provides a means to set up automatic alerts. For instance, you can set up alerts to email you or update your RSS feed for any news on “Woolworth & Georgia,” “Woolworth & incident,” “Woolworth & crime,” etc. Frequency can be set to weekly, daily, or “as-it-happens.”

Your client’s potential indemnitors and potential non-parties at fault

Did the plaintiff trip on a rug? There is a good chance the rug is supplied by a third-party vendor. Did your plaintiff slip and fall in the soft drink aisle? There is a good chance that you have a third-party vendor stocking those shelves directly, rather than shipping product through a regional distribution center. This is also often true for some frozen items. Keeping informed about your client’s business will keep you up to speed on possible third-parties for shifting risk and apportionment. Make this topic a part of your conversations with store level management at store visits as well.

Cast of Characters

When you first get a new premises case assignment, how quickly before you have identified your top two or three employee trial witnesses? Of course, you will be developing a sense for this right away, and the face-to-face interviews that you conduct will solidify that sense. Organizing your approach to early investigation with the trial witness cast of characters in mind will be helpful. Get face-to-face with the key persons with knowledge (whether they still work for your client or not) in your early investigation.
Anticipate an eventual 30(b)(6) deposition in your premises cases and be thinking about who among the personnel with knowledge of the incident or the store operations may be a good candidate to serve in the capacity as the corporate representative.

- Who were the managers assigned around the time of the incident, and where are they now? Who are the managers assigned to that location now?
- Who wrote your store incident report? Where is he or she now?
- Does your client log store sweeps? Where are those individuals now?

Many retailers hire younger persons, often high school students, and it would not be surprising to learn they’ve moved on to other employment, moved away to college, or maybe just voluntarily quit so they could finish high school. Your client H.R. department will be your best resource, but don’t overlook the local store personnel who know the employees best and may well continue to see them from time to time.

In essence, consider your case’s and client’s categories of personnel, and have a plan before you travel to the actual location. And be ready for your store manager to say, “so-and-so is here today – would you like to speak with her?”

I like to keep track of my witness sources-of-information by connecting every written note or fact with a specific person/source; the speediest way to do this is probably with the person’s initials. (Make a legend of initials before you arrive and add to it when new people come into the mix and you’ll be able to readily cross-reference.)

Stop at the nearest Burger Castle before beginning that drive back to the office to draft substantive additions to your summary file memo while details are still fresh in your mind.

**Know Your File (Organization)**

Keep control of your case file so that it doesn’t take control of you and your time. Here are a few pointers that may help you keep a focused approach and file.

_**Uniquely-identified documents and use of citations**_

Everyone who earned a J.D. had the importance of proper citation ingrained and it’s a matter of second nature for lawyers. Not always the case for non-lawyers, folks such as claims adjusters, paralegals, and outside experts. Many firms use case management software that solves much of this problem but if needed, consider applying bates-numbering systematically to any “document”. These unique identifiers serve as a citation for your own internal memoranda, your client reports, your pre-trial and trial notebooks, deposition notebooks, mediation notebooks, the list goes on.
Things to look out for when you first receive the Claim File

- Is it a word-searchable PDF? If not, perform optical character recognition (OCR) on the PDF as the very first step.

- Depending on your document management system, consider creating a “Working Copy” following a consistent pattern and structure using Adobe. Being able to rapidly and intuitively locate particular details and specific documents on the fly will make your file handling so much more efficient through the life of the case.

- As you review in your Working Copy, any time you have a question you can input it directly into the PDF as a comment. As you get further through the documents, and likely answer your prior question, you can easily cross-reference and update the comment with the answer and source.

- Bates-number your Working Copy and pin-cite the source of details in your memos and reports.

In the later stages of the case, your early investment in preparation and organization will pay for itself. For instance, when your mediator comes to you asking for that specific record that you referenced in the position statement and opening which proves the injury was pre-existing, use the pin-cite to locate that specific page. Additionally, when you on a phone conference with an expert and she references a specific lab or exam result, ask her for the unique identifier on that page so that you can locate it without any uncertainty or delay. When you are interviewing witnesses, while making your notes on the fly, you will save time by using the short-hand citation to the document under discussion.

Google Maps is your friend

- Aerial/satellite map
- Street Views
- Historical images

Once you know the location of a particular incident, go to Google Maps and start pulling maps. Save these as JPEGs with descriptive and systematic file names beginning with a broad overview satellite image, zoom in to locate your specific area, and use mark-up features on the fly to make notes, add arrows, etc.

Historical images in Google Maps are accessible through the Street View by clicking on the “clock” icon in the upper left, and then you have direct access to whatever historical images are in Google’s archives, by date. (Checking here can reveal when a
roadway project has changed the look and layout of an intersection, for instance. It may also show you the previous configuration of traffic control devices.)

**Know Your Venue/Forum**

*Standing orders*

Many judges have standing orders. Seemingly a majority of federal judges, and a number of state judges have them. Remind and reinforce the importance of these with your team. Very often these will state expectations and requirements set by your trial judge for how to conduct depositions, and how to state objections within the court’s specific parameters. Whether you have a physical deposition notebook or an electronic equivalent like a folder of documents on your laptop, I highly recommend placing the Standing Order in the first position with tabs and highlighting text relating to deposition objections.

*Removability and the Destination Forum*

Your case may not be removable at the time the answer is due, but it may become removable once you receive the Plaintiff’s responses to your first interrogatories. If your claim file does not contain a pre-suit demand letter, and the complaint does not specify an amount of claimed damages, most likely the amount in controversy is not met, and you cannot yet remove the case. Keep on the look-out for the responses and review them yourself immediately to see what is claimed, because it is your receipt of this “other writing” that is going to trigger the 30-day timer to remove.

There are several differences between the local rules in the Northern District and the Middle District - not getting them right the first time is going to flag you in a bad way. Better to meet the bill the first time and show the court the respect and familiarity you aim for. For instance, the Initial Disclosures in the Northern District and Middle District are different. Further, the Middle District does not call for certificates of service of discovery, the Middle District does not want you to file the Initial Disclosures or the Notice of Deposition. You need to certify the font type and size in the Northern District, but the Middle District does not have an equivalent rule.

In the Northern District, your case is by default going to be categorized as a four-month discovery track case. If you think more time is going to be needed, consider letting the court know in the Joint Preliminary Report, and explain why succinctly, and outline what the dates and timelines would be if the court decides to grant the longer time-frame.

*Discovery, Timing, and Experts*

In a federal case with a short discovery track, you will not have the luxury of sending discovery out, waiting 33 days to get the responses back, then sending the
nonparty subpoenas out, and waiting another month or so for the records to arrive, and then recommending to your client that it authorize you to retain an expert. Have that conversation with your client/adjuster early.

Very often a case may warrant have a radiologist review studies from before and after the incident at issue. Knowing what the studies are, when they were generated, and at what facility, is going to be important to quickly gathering them and getting them to the expert for review. Keeping a separate chart or a sub-set of these will pay off in the time saved and the headaches avoided. A radiologist expert may be a good choice to balance time and expense.

**Early Fact Investigation/Pre-Suit Investigation**

From time to time your client will ask you to lead an investigation immediately following a serious event like a third-party criminal act on or near a client establishment. Consider utilizing a consistent, checklist-type approach:

- Obtain the pertinent lease agreement and certificates of insurance, security services agreements.
- Determine whether the location is leased or owned. Is it a shopping center? What are the Common Area obligations?
- Determine duties owed to your client by other related parties such as landlord, property manager, security contractor.
- Put landlords and their insurers and security contractors and their insurers on timely notice of the incident for purposes of a later tender to all.

In addition to your evaluation of potential duties to defend and indemnify, coordinate with your client in terms of leading the investigation for attorney-client and Rule 26 protections. Consider scope of document gathering such as the following:

- Video from your client: obtaining, verifying, archiving
- Media reports: Page Vault software for archiving web pages / news articles
- Police reports
- Medical examiner report
- Death certificate
- 911 call audio and call logs
- Store incident reports
- Canvass nearby establishments
- Employee interviews
- Witness interviews

Just like with matters assigned after suit is filed, employing a methodical and consistent approach in pre-suit matters is key.

**Video Surveillance – in Early Investigation, Depositions, Mediation, Trial.**

Store video is often the best and most compelling evidence in premises cases. Jurors prefer to watch the video of what happened and make up their mind as to who should win, as compared to a lawyer showing still shots or using words to explain what happened. And, the same thing is likely true for a judge who is considering a summary judgment motion. Be prepared need to show the judge and jury a carefully and strategically prepared montage of video evidence to explain why your client should win the case.

We look for opportunities to incorporate the video montage into our MSJs, properly authenticated with an affidavit from the client. And, we anticipate showing the trial judge our video montage during oral argument.

It is often very helpful to show at mediation. With FTP software like ShareFile or Drop Box, you should be able to deliver even larger size files to your mediator a few days before the mediation. This is a very good way to introduce the case to the mediator and the more familiar the mediator with the case before the date of mediation, the more effective she can be on the date of mediation.

**Early Investigation Phase - Still Shot Images (“Snipping Tool”)**

In the early investigation stage, you will be surveying the video to identify what there is (How many cameras? What time frame? Are there any problems with the video? If there are problems, are they significant?). In addition to surveying what there is, you will of course need to locate the camera that shows the incident, correlate that to the layout of the premises, and identify other angles that may also capture the area of the incident and pathways leading to the area of incident.

Early surveying will also involve determining whether there were employees or other customers in the area or had traversed the area. Ideally you will have fully surveyed all angles of relevance before heading to the location, but typically after seeing the location first-hand you will have new insights that you take back with you. Revisiting the video after interviews, site visits, and before and after depositions will often lead to new discoveries or at least to more subtle understanding of what happened and how to best narrate it to the mediator, judge, or jury.
The “Snipping Tool” in Windows is a quick and easy way to capture screen still images. (Sometimes the proprietary video software provides an easy option to save stills, but Snipping Tool is always there for you.) If you name the stills so the filename begins with the exact timestamp (like this: “122436 PM 3.1 Parking Lot (Plf's fall).jpg”), no matter how many different cameras you are working with, the individual images will self-order as long as you keep them in the same folder, sorted by file name. This method gives you a self-generated timeline of images, easy to scroll through on the fly.

These “snips” will help you in number of ways. Such as: follow ups to ask someone to identify an employee, by attaching a still to an email. Use them as exhibits in depositions. In depositions, you may have these still images at your fingertips (on your laptop). Email them to the court reporter and opposing counsel for them to be added to the transcript as exhibits. And these will help you when it comes time to generate a montage of actual video footage.

Ultimately a well-vetted video montage is the goal. Getting from point A to point B will normally involve performing the leg-work to allow you to gauge what the important facts and video are, and how to best distill large volumes of video into a concise montage.

If Store Video is Definitive on Liability

Typically store video will be produced in discovery after suit is filed and answered but often video is not made available to the claimant side, pre-suit. So, opposing counsel may not know how compelling the video is in favor of your client. In some situations, an early sit-down with opposing counsel is a good idea, as it might result in a rapid resolution. Here are few things to consider while determining if an early sit-down makes sense:

- Is the counsel who filed suit the same counsel who handled the claim pre-suit?
- Has counsel seen the video yet?
- What are the chances that after viewing the video, opposing counsel of record dismisses the case, or only withdraws as counsel?
- How likely is it another attorney will pick up the representation, if the current counsel withdraws?
- Is the video a slam dunk?

Every case is different and so is each case’s video. If an incident is at the far view of the camera (resulting in grainy, pixelated video), or just off the edge of view in part, it is probably not a “slam-dunk.” If you need to explain why the video proves your point, it may not be a great candidate for using in early resolution. But if the video truly speaks
for itself, and makes your point with little or no commentary, consider an early sit-down with opposing counsel.

**Conclusion**

Whether you are looking at your first or your one-hundred-first file with a premises owner or occupier, each will have some new twist. Reap the benefit of the commonality however and employ organizational protocols of your own to build upon your own institutional knowledge of your client. Visualize the end game as your investigation and defense proceed so that you end up assembling a succinct video montage that ties together the important timeline, persons with knowledge, and events for your fact-finder.
Daubert Applies To Premises Experts: Dealing With It

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THE
ADMISSIBILITY OF
EXPERT TESTIMONY
IN GEORGIA

2017-2018 Edition

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By
MARY DONNE PETERS

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APPENDIX C

Expert Testimony Checklist

1. Is the subject or topic of testimony beyond the comprehension or experience of the average juror?
2. Is the expert qualified by experience, education and/or training? How?
3. Do the expert's qualifications fit the facts of this case?
4. What facts are relied on by the expert?
5. Is the expert relying on other experts? (Is the expert a "mere conduit" for other experts?)
6. Is the expert's testimony based on "sufficient" facts or data that are or will be admitted into evidence?
7. Is the expert's opinion helpful to the jury?
   a. Does the opinion add something more than just what the parties or lawyers would argue at closing?
   b. Is the opinion so complex as to be unintelligible?
8. Is the expert's opinion "reliable"?
   a. Has the expert's theory or technique been tested? (can it be tested?)
   b. Has the theory or technique been subject to peer review or publication?
   c. What is the known error rate (and what did the expert do to rule in or out other theories or explanations for causation or damages?)
   d. Do standards exist regarding this topic of testimony? (If so, did the expert take those standards into consideration?)
   e. Has the theory or technique been generally accepted in the relevant scientific community?
9. Has the expert's opinion been reasonably applied to the facts of the case?
   a. Does an analytical gap exist between the data and the conclusion? (i.e., did the expert miss a step?)
   b. Did the expert apply the same intellectual rigor in the courtroom as employed by other experts in the field?
   c. Has the expert relied too much on anecdotal evidence?

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App. C

THE ADMISSIBILITY OF EXPERT TESTIMONY IN GEORGIA

d. Are studies or research used by the expert relevant and reliable?

e. Has the expert changed his or her opinion or shaped it in an effort to shape testimony for trial?

10. Do general grounds exist to impeach the expert?

a. What percentage of the expert's annual income is derived from work as an expert (testifying or non-testifying)?

b. How is the expert's work divided between plaintiffs and defendants? (Between companies and individuals? Between doctors and patients?)

c. How much is the expert being paid in this case? (How does that compare to work outside work as an expert witness?)

d. How many times has the expert testified in court or in a deposition? (How many times does the expert testify, on average, in a given year?)

e. Has any court ever ruled that the expert's testimony was admissible? (or not admissible?)

f. Has the expert ever been fired or asked to leave a job?

g. Has the expert ever been sued?

h. Has the expert ever been refused admission to a professional society or organization?

i. Has the expert ever been arrested or convicted of a crime?


a. Did the parties request in discovery the identity of all testifying experts and the facts upon which the experts rely and the conclusions the experts will offer at trial?

b. Did the party challenging introduction of the expert's testimony make a motion to exclude the testimony pretrial? (If not, motion may be untimely.)

c. Will the court hold a pretrial hearing to consider the motion to exclude expert testimony? (If so, will the court permit or require the expert to appear and give testimony?)

d. Is the motion to exclude expert testimony filed with a summary judgment motion? (If so, will exclusion of the expert result in the granting of a summary judgment motion?)

e. If the expert's testimony is excluded, will the party who offered the expert be permitted to offer another expert?

12. Special Considerations for Professional Malpractice Actions.

a. Was the expert licensed by an appropriate regulatory agency to practice his or her profession in the state in which the expert was practicing or teaching?
EXPERT TESTIMONY CHECKLIST

b. If this is a medical negligence case, does the expert have actual professional knowledge and experience in the area in which the opinion is to be given?

c. If this is a medical negligence case, has the expert actually practiced in the area of specialty of his or her opinion for at least three of the past five years immediately preceding the allegedly negligent act or omission with sufficient frequency to have adequate knowledge regarding the performance of the medical procedure, diagnosis of the condition, or treatment that was alleged to be negligent?—or—Has the expert taught for at least three of the last five years immediately preceding the allegedly negligent act or omission as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge (as set forth above)?

d. If this is a medical negligence case, is the expert:
   - A member of the same profession?
   - A medical doctor testifying about a doctor of osteopathy or a doctor of osteopathy testifying about a medical doctor?
   - A physician testifying about nurses, physician's assistants or other non-physician medical personnel where the physician would have regularly supervised such medical personnel for at least three of the past five years immediately preceding the act or omission alleged to be negligent?
The Admissibility of Expert Testimony in Georgia

2018 Update

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New Evidence Code
- January 2013: Georgia’s Evidence Code became effective.
- Where do we stand on the admissibility of expert testimony?
- Are we now perfectly aligned with the federal rules? Not at all!

Where Are We Now?
- After January 1, 2013, we now have five different standards for the admissibility of expert testimony in Georgia courts.
- The standard governing expert testimony will depend on which court and what type of case you have.
- So, how did we get here?

Brief Historical Overview
- Pre-2005 Expert testimony was presumed admissible in all cases in Georgia courts.
- Pre-2005 Georgia standards at odds with federal court standards, where the federal judges were required to serve as “gatekeepers.”

Federal Judges as Gatekeepers
  - Trial judge has a duty to ensure that scientific testimony is based on reliable principles and methods before allowing expert opinion to go to jury.
  - Expands gatekeeping requirement to all expert testimony, not just scientific.
  - Trial court decision to admit or exclude expert testimony will not be set aside absent abuse of discretion — even if outcome determinative.
- Rule 702 of the Federal Rules of Evidence was adopted in 2000.
  - Rule 702 codifies the holdings in the *Daubert* trilogy of cases.
- Expert testimony rules are found at Rules 701-705.

Rule 702
- Expert must be qualified by knowledge, skill, experience, training or education;
- Expert’s opinion must help the trier of fact understand the evidence or determine a fact;
- Expert’s opinion must be supported by sufficient facts and data;
- Expert’s testimony must be the product of reliable principles and methods; and
- Expert has reasonably applied the facts and principles and methods to the facts of a case.

How to Determine Reliability
- *Daubert* — Court gave a checklist (but indicated it was not exhaustive or exclusive):
  - Theory tested? (Can it be?)
  - Theory subject to peer review?
  - Known or potential error rate?
  - Applicable standards?
  - Generally accepted in relevant scientific community?

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• Rule 702 Advisory Notes added more variables:
  ▪ Opinion grow naturally out of work or prepared for court?
  ▪ Unjust extrapolation?
  ▪ Account for other theories?
  ▪ Expert as careful as outside work?
  ▪ Field known to reach reliable results?

Tort Reform Brings Daubert to Some Georgia Cases
• Pre-2005 — all expert testimony is presumed admissible. (O.C.G.A §24-9-67).
• Jan. 1, 2005 – New code section O.C.G.A. §24-7-67.1 becomes effective and applies to civil cases. Criminal cases and condemnation cases continue to be governed by §24-7-67.

2008 – Constitutional Challenge Fails
  ▪ The Georgia Supreme Court rejects an Equal Protection Clause challenge to §24-7-67.1.

2010 – Georgia Supreme Court Adopts Joiner
  ▪ Trial court’s decision to admit or exclude expert testimony will be reversed only for abuse of discretion.

2011 – Georgia Legislature Adopts New Evidence Code
• Changes became effective Jan. 1, 2013.
• Code kept the bifurcated system in place but renumbered the provisions and added some complexity.
• New expert testimony sections found in §24-7-701 to §24-7-707.

2018 – Where Are We Now?
• Criminal Cases and Condemnation Cases: No Daubert analysis. Expert opinion presumed admissible.
• Workers’ Comp and Administrative Cases: Daubert applies but “shall not be strictly construed.”
• General Civil Cases: Daubert analysis required.
• “Market Value” Property Cases: No expert testimony required to show value, but the witness much show he or she had an opportunity to form a reasoned opinion.
• “Slip or Trip and Fall” Cases: Courts have often excluded expert testimony reasoning that such a determination is within the ability of a jury to decide on its own.
• “Building Codes” Cases: Expert testimony is admissible when the expert is able to offer testimony regarding a deviation from a specific standard that is considered beyond the common understanding of the average juror.
“Third Party Criminal Act” Cases: Expert testimony can be used to demonstrate that the crime that occurred was reasonably foreseeable such that the defendant should have exercised diligence to guard against the threat.

**Procedural Issues**
- Must raise Daubert objection by motion before trial in Georgia state court.
- Trial court may hold a hearing and, if a hearing is held, must be no later than the final pretrial hearing.
- In Georgia state courts you must send expert discovery.
- In federal court, Rule 26 requires expert disclosures.
- Sharp differences in timing for expert disclosures in state and federal courts.
- Must disclose expert well before discovery closes in federal court.

**Can Your Expert Be Hired to Testify Against You?**
- Be sure to spell out expectations in advance by contract. (NDA/Nonuse/Confidentiality for non-testifying experts.)
- If expert is designated as testifying expert, drafts may be discoverable, though not in federal court.
- If you want to keep a “shadow” expert, you should clearly indicate (in writing) that the expert is a non-testifying expert. Newman v. State, 279 Ga. 501 (2015).

**Important Strategic Concerns**
- Beware Daubert motions filed with summary judgment motions.
- Fail to supplement or substitute expert opinion at your peril following a challenge.
- Federal court may not allow supplement or substitution.
- Important to know your judge.

**Important New Issue: Privacy for Experts**
- HIPAA concerns/Business Associate Agreements (BAAs)
- Financial Records
- Document Destruction
- Contracts?
APPENDIX M

Sample Business Associate Agreement Regarding Protected Personal Health Information

SPECIAL DUTIES OF EXPERT PERTAINING TO PROTECTED PERSONAL HEALTH INFORMATION

Sample Business Associate Agreement Provisions¹

Words or phrases contained in brackets are intended as either optional language or as instructions to the users of these sample provisions.

Definitions

Catch-all definition:

The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Protected Health Information, Required By Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information, and Use.

Specific definitions:

(a) Business Associate. “Business Associate” shall generally have the same meaning as the term “business associate” at 45 C.F.R. 160.103, and in reference to the party to this agreement, shall mean [Insert Name of Business Associate].

(b) Covered Entity. “Covered Entity” shall generally have the same meaning as the term “covered entity” at 45 C.F.R. 160.103, and in reference to the party to this agreement, shall mean [Insert Name of Covered Entity].

(c) HIPAA Rules. “HIPAA Rules” shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 C.F.R.


App. M-1

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Obligations and Activities of Business Associate

Business Associate agrees to:

(a) Not use or disclose protected health information other than as permitted or required by the Agreement or as required by law;

(b) Use appropriate safeguards, and comply with Subpart C of 45 C.F.R. Part 164 with respect to electronic protected health information, to prevent use or disclosure of protected health information other than as provided for by the Agreement;

(c) Report to covered entity any use or disclosure of protected health information not provided for by the Agreement of which it becomes aware, including breaches of unsecured protected health information as required at 45 C.F.R. 164.410, and any security incident of which it becomes aware;

[The parties may wish to add additional specificity regarding the breach notification obligations of the business associate, such as a stricter timeframe for the business associate to report a potential breach to the covered entity and/or whether the business associate will handle breach notifications to individuals, the HHS Office for Civil Rights (OCR), and potentially the media, on behalf of the covered entity.]

(d) In accordance with 45 C.F.R. 164.502(e)(1)(ii) and 164.308(b)(2), if applicable, ensure that any subcontractors that create, receive, maintain, or transmit protected health information on behalf of the business associate agree to the same restrictions, conditions, and requirements that apply to the business associate with respect to such information;

(e) Make available protected health information in a designated record set to the [choose either "covered entity" or "individual or the individual's designee"] as necessary to satisfy covered entity's obligations under 45 C.F.R. 164.524;

[The parties may wish to add additional specificity regarding how the business associate will respond to a request for access that the business associate receives directly from the individual (such as whether and in what time and manner a business associate is to provide the requested access or whether the business associate will forward the individual's request to the covered entity to fulfill it and the timeframe for the business associate to provide the information to the covered entity).]

(f) Make any amendment(s) to protected health information in a designated record set as directed or agreed to by the covered entity pursuant to 45 C.F.R. 164.526, or take other measures as
SAMPLE BUSINESS ASSOCIATE AGREEMENT

necessary to satisfy covered entity's obligations under 45 C.F.R. 164.528;

The parties may wish to add additional specificity regarding how the business associate will respond to a request for amendment that the business associate receives directly from the individual (such as whether and in what time and manner a business associate is to act on the request for amendment or whether the business associate will forward the individual's request to the covered entity) and the timeframe for the business associate to incorporate any amendments to the information in the designated record set.

(g) Maintain and make available the information required to provide an accounting of disclosures to the (Choose either "covered entity" or "individual") as necessary to satisfy covered entity's obligations under 45 C.F.R. 164.528;

The parties may wish to add additional specificity regarding how the business associate will respond to a request for an accounting of disclosures that the business associate receives directly from the individual (such as whether and in what time and manner the business associate is to provide the accounting of disclosures to the individual or whether the business associate will forward the request to the covered entity) and the timeframe for the business associate to provide information to the covered entity.

(h) To the extent the business associate is to carry out one or more of covered entity's obligation(s) under Subpart E of 45 C.F.R. Part 164, comply with the requirements of Subpart E that apply to the covered entity in the performance of such obligation(s); and

(i) Make its internal practices, books, and records available to the Secretary for purposes of determining compliance with the HIPAA Rules.

Permitted Uses and Disclosures by Business Associate
(a) Business associate may only use or disclose protected health information

Option 1—Provide a specific list of permissible purposes.

Option 2—Reference an underlying service agreement, such as "as necessary to perform the services set forth in Service Agreement."

In addition to other permissible purposes, the parties should specify whether the business associate is authorized to use protected health information to de-identify the information in accordance with 45 C.F.R. 164.514(a)-(c). The parties also may wish to specify the manner in which the business associate will de-
identify the information and the permitted uses and disclosures by the business associate of the de-identified information.

(b) Business associate may use or disclose protected health information as required by law.

(c) Business associate agrees to make uses and disclosures and requests for protected health information

   [Option 1] consistent with covered entity's minimum necessary policies and procedures.

   [Option 2] subject to the following minimum necessary requirements: [Include specific minimum necessary provisions that are consistent with the covered entity's minimum necessary policies and procedures.]

(d) Business associate may not use or disclose protected health information in a manner that would violate Subpart E of 45 C.F.R. Part 164 if done by covered entity [if the Agreement permits the business associate to use or disclose protected health information for its own management and administration and legal responsibilities or for data aggregation services as set forth in optional provisions (e), (f), or (g) below, then add "except for the specific uses and disclosures set forth below."]

(e) [Optional] Business associate may use protected health information for the proper management and administration of the business associate or to carry out the legal responsibilities of the business associate.

(f) [Optional] Business associate may disclose protected health information for the proper management and administration of business associate or to carry out the legal responsibilities of the business associate, provided the disclosures are required by law, or business associate obtains reasonable assurances from the person to whom the information is disclosed that the information will remain confidential and used or further disclosed only as required by law or for the purposes for which it was disclosed to the person, and the person notifies business associate of any instances of which it is aware in which the confidentiality of the information has been breached.

(g) [Optional] Business associate may provide data aggregation services relating to the health care operations of the covered entity.

Provisions for Covered Entity to Inform Business Associate of Privacy Practices and Restrictions

(a) [Optional] Covered entity shall notify business associate of any limitation(s) in the notice of privacy practices of covered entity under 45 C.F.R. 164.520, to the extent that such limitation may affect business associate's use or disclosure of protected health information.
(b) [Optional] Covered entity shall notify business associate of any changes in, or revocation of, the permission by an individual to use or disclose his or her protected health information, to the extent that such changes may affect business associate's use or disclosure of protected health information.

(c) [Optional] Covered entity shall notify business associate of any restriction on the use or disclosure of protected health information that covered entity has agreed to or is required to abide by under 45 C.F.R. 164.522, to the extent that such restriction may affect business associate's use or disclosure of protected health information.

Permissible Requests by Covered Entity

[Optional] Covered entity shall not request business associate to use or disclose protected health information in any manner that would not be permissible under Subpart E of 45 C.F.R. Part 164 if done by covered entity. [Include an exception if the business associate will use or disclose protected health information for, and the agreement includes provisions for, data aggregation or management and administration and legal responsibilities of the business associate.]

Term and Termination

(a) Term. The term of this Agreement shall be effective as of [Insert effective date], and shall terminate on [Insert termination date or event] or on the date covered entity terminates for cause as authorized in paragraph (b) of this Section, whichever is sooner.

(b) Termination for Cause. Business associate authorizes termination of this Agreement by covered entity, if covered entity determines business associate has violated a material term of the Agreement and business associate has not cured the breach or ended the violation within the time specified by covered entity. [Bracketed language may be added if the covered entity wishes to provide the business associate with an opportunity to cure a violation or breach of the contract before termination for cause.]

(c) Obligations of Business Associate Upon Termination.

[Optional 1—If the business associate is to return or destroy all protected health information upon termination of the agreement.]

Upon termination of this Agreement for any reason, business associate shall return to covered entity (or, if agreed to by covered entity, destroy) all protected health information received from covered entity, or created, maintained, or received by business associate on behalf of covered entity, that the business associate still maintains in any form. Business associate shall retain no
Copies of the protected health information.

Option 2—if the agreement authorizes the business associate to use or disclose protected health information for its own management and administration or to carry out its legal responsibilities and the business associate needs to retain protected health information for such purposes after termination of the agreement:

Upon termination of this Agreement for any reason, business associate, with respect to protected health information received from covered entity, or created, maintained, or received by business associate on behalf of covered entity, shall:

1. Retain only that protected health information which is necessary for business associate to continue its proper management and administration or to carry out its legal responsibilities;

2. Return to covered entity [or, if agreed to by covered entity, destroy] the remaining protected health information that the business associate still maintains in any form;

3. Continue to use appropriate safeguards and comply with Subpart C of 45 C.F.R. Part 164 with respect to electronic protected health information to prevent use or disclosure of the protected health information, other than as provided for in this Section, for as long as business associate retains the protected health information;

4. Not use or disclose the protected health information retained by business associate other than for the purposes for which such protected health information was retained and subject to the same conditions set out at [Insert section number related to paragraphs (a) and (b) above under “Permitted Uses and Disclosures By Business Associate”] which applied prior to termination and

5. Return to covered entity [or, if agreed to by covered entity, destroy] the protected health information retained by business associate when it is no longer needed by business associate for its proper management and administration or to carry out its legal responsibilities.

(The agreement also could provide that the business associate will transmit the protected health information to another business associate of the covered entity at termination, and/or could add terms regarding a business associate's obligations to obtain or ensure the destruction of protected health information created, received, or maintained by subcontractors.)

(d) Survival. The obligations of business associate under this Section shall survive the termination of this Agreement.

Miscellaneous [Optional]

App. M.6

For Educational Purposes Only
SAMPLE BUSINESS ASSOCIATE AGREEMENT

(a) [Optional] Regulatory References. A reference in this Agreement to a section in the HIPAA Rules means the section as in effect or as amended.

(b) [Optional] Amendment. The Parties agree to take such action as is necessary to amend this Agreement from time to time as is necessary for compliance with the requirements of the HIPAA Rules and any other applicable law.

(c) [Optional] Interpretation. Any ambiguity in this Agreement shall be interpreted to permit compliance with the HIPAA Rules.
THE ADMISSIBILITY OF EXPERT TESTIMONY IN GEORGIA
2018 UPDATE

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NEW EVIDENCE CODE

* January 2013 Georgia’s Evidence Code became effective.

* Where do we stand on the admissibility of expert testimony?

* Are we now perfectly aligned with the federal rules? Not at all!
WHERE ARE WE NOW?

* After January 1, 2013, we now have five different standards for the admissibility of expert testimony in Georgia courts.

* The standard governing expert testimony will depend on which court and what type of case you have.

* So, how did we get here?

BRIEF HISTORICAL OVERVIEW

* Pre-2005 Expert testimony was presumed admissible in all cases in Georgia courts.

* Pre-2005 Georgia standards at odds with federal court standards, where the federal judges were required to serve as "gatekeepers."
FEDERAL JUDGES AS GATEKEEPERS

* Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993) — Trial judge has a duty to ensure that scientific testimony is based on reliable principles and methods before allowing expert opinion to go to jury.

FEDERAL JUDGES AS GATEKEEPERS


* General Electric Co. v. Joiner, (1997) — Trial court decision to admit or exclude expert testimony will not be set aside absent abuse of discretion — even if outcome determinative.
FEDERAL JUDGES AS GATEKEEPERS

- Rule 702 of the Federal Rules of Evidence was adopted in 2000. Rule 702 codifies the holdings in the Daubert trilogy of cases.

- Expert testimony rules are found at Rules 701-705.

RULE 702

- Expert must be qualified by knowledge, skill, experience, training or education;

- Expert’s opinion must help the trier of fact understand the evidence or determine a fact;

- Expert’s opinion must be supported by sufficient facts and data;
RULE 702 (cont.)

- Expert’s testimony must be the product of reliable principles and methods; and

- Expert has reasonably applied the facts and principles and methods to the facts of a case.

HOW TO DETERMINE RELIABILITY

_Daubert_ Court gave a checklist (but indicated it was not exhaustive or exclusive):

- Theory tested? (Can it be?)
- Theory subject to peer review?
- Known or potential error rate?
- Applicable standards?
- Generally accepted in relevant scientific community?
HOW TO DETERMINE RELIABILITY

Rule 702 Advisory Notes added more variables:

- Opinion grow naturally out of work or prepared for court?
- Unjust extrapolation?
- Account for other theories?
- Expert as careful as outside work?
- Field known to reach reliable results?

TORT REFORM BRINGS DAUBERT TO SOME GEORGIA CASES

- Pre-2005 — all expert testimony is presumed admissible. (O.C.G.A §24-9-67).

- Jan. 1, 2005 — New code section O.C.G.A. §24-7-67.1 becomes effective and applies to civil cases. Criminal cases and condemnation cases continue to be governed by §24-7-67.
2008 — CONSTITUTIONAL CHALLENGE FAILS


2010 — GEORGIA SUPREME COURT ADOPTS JOINER

*HNTB GA, Inc. v. Hamilton-King, 287 Ga. 64, 697 S.E.2d 770 (2010)* – Trial court’s decision to admit or exclude expert testimony will be reversed only for abuse of discretion.
2011 – GEORGIA LEGISLATURE ADOPTS NEW EVIDENCE CODE

* Changes became effective Jan. 1, 2013.

* Code kept the bifurcated system in place, but renumbered the provisions and added some complexity.

* New expert testimony sections found in §24-7-701 to §24-7-707.

2018 WHERE ARE WE NOW?

* Criminal cases and condemnation cases — no Daubert analysis. Expert opinion presumed admissible.

* Workers’ Comp and Administrative cases – Daubert applies but “shall not be strictly construed.”

* General Civil Cases – Daubert analysis required.
2018 WHERE ARE WE NOW?

• “Market Value” property cases — no expert testimony required to show value but the witness must show he or she had an opportunity to form a reasoned opinion.

2018 WHERE ARE WE NOW?

• “Slip or trip and fall” cases — courts have often excluded expert testimony reasoning that such a determination is within the ability of a jury to decide on its own. *Sullivan v. Quisc, Inc.*, 207 Ga. App. 114, 115, 427 S.E.2d 86, 88 (1993).
2018 WHERE ARE WE NOW?

* "Building codes" cases – expert testimony is admissible when the expert is able to offer testimony regarding a deviation from a specific standard that is considered beyond the common understanding of the average juror.

2018 WHERE ARE WE NOW?

* "Third party criminal act" cases – expert testimony can be used to demonstrate that the crime that occurred was reasonably foreseeable such that the defendant should have exercised diligence to guard against the threat.

* Security Expert vs. Criminal Profiler
Procedural Issues

* Must raise Daubert objection by motion before trial in Georgia state court.

* Trial court may hold a hearing and, if a hearing is held, must be no later than the final pretrial hearing.

Procedural Issues

* In Georgia state courts you must send expert discovery.
* In federal court, Rule 26 requires expert disclosures.
* Sharp differences in timing for expert disclosures in state and federal courts.
* Must disclose expert well before discovery closes in federal court.
Can Your Expert Be Hired to Testify Against You?

* Be sure to spell out expectations in advance by contract. (NDA/Nonuse/Confidentiality for non-testifying experts.)

* If expert is designated as testifying expert, drafts may be discoverable, though not in federal court.

* If you want to keep a “shadow” expert, you should clearly indicate (in writing) that the expert is a non-testifying expert. Neuman v. State, 279 Ga. 501 (2015).

Important Strategic Concerns

* Beware Daubert motions filed with summary judgment motions.

* Fail to supplement or substitute expert opinion at your peril following a challenge.

* Federal court may not allow supplement or substitution.

* Important to know your judge.
Important New Issue:
Privacy for Experts

- HIPAA concerns/Business Associate Agreements (BAAs)
- Financial Records
- Document Destruction
- Contracts?

Questions?
- mpeters@gorbypeters.com
Panel Discussion Of Common Evidentiary Problems In A Premises Liability Case
Evidentiary issues with Apportionment of Damages

O.C.G.A. § 51-12-33. Requires the jury to apportion an award of damages according to percentage of fault of parties and nonparties.

(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.

–criminal assault on a hotel guest on the premises of the hotel;
–assailants never identified
–certified questions from federal court: (1) can fault be allocated to the unknown criminal assailants under O.C.G.A. § 51-12-33? and, if so, (2) would such an apportionment violate the plaintiff’s constitutional rights to a jury trial, due process or equal protection.
Holdings: “(1) the jury is allowed to apportion damages among the property owner and the criminal assailant and (2) instructions or a special verdict form requiring such apportionment would not violate the plaintiff’s constitutional rights.”

Reasoning: (1) The ordinary meaning of the word “fault” includes intent; (2) Court looked at other jurisdictions with similar statutes (3) The statute is constitutional because it does not abdicate the right to jury trial, is not unconstitutionally vague, and passes the rational basis test. Dissent’s Critique:

- Creation of a comparative negligence defense for intentional torts;
- Majority of states that allow apportionment between intentional and negligent tortfeasors do so only when the term “fault” is expressly defined to include intent;
- Apportioning fault to criminal assailants undermines a premise owner’s statutory “non-delegable” duty to use reasonable care to protect invitees from the foreseeable risk of criminal assaults (O.C.G.A. § 51-3-1)
- Constitutional issue: Trial court did not rule on constitutional issues, so Supreme Court had no standing to do so.


Wife was a passenger in car driven by her husband. At fault driver requested apportionment charge based on Husband’s negligence. Interspousal tort immunity prevented wife from suing husband.

Court holds Fault may be apportioned to someone who is immune from liability as to the plaintiff.
Union Carbide Corp. v. Fields, 315 Ga. App. 554, 726 S.E.2d 521 (2012)- Plaintiff filed action against mnfg. of asbestos (mesothelioma). Mnfg. wanted jury to apportion fault to Plaintiff’s father’s employer for allowing father to wear home asbestos contaminated clothing. Fault may not be apportioned to someone who does not owe a duty to the plaintiff.


Fault may not be apportioned to someone whose liability to the plaintiff is purely derivative.


Co defendant had cross claim against GM for contribution and/or set off.

Co defendant also asserted claim for jury to apportion against non party GM.

Supreme Court held: holding #1: “in applying O.C.G.A. § 51-12-33, the trier of fact must ‘apportion its award of damages among the persons who are liable according to the percentage of fault of each person’ even if the plaintiff is not at fault...”

holding #2: there is no right of contribution since the statute expressly states that “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.”

–holding #3: a defendant who does not present evidence establishing that a party who settles with the plaintiff is at least partially liable for the plaintiff’s injury is not entitled to submit the issue of apportionment to the jury.
Questions to consider:

can “fault” be apportioned to someone who is “strictly liable,” or whose liability is based
on breach of warranty?

–How to reconcile O.C.G.A. §51-12-31 (under which a jury “may” apportion damages)
and O.C.G.A. § 51-12-33(b) (under which a jury “shall” apportion fault)

–How to reconcile O.C.G.A. § 51-12-32 (authorizing contribution among joint

–Can an innocent plaintiff avoid apportionment by suing only one defendant?

O.C.G.A. 51-12-33(b) provides “Where an action is brought against more than one

person.....”
Slip And Fall Law: The Basics

Presented By:

Tony C. Jones
Galloway Johnson Tompkins Burr & Smith PLC
Atlanta, GA
I. Slip & Fall
   A. Introduction
      ▪ Most people can readily understand what the phrase "slip and fall" means. A slip and fall typically involves a loss of balance on a substance or structure.
      ▪ In Georgia, there are generally two classes of slip and fall cases: (a) Foreign substance cases and (b) static defect cases.

   B. Foreign Substance Cases
      i. Types of Cases
         ▪ Your typical foreign substance case involves substances like water, liquids and oils of various kinds, food particles, trash, and debris on a surface. As a result, these types of claims tend to arise in restaurants, grocery stores, pet stores, sporting venues, and common areas of apartments, hotels, dormitories, and office buildings.
         ▪ In areas of low, moderate, or high foot traffic, stray items and substances can easily make their way to the floor creating a slip and fall risk for others.

   a. Duties: Reasonable Inspection
      o All premises owners or managers must have reasonable inspection procedures in place to prevent and lessen the likelihood of slip and falls. However, with foreign substances, the manner and timing of inspections will be critical as foreign substances can accumulate on surfaces within seconds and without anyone knowing about it before an incident occurs.
      o The owner is allowed a reasonable period of time to inspect and maintain the premises in foreign substance cases. There is no duty to inspect the entirety of the premises every second of the day. However, a defendant in this type of case must show that it exercised “ordinary care” in inspecting and maintaining the premises. As a result, the length of time between the last inspection and the
actual incident can often be determinative in foreign substances cases.

- Generally, if a defendant can show that it didn't know that a foreign substance was present and that there is no way that the foreign substance was present for more than a matter of minutes (as opposed to hours), a defendant can usually prevail in a foreign substance slip and fall case. The time frame for reasonableness often varies depending on the context, but the point is that the defendant must show that it inspected the subject area with some degree of frequency in order to prevail.

- Importantly, the duty to inspect is not a duty to discover. What's required is the existence of a reasonable inspection procedure.

- In most cases, it's fair to presume that a reasonable inspection procedure would reveal the alleged hazard. However, in some cases, a defendant wouldn't be able to discover the foreign substance despite having a reasonable inspection procedure in place. In these types of cases, a defendant will likely prevail because, regardless of the inspection procedure, a “reasonable” inspection wouldn't have revealed the defect anyway.

b. **Special Substances: Wax, Water & Standing Water**

- Ordinarily, for a plaintiff to prevail in a "floor wax" case, he must show that the defendant was negligent in either the materials he used to wax the floor or negligent in his application of the floor waxing materials. However, these cases are contextual. For example, a plaintiff who slipped and fell on a waxed locker room floor after a football game may survive summary judgment because there may be a jury issue as to whether or not it was hazardous to wax the floors in an area where the defendant knew patrons could be wearing football cleats.

- Rain water cases are unique in that there is a presumption that a plaintiff will be aware of the presence or likelihood of rainwater on the floor near entrances and exits. Further, the average person is aware that he has to use caution and due care in traversing rain soaked surfaces. For that reason, a plaintiff's burden is substantially higher...
in these cases. The plaintiff must show superseding causes such as negligent construction, building code violations, or establish facts showing that other patrons had fallen in the same location.

- Standing water cases involve a hybrid of a static condition and a foreign substance. While it's difficult for a plaintiff to establish negligence when he deliberately tried to traverse a visible puddle in a parking lot, the plaintiff's burden isn't as high if this same puddle is located in the men's room.

C. Static Defect Cases

- A static condition is a condition that's long standing and generally fixed in time and position. A common example of a static condition is a jagged speed bump, a pothole, an uneven curb or uneven staircase, or a loose brick or stone on a walkway.
- In these cases, the alleged defect often didn't spring up overnight and is always present, hence the term static defect.
- Because a static condition is a relatively unchanging condition, there are many defenses available to a defendant in this type of situation.

i. “Open & Obvious”

- When nothing obstructs or interferes with a plaintiff's ability to see a static defect, the owner or occupier of the premises is justified in assuming that the plaintiff will see it, realize the potential risks involved, and will tailor his conduct accordingly. This static defect is "open and obvious" and provides a complete defense to an owner or occupier's liability.

ii. "Prior Traversal"

- The prior traversal doctrine charges a plaintiff with equal knowledge of a condition that he has negotiated before.
- For instance, let's assume that there's a football game going on at a local stadium. Let's also assume that a stairwell in this stadium has uneven steps. If the plaintiff manages to get to his seat using that stairwell, manages to go to the concessions stand at halftime using that stairwell, and manages to go to the restroom during the
third quarter using that stairwell, if the plaintiff falls at the end of the game and blames it on the unevenness of the stairwell, his claims are barred by the prior traversal doctrine. He knew that the stairs were uneven and had negotiated the stairs before without incident.

iii. Ramp Cases

- Ramp cases are generally regarded as static defect cases, so a defendant has the same static defect defenses available here.
- However, if a plaintiff argues that the ramp isn't built in accordance with local building codes, was painted in a way that made the ramp slippery, or was not painted in a way to delineate changes in elevation, a plaintiff may overcome the typical defenses associated with static defect cases.

D. Required Elements: Actual or Constructive Knowledge

- In order for a Plaintiff to prevail in any slip and fall action—whether it’s a foreign substance case or a static defect case—the Plaintiff must show that the Defendant had (a) Actual or (b) Constructive Knowledge of the alleged defect.
- When a Defendant has actual knowledge of an alleged defect, the Defendant or one of its employees knew about the dangerous condition either from seeing it or having it reported to them, etc.
- If the Plaintiff can’t show that the Defendant had actual knowledge of the alleged defect, the Plaintiff must show that the Defendant had constructive knowledge of the defect.
- Constructive knowledge is shown if the Plaintiff can establish that (a) the defect existed for so long that the defendant knew or should have known of its existence, (b) that a reasonable inspection procedure would have revealed the defect, or (c) that the Defendant was on notice of the defect because of the complaints of one or more other patrons.
- Again, a Defendant can often defeat these claims by showing that it had a reasonable inspection procedure in place and that it was unaware of the defect prior to the Plaintiff’s complaints.
## E. Defenses

### Contributory Negligence
Contributory negligence is a common defense in slip and fall cases. This defense is most successfully asserted when a Defendant has shown that the Plaintiff had equal knowledge of the alleged hazards or that the Plaintiff assumed the risk of injury in exposing himself to known hazards.

### Equal Knowledge
A Defendant can directly assert that Plaintiff’s equal knowledge of the hazardous condition to bar his recovery.

### Assumption of Risk
When the Plaintiff had equal knowledge of the alleged hazard, but deliberately took their chances in exposing themselves to the hazard, he has assumed the risk of his injuries and his claims are barred. This is often seen where a Plaintiff steps onto a clearly uneven surface, steps into a hole or puddle of water, or takes a chance crossing an obviously slick surface.

### Causation
If a Defendant can show that its conduct was not the cause of the Plaintiff’s injuries, the Plaintiff is barred from recovery. In any negligence action, a Plaintiff is required to show that the Defendant’s conduct—or lack of conduct—caused his injuries. If the Plaintiff can’t show that the Defendant’s conduct actually caused the incident that led to their injuries, they can’t recover against the Defendant.
Sovereign Immunity Issues In Prosecuting A Premises Liability Case Against A Governmental Entity

Presented By:

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Institute of Continuing Legal Education in Georgia

Premises Liability

Sovereign Immunity

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SOVEREIGN IMMUNITY

Matthew A. Cathey
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I. INTRODUCTION

When contemplating a claim or a lawsuit against a government entity in any type of case (premises or otherwise), whether the governmental entity be a city, county, state or the federal government, you must have some working knowledge of the concept of "sovereign immunity". Sovereign immunity is a doctrine which serves to shield government entities from lawsuits. Federal and Georgia law have both embraced the doctrine of sovereign immunity, however, the legislatures and courts have created exceptions to the application of absolute sovereign immunity for governmental entities so that individuals may recover, under limited circumstances, for injuries and damages sustained as a result of government activity or negligence. It is these exceptions which have been the source for much confusion among attorneys handling cases against governmental entities, and whether there is a viable claim against a government entity can be very fact dependent and very case specific. As a result, it is vital that attorneys fully understand the pitfalls that such cases can present if the issues are not recognized and handled at the outset of the case. By way of introduction, the best advice to any lawyer evaluating a potential governmental entity case is very simple: Be careful and read/know the law!

II. NOTICE/ANTE LITEM REQUIREMENTS

If you are considering a claim or a lawsuit against any governmental entity, the first issue that needs to enter your before anything else is the issue of NOTICE. Much like missing a statute of limitations, if an attorney does not give notice in a timely fashion it is irrelevant how good of a case an attorney may think he has, as a violation of the notice requirement is an incurable defect in almost all instances and will result in an automatic dismissal of your case. Therefore, it is essential that an attorney know the time limits and procedures required when choosing to handle a case that will involve a governmental entity.
The Federal government, the State of Georgia, counties and municipalities all have some procedure for "ante litem" notice which must be served upon the government entity in proper form within a certain time period prior to any litigation. These ante litem notice requirements are jurisdictional and operate as statutes of limitations which will bar any claim if you do not properly follow the procedures and time deadlines required. The ante litem notice procedures are essentially a vehicle to allow administrative investigation and consideration of the claim by the governmental entity before the claim goes into litigation (Note: Notice is required even if the government is already aware of the incident that will form the basis of the case). Unfortunately for attorneys, a lot of confusion arises due to the fact that the ante litem procedures and timelines differ depending on the type of governmental entity against whom a claim is made. Thus, I have set out here the relevant notice/administrative requirements which apply to the various government entities:

1. **United States**: Federal Tort Claims Act ("FTCA") 98 U.S.C. §§ 1346(b), 2671-2680. Ante litem notice is required under the FTCA by the express provisions of 28 U.S.C. § 2675 by filing claim form 95. Before suit may be filed against the United States Government, an administrative claim must be filed with the federal agency alleged to be vicariously or independently responsible for the tortious act which caused the injury. It is a jurisdictional requirement. If the administrative claim is not timely filed, the plaintiff cannot sue the United States government thereafter. An administrative claim must be filed with the appropriate federal agency within two years from the date of the incident which gives rise to the claim. 28 U.S.C. §2401(b). Once the claim is received, the agency receiving the claim has up to six months to act upon it before the claim shall be considered by law to be denied. 28 U.S.C. § 2675. In other words, once an administrative claim is filed in a timely fashion within the statute of limitations, (2 years), suit cannot be
filed for another six months. If the claim is formally denied earlier than six months, then suit may be filed once the agency has denied the claim in writing. 28 U.S.C. §2401(b).

2. **State of Georgia:** Georgia Tort Claims Act O.C.G.A. § 50-21-20 et seq. The ante litem notice requirements for claims against the State of Georgia are as follows: prior to the filing of a complaint, specific notice of the claim must have been given to and received by the State within 12 months from the date of the loss was discovered or should have been discovered. O.C.G.A. § 50-21-26(a)(1). No action may be commenced in the State courts until the claim has been denied or until more than 90 days have passed since the presentation of the claim to the State without any action by the State. O.C.G.A. § 50-21-26(b).

3. **Counties:** Any person having a claim against a county must present that claim in writing to the county or file and serve a lawsuit upon the county within 12 months after the occurrence of the incident. Failure to make a written claim or file and serve the lawsuit on the county within the 12 month statute of limitations will be an absolute bar to the claim. O.C.G.A. § 36-11-1.

4. **Municipalities:** A person or corporation which has a claim for damages against a municipality as a result of the injuries to persons or property may not bring an action without first giving written ante litem notice within six months of happening of the incident upon which the claim is based. O.C.G.A. § 36-33-5(a). This statutory ante litem notice operates as a statute of limitations. *City of LaGrange v. USAA Insurance Co.*, 211 Ga.App. 19 (1993).
III. CHECKLIST/OUTLINE OF GENERAL RULES AND PROCEDURES PERTAINING TO SUITS AGAINST GOVERNMENT ENTITIES

A. UNITED STATES OF AMERICA

1. **Bases for Liability:** Federal Tort Claims Act, 28 U.S.C. § 1346(b); 2671-2680

2. **Ante-Litem Notice Requirements:** Must file with agency alleged to be vicariously liable within 2 years of accident. 28 U.S.C. § 2401(b).

3. **Requirements of Form:** Dept. of Justice Form 95; 28 C.F.R. Part 14 (See Appendix)

4. **Waiting Period:** Formal written denial or six months, whichever is earlier. 28 U.S.C. § 2675(a).

5. **Statute of Limitations:** Administrative claim must be filed within 2 years after the claim accrues and lawsuit must be filed within 6 months of claim denial. 28 U.S.C. § 2401(b).

6. **Venue:** Where Plaintiff resides or where act or omission occurred. 28 U.S.C. § 1402(b).

7. **Who may be sued:** Only the United States of America may be named as a defendant not the agency or the employee who committed the tortious act. 28 U.S.C. § 2401(b).

8. **Trial:** Bench trial only - no right to a jury trial. 28 U.S.C. § 2402.

9. **Damages:** Compensatory damages only - governed by the law of the jurisdiction where act or omission occurred. 28 U.S.C. § 2674. No punitive damages may be recovered. 28 U.S.C. § 2674. See *Molzof v. United States*, 502 U.S. 301, 112 S.Ct. 711, 116 L.Ed. 731 (1992). The amount of damages included in the Form 95 may not be increased when suit is filed (with limited exception).
10. **Defenses:**

- No liability under applicable state law for the same alleged acts or omissions. *Sellfors v. United States*, 697 F.2d 1362, 1365, (11th Cir. 1983).


- Specific statutory exclusions specified in the FTCA at 28 U.S.C. § 2680(a) - (n) including: a claim based upon an act/omission of employee in the execution of the statute or regulation; claim for the negligent transmission of a letter; assessment for collection of tax; claim arising out of any assessment or collection of any tax; any claim arising out of foreign country; any claim arising out of the combatant activities of the military during time of war.)

The "Feres doctrine" - a judicially created exclusion. In Feres v. United States, 340 U.S. 135, 146 (1950), the Supreme Court held that the government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or in the course of activity incident to service.

11. Other things to know:
   (I) Attorneys’ fees - limited to 20% of settlement without filing suit; 25% if case settles before judgment is obtained after filing suit. 28 U.S.C. § 2678. Attorney's fees are payable from the amount of the recovery - not in addition to the amount of the recovery.
   (ii) Costs and interest - Costs are taxable against the United States under the Federal Tort Claims Act just as they are against a private litigant. 28 U.S.C. §2412. Costs do not include attorney’s fees and expert witness costs. The United States is not liable for pre-judgment interest but may be liable for post-judgment interest. 28 U.S.C. §2674, 1961.

B. STATE OF GEORGIA
1. Basis for liability: State Tort Claims Act - O.C.G.A. § 50-21-20 et seq. (1992); The Act resulted from an Amendment to Art. I, Sec. II, Par. IX of the Georgia Constitution (1991). It became law on April 16, 1992. The Act was intended to provide a remedy for torts committed by state officers and establishes a procedure to waive sovereign immunity under certain circumstances to allow suits against the state for tortious acts of its agents, officers and employees. Individual state officers and employees may not be named as parties to a lawsuit
against the State. O.C.G.A. § 50-21-25.

2. **Ante Litem Notice Requirement**: A written notice of claim must be given within twelve months of the date the loss was discovered or should have been discovered. O.C.G.A. § 50-21-26(a)(1).

3. **Requirements of Form**: Notice shall be given in writing mailed by certified mail, return receipt requested or delivered personally to (and receipt obtained from) the Risk Management Division of the Department of Administrative Services. O.C.G.A. § 50-21-26(a)(2). Additionally, a copy shall be delivered personally to or mailed by first class mail to the state government entity, the act or omission of which is asserted as the basis of the claim. Id. Content of the notice is governed by O.C.G.A. § 50-21-26(a)(5). It must state to the extent of the claimant’s knowledge and belief as may be practicable under the circumstances including the name of the government entity, the acts or omission of which are asserted as the basis of the claim, the time and place of the transaction of the occurrence out of which the loss arose, the nature of the loss suffered, the amount of the loss claimed, and the acts or omissions which caused the loss.

4. **Waiting period**: Legal action against the state under the Georgia Tort Claims Act shall not be commenced and the court shall have no jurisdiction unless and until the notice of the claim has been timely presented to the state as provided in this section. O.C.G.A. § 50-21-26(a)(3). No action may be commenced under the Georgia Tort Claims Act following the presentation of a Notice of Claim until either the Department of Administrative Services has denied the claim or more than 90 days have elapsed after the presentation of the notice of claim.
without action by the Department of Administrative Services, whichever occurs first. O.C.G.A. § 50-21-26(b).

5. **Statute of Limitations:** Two year limitation period for personal injuries and wrongful death actions assuming you have met the first *ante litem* notice requirement. However, a claimant needs to be aware that the 90 day waiting period required by O.C.G.A. § 50-21-26(b) can create a problem with respect to the expiration of the statute of limitations in certain cases.

6. **Venue:** Suit must be filed in the state or superior court within the state of Georgia. O.C.G.A. § 50-21-28. For losses which occurred in Georgia, the proper venue is the county where the loss occurred. Provided, however, that in any case in which an officer or employee of the state is included as a defendant in his individual capacity, the action may be brought in the county of residence of the officer or employee. O.C.G.A. § 50-21-28. For losses which are sustained in any other state, suit shall be brought in the county of residence of any officer or employee residing in the state upon whose acts or omissions the claim against the state is based. O.C.G.A. § 50-21-28.

7. **Who may be sued:** Individual state officers and employees may no longer be named as parties to a lawsuit against the state. O.C.G.A. § 50-21-25. However, this does not apply when the claim involves an individual physician/patient relationship. *Keenan v. Plouff*, 267 Ga. 791, 793 (1997). The state has no liability for losses resulting from conduct on the part of its officers or employees which were not within the scope of their official duties or employment, O.C.G.A. § 50-21-23(a), however, such officers and employees can still be sued in their
individual capacities O.C.G.A. § 50-21-25(a). Only the State government entity (e.g. department) shall be named as a party to the lawsuit. O.C.G.A. § 5-21-25(b).

8. **Trial**: Trial by jury. O.C.G.A. § 50-21-29

9. **Defenses**: The Georgia Tort Claims Act applies only to claims for money damages for losses caused by the tortious acts of state officers or employees acting within the scope and course of their employment. There are 12 areas of state activity specifically excluded under O.C.G.A. § 50-21-24, including as follows: losses resulting from any exercise or performance of a discretionary function; acts or omissions in the execution of statutes, regulations, rules, etc.; assessment of tax or detention by law enforcement officers; legislative, judicial or prosecutorial actions; civil disturbance or riot; assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander or interference with contractual rights; inspection powers or functions; licensing powers or functions; highway and other public work designs when prepared in substantial compliance with generally accepted engineering design standards.

10. **Damages**: There is a limitation upon recovery in the amount of $1,000,000 due to a "loss arising from a single occurrence, regardless of the number of state government entities involved; and the state's aggregate liability per occurrence shall not exceed $3,000,000." O.C.G.A. § 50-21-29(b). The existence of these caps on liability cannot be disclosed to the jury during the trial of any action under the Georgia Tort Claims Act. Id. Punitive damages are prohibited under the Georgia Tort Claims Act. O.C.G.A. § 50-21-30.
11. **Other things to know:**

(I) **Interest:** No award for damages under the Tort Claims Act shall include interest prior to judgment. O.C.G.A. § 50-21-30. However, judgments shall bear interest from the date of judgment at the rate of 7% per annum. O.C.G.A. §50-21-31. (Note that the State is not subject to the standard statutory provision for interest on judgments).

(ii) **Complaint:** Any complaint filed under the Georgia Tort Claims Act **must** have a copy of a notice of the claim presented to the Department of Administrative Services together with a certified mail receipt for other delivery attached as exhibits. O.C.G.A. § 50-21-26(a)(4). Failure to do so is an amendable defect, however, this defect **must** be cured within 30 days after the state raises the issue by Motion. \[Id \]

C. **COUNTIES**

County employees may, therefore, be liable "for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions." They may be liable for injuries and damages resulting from discretionary acts if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Ga. Const. Art. I, Sec. 2, Par. 9(d). See also *Hennessy v. Webb*, 245 Ga. 329, 330-331 (1980).

Official immunity is applicable to county officials and employees sued in their individual capacities. Damage suits are maintainable in this state against government officers and agents for failure to perform ministerial duties, but such officers and employees are immune from negligence claims when the acts complained of involve a discretionary function of an office. Whether the acts upon which liability is predicated are ministerial or discretionary is determined by the facts of the particular case.

**Ministerial or Discretionary?**
A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberations and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. A government employee who is invested with discretion and empowered to exercise his judgment in the course of execution of his duties is immune from liability when performing discretionary tasks. The question whether a duty is ministerial or discretionary turns on the
character of the specific act, not the general nature of the official’s position. 
a discretionary act as one which occurs at the planning level whereas a 
ministerial act occurs at the operational level. See e.g. **Dalehite v. United 

**Official or Sovereign Immunity?**

A good illustration of just how confusing the different immunity doctrines 
can become in application, particularly when dealing with counties and their 
employees, is the case of **Norris v. Emanuel County**, 254 Ga. App. 114, 561 
S.E.2d 240 (2002). In the decision, the Court of Appeals explained that 
official immunity and sovereign immunity are not synonymous. Norris was 
injured when a truck driven by her grandson tipped over due to the collapse 
of the shoulder of the road. Norris sued Emanuel County, five county 
commissioners, the county road superintendent and a road-crew supervisor, 
all of whom were granted summary judgment by the trial court judge, who 
ruled that the defendants were immune from suit under the doctrine of 
oficial immunity because "...determining the extent of the work to be 
performed is a discretionary function requiring the allocation of limited 
resources." The plaintiffs appealed, arguing that the trial court erred in 
granting summary judgment on a basis that was not raised on motion for 
summary judgment - sovereign immunity. The defendants contended that 
"official immunity,""sovereign immunity" and "public immunity" referred to 
the same principle and that the defendants therefore raised the issue of 
sovereign immunity by raising the issue of official immunity.
The Court of Appeals disagreed, explaining that sovereign immunity and official immunity are not synonymous but are separate doctrines. **Sovereign** or governmental immunity is traditionally granted to **government entities** such as the State or its counties. **Official immunity** applies to **government officials** and employees sued in their **individual capacities**. In the list of defendants, only two were sued in their individual capacity and therefore the doctrine of official immunity related only to them. If the remaining defendants were immune from suit, such immunity stemmed from sovereign immunity, an issue that was not raised by the defendants in their motion for summary judgment. By ruling in favor of the defendants based upon an argument that was not raised in the motion, the trial court deprived the plaintiff of her opportunity to respond to the issue.

2. **Ante-Litem Notice Requirements:** Any person having a claim against the county must present that claim in writing to the county or file and serve a lawsuit upon the county within 12 months after the cause of action accrues. Failure to make such a written claim or to file and serve the lawsuit upon the county within this statutory period acts as an absolute bar to the claim. O.C.G.A. § 36-11-1; **Evans County v. McDonald,** 133 Ga.App. 955 (1995).


4. **Waiting period:** There is no waiting period for filing suit after giving ante litem notice to a county. Also, note that filing and serving a lawsuit within twelve months is sufficient ante litem notice for a **county** (but not the United States, the State or a municipality). **Godfrey v. County of Jefferson, 21 Ga.**
5. **Statute of limitations:** Two years for personal injury and wrongful death actions assuming you have first met the *ante litem* notice requirements.

6. **Venue:** Constitution of Georgia, Article VI, § II, Par. VI.

7. **Who may be sued:** See Sections 1 and 9 herein regarding the distinction between discretionary and ministerial acts.

8. **Trial:** Jury trial.

9. **Defenses:** Discretionary acts which will be shielded by sovereign immunity include as follows:
   - a law enforcement officer's rushing to an emergency scene and a firefighter rushing to a collision scene
   - conducting inspections for construction purposes
   - making decisions concerning inmate work details
   - the decision concerning how to respond to downed traffic signs
   - purchasing automobile insurance
   - diagnosing of inmates by a sheriff's department physician's assistant
   - inspecting and maintaining traffic control signs
   - the setting of bail
   - inspecting bridges
   - a paramedic's treatment and transportation of a patient
   - the operation of a law enforcement agency including the degree of training and supervision provided to officers
   - the constructing and inspecting of county roads.


Ministerial acts to which sovereign immunity does not apply include closing
a bridge; the replacement of road signs once the office charged with replacing
them receives notice that they are missing and the provision of adequate
medical care for inmates. Id.

10. **Damages:** No punitive damages as a matter of law based on public policy
*Martín v. Hospital Authority of Clarke County*, 264 Ga. 626 (1994); *City of

11. **Other things to know:**

   I. **Nuisances:** Counties are **not** liable for nuisances, except in the context
      of a taking of private property for public purposes amounting to
      inverse condemnation. *DeKalb County v. Orwig*, 261 Ga. 137 (1991);
      *Canfield v. Cook County*, 213 Ga.App. 625 (1994); a county is not liable
      for nuisance claims arising from personal injuries or wrongful death,

   ii. **Vicarious Liability:** Suits against the head of a county department or
       agency acting in an official capacity are viewed to be suits against the
       county itself and an official sued in his official capacity can only be
       held liable under the doctrine of **respondeat superior**. Gilbert v.

D. **MUNICIPALITIES/CITIES**

1. **Bases for liability:** A city has sovereign immunity **unless** it has
   4 (1994). Additionally, a municipality which provides liability
   insurance through its participation in the Georgia Interlocal Risk
Management Agency ("GIRMA") constitutes a waiver of sovereign immunity to the extent of available insurance coverage. O.C.G.A. § 36-85-1, et seq; See also, Hiers v. City of Barwick, 262 Ga. 129 (1992).

In the absence of liability insurance coverage, a municipality is not liable for the negligent performance of its governmental duties but may be liable for the negligence of performance of ministerial acts. O.C.G.A. § 36-33-1(b); Sinkfield v. Pike, 201 Ga.App. 652 (1991). If there is no insurance coverage applicable, individual city officials are entitled to raise the defense of official immunity for negligence in their discretionary actions performed within the course and scope of their employment (and performed without malice, corruption or reckless disregard). O.C.G.A. § 36-33-2. Those officials may, however, be liable for the negligent performance of ministerial functions. Hennessy v. Webb, 245 Ga. 329 (1980); Hiers v. City of Barwick, 262 Ga. 129 (1992).

Governmental functions which can be shielded by sovereign immunity include:

♦ determining whether or not to erect traffic control signs, railroad crossing signals, or barriers along the edge of a roadway
♦ the construction, installation, and maintenance of a sewer-drainage system
♦ trash removal and the driving of garbage collection trucks for such purposes
the operation of a fire department
the operation of a police department
the erection and maintenance of a city prison.


A municipality is statutorily immune from any liability occasioned by defects in the public roadways of the municipality provided that there has been no negligence in their construction or maintenance or that there has been no actual or constructive notice of a defect. O.C.G.A. § 32-4-93.

A municipality engages in ministerial functions when it conducts business activities for corporate advantage or gain. *Koehler v. City of Atlanta*, 221 Ga. App. 534 (1996). These include:

- furnishing electric power and water to inhabitants
- operating a cemetery when it sells lots therein for burial purposes
- operating buses for hire for the transportation of passengers
- maintaining a park primarily as a source of revenue
- maintaining streets and sidewalks to keep them safe for travel.

Id.


2. **Ante Litem Notice Requirements**: Before any action for money damages or injury to property or person can be brought against a municipal corporation, written notice of the claim must be given to the municipality within six months of the occurrence. O.C.G.A. § 36-33-5.
This six month ante litem notice constitutes a statute of limitations. 

3. **Requirements of Form:** Claimant must present the claim in writing to the government authority which includes sufficient information so that the claim may be evaluated and adjusted. O.C.G.A. § 36-35-5(b). 


4. **Waiting period:** No action may be entertained against a municipality until the cause of action asserted in the ante litem notice has first been presented to the governing authority for assessment. O.C.G.A. § 36-33-5(b). After presentation of the written claim, the governing authority of the municipality must consider and act upon the claim within 30 days from the presentation. O.C.G.A. § 36-33-35(c).

5. **Statute of Limitations:** Two year statute of limitations for personal injuries and wrongful death assuming you have first met the ante litem notice requirement. **Ante litem** notice requirement acts as a statute of limitations. See **City of Atlanta v. Barrett**, 102 Ga.App. 469 (1960); **Webster**, *supra*, 164 Ga.App. at 610. However, the running of the statute of limitations is suspended during the time the demand for payment is pending. O.C.G.A. § 36-33-5(d).


7. **Who may be sued:** See Sections III.C.1. and D.1. above. Generally the
same immunity principals apply to city employees as apply to individual immunity for county officers. (See III.C.1. of this paper). However, O.C.G.A. § 36-33-4 provides that:

Members of a city council and other officers of a municipal corporation shall be personally liable to one who sustains special damages as a result of any official act of such officer if done oppressively, maliciously, corruptly or without authority of law. See also City of Buford v. Ward, 212 Ga.App. 752 (1994).

If the acts of an individual city officer or employee are covered by insurance, then that person’s immunity is waived regardless of whether his actions are discretionary or ministerial. See Hiers v. City of Barwick, 262 Ga. 129, 132 (1992). This does not pertain to private insurance. See Doe v. Howell, 212 Ga. App. 305, 306 (1994).

8. **Trial:** Trial by jury.


10. **Defenses:** See Sections III.C.1. and D.1. above pertaining to discretionary and ministerial functions/waiver of sovereign immunity by the purchase of insurance.

11. **Other things to know:**

   (I) **Nuisance:** The city has no sovereign immunity for a nuisance. See City of Thomasville v. Shank, 263 Ga. 624 (1993). A city,
whether exercising governmental or ministerial functions is liable for injuries resulting from the maintenance of a nuisance. 


(iii) Non-governmental activities: A city does not have immunity if it engages in a governmental function as a business enterprise as a source of revenue. This may be a question of fact for the jury. City of Atlanta v. Watley, 161 Ga.App. 705 (1982); Mayor v. Radford, 261 Ga. 129 (1991). A golf course is governmental. City of Atlanta v. Mapel, 121

IV. INSURANCE

(a) Generally


O.C.G.A. § 33-24-51(b) provides:

Whenever a municipal corporation, a county, or any other political subdivision of this state shall purchase the insurance authorized by subsection (a) of this Code section to provide liability coverage for the negligence of any duly authorized officer, agent, servant, attorney, or employee in the performance of his official duties, its governmental immunity shall be waived to the extent of the amount of insurance so purchased...

O.C.G.A. § 33-24-51(a) limits the immunity waiver to insurance covering liability "arising by reason of ownership, maintenance, operation, or use of any motor vehicle by the ...county." Whether an event arises from the "use" of a motor vehicle depends on the circumstances of the case. Harry v. Glynn County, 269 Ga. 503, 504 (1), 501 S.E.2d 196 (1998).


(b) Statute effective January 1, 2005

In 2002 the Georgia legislature passed legislation which amended O.C.G.A. §§ 33-24-
51, 36-33-1 and 40-6-6 ("Authorized Emergency Vehicles") and enacted O.C.G.A. § 36-92-1. This legislation provides for the waiver of immunity of local government entities, including counties, for injuries or damages arising out of the negligent use of motor vehicles under certain circumstances and with certain limitations. It also provides for graduated mandatory liability limits beginning in January 1, 2005 and increasing until January 1, 2008. A "local government entity" means any "county, municipal corporation or consolidated city-county government of this state." The term does not include local school systems. (O.C.G.A. § 36-92-1). The limits are as follows:

- $100,000 for bodily injury or death per person per occurrence and an aggregate amount of $300,000 for bodily injury or death for two or more persons per occurrence and $50,000 for injury or destruction of property per occurrence and incidents occurring after January 1, 2005.
- For incidents occurring after January 1, 2007, the limits increase to $250,000 per person per occurrence and $450,000 aggregate.
- After January 1, 2008, the limits increase again to $500,000 per person per occurrence and $700,000 aggregate. See O.C.G.A. § 36-92-2.

Immunity can also be waived in a greater amount by resolution or the purchase of higher limits. The new Act also provides that a person bringing an act under this section against a local government shall name the local government as an entity and not the local government officer or employee. O.C.G.A. § 36-92-3. In fact, any local government officer or employee who commits a tort involving the use of a covered motor vehicle while in the performance of his/her official duties is not subject to a lawsuit or liability therefor. O.C.G.A. § 36-92-3. Neither the local government entity nor the insuring company can plead governmental immunity as a defense and the governmental entity/insuring company can make only those defenses which could be made if the insured were a private person. See
O.C.G.A. § 33-24-51(b), as amended.

O.C.G.A. § 36-92-4(b) provides statutorily that there shall be no award for punitive damages against local government entities. Additionally, the existence or amount of the waiver of immunity shall not be disclosed or suggested to a jury. O.C.G.A. § 36-92-4(f). A copy of the new legislation is attached hereto.

V. POLICE CHASE CASES

The legislation summarized above, and particularly Chapter 92 of Title 36, which became effective January 1, 2005, subjects all claims arising under that sub-section which are brought against local governmental entities pursuant to O.C.G.A. § 40-6-6 (Authorized emergency vehicles) to the same conditions and limitations, including the graduated insurance limits. See O.C.G.A. § 40-6-6(d).

O.C.G.A. § 40-6-6 is the code section, which specifically includes liability for high speed chases, states that the new sub-section shall apply "...only to issues of causation and duty and shall not effect the existence or absence of immunity but shall be determined as otherwise provided by law." O.C.G.A. § 40-6-6(d)(3) as amended, effective January 1, 2005. Therefore, after January 1, 2005, mandatory liability limits are available against which a claim can be made against local government law enforcement agencies based on high speed pursuits.

Currently, the relevant Georgia high speed pursuit statute, O.C.G.A. § 40-6-6(d)(2) and (3) provides as follows:

When a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, the law enforcement officer’s pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury or death caused by the fleeing suspect unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer’s decision to initiate or continue the pursuit. Where such reckless disregard exists, the pursuit may be found to constitute a proximate cause of the damage, injury or death caused by the fleeing suspect, but the existence of such reckless disregard shall not in and of itself establish causation...The provisions of this subsection shall apply only to issues of causation and duty and shall not affect the existence or absence of immunity which
shall be determined as otherwise provided by law.

When analyzing liability in a police chase, you must first remember that nothing in the language of this statute requires a court to address the issue of a public official defendant's immunity liability before dealing with causation. See Cameron v. Lang, 274 Ga. 122, 126 (2001). In other words, a court must consider an officer's official immunity from liability as a threshold issue in a suit against the officer in his personal capacity in a high speed chase. His liability can only be evaluated after the court has determined whether the officer is immune from suit. Waiver of immunity is the first question which must be addressed and, therefore, the purchase of insurance by the local government will be an important question in making a determination about immunity or waiver thereof. An analysis of "ministerial versus discretionary" acts will also be important. If there is a clear violation of a written chase policy/procedure of the local government entity under consideration, then this may go a long way in establishing that the officer had no discretion in initiating or continuing the pursuit in direct violation of the written chase policy.

However, once again, the case law is not consistent in this regard. In Williams v. Solomon, 242 Ga.App. 807 (2000), the court affirmed the trial court's grant of summary judgment in favor of appellees/police officer and municipality on appellant's claim for damages for injuries sustained in a collision with a patrol car. The court held that appellee/office was entitled to official immunity because the pursuit of a stolen car was within the scope of his official authority and appellee/municipality was entitled to sovereign immunity because there was no evidence that appellee had waived immunity in this case.

In Lang v. Becham, 243 Ga.App. 132 (2000) affirmed by Cameron v. Lang, 274 Ga. 122 (2001), appellant's husband was killed when his vehicle was struck head-on by a car driven by a fleeing felon who was being pursued by an officer of the sheriff's department. Reversing a grant of summary judgment based on official immunity, the court found that the appellant had presented evidence from which a jury could conclude that the officer had
recklessly disregarded proper law enforcement procedures in his decision to continue to pursue the fleeing felon. In this case the county had purchased liability insurance.

In the case of City of Winder v. McDougald, 276 Ga. 866 (2004), the Georgia Supreme Court reversed the judgment of the Court of Appeals in a suit involving the death of a fourteen year old suspect during a high speed chase. The Court of Appeals (at 254 Ga. App. 537) had ruled that the family of a fleeing suspect had a right to a jury trial after being killed in a high speed chase in which she was the perpetrator. The Supreme Court held that O.C.G.A. § 40-6-6(d)(2) applies only to claims of innocent parties. The statute (as amended in 1995) provides that an officer’s pursuit of a suspect is not the proximate cause of injury caused by the suspect unless the officer acted with reckless disregard for proper law enforcement procedures. The Court said that the fleeing suspect may be able to recover for her own injuries if an officer acted with actual intent to cause injury, citing Kidd v. Coates, 271 Ga. 33 (1999).

In the case of Hilson v. Dept. of Public Safety, 236 Ga. App. 638 (1999), the Georgia Court of Appeals found that any and all actions taken in connection with a high speed police chase constitute “a method of providing law enforcement” which is one of the exceptions under the Georgia State Tort Claims Act. See O.C.G.A. § 50-21-24(6). Therefore, the Court held that the State is shielded from suit for all claims stemming from such chases. This case was reaffirmed in the recent case of Blackston v. Dept. of Public Safety, 274 Ga. App. 373 (2005) and cert was denied by the Georgia Supreme Court. Based on these rulings, the citizens of Georgia now face a dual standard which is inconsistent and irrational in high speed police pursuits. When a fleeing suspect injures or kills an innocent third party during a high speed police pursuit, city, county and federal law enforcement officials may be held liable. However, if the same tragedy occurs during a high speed police chase involving a Georgia State trooper, the State is unconditionally and absolutely immune because this chase falls within the “method of providing law enforcement” exception to the Georgia State

VI. SCHOOL DISTRICTS, SCHOOL BOARDS AND SCHOOLS

(a) Generally


(b) School Buses

In DeKalb County School District v. Allen, 254 Ga. App. 66 (2002), the Court of Appeals affirmed the denial of summary judgment to the DeKalb County School District and its employee in the Plaintiff’s wrongful death suit arising out of the death of her seven year old daughter. The daughter was struck and killed by an automobile on a two-lane highway while attempting to get back to her mother's vehicle after trying to board the wrong
school bus.

The Court held that the defendants waived sovereign immunity under O.C.G.A. § 33-24-51 by purchasing liability insurance for the school bus. This Court also held that the incident came within the Defendant's liability insurance because the deceased child was using the school bus within the meaning of the policy at the time of the accident.

The Court of Appeals has previously held that the definition of "use" of a school bus does include the loading and unloading of children. See Cawthorn v. Waco Fire & Casualty Insurance Co., 183 Ga. App. 238 (1987), rev'd on other grounds, 259 Ga. 632 (1989). Furthermore, the duty of unloading a school bus encompasses not only depositing children outside the bus but assuring that each reaches a place of safety, which may include crossing a street. Ga.Farm Bureau Mutual Insurance Co. v. Greene, 174 Ga. App. 120 (1985).

This case is a clear example of how the Court applies a different analysis to determine whether sovereign immunity bars the claim than would apply to determine liability. The question was tied directly to whether the accident occurred in a situation involving "the use" of a school bus and the Court found that but for the bus' presence, the child would not have been killed. Therefore, the county was not immune from liability and the insurance coverage was available to the plaintiff if they were able to prove liability. Allen, 254 Ga. App. at 70.

(c) School Teachers/Administrators and Other School Employees

We know that public officials are protected from personal liability for discretionary actions taken with the scope of their professional authority, if those actions are not accompanied by acts of malice or actual intent to cause injury. Daniels v. Gordon, 232 Ga. App. 811 (1998). The general test imposed on teachers to monitor, supervise and control students has also been held to be a discretionary action which is protected by the doctrine of official immunity. Id. In the case of Butler v. McNeal, the Court of Appeals affirmed the grant of summary judgment to teacher McNeal in Butler's injury suit. The Court held that,
in the absence that the teacher acted with malice or intent to cause injury, she was immune from suit for the injuries Butler allegedly suffered when he fell from a chair while McNeal was attempting to help another teacher control Butler's classroom. The Court held that McNeal was simply performing her discretionary authority to monitor, control and supervise the children in her school after hearing a disruption in the neighboring class. Butler v. McNeal, 252 Ga. App. 68 (2001).

VII. BOARD OF REGENTS

The Georgia Supreme Court's holding in Pollard v. Board of Regents, 260 Ga. 885 (1991) has made it clear that the Board of Regents of the University System of the State of Georgia has no sovereign immunity. See also Ga. Const. 1976, Art. VIII, Sec. 4, Par. 1.

The Supreme Court of Georgia has ruled that a governmental entity which has immunity cannot unilaterally waive that immunity. CSX Transportation, Inc. v. City of Garden City, 277 Ga. 248 (2003). This ruling prohibits a school system from entering into contracts which provide that the School System agrees to indemnify or hold harmless the other party.

Further, the use of tax payer funds for education must be used for educational purposes. The Constitution still adheres to the strict requirement that all school funds be devoted to educational purposes as defined in the statutes and Constitution of this State. This constitutional proscription includes the defendant board. Commissioners of Chatham County v. Savannah Electric & Power Co., 215 Ga. 636 (112 SE 2d 655); State Board of Education v. Board of Public Education for the City of Savannah and County of Chatham, 190 Ga. 588 (10 SE 2d 369).

School principals, teachers, aides, bus drivers and others employed by a school district are entitled to official immunity. See e.g., Smith v. McDowell, 292 Ga. App. 731, 733, 666 S.E. 2d 94, 96 (Ga. Ct. App. 2008) (“Absent malice or intent to injure, which are
not alleged here, public school officials and employees may be held personally liable only for the negligent performance of ministerial acts.")

Georgia courts have consistently reached the conclusion that when school officials are monitoring, supervising or controlling students, they are performing “discretionary functions”. Payne v. Twiggs County School District, 232 Ga. App. 175, 177, 501 S.E. 2d 550, 552 (Ga. Ct. App. 1998). Furthermore,

[s]upervision of students is considered discretionary even where specific school policies designed to help control and monitor students have been violated. The rule that principals and teachers are immune from actions involving supervising and monitoring students has been applied uniformly in cases where students have been injured or killed.


VIII. HOSPITAL AUTHORITIES/MCG


Be aware that physicians employed by the Medical College of Georgia are immune from medical malpractice suits wherein the conduct complained of was being carried out as part of their official duties at MCG. Shekhawat, et al v. Jones, 293 Ga. 468 (2013). The holding of Shekhawat means that if a physician commits malpractice during the scope of their employment with MCG, then the GTCA is the only vehicle by which an injured person may bring his or her claim. Since the GTCA caps damages, attorneys seeking to bring a suit against a physician practicing at MCG should seek to prove that the physician was acting outside the scope of his employment with MCG (i.e. proving the physician was an
IX. SPECIAL EXCEPTION TO IMMUNITY BY LOCAL GOVERNMENTS

Despite the strict enforcement of sovereign immunity as almost an absolute defense after the 1991 Constitutional amendment, the Georgia Supreme Court created somewhat of an exception to this defense in the case of City of Rome v. Jordan, 263 Ga. 26 (1993). It is sometimes known as the "special relationship" exception to sovereign immunity. In Jordan, the Supreme Court held that when there is a special relationship between the individual and the governmental entity "which sets the individual apart from the normal public and engenders and special duty owed to that individual, liability may arise." 203 Ga. at 28. For a special relationship to exist the following requirements must be met:

1. An explicit assurance, through promises or actions that action will be taken on behalf of the injured party;
2. Knowledge that inaction could lead to harm;
3. Justifiable and detrimental reliance by the injured party that there would be an affirmative undertaking.

X. THE RECREATIONAL PROPERTY ACT.

Under Georgia’s Recreational Property Act, it is specifically provided that an owner of land which is made available for recreational purposes owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure or activity on the premises to persons entering for recreational purposes. See O.C.G.A. § 51-3-22. This limitation is subject to important exceptions. The owner of recreational property may be liable (1) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity or (2) for injury suffered when the owner of land charges the person or persons who enter or goes onto the land for recreational use except that in the case where land is leased to the state or a subdivision of the state, any consideration which is received by the owner for the lease is not deemed a charge within the meaning of the code section. O.C.G.A. § 51-3-25. The purpose of the article is to encourage landowners to make land and water areas available to the public by limiting the liability in connection with the use of the land and prescribing the duty of care owed by landowners to those using the land for recreational purposes. North v. Toco Hills, Inc., 160 Ga. App. 116 (1981). The article applies to private owners of land as well as to public owners of land.


In Anderson v. Atlanta Committee for the Olympic Games, Inc., 261 Ga. App. 895, affirmed at 278 Ga. 116 (2004), the Court of Appeals held that summary judgment was improperly entered in favor of the Olympic Committee where a genuine issue of material existed about whether the operation of the Olympic Park was a commercial or recreational venture. On remand, the jury was ordered to resolve the question of whether the nature of the park at the time of the underlying explosion which caused the death or injury of those involved in the litigation was commercial or recreational and the Court was to decide whether the act applied to the park and insulated the Committee from liability.
XI. INDIAN TRIBES

Indian tribes, as governments, occupy a unique place in our governmental system. They are separate and independent political entities. Early Supreme Court decisions developed the nature of the legal relationship between the Indian Tribes and the United States and the unique status of tribal governments. The Supreme Court held in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) that Indian tribes were distinct, self-governing legal entities and in Worcester v. Georgia, 32 U.S. (6 Pet.) 515 (1832) that state laws did not apply to Indian lands. Indian tribes comprise the third sovereignty in the United States, together with the federal government and the states.

In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) the Supreme Court determined that suits against Indian Tribes were barred by sovereign immunity.

As a result of tribal sovereignty and retained jurisdiction, many states do not have subject matter jurisdiction to establish and enforce child support orders. For states that can establish child support orders, many tribes will not honor state garnishment orders. Another issue is that many tribes do not have comprehensive tribal codes to address the establishment and enforcement of child support orders.

XII. ACTIONS EX CONTRACTU (Breach of Contract Actions)

Sovereign immunity is waived in any action ex contractu for the breach of any written contract now existing or hereafter entered into by the state or its departments and agencies. Ga. Const. of 1983, Art. I, Sec. II, Par. IX (c); See also OCGA § 50–21–1(a). In order to bring a claim against the state where a breach of contract is alleged, the contract must (a) express; (b) be in writing; and (c) the person bringing the action ordinarily must be a party to the contract. In other words, the ex contractu exception to sovereign immunity does not apply to oral contracts and does not allow third party beneficiaries to bring the suit unless the contract itself specifies otherwise. An exception to this rule was recently addressed in the case of McCoy v. Georgia Department of Administrative Services,
326 Ga.App. 853 (2014), in which it was held that a judgment creditor of a state employee who is covered by a state issued liability insurance policy has standing to bring suit against the State to enforce the judgment, but in the same holding the Court reiterated that third party beneficiaries to a contract do not have standing to sue.

XIII. CASES ALLEGING BREACH OF A PROFESSIONAL DUTY

Oftentimes, a case can be brought against a governmental entity for a breach of a professional duty (i.e. negligent building, designing roads, etc.). It is important to be aware that in such cases, it is **MANDATORY** that you file an expert affidavit contemporaneously with the Complaint. As a result of a 2007 amendment to O.C.G.A. § 9-11-9.1, the expert affidavit requirement applies to actions filed against either the individual professional or the governmental entity. Be aware that if you file a complaint without the required affidavit, and if the statute of limitations expires prior to you curing the defect, your case will be barred. In other words, a failure to include the affidavit is only a curable defect if the statute of limitations has not run.

XIV. RECENT CASES OF INTEREST

♦️ **In Georgia Department of Transportation v. Wyche**, 332 Ga.App. 596 (2015), the issue was whether the Georgia Department of Transportation could be sued for the negligence of an independent contractor it had hired to serve as an inspector on a road paving project. The paving project was being done by the employer of the deceased Plaintiff, which had also been hired by the State as an independent contractor. While working on the project, the Plaintiff was killed when a car came through the roadway without noticing that Plaintiff was in the road, and tragically the Plaintiff was struck and killed by the car. Plaintiff’s suit alleged that there were inadequate signs and warning devices to traffic that a road project was underway, and that the independent contractor was negligent in not recognizing and remediing the deficient warning signs.

The Plaintiff’s suit alleged that the DOT had a nondelegable duty to maintain traffic safety in construction zones on state highways, and thus the DOT should be held liable for the actions of its independent contractors. The Court held that the DOT was within
its right to delegate the duties and furthermore, could not be held liable under the GTCA for the negligence of its independent contractors.

♦

In Georgia Department of Natural Resources, et al v. Center for a Sustainable Coast, Inc., et al, 294 Ga. 593 (2014) the issue was whether sovereign immunity bars a claim for injunctive relief against the State. In this case, citizens filed suit against the Georgia Department of Natural Resources and sought to enjoin the DNR from issuing Letters of Permission to third parties authorizing land alterations to property within the jurisdiction of the “Shore Protection Act” (O.C.G.A. § 12-5-230, et seq). Importantly, there were no monetary damages sought in the suit, rather, the injunctive relief was the only remedy sought by the Plaintiffs. The State filed a Motion to Dismiss based on sovereign immunity grounds, and the trial court granted the motion. On appeal, the Georgia Court of Appeals reversed the trial court, finding that the case of IBM v. Evans, 265 Ga. 215 (1995) controlled and permitted Plaintiff’s injunctive relief to go forwards. Defendants then appeals to the Georgia Supreme Court, whereby the Court of Appeals decision was reversed.

In overruling the Court of Appeal, the Georgia Supreme Court found that the rationale it used in deciding the Evans case no longer sound, and therefore overruled its prior decision. In its holding, the Court noted that the 1991 Amendment to the Georgia Constitution mandates that sovereign immunity can only be waived by an Act of the General Assembly, and the Act under which the suit was brought (“Shore Protection Act”) did not contain a waiver of sovereign immunity. Therefore, in Georgia, a sovereign immunity bars injunctive relief against the State unless sovereign immunity has been specifically waived.

♦

In Georgia Department of Corrections v. Couch, 744 S.E. 2d 432; 2013 Ga. App. LEXIS 491; 2013 Fulton County D. Rep. 1982 (June 13, 2013) the Georgia Department of Corrections appealed the judgment of a Georgia trial court in favor of plaintiff inmate. The inmate brought a personal injury suit against the Department after he was injured while working on a painting detail at the warden’s house. The inmate’s suit proceeded to trial and he was awarded a jury verdict of $105,417. The inmate also filed a motion for attorney fees and expenses pursuant to O.C.G.A. § 9-11-68(b)(2) based on the Department’s earlier rejection of his pre-judgment offer to settle the claims. The inmate had a contingency agreement with his attorneys to pay them 40 percent of any recovery plus reasonable costs, and after the trial court granted the motion for attorneys’ fees, it awarded him 40 percent of his final recovery and litigation
expenses in attorney’s fees. On appeal, the Department asserted that the trial court erred by denying its motion to dismiss based on sovereign immunity. The Court disagreed, finding that the Georgia Tort Claims Act, O.C.G.A. § 50-21-23(a), waived the States sovereign immunity for the torts of state employees while acting within the scope of their official duties in the same manner as a private individual or entity would be liable under the like circumstances. Therefore, the Department was subject to the ramifications of O.C.G.A. §9-11-68, including attorney fees.

In the case of Gates, et al v. Glass, et al, 291 Ga.350 (2012), the Georgia Supreme Court granted certiorari after the Georgia Court of Appeals reversed a trial court’s decision to grant summary judgment to a county in a wrongful death and survivor action filed by an inmate’s executor and minor son.

The inmate was killed after an accident occurred while he was assigned to a work detail. Specifically, a rock struck the inmate in the throat after a tractor’s bush hog was engaged. A wrongful death and survivor action was filed against the county and the supervisor. The trial court granted summary judgment for the county after finding that the county did not waive sovereign immunity because neither a tractor nor a bush hog were motor vehicles under O.C.G.A. §36-92-1. The Court of Appeals reversed and found that the county had waived a sovereign immunity by purchasing insurance coverage because the broader definition of motor vehicle should have been applied. A writ of certiorari was then granted. In affirming the Court of Appeals, the Supreme Court determined that, if the Georgia Legislature intended to apply a narrow definition of motor vehicle to situations in which a local government purchased automobile insurance coverage for amounts over and above the prescribed sovereign immunity limits, it would have done so explicitly. The judgment of the Court of Appeals was affirmed.

In the case of Campbell, et al v. Goode, 304 Ga.App., 47 (2010), an arrestee filed an action against a city and police officers, personally and in their official capacities, after one of the officers broke his arm during a Terry pat-down for weapons. The city and officers challenged an order of the trial court (Georgia), which granted the arrestee’s motion for summary judgment and denied the officers’ motion for summary judgment as to the arrestee’s claims against them in their personal capacities.

The Court of Appeals held that the trial court erred in failing to grant summary judgment in favor of the officers as to the arrestee’s claims against them in their personal capacities. The evidence did not create a genuine issue of material fact as to whether the officers
acted with the actual malice. The arrestee acknowledged that he did not believe an officer intended to break his arm. Genuine issues of fact remained as to whether the officer acted negligently. Reasonable minds could differ as to whether he acted negligently. Even if a jury were to find that the officer acted negligently and that his negligence resulted in the arrestee’s injury, the claim against him in his official capacity was, in reality, a suit against a government entity and the subject to a claim of sovereign immunity. No genuine issue of fact remained as to whether the city waived it sovereign immunity pursuant to O.C.G.A. § 33-24-51. The alleged negligence was unrelated to the use of a motor vehicle. As a result, the trial court erred in denying the motion for summary judgment as to the claims against the city and the officers in their official capacities. The Court of Appeals reversed the judgment.

In the case of Currid, et al v. DeKalb State Court Probation Dept., et al 285 Ga. 184 (2009), the Georgia Supreme Court granted certiorari to determine whether the Court of Appeals (Georgia) erred in concluding that the language of the Community Service Act (CSA), O.C.G.A. § 42-8-70 et seq, did not create a statutory waiver of a county’s sovereign immunity under Ga. Const. Art. I, & II, para. IX (e) in a case by a decedent’s brother, as his estate administrator, and his father (the estate) alleging wrongful death.

While performing court-ordered community service work, the decedent fell off the rear catwalk of a county sanitation truck and sustained a serious head injury. The estate brought the instant action against, inter alia, the county probation department and public works department (the county). After the county was granted partial summary judgment, the appellate court reversed, finding a jury question as to whether the county’s actions in assigning the decedent to the sanitation truck constituted gross negligence. Once a jury verdict was rendered in favor of the estate, the appellate court again reversed, finding that the CSA did not create a statutory waiver of the county’s sovereign immunity. On further appeal, the court affirmed. Section 42-8-71(d) did not expressly waive the county’s sovereign immunity. The plain language only created a limitation of liability for any agency or community service officer participating in a community service program and did not apply to, inter alia, gross negligence. Because no specific waiver or the extent of any waiver was expressed, § 42-8-71(d) did not expressly waive the county’s sovereign immunity. The plain language only created a limitation of liability for any agency or community service officer participating in a community service program and did not apply to, inter alia, gross negligence. Because no specific waiver or the extent of any waiver was expressed. §41-8-71(d) failed both prongs of the constitutional test under Ga. Const. Art. I & II para. IX(e). The court affirmed the appellate court’s
decision.

XV. OTHER ILLUSTRATIVE DECISIONS TO NOTE

♦ Gallardo v. United States of America, 29 F. Supp. 2d 572 (E.D. Mo., 1998). Defendant United States sought summary judgment on plaintiffs’ complaint under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., alleging tort liability of the United States for a slip and fall in the Museum of Westward Expansion at the Jefferson National Expansion Memorial. Plaintiffs, a husband and wife, sought compensation for medical expenses and loss of consortium after the wife fell on the interior steps of the museum. The United States invoked the discretionary function exception to liability. The Court granted summary judgment in favor of the United States, holding that the challenged design characteristics of the steps upon which the wife fell were within the discretionary function exception to the FTCA, because they were the product of judgment based on competing policy considerations of aesthetics and safety.

♦ In Brantley v. Dept. of Human Resources 271 Ga. 679 (1999), the Georgia Supreme Court seems to have cleared the way for more liability suits against the state when it ruled that a father can sue over the death of his daughter who was in foster care. It certainly expanded the ability of plaintiffs to sue under the Georgia Tort Claims Act by instructing judges to construe the act liberally instead of strictly. The issue in the case was whether the state could be liable for the death of a two year old who had drowned in a pool at the home of her foster parents. The Supreme Court reversed the Court of Appeals holding that the discretionary function exception to the Georgia Tort Claims Act applies only to a state employee's exercise of judgment of discretion involving matters of basic governmental policy. Therefore, the Department of Human Resources was not immune from a lawsuit for the drowning death of the two year old when the foster parents decided to leave the child unattended. This decision did not involve governmental policy but was a matter of routine child care. In that decision, the Supreme Court specifically noted that county employees fell outside the scope of GTCA.

♦ In Washington v. Dept. of Human Resources, 241 Ga.App. 319 (1999) the Court of Appeals reversed the grant of summary judgment to Linda Lawson and another employee of the Dooley County Mental Retardation Center in Marzell Washington's suit for burns which were suffered by her mentally retarded ward while being bathed by employees. The Court held that the employees did not have official immunity since their duty to bathe attendees at mental retardation centers was ministerial in nature.
However, the Court affirmed the grant of summary judgment to the Mental Retardation Center and the Middle Flint Health Care Community Service Board holding that those entities had sovereign immunity since they were public agencies under O.C.G.A. § 37-2-11.1(c)(1).

♦ Wanless v. Tatum, 244 Ga.App. 882 (2000). The Court of Appeals held that the trial court erred in granting one of appellee's motions for summary judgment on the ground of official immunity because it was a jury question as to whether the county engineer had negligently breached his ministerial duty to investigate a prior complaint concerning the hazardous nature of the road on which the decedent died.

♦ Department of Transp. v. Cox, 246 Ga. App. 221 (2000). Trial court reversed because DOT was entitled to summary judgment on plaintiffs' claims that the configuration of a 4-lane divided highway contributed to their injuries in an accident caused by a driver who failed to yield; the state is immune from liability for failing to upgrade an intersection that is built according to generally-accepted engineering and design standards; DOT was not required to readress roadway design issues when it resurfaced the road a few years before the plaintiffs' accident; DOT was not liable for the city's alleged delay in issuing a permit to install a traffic signal.

♦ In Anderson v. Barrow County, 256 Ga. App. 160 (2002) the Court of Appeals affirmed the grant of summary judgment to Amason, a volunteer firefighter, and partial summary judgment to Barrow County in Anderson's negligence suit arising out of his wife's death in an accident involving a Barrow county rescue vehicle. Amason was a captain and volunteer firefighter responding to a call when he collided with Michelle Anderson's vehicle. The Court relied on its rationale and decision in Logue v. Wright, 260 Ga. 206, 208 (1990) wherein it was held that "the decision to rush to the scene of the disorder lay within [the officer's] discretion. He exercised this discretion. The fact that he did so negligently does not place him outside the rule." 260 Ga. 206 at 208. The Court of Appeals found that this reasoning was equally applicable to a volunteer firefighter who has exercised his discretion in rushing to the scene of an accident. Therefore, Amason was protected with official immunity because he was acting within the scope of his official duties and was engaged in a discretionary act with no allegation of malice or intent.

♦ City of Atlanta v. Vaillant, 267 Ga. App. 294 (2004). Plaintiff who sued a city for negligence after allegedly being pushed by an airport employee failed to satisfy the ante litem notice requirements, as a statute requires that a person must present a claim against a municipal corporation in writing to the governing authority for adjustment within six months of the event upon which the claim is predicated. Neither her oral notice to airport
personnel nor the “how are we doing” form she returned to the airport complied with the statutory requirements, which include written notice of the time, place, and extent of injury.

♦ **Oconee Community Service Board v. Holsey**, 266 Ga. App. 385 (2004). When a blind, mentally retarded girl with cerebral palsy was stabbed to death by a housemate in a community home run by a state agency, the trial court erred in not granting the State’s motion to dismiss the decedent’s relatives’ suit on grounds of sovereign immunity. Under O.C.G.A. § 50-21-24(7) the State has no liability for losses resulting from assault or battery; stabbing constitutes an assault or battery within the meaning of the statute.

♦ **Colvin v. City of Thomasville**, 269 Ga. App. 173 (2004). Trial court did not err in granting summary judgment to a city in plaintiff’s action arising out of an alleged fall that he sustained as he exited a police vehicle, as a letter did not substantially comply with the ante litem notice requirements pertaining to injury-based claims against municipal corporations for money damages. Other than providing the city with the date of the alleged incident, the notice provided no indication as to the time, place, and extent of the injury, nor did the letter state what alleged negligence on the part of the city caused the incident.

♦ **Brown v. Taylor**, 266 Ga. App. 176 (2004). In an action brought by a driver who lost control of her vehicle on a poorly maintained public road, the trial court did not err in granting summary judgment to county employees in their individual capacities based on official immunity. The acts upon which liability was premised were discretionary, as there was no formal or written policy regarding road maintenance in the county at the time, and there was no evidence that any county public works employees were aware of any allegedly defective road condition in the area.

♦ **Davis v. City of Forsyth, Ga.**, 275 Ga. App. 747 (2005). The Georgia Court of Appeals affirmed a grant of summary judgment to the City of Forsyth in a suit alleging damages for a nuisance based on sewage overflows onto the plaintiffs’ property. The court held that the plaintiffs could not pursue a personal injury claim since they failed to assert a personal injury claim in their ante litem notice. In their ante litem notice letter, the plaintiffs stated that the sewage overflows posed a “health hazard” but did not state that they had suffered any specific injury to their persons.

♦ **Phillips v. Hanse**, 281 Ga. 133 (2006). The Georgia Supreme Court held that a county police officer engaged in a high speed case with a third party which resulted in injuries to the plaintiff was in the exercise of discretion. The Court discounted the fact that the officer’s pursuit violated several
provisions in the county police manual setting out rules for such chases, including bringing his vehicle into physical contact with the fleeing vehicle. The Supreme Court held that the officer had discretion to engage in the high speed chase and the fact that he may have violated departmental rules did not change his initial discretionary decision into a ministerial act.

♦ Murphy v. Bajani, 282 Ga. 197 (2007). The Georgia Supreme Court reversed the Court of Appeals decision which had concluded that the school safety plan mandated by O.C.G.A. § 20-2-1185 was discretionary and not ministerial; therefore, the school’s negligent failure to have such a plan (or at least to fail to place it into the appellate record) did not constitute a ministerial act. The Court acknowledged that, as a general rule of statutory construction, the word “shall” is a term of mandatory import; however, the Court disagreed that a statutorily mandated action is the equivalent of a ministerial act that deprives the act of official immunity if done negligently.

♦ Smith v. McDowell, 292 Ga. App. 731 (2008), affirmed at 285 Ga. 592. The defendant, a primary school receptionist, released plaintiff’s six year old child to the plaintiff’s estranged husband, in direct contravention of school policy and the child’s registration form, which specifically stated that the only persons authorized to check the child out of school other than the plaintiff were the child’s grandmother and aunt.

School procedure called for defendant, before releasing any student to anyone other than a parent she knew, to check the child’s registration form to verify that the person picking up the child was authorized to do so. Defendant admitted that she had no discretion with regard to this procedure. In this case, however, defendant received a telephone call and a fax from a woman posing as plaintiff, instructing defendant to release the child to the estranged husband. Upon failing to locate the child’s registration form, defendant made no further effort to follow the procedure, but rather called the child to the office. When the child recognized her father and was happy to see him, defendant released the child to him. The Court of Appeals, in holding that defendant violated a ministerial duty, rejected the argument that “any school employee who disobeys an explicit, unambiguous written policy would be exercising discretion in doing so. This stands the plain language of the law on its head.” 292 Ga. App. at 733-34 (original emphasis).

Noting that “it is plain upon a review of recent decision that a de facto absolute immunity for school employees has developed gradually across the last [decade, and that] [n]ot one recent case exists in which the Georgia courts have found a ministerial duty on the party of school employee,” the Court nevertheless concluded that “[t]he appeal before [it]...presents a clear example of a ministerial function.” 292 Ga. App. at 734. Distinguishing all of the recent cases which have afforded
discretionary immunity to school employees, the Court in this case concluded that

[t]here should be no special category of absolute immunity for school employees. The effective elimination of ministerial acts on the part of school employees appears to be unique to Georgia because other jurisdictions that recognize the distinction have found ministerial conduct of the school in context.

On the one hand, the General Assembly requires that parents entrust their small children to the public schools, unless they have the resources to educate them privately or at home. [cit.] On the other hand, our courts increasingly allow school employees to avoid responsibility for all harm to the children placed in their custody by law. At some point, this accelerating trend must come to a halt, otherwise, the most flagrant failure to follow any school policy, no matter how plainly and unambiguously stated, is “discretionary” and therefore without legal consequences. Such a decision abrogates the constitutional right of citizens to seek redress for injuries inflicted by the ministerial acts of school employees, especially upon young children who are not capable of caring for themselves or exercising judgment. If Georgia school employees are to be clothed with absolute immunity under any and all circumstances, that is a decision to be made by the Georgia General Assembly; it is not the function of this, or any, court.

292 Ga. App. at 736-37 original emphasis) (footnote omitted).

† Georgia Dept. of Transportation v. Miller, 2009 Ga. App. LEXIS 1293 (November 10, 2009). Johnny Miller was killed in a single car crash after his car hydroplaned on a wet road and landed submerged in a roadside pond where he drowned. Due to debris blocking a drainage culvert, accumulated rainwater from the pond covered the road. A jury verdict was rendered in favor of Johnny Miller’s estate and his surviving spouse. The jury found that the DOT had failed to properly keep the culvert clear of debris which caused water to run over the road where Miller lost control of
the vehicle and died. The DOT argued that its failure to allegedly comply with a storm patrol policy was a discretionary function by a state employee. The DOT argued that, when implementing this policy, DOT personnel could make a “judgment call” as to which areas to inspect and the policy afforded crews discretion as to whether to inspection after a particular storm. Therefore, the practices regarding the storm policy were discretionary and were therefore not subject to the sovereign immunity waiver in O.C.G.A. § 50-21-24(2). The Court of Appeals found, in affirming the jury’s verdict in favor of the plaintiff, that the “judgment call relied upon by DOT” is not the type of discretionary function contemplated by O.C.G.A. § 50-21-24(2). The Georgia Tort Claims Act defines “discretionary function or duty” as a function or duty requiring a state officer or employee to exercise his or her policy judgment in choosing among alternate courses of action based upon a consideration of social, political or economic factors. These factors are only intended to signal basic governmental policy decisions and are not to be construed overly broadly. Therefore, the Court found that in this particular case, the day-to-day operational decision of whether and where to send out DOT personnel to inspect for road hazards was not a basic governmental policy decision for the purposes of GTCA immunity.

Murphy v. Bajiani, 282 Ga. 197, 647 S.E. 2d 54 (2007)). Male student at North Gwinnett High School responded to another male student’s question in an “inflammatory” way which led to the second student severely beating the first student (kicking him in the face and stomach and stomping on his head while he lay unconscious on a concrete floor). The principal and assistant principal found the beaten student in the hallway, still unconscious and bleeding profusely. The school had the school nurse clean his wounds but did not call 911 until after the parents were notified and his mother had come to the school and found her son “still covered in blood, writhing in pain, begging for help and unable to say what had happened to him.” The student’s brain was leaking spinal fluid, he was vomiting and his injuries included severe head trauma, subdural hematoma and temporal skull facial fractures. He required surgery, extensive dental work and suffers from seizures, and difficulty eating and sleeping. There was evidence that, because the school system did not want the stigma of having a school designated as “persistently dangerous” under No Child Left Behind, the system grossly under reported student discipline data and, that at this school, teachers had been specifically instructed to never call 911 for any injury on school grounds. There was also evidence that the assailant had a history - known to both is parents and school officials - of explosive, violent behavior, including fights both on and off school grounds. The parents won at the Court of Appeals but the Georgia supreme Court reversed, finding that the school superintendent and school board members were entitled to official immunity for the discretionary act of creating a school safety plan required by O.C.G.A. § 20-2-1185 and that the school’s failure to seek immediate medical attention for the student did not rise to the level of “actual malice” and thus was not enough to overcome official immunity.
Rahmaan v. DeKalb County, 300 Ga. App. 572 (2009). The Court of Appeals reversed the grant of summary judgment to DeKalb County and to police officer Gary Thull in Cherise Rahmaan’s suit to recover for the injuries she sustained in a collision involving a high-speed chase, holding that factual issues remained as to whether Thull acted with reckless disregard for proper law enforcement procedures in deciding to continue pursuing a fleeing suspect and a jury could find that Thull’s decision was a proximate cause of Rahmaan’s damages. Rahmaan testified that Thull was pursuing a Cadillac, then purposefully rammed into the Cadillac, causing the Cadillac to impact Rahmaan’s stationary car; Thull testified that the Cadillac bounced off his patrol car while he was attempting to block the road with his vehicle, however, his deposition testimony showed that the county had a policy prohibiting officers in pursuit of suspects from deliberately making physical contact between their vehicles, except under certain circumstances; and the evidence in the record would authorize a jury to find that the circumstances for this case did not fall within an exception. In a footnote, the Court of Appeals specifically referenced the Phillips v. Hanse case, 281 Ga. 133 (2006) as a case which acknowledged that evidence that law enforcement officers bumping his vehicle into a fleeing vehicle during a high-speed chase on the interstate system of a major city might be considered reckless.

XVI. CONCLUSION

The law relating to suing government entities, sovereign immunity and particularly the "discretionary vs. ministerial" function analysis is complex and can be very confusing - sometimes hopelessly so. The statutes and case law are replete with notice and procedural requirements, technical defenses and inconsistent holdings that can operate to bar a claim. If the Georgia Legislature would adopt a uniform, coherent and fair set of rules which would apply to all government entities, it would go a long way towards putting some consistency into this area of tort law.

If you take in a case that involves even potentially suing one or more government entities, do several things immediately:

1. Remember the requirement of the ante-litem notice.
2. Go immediately to the relevant statutes and case law to re-familiarize yourself with the administrative requirements.
3. Determine the legal strength of your case from an immunity perspective by analyzing the specific facts of your case in light of existing case law. This will differ from a pure liability analysis in a traditional tort case.
Common And Not So Common Code Violations In A Premises Liability Case – What To Look For At The Scene

Presented By:

Jeffrey H. Gross
Jeffrey Gross Premises Liability Consultant
Powder Springs, GA
Confusing Codes
Means of Egress

One of the most confusing sections of the International Building Code with Georgia Amendments; currently in use affecting commercial buildings, is the Means of Egress Section. Within this code section, stairways and handrails are addressed as part of the means of egress. Falls occurring on stairs tend to result in injuries more varied and severe than those falls occurring on a level walking surface. In understanding why, a person lost their balance and fell on steps, one must inspect the steps for design errors or code violations.

Violations of The Means of Egress standards and codes have resulted in some of the most catastrophic fire incidents in United States history.

Some History and Background

Starting in 1912 the National Fire Prevention Association issued one of its first pamphlets addressing "exit drills in factories, schools, department stores and theaters.” The objective of this pamphlet was to increase interest in fire drills which in turn would aid persons in exiting a building in the event of fire and other emergencies. The need for establishing effective means of egress was seen in 1911 at the Triangle Shirtwaist Factory fire in New York City. 146 garment workers died in the fire as a result of exit doors being locked to prevent unauthorized breaks being taken outside the factory by employees.

Other fires which showed the importance of adequate and proper exits were the Coconut Grove Nightclub fire in Boston in 1942 in which 492 lives were lost, the Winecoff Hotel Fire in December of 1946 at 176 Peachtree Street in Downtown Atlanta, were 119 hotel guests died. In that fire only one staircase provided egress for the entire 12-story building. When the fire broke out on a lower floor all hotel guests above that floor were trapped. The Beverly Hills Supper Club fire in Southgate, Kentucky on May 28, 1977 resulted in the deaths of 165 persons in large part due to the inability to escape the flames owing to complex passageways that comprised the means of egress from the building.

Issues concerning the means of egress in fires are not limited to buildings. On July 6, 1944 in Hartford, Connecticut, the Ringling Brothers Barnum and Bailey Circus' main event tent caught fire killing 167 people and injuring 700 others. Two of the exits from the grandstand area were blocked by ramps that were used to bring in animals and equipment for the show. An interesting additional fact that contributed to the loss of life is that the tent's canvass had been coated with
1,800 pounds of paraffin wax that was dissolved in thousands gallons of gasoline, which was a common waterproofing method for canvass at that time.

The National Fire Prevention Association would go on to publish the National Fire Prevention Life Safety Code, which is still in use in Georgia to this day. As early as the 1965 edition of the Southern Building Code first adopted in November 1945, components of the means of egress including stairways and handrails were first addressed. The 1965 Southern Building Code also known as the Standard Building Code used in Georgia stated in Section 1115.5 titled Handrails:

“All stairs shall have walls or well-secured handrails or guards on both sides of the stairs of not less than 32 inches high. Stairs of less than 44 inches in width may have handrails on one side only. Horizontal rungs and rails around open wells shall not be less than 36 inches in height.”

There were two problems with this code section which would not be addressed until the mid-1990s in the Southern Building Code. One problem being: what is the definition of a stair and the other, what is a proper handrail. It would not be until the Southern Building Code required handrails on “stairs” which had four or more changes in elevation, that this question was partially answered. The Code did not define what a stair was, but rather that a handrail would be necessary if there were four or more steps. During this same period while handrails were required for stairs in the means of egress, the issue of the geometry of the handrails was not addressed. One can first find reference to handrail geometry in the mid-1990s appendix section of the National Fire Prevention Association's Life Safety Code, where handrails were required to be "graspable." However, at that same time the definition of a stair was published in the Life Safety Code. It stated a stair is a change in elevation of one or more steps and requires a handrail. The one-step and handrail requirement would not be codified in the International Building Code with Georgia amendments until January 1, 2002. As to what was considered “graspable”, that was not codified until the adoption of the 2000 edition of Life Safety Code Means of Egress section as part of the building code until January 1 2002.

**Which Code Applies**

Prior to 2000 the State of Georgia used the Southern Building Code, sometimes referred to as the Standard Building Code, for all new construction in Georgia. In the year 2000 Georgia adopted the International Building Code. The Georgia Department of Community Affairs upon reviewing the Means of Egress Section of the 2000 edition of International Building Code decided that the Means of Egress section as written was not appropriate for use in Georgia, and by statute they adopted the Means of Egress section of the Life Safety Code 2000 edition as the replacement for the Means of Egress section of the building code. What this means simply is, if you want to know what the Means of Egress laws are in the building code in Georgia you must look at the Means of Egress section of the Life Safety Code. This began in the year 2000 and continues to this day with the adoption of the 2013 edition of the Life Safety Code.
A list of current construction codes in Georgia is available on the Department of Community Affairs' (DCA) web site as well as amendments to all building codes in Georgia including electrical, plumbing, and fire.


Note. The above applies to commercial properties only and not residential units.

**Proper Stairs**

The code requirements cited below are not an all-inclusive list of the requirements of the Means of Egress under the International Building Code with Georgia Amendments. The items listed are basic criteria for certain steps. Circular, winder, industrial, and monumental steps are not considered in this writing. *A thorough in-person examination of steps and handrails resulting in accurate measurements is required to determine code compliance.*

**General Criteria**

1. The minimum step width clear of all obstructions except for projections not more than 3½ inches at or below handrail height, requires a width of 44 inches. This assumes the stairway will be served by fewer than 50 persons.


3. For existing stairs prior to the year 2000. Maximum height of risers, 7½ inches for Class A properties and 8 inches for Class B properties. Minimum tread depth, 10 inches for Class A properties, 9 inches, for Class B properties. Minimum headroom 6 feet 8 inches for Class A and Class B properties. Maximum height between landings 12 feet for Class A and Class B properties.

4. Tread and landing surfaces. Stair treads and landings shall be solid, without perforations, and free of projections or lips that could trip stair users. If not vertical, risers shall be permitted to slope under the tread at an angle not to exceed 30 degrees from vertical. However, permitted projections of the nosing shall not exceed 1½ inches.

5. Tread slope. Tread slope shall not exceed one-quarter inch per foot for a slope of 1 in 48. Note: this allows for drainage of water.
6. Riser height and tread depth. Riser height shall be measured as a vertical distance between tread nosings. Tread depth shall be measure horizontally between the vertical planes of the foremost projection of the adjacent treads and at a right angle to the treads' leading edge but shall not include bevel or rounded tread surfaces that slope more than 20 degrees. At tread nosings, beveling or rounding shall not exceed a half inch in horizontal dimension.

7. Dimensional uniformity. There shall be no variation in excess of 3/10ths of an inch in the depth of adjacent treads or in the height of adjacent risers, and the tolerance between the largest and the smallest riser or between the largest and smallest tread shall not exceed 3/8th of an inch in any flight.

Guards and Handrails

1. Guards. Means of egress that are more than 30 inches above the floor or grade shall be provided with guards to prevent falls over the open side. Means of egress components that might require protection with guards includes stairs, landings, balconies, corridors, passageways, floor or roof openings, ramps, aisles, porches and mezzanines.

2. Handrails. Stairs and ramps shall have handrails on both sides. In addition, handrails shall be provided within 30 inches of all portions of the required egress width of stairs. The required egress width shall be provided along the natural path of travel. Note: There are some variations and exceptions to this requirement.

3. Handrail details. Handrails on stairs shall not be less than 34 inches and not more than 38 inches above the surface of the tread, measured vertically to the top of the rail from the leading edge of the tread. Handrails shall extend a minimum of 12 inches at the top of the steps along the landing and for one tread depth past the bottom of the steps following the slope of the steps. Handrails shall have a circular cross-section with an outside diameter of not less than 1-1/4 inch and not more than 2 inches. Exception. Any other shape with a perimeter dimension of not less than 4 inches but not more than 6-1/4 inches and with the largest cross-sectional dimension not more than 2½ inches shall be permitted, provided that the edges are rounded so as to provide a radius of not less than 1/8 inch. Handrails shall be continuously graspable along the entire length.

The above gives an example of some of the requirements for proper stairs and handrails in the means of egress. There are other requirements concerning the space between a handrail and an adjacent wall, interruption of the handrail by newels or posts, and consideration for handrails in environments where they will be used primarily by children. The Life Safety Code as well as the American Society of Testing and Materials addresses issues concerning the importance of handrails along steps. Aside from a handrail providing a grasping surface to establish or maintain balance, it provides a distinct visual queue of the presence of most steps. This is especially important in short flight steps of three or fewer risers where a short flight stair or single step transition cannot be readily discerned. Of course, this condition may be affected by lighting, step construction, color and/or a complex visual field.
In evaluating claims on steps, it is extremely important the steps are memorialized as early as possible to preserve all available evidence. Evidence of prior repairs or lack of repairs can be found during an inspection. As accident scenes are highly perishable, an inspection should be conducted as soon as possible by a person who understands the codes, standards, the creation and use of demonstrative evidence photography including low light or night photography.

Should you have any questions please feel free to contact me.

Jeffrey Gross

NOTES:_______________________________________________________________________
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Professionalism In The Appeal Of A Premises Case

Presented By:

Hon. Carla Wong McMillian
Georgia Court of Appeals
Atlanta, GA
THE CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM  
(Founded 1989)  

A Brief History of the Chief Justice’s Commission on Professionalism  

Karlise Y. Grier, Executive Director  

The mission of the Chief Justice’s Commission on Professionalism is to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts and the public, and to fulfill their obligations to improve the law and legal system and to ensure access to that system.

After a series of meetings of key figures in Georgia’s legal community in 1988, in February of 1989, the Supreme Court of Georgia created the Chief Justice’s Commission on Professionalism (“Commission”), the first entity of this kind in the world created by a high court to address legal professionalism. In March of 1989, the Rules of the State Bar of Georgia were amended to lay out the purpose, members, powers and duties of the Commission. The brainchild of Justice Thomas Marshall and past Emory University President James Laney, they were joined by Justices Charles Weltner and Harold Clarke and then State Bar President A. James Elliott in forming the Commission. The impetus for this entity then and now is to address uncivil approaches to the practice of law, as many believe legal practice is departing from its traditional stance as a high calling – like medicine and the clergy – to a business.

The Commission carefully crafted a statement of professionalism, A Lawyer’s Creed and the Aspirational Statement on Professionalism, guidelines and standards addressing attorneys’ relationships with colleagues, clients, judges, law schools and the public, and retained its first executive director, Hulett “Bucky” Askew. Professionalism continuing legal education was mandated and programming requirements were developed by then assistant and second executive director Sally Evans Lockwood. During the 1990s, after the Commission conducted a series of convocations with the bench and bar to discern professionalism issues from practitioners’ views, the State Bar instituted new initiatives, such as the Committee on Inclusion in the Profession (f/k/a Women and Minorities in the Profession Committee). Then the Commission sought the concerns of the public in a series of town hall meetings held around Georgia. Two concerns raised in these meetings were: lack of civility and the economic pressures of law practice. As a result, the State Bar of Georgia established the Law Practice Management Program.

Over the years, the Commission has worked with the State Bar to establish other programs that support professionalism ideals, including the Consumer Assistance Program and the Diversity Program. In 1993, under President Paul Kilpatrick, the State Bar’s Committee on Professionalism partnered with the Commission in establishing the first Law School Orientation on Professionalism Program for incoming law students held at every Georgia law school. At one time, this program had been replicated at more than forty U.S. law schools. It engages volunteer practicing attorneys, judges and law professors with law students in small group discussions of hypothetical contemporary professionalism and ethics situations.

In 1997, the Justice Robert Benham Community Service Awards Program was initiated to recognize members of the bench and bar who have combined a professional career with outstanding service to their communities around Georgia. The honorees are recognized for voluntary participation in community organizations, government-sponsored activities, youth programs, religious activities or humanitarian work outside of their professional practice or judicial duties. This annual program is now usually held at the State Bar Headquarters in Atlanta.
and in the past it has been co-sponsored by the Commission and the State Bar. The program generally attracts several hundred attendees who celebrate Georgia lawyers who are active in the community.

In 2006, veteran attorney and former law professor, Avarita L. Hanson became the third executive director. In addition to providing multiple CLE programs for local bars, government and law offices, she served as Chair of the ABA Consortium on Professionalism Initiatives, a group that informs and vets ideas of persons interested in development of professionalism programs. She authored the chapter on Reputation, in Paul Haskins, Ed., ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER, ABA Standing Committee on Professionalism, ABA Center for Professional Responsibility (July 2013) and recently added to the newly-released accompanying Instructor’s Manual (April 2017). Ms. Hanson retired in August 2017 after a distinguished career serving the Commission.

Today, the Commission, which meets three times per year, is under the direction and management of its fourth Executive Director, attorney Karlise Yvette Grier. The Commission continues to support and advise persons locally and nationally who are interested in professionalism programming. The Chief Justice of the Supreme Court of Georgia serves as the Commission’s chair, and Chief Justice Harold D. Melton currently serves in this capacity. The Commission has twenty-two members representing practicing lawyers, the state appellate and trial courts, the federal district court, all Georgia law schools and the public. (See Appendix A). In addition to the Executive Director, the Commission staff includes Terie Latala (Assistant Director) and Nneka Harris-Daniel (Administrative Assistant). With its chair, members and staff, the Commission is well equipped to fulfill its mission and to inspire and develop programs to address today’s needs of the legal profession and those concerns on the horizon. (See Appendix B).

The Commission works through committees and working groups (Access to Justice, Finance and Personnel, Continuing Legal Education, Social Media/Awareness, Financial Resources, and Benham Awards Selection) in carrying out some of its duties. It also works with other state and national entities, such as the American Bar Association’s Center for Professional Responsibility and its other groups. To keep Georgia Bar members abreast of professionalism activities and issues, the Commission maintains a website at www.cjcpga.org. The Commission also provides content for the Professionalism Page in every issue of the Georgia Bar Journal. In 2018, the Commission engaged in a strategic planning process. As a result of that process, the Commission decided to focus on four priority areas for the next three to five years: 1) ensuring high quality professionalism CLE programming that complies with CJCP guidelines; 2) promoting the understanding and exercise of professionalism and emphasizing its importance to the legal system; 3) promoting meaningful access to the legal system and services; and 4) ensuring that CJCP resources are used effectively, transparently and consistent with the mission.

After 29 years, the measure of effectiveness of the Commission should ultimately rest in the actions, character and demeanor of every Georgia lawyer. Because there is still work to do, the Commission will continue to lead the movement and dialogue on legal professionalism.

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THE MEANING OF PROFESSIONALISM

The three ancient learned professions were the law, medicine, and ministry. The word profession comes from the Latin *professus*, meaning to have affirmed publicly. As one legal scholar has explained, “The term evolved to describe occupations that required new entrants to take an oath professing their dedication to the ideals and practices associated with a learned calling.”1 Many attempts have been made to define a profession in general and lawyer professionalism in particular. The most commonly cited is the definition developed by the late Dean Roscoe Pound of Harvard Law School:

The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.2

Thinking about professionalism and discussing the values it encompasses can provide guidance in the day-to-day practice of law. Professionalism is a wide umbrella of values encompassing competence, character, civility, commitment to the rule of law, to justice and to the public good. Professionalism calls us to be mindful of the lawyer’s roles as officer of the court, advocate, counselor, negotiator, and problem solver. Professionalism asks us to commit to improvement of the law, the legal system, and access to that system. These are the values that make us a profession enlisted in the service not only of the client but of the public good as well. While none of us achieves perfection in serving these values, it is the consistent aspiration toward them that defines a professional. The Commission encourages thought not only about the lawyer-client relationship central to the practice of law but also about how the legal profession can shape us as people and a society.

BACKGROUND ON THE LEGAL PROFESSIONALISM MOVEMENT IN GEORGIA

In 1986, the American Bar Association ruefully reported that despite the fact that lawyers’ observance of the rules of ethics governing their conduct is sharply on the rise, lawyers’ professionalism, by contrast, may well be in steep decline:

1  DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERSUASIVE METHOD 39 (1994)
2  ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)
[Although] lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits, . . . [they] have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.3

The ABA’s observation reflects a crucial distinction: while a canon of ethics may cover what is minimally required of lawyers, “professionalism” encompasses what is more broadly expected of them – both by the public and by the best traditions of the legal profession itself.

In response to these challenges, the State Bar of Georgia and the Supreme Court of Georgia embarked upon a long-range project – to raise the professional aspirations of lawyers in the state. Upon taking office in June 1988, then State Bar President A. James Elliott gave Georgia’s professionalism movement momentum when he placed the professionalism project at the top of his agenda. In conjunction with Chief Justice Marshall, President Elliott gathered 120 prominent judges and lawyers from around the state to attend the first Annual Georgia Convocation on Professionalism.

For its part, the Georgia Supreme Court took three important steps to further the professionalism movement in Georgia. First, at the first Convocation, the Supreme Court of Georgia announced and administered to those present a new Georgia attorney’s oath emphasizing the virtue of truthfulness, reviving language dating back to 1729. (See also Appendix C). Second, as a result of the first Convocation, in 1989, the Supreme Court of Georgia took two additional significant steps to confront the concerns and further the aspirations of the profession. First, it created the Chief Justice’s Commission on Professionalism (the “Commission”) and gave it a primary charge of ensuring that the practice of law in this state remains a high calling, enlisted in the service not only of the client, but of the public good as well. This challenging mandate was supplemented by the Court’s second step, that of amending the mandatory continuing legal education (CLE) rule to require all active Georgia lawyers to complete one hour of Professionalism CLE each year [Rule 8-104 (B)(3) of the Rules and Regulations for the Organization and Government of the State Bar of Georgia and Regulation (4) thereunder].

GENERAL PURPOSE OF CLE PROFESSIONALISM CREDIT

Beginning in 1990, the Georgia Supreme Court required all active Georgia lawyers to complete one hour of Professionalism CLE each year [Rule 8-104 (B)(3) of the Rules and Regulations for the Organization and Government of the State Bar of Georgia and Regulation (4) thereunder]. The one hour of Professionalism CLE is distinct from and in addition to the required ethics CLE. The general goal of the Professionalism CLE requirement is to create a

forum in which lawyers, judges and legal educators can explore the meaning and aspirations of professionalism in contemporary legal practice and reflect upon the fundamental premises of lawyer professionalism – competence, character, civility, commitment to the rule of law, to justice, and to the public good. Building a community among the lawyers of this state is a specific goal of this requirement.

DISTINCTION BETWEEN ETHICS AND PROFESSIONALISM

The Supreme Court has distinguished between ethics and professionalism, to the extent of creating separate one-hour CLE requirements for each. The best explanation of the distinction between ethics and professionalism that is offered by former Chief Justice Harold Clarke of the Georgia Supreme Court:

“. . . the idea [is] that ethics is a minimum standard which is required of all lawyers, while professionalism is a higher standard expected of all lawyers.”

Laws and the Rules of Professional Conduct establish minimal standards of consensus impropriety; they do not define the criteria for ethical behavior. In the traditional sense, persons are not “ethical” simply because they act lawfully or even within the bounds of an official code of ethics. People can be dishonest, unprincipled, untrustworthy, unfair, and uncaring without breaking the law or the code. Truly ethical people measure their conduct not by rules but by basic moral principles such as honesty, integrity and fairness.

The term “Ethics” is commonly understood in the CLE context to mean “the law of lawyering” and the rules by which lawyers must abide in order to remain in good standing before the bar. Legal Ethics CLE also includes malpractice avoidance. “Professionalism” harkens back to the traditional meaning of ethics discussed above. The Commission believes that lawyers should remember in counseling clients and determining their own behavior that the letter of the law is only a minimal threshold describing what is legally possible, while professionalism is meant to address the aspirations of the profession and how we as lawyers should behave. Ethics discussions tend to focus on misconduct -- the negative dimensions of lawyering. Professionalism discussions have an affirmative dimension -- a focus on conduct that preserves and strengthens the dignity, honor, and integrity of the legal system.

As former Chief Justice Benham of the Georgia Supreme Court says, “We should expect more of lawyers than mere compliance with legal and ethical requirements.”

ISSUES AND TOPICS

In March of 1990, the Chief Justice’s Commission adopted A Lawyer’s Creed (See Appendix D) and an Aspirational Statement on Professionalism (See Appendix E). These two documents should serve as the beginning points for professionalism discussions, not because they are to be imposed upon Georgia lawyers or bar associations, but because they serve as
words of encouragement, assistance and guidance. These comprehensive statements should be utilized to frame discussions and remind lawyers about the basic tenets of our profession.

Specific topics that can be used as subject matter to provide context for a Professionalism CLE include:

- Access to Justice
- Administration of Justice
- Advocacy - effective persuasive advocacy techniques for trial, appellate, and other representation contexts
- Alternative Dispute Resolution - negotiation, settlement, mediation, arbitration, early neutral evaluation, other dispute resolution processes alternative to litigation
- Billable Hours
- Civility
- Client Communication Skills
- Client Concerns and Expectations
- Client Relations Skills
- Commercial Pressures
- Communication Skills (oral and written)
- Discovery - effective techniques to overcome misuse and abuse
- Diversity and Inclusion Issues - age, ethnic, gender, racial, sexual orientation, socioeconomic status
- Law Practice Management - issues relating to development and management of a law practice including client relations and technology to promote the efficient, economical and competent delivery of legal services.

Practice Management CLE includes, but is not limited to, those activities which (1) teach lawyers how to organize and manage their law practices so as to promote the efficient, economical and competent delivery of legal services; and (2) teach lawyers how to create and maintain good client relations consistent with existing ethical and professional guidelines so as to eliminate malpractice claims and bar grievances while improving service to the client and the public image of the profession.

- Mentoring
- Proficiency and clarity in oral, written, and electronic communications - with the court, lawyers, clients, government agencies, and the public
- Public Interest
- Quality of Life Issues - balancing priorities, career/personal transition, maintaining emotional and mental health, stress management, substance abuse, suicide prevention, wellness
- Responsibility for improving the administration of justice
- Responsibility to ensure access to the legal system
• Responsibility for performing community, public and pro bono service
• Restoring and sustaining public confidence in the legal system, including courts, lawyers, the systems of justice
• Roles of Lawyers
  - The Lawyer as Advocate
  - The Lawyer as Architect of Future Conduct
  - The Lawyer as Consensus Builder
  - The Lawyer as Counselor
  - The Lawyer as Hearing Officer
  - The Lawyer as In-House Counsel
  - The Lawyer as Judge (or prospective judge)
  - The Lawyer as Negotiator
  - The Lawyer as Officer of the Court
  - The Lawyer as Problem Solver
  - The Lawyer as Prosecutor
  - The Lawyer as Public Servant
• Satisfaction in the Legal Profession
• Sexual Harassment
• Small Firms/Solo Practitioners

Karl N. Llewellyn, jurisprudential scholar who taught at Yale, Columbia, and the University of Chicago Law Schools, often cautioned his students:

The lawyer is a man of many conflicts. More than anyone else in our society, he must contend with competing claims on his time and loyalty. You must represent your client to the best of your ability, and yet never lose sight of the fact that you are an officer of the court with a special responsibility for the integrity of the legal system. You will often find, brethren and sistern, that those professional duties do not sit easily with one another. You will discover, too, that they get in the way of your other obligations – to your conscience, your God, your family, your partners, your country, and all the other perfectly good claims on your energies and hearts. You will be pulled and tugged in a dozen directions at once. You must learn to handle those conflicts.

The real issue facing lawyers as professionals is developing the capacity for critical and reflective judgment and the ability to “handle those conflicts,” described by Karl Llewellyn. A major goal of Professionalism CLE is to encourage introspection and dialogue about these issues.

4 MARY ANN GLENDON, A NATION UNDER LAWYERS 17 (1994)
APPENDICES

A – 2018-2019 COMMISSION MEMBERS

B – MISSION STATEMENT

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CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM

2018 - 2019

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Italics denotes public member/non-lawyer
APPENDIX B

MISSION STATEMENT
The mission of the Chief Justice’s Commission on Professionalism is to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts, and the public and to fulfill their obligations to improve the law and the legal system and to ensure access to that system.

CALLING TO TASKS
The Commission seeks to foster among lawyers an active awareness of its mission by calling lawyers to the following tasks, in the words of former Chief Justice Harold Clarke:

1. To recognize that the reason for the existence of lawyers is to act as problem solvers performing their service on behalf of the client while adhering at all times to the public interest;

2. To utilize their special training and natural talents in positions of leadership for societal betterment;

3. To adhere to the proposition that a social conscience and devotion to the public interest stand as essential elements of lawyer professionalism.
HISTORICAL INFORMATION ABOUT THE COMMISSION’S ROLES IN THE DEVELOPMENT OF THE CURRENT GEORGIA ATTORNEY OATH

In 1986, Emory University President James T. Laney delivered a lecture on “Moral Authority in the Professions.” While expressing concern about the decline in moral authority of all the professions, he focused on the legal profession because of the respect and confidence in which it has traditionally been held and because it has been viewed as serving the public in unique and important ways. Dr. Laney expressed the fear that the loss of moral authority has as serious a consequence for society at large as it does for the legal profession.

For its part, the Georgia Supreme Court took an important step to further the professionalism movement in Georgia. At the first convocation on professionalism, the Court announced and administered to those present a new Georgia attorney’s oath emphasizing the virtue of truthfulness, reviving language dating back to 1729. Reflecting the idea that the word “profession” derives from a root meaning “to avow publicly,” this new oath of admission to the State Bar of Georgia indicates that whatever other expectations might be made of lawyers, truth-telling is expected, always and everywhere, of every true professional. Since the convocation, the new oath has been administered to thousands of lawyers in circuits all over the state.

Attorney’s Oath

I,_____________, swear that I will truly and honestly, justly, and uprightly demean myself, according to the laws, as an attorney, counselor, and solicitor, and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia. So help me God.

In 2002, at the request of then-State Bar President George E. Mundy, the Committee on Professionalism was asked to revise the Oath of Admission to make the wording more relevant to the current practice of law, while retaining the original language calling for lawyers to “truly and honestly, justly and uprightly” conduct themselves. The revision was approved by the Georgia Supreme Court in 2002.
APPENDIX C

OATH OF ADMISSION
TO THE STATE BAR OF GEORGIA

“I,______________, swear that I will truly and honestly, justly and uprightly conduct myself as a member of this learned profession and in accordance with the Georgia Rules of Professional Conduct, as an attorney and counselor and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia. So help me God.”

As revised by the Supreme Court of Georgia, April 20, 2002
APPENDIX D

A LAWYER’S CREED

To my clients, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor, and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

Entered by Order of Supreme Court of Georgia, October 9, 1992, nunc pro tunc July 3, 1990, Part IX of the Rules and Regulations of the State Bar of Georgia, as amended September 10, 2003 and April 26, 2013
APPENDIX E

ASPIRATIONAL STATEMENT ON PROFESSIONALISM

The Court believes there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good. As a community of professionals, we should strive to make the internal rewards of service, craft, and character, and not the external reward of financial gain, the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly.

As professionals, we need aspirational ideals to help bind us together in a professional community. Accordingly, the Court issues the following Aspirational Statement setting forth general and specific aspirational ideals of our profession. This statement is a beginning list of the ideals of our profession. It is primarily illustrative. Our purpose is not to regulate, and certainly not to provide a basis for discipline, but rather to assist the Bar’s efforts to maintain a professionalism that can stand against the negative trends of commercialization and loss of community. It is the Court’s hope that Georgia’s lawyers, judges, and legal educators will use the following aspirational ideals to reexamine the justifications of the practice of law in our society and to consider the implications of those justifications for their conduct. The Court feels that enhancement of professionalism can be best brought about by the cooperative efforts of the organized bar, the courts, and the law schools with each group working independently, but also jointly in that effort.

Entered by Order of Supreme Court of Georgia, October 9, 1992, nunc pro tunc July 3, 1990; Part IX of the Rules and Regulations of the State Bar of Georgia, as amended September 10, 2003 and April 26, 2013
APPENDIX E

GENERAL ASPIRATIONAL IDEALS

As a lawyer, I will aspire:

(a) To put fidelity to clients and, through clients, to the common good, before selfish interests.

(b) To model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.

(c) To avoid all forms of wrongful discrimination in all of my activities including discrimination on the basis of race, religion, sex, age, handicap, veteran status, or national origin. The social goals of equality and fairness will be personal goals for me.

(d) To preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.

(e) To make the law, the legal system, and other dispute resolution processes available to all.

(f) To practice with a personal commitment to the rules governing our profession and to encourage others to do the same.

(g) To preserve the dignity and the integrity of our profession by my conduct. The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.

(h) To achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.

(i) To practice law not as a business, but as a calling in the spirit of public service.

Entered by Order of Supreme Court of Georgia, October 9, 1992, nunc pro tunc July 3, 1990, Part IX of the Rules and Regulations of the State Bar of Georgia, as amended September 10, 2003 and April 26, 2013
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SPECIFIC ASPIRATIONAL IDEALS

As to clients, I will aspire:

(a) To expeditious and economical achievement of all client objectives.

(b) To fully informed client decision-making.
   As a professional, I should:
   (1) Counsel clients about all forms of dispute resolution;
   (2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes;
   (3) Maintain the sympathetic detachment that permits objective and independent advice to clients;
   (4) Communicate promptly and clearly with clients; and,
   (5) Reach clear agreements with clients concerning the nature of the representation.

(c) To fair and equitable fee agreements.
   As a professional, I should:
   (1) Discuss alternative methods of charging fees with all clients;
   (2) Offer fee arrangements that reflect the true value of the services rendered;
   (3) Reach agreements with clients as early in the relationship as possible;
   (4) Determine the amount of fees by consideration of many factors and not just time spent by the attorney;
   (5) Provide written agreements as to all fee arrangements; and,
   (6) Resolve all fee disputes through the arbitration methods provided by the State Bar of Georgia.

(d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve the fidelity to clients that is the purpose of these obligations.

As to opposing parties and their counsel, I will aspire:

(a) To cooperate with opposing counsel in a manner consistent with the competent representation of all parties.
   As a professional, I should:
   (1) Notify opposing counsel in a timely fashion of any cancelled appearance;
APPENDIX E

(2) Grant reasonable requests for extensions or scheduling changes; and,
(3) Consult with opposing counsel in the scheduling of appearances, meetings, and depositions.

(b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice.
As a professional, I should:
(1) Not serve motions or pleadings in such a manner or at such a time as to preclude opportunity for a competent response;
(2) Be courteous and civil in all communications;
(3) Respond promptly to all requests by opposing counsel;
(4) Avoid rudeness and other acts of disrespect in all meetings including depositions and negotiations;
(5) Prepare documents that accurately reflect the agreement of all parties; and,
(6) Clearly identify all changes made in documents submitted by opposing counsel for review.

As to the courts, other tribunals, and to those who assist them, I will aspire:

(a) To represent my clients in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice.
As a professional, I should:
(1) Avoid non-essential litigation and non-essential pleading in litigation;
(2) Explore the possibilities of settlement of all litigated matters;
(3) Seek non-coerced agreement between the parties on procedural and discovery matters;
(4) Avoid all delays not dictated by a competent presentation of a client’s claims;
(5) Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual; and,
(6) Advise clients about the obligations of civility, courtesy, fairness, cooperation, and other proper behavior expected of those who use our systems of justice.

Entered by Order of Supreme Court of Georgia, October 9, 1992, nunc pro tunc July 3, 1990; Part IX of the Rules and Regulations of the State Bar of Georgia, as amended September 10, 2003 and April 26, 2013
APPENDIX E

(b) To model for others the respect due to our courts.
   As a professional I should:
   (1) Act with complete honesty;
   (2) Know court rules and procedures;
   (3) Give appropriate deference to court rulings;
   (4) Avoid undue familiarity with members of the judiciary;
   (5) Avoid unfounded, unsubstantiated, or unjustified public criticism of
        members of the judiciary;
   (6) Show respect by attire and demeanor;
   (7) Assist the judiciary in determining the applicable law; and,
   (8) Seek to understand the judiciary’s obligations of informed and impartial
        decision-making.

As to my colleagues in the practice of law, I will aspire:

(a) To recognize and to develop our interdependence;
(b) To respect the needs of others, especially the need to develop as a whole person; and,
(c) To assist my colleagues become better people in the practice of law and to
    accept their assistance offered to me.

As to our profession, I will aspire:

(a) To improve the practice of law.
   As a professional, I should:
   (1) Assist in continuing legal education efforts;
   (2) Assist in organized bar activities; and,
   (3) Assist law schools in the education of our future lawyers.
(b) To protect the public from incompetent or other wrongful lawyering.
   As a professional, I should:
   (1) Assist in bar admissions activities;
   (2) Report violations of ethical regulations by fellow lawyers; and,
   (3) Assist in the enforcement of the legal and ethical standards imposed upon
        all lawyers.

Entered by Order of Supreme Court of Georgia, October 9, 1992, nunc pro tunc July 3, 1990; Part IX of the
Rules and Regulations of the State Bar of Georgia, as amended September 10, 2003 and April 26, 2013
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As to the public and our systems of justice, I will aspire:

(a) To counsel clients about the moral and social consequences of their conduct.

(b) To consider the effect of my conduct on the image of our systems of justice including the social effect of advertising methods.

As a professional, I should ensure that any advertisement of my services:
(1) is consistent with the dignity of the justice system and a learned profession;
(2) provides a beneficial service to the public by providing accurate information about the availability of legal services;
(3) educates the public about the law and legal system;
(4) provides completely honest and straightforward information about my qualifications, fees, and costs; and,
(5) does not imply that clients’ legal needs can be met only through aggressive tactics.

(c) To provide the pro bono representation that is necessary to make our system of justice available to all.

(d) To support organizations that provide pro bono representation to indigent clients.

(e) To improve our laws and legal system by, for example:

(1) Serving as a public official;
(2) Assisting in the education of the public concerning our laws and legal system;
(3) Commenting publicly upon our laws; and,
(4) Using other appropriate methods of effecting positive change in our laws and legal system.
APPENDIX F

SELECT PROFESSIONALISM PAGE ARTICLES
The Importance of Lawyers Abandoning the Shame and Stigma of Mental Illness

One tenet of the Chief Justice’s Commission on Professionalism’s “A Lawyer’s Creed” is “To my colleagues in the practice of law, I offer concern for your welfare.” If you are aware of a colleague that may be experiencing difficulties, ask questions and offer to help them contact the Lawyer Assistance Program for help.

BY MICHELLE BARCLAY

January is the month when Robin Nash, my dear friend and lawyer colleague, godfather to my child, officiate for my brother’s marriage and former director of the Barton Center at Emory University, left the world. Positive reminders of him are all around, including a child law and policy fellowship in his name, but January is a tough month.

Robin’s suicide, 12 years ago, was a shock to me. As time passed and I heard stories about Robin from others who knew him and I learned more about suicide, I can see in hindsight the risk looming for him. Today, I think his death was possibly preventable.

In 2006, Robin wrote this essay about himself for Emory’s website.

“Robin Nash, age 53, drew his first breath, attended college and law school and now works at Emory University. He loves to travel to places like Southeast Asia and the Middle East but he always returns home to Emory and his hometown of Decatur. Robin majored in Economics and Mathematics. He began his law practice in 1980 in Decatur surviving mostly on court appointed cases for mentally ill patients in commitment hearings.

His practice expanded to working with institutionalized developmentally delayed clients, special education cases, wills and estate litigation and representing banks in the hugely interesting area of commercial real estate closings.

In 1995, he was appointed as a juvenile court judge in DeKalb County. He resigned from the bench effective December 2005. He sold most of his personal belongings, paid off his remaining debts and moved overseas to think and travel. After thinking and traveling for three months, he returned to the active world of Decatur. He was appointed director of the Barton Clinic effective April 15, 2006.”

When Robin came back from traveling, he told his friends—I can be more impactful here—which was and is true. Robin’s impact continues today through the work of young lawyers serving as Robin Nash Fellows and through the lives of the thousands of mothers, fathers, daughters and sons he touched, helping people traumatized by child abuse, neglect, addiction and crime.

He was impactful in part because he had so much empathy for others. He was
well regarded and well loved. He was a person you could count on who did extraordinary things for others—helping a student obtain a TPO in the middle of the night to stop a stalker; quietly helping a refugee family get stable and connected to services; and of course, his consistent care of his friend Vinny. Vinny was a severely disabled adult Robin befriended and with whom he had a deep connection. Because he was a lawyer, Robin was able to help Vinny obtain full access to available medical services without being institutionalized.

So why did Robin leave? He lost his battle with mental illness. He masked it well and as a private person, did not share his struggles. His friends had some insight into his struggles but it was always complicated. While a judge, Robin was known for saying things like, “I am a manager of misery” or “I manage the competition not to serve the most vulnerable families and children.” But he also said, “Talk like this is just dark humor which is a useful coping mechanism for an emotionally draining job.”

I know today that a low serotonin level in his body was dangerous for his depression and that the medications he took waded and waxed in effectiveness. I also now know that he had not slept well for days before he acted. Weid had a work meeting the day before he died where he made a long to do list. Who makes a long to do list when one is contemplating suicide? Plenty of people, I have learned. I saw that to do list on his table when I was in his apartment after his death.

What could have helped? Abandoning the shame and stigma of mental illness is a good start. I have been heartened by the social movement campaign, Time to Change, designed to help people speak up about mental illness. A safety plan shared with a reasonably wide network of people can also help. Anti-depressant medications can help. Recent studies about anti-depression drugs "puts to bed the controversy on anti-depressants, clearly showing that these drugs do work in lifting mood and helping most people with depression." Science is advancing better treatments at a rapid pace. And some experts advise that directly asking whether a person has considered killing themselves can open the door to intervention and saving a life.

Before becoming a lawyer, I worked as a nurse in a variety of settings at both Grady and Emory hospitals. I saw attempted suicides. I witnessed a number of those people who were grateful they were not successful. I saw safety plans work when enough people knew about the risks. Sometimes, medications were changed, new treatments tried and I saw people get better.

I feel like with my background I could have and should have probed Robin more. But at the time, I thought I was respecting his privacy by not asking too many questions. Today I know that a person can be fine one day and then chemicals in their brain can wildly change within 24 hours, and they’re no longer ok. I learned that not sleeping can be deadly. I have also learned that just talking about it can help a person cope.

A book that has helped me is called “Stay: A History of Suicide and the Philosophy Against It,” by Jennifer Michael Hecht. If I had a second chance, I would try to use some of the arguments in that book, such as:

None of us can truly know what we mean to other people, and none of us can know what our future self will experience. History and philosophy ask us to remember these mysteries, to look around at friends, family, humanity, at the surprises life brings—the endless possibilities that living offers—and to persuade.

Of course, first I would have just asked about his mental health with love and listened. I still wish for that chance to try.

Afterward by Chief Justices Commission on Professionalism Executive Director Karlise Yvette Grier; One tenant of the Chief Justices Commission on Professionalism’s “A Lawyer’s Creed” is “Try to help them contact the Lawyer Assistance Program for help.”

Michelle and Andy Barclay are so grateful to the Emory University community for the care and care that surrounded everyone, especially the students, when Robin died.

Michelle Barclay, J.D., has more than 20 years experience working in Georgia’s judicial branch. She is currently the division director of Communications, Children, Families, and the Courts within the Judicial Council of Georgia’s Administrative Office of the Courts. Before becoming a lawyer, she was a nurse for 10 years, specializing in ICU and trauma care. Her degrees include a Juris Doctor from Emory University School of Law, a Bachelor of Science in Nursing from Emory University and a Bachelor of Interdisciplinary Studies from Georgia State University. She is also co-founder along with her husband Andrew Barclay of the Barton Child Law and policy Center at Emory University School of Law. She can be reached at 404-657-9219 or michelle.barclay@georgiacourts.gov.

Endnotes
1. https://twitter.com/TimeToChange
Promoting a Professional Culture of Respect and Safety

In keeping with our professionalism aspirations, I challenge you to take a proactive, preventative approach to sexual harassment and to start the discussions... about things we as lawyers can do to promote a professional culture of respect and safety to prevent #MeToo.

BY KARLISE Y. GRIER

“There is no doubt that Marley was dead. This must be distinctly understood, or nothing wonderful can come of the story I am going to relate.”—Excerpt from: “A Christmas Carol” by Charles Dickens.

To borrow an idea from an iconic writer: There is no doubt that #MeToo testimonials are real. This must be distinctly understood, or nothing wonderful can come of the ideas I am going to share.

I start with this statement because when I co-presented on behalf of the Chief Justice’s Commission on Professionalism at a two-hour seminar on Ethics, Professionalism and Sexual
Harassment at the University of Georgia (UGA) in March 2018, it was clear to me that men and women, young and old, question some of the testimonials of sexual harassment that have recently come to light. For the purposes of starting a discussion about preventing future #MeToo incidents in the Georgia legal profession, I ask you to assume, arguendo, that sexual harassment does occur and to further assume, arguendo, that it occurs in Georgia among lawyers and judges. Our attention and discussion must therefore turn to "How do we prevent it?" We won't expend needless energy on "Is he telling the truth?" We won't lament, "Why did she wait so long to come forward?"

First, I want to explain why I believe that sexual harassment in the legal profession is, in part, a professionalism issue. As Georgia lawyers, we have A Lawyer's Creed and an Aspirational Statement on Professionalism that was approved by the Supreme Court of Georgia in 1990. One tenet of A Lawyer's Creed states: "To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship." Frankly, it is only a concern for the welfare of others that in many cases will prevent sexual harassment in the legal profession because of "gaps" in the law and in our ethics rules. For example, under federal law, sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees. According to a 2016 article on lawyer demographics, three out of four lawyers are working in a law firm that has two to five lawyers working for it. In Georgia, there are no state laws similar to Title VII's statutory scheme.

There is currently nothing in Georgia's Rules of Professional Conduct that explicitly prohibits sexual harassment of a lawyer by another lawyer. Moreover, it is my understanding that generally the Office of the General Counsel will not prosecute a lawyer for alleged lawyer-on-lawyer sexual harassment absent a misdemeanor or felony criminal conviction, involving rape, sexual assault, battery, moral turpitude and other similar criminal behavior. Other circumstances in which laws or ethics rules may not apply include sexual harassment of lawyers by clients or sexual harassment that occurs during professional events, such as bar association meetings or continuing education seminars.

Former Georgia Chief Justice Harold Clarke described the distinction between ethics and professionalism as . . . the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers. Therefore, in the absence of laws and ethical rules to guide our behavior, professionalism aspirations call on Georgia lawyers to consider and implement a professional culture of respect and safety that ensures zero tolerance for behavior that gives rise to #MeToo testimonials.

practical advice for legal employers to address or to prevent sexual harassment. Some of the suggestions included: establishing easy and inexpensive ways to detect sexual harassment, such as asking about it in anonymous employee surveys and/or exit interviews; not waiting for formal complaints before responding to known misconduct; and discussing the existence of sexual harassment openly. The federal judiciary’s working group on sexual harassment has many reforms that are currently underway, such as conducting a session on sexual harassment during the ethics training for newly appointed judges; reviewing the confidentiality provisions in several employee/law clerk handbooks to clarify that nothing in the provisions prevents the filing of a complaint; and clarifying the data that the judiciary collects about judicial misconduct complaints to add a category for any complaints filed relating to sexual misconduct. For those planning CLE or bar events, the American Bar Association Commission on Women in the Profession cautions lawyers to “be extremely careful about excessive use of alcohol in work/social settings.”

During our continuing legal education seminar at UGA, one of the presenters, Erica Mason, who serves as president of the Hispanic National Bar Association (HNBA), shared that HNBA has developed a “HNBA Conference Code of Conduct” that states in part: “The HNBA is committed to providing a friendly, safe, supportive and harassment-free environment for all conference attendees and participants . . . Anyone violating these rules may be sanctioned or expelled from the conference without a registration refund, at the discretion of HNBA Leadership.” Mason also shared that the HNBA has signs at all of its conferences that reiterate the policy and that provide clear instructions on how anyone who has been subjected to the harassment may report it. In short, you don’t have to track down a procedure or figure out what to do if you feel you have been harassed.

Overall, some of the takeaways from our sexual harassment seminar at UGA provide a good starting point for discussion about how we as lawyers should aspire to behave. Generally, our group agreed that women and men enjoy appropriate compliments on their new haircut or color, a nice dress or tie, or a general “You look nice today.” Admittedly, however, an employment lawyer might say that even this is not considered best practice.

Many of the seminar participants agreed on some practical tips, however. Think twice about running your fingers through someone’s hair or kissing a person on the cheek. Learn from others’ past mistakes and do not intentionally pat or “flick” someone on the buttocks even if you mean it as a joke and don’t intend for it to be offensive or inappropriate.

In our professional friendships, we want to leave room for the true fairy-tale happily ever after endings, like that of Barack and Michelle, who met at work when she was an associate at a law firm and he was a summer associate at the same firm. We also need to ensure that our attempts to prevent sexual harassment do not become excuses for failing to mentor attorneys of the opposite sex.

Finally, just because certain behaviors may have been tolerated when you were a young associate, law clerk, etc., does not mean the behavior is tolerated or accepted today. Professionalism demands that we constantly consider and re-evaluate the rules that should govern our behavior in the absence of legal or ethical mandates. Our small group at UGA did not always agree on what was inappropriate conduct or on the best way to handle a situation. We did all agree that the conversation on sexual harassment was valuable and necessary.

So in keeping with our professionalism aspirations, I challenge you to take a proactive, preventative approach to sexual harassment and to start the discussions in your law firm, corporate legal department, court system and/or bar association about things we as lawyers can do to promote a professional culture of respect and safety to prevent #MeToo.

Karlise Y. Grier
Executive Director
Chief Justice’s Commission on Professionalism
kggrier@cjcoga.org

Endnotes
5. The Georgia Code of Judicial Conduct differs from the Georgia Rules of Professional Conduct in that Rule 2.3 (b) of the Code of Judicial Conduct specifically prohibits discrimination by a judge in the performance of his or her judicial duties. See https://
Appendix
## ICLE BOARD

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<th>Term Expires</th>
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<tr>
<td>Carol V. Clark</td>
<td>Member</td>
<td>2019</td>
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<td>Harold T. Daniel, Jr.</td>
<td>Member</td>
<td>2019</td>
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<tr>
<td>Laverne Lewis Gaskins</td>
<td>Member</td>
<td>2021</td>
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<tr>
<td>Allegra J. Lawrence</td>
<td>Member</td>
<td>2019</td>
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<tr>
<td>C. James McCallar, Jr.</td>
<td>Member</td>
<td>2021</td>
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<tr>
<td>Jennifer Campbell Mock</td>
<td>Member</td>
<td>2020</td>
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<td>Brian DeVoe Rogers</td>
<td>Member</td>
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<td>Kenneth L. Shigley</td>
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<td>A. James Elliott</td>
<td>Emory University</td>
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<td>Jeffrey Reese Davis</td>
<td>Staff Liaison</td>
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<td>Tangela Sarita King</td>
<td>Staff Liaison</td>
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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.

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.

If you have any questions concerning attendance credit at ICLE seminars, please call: 678-529-6688