

# Update on Premises Liability – An Overview

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A review of the recent appellate court decisions in the premises liability arena, drives home the concept that whether the case involves a grocery store customer slipping on a grape, or a victim of a crime seeking recovery for injuries sustained by a criminal act at an office park, hotel, or restaurant, the genesis of all these cases arise out of O.C.G.A. §51-3-1:

“Where an owner or occupier of land, by express or implied invitation induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.”

Many times, litigants, and judges, limit or apply this statute only to cases involving “invitees” who are injured on the defendant’s property because of a “defect” i.e., banana peel, faulty balcony railing, rickety steps etc. However, some of the recent cases we are going to review suggest that a premises liability theory under the property owner’s statute is appropriate in a medical negligence context, in a mass shooting incident, and in the context of a patron at a movie theatre being unfairly arrested, detained, and prosecuted for a suspected criminal offense. And indeed, since the statute itself contains no restrictive language with respect to its applicability, the statute should be equally applicable to a patient in a hospital as it is to a customer at a retail store.

The recent decisions also show that the essential element for any case involving premises liability remains foreseeability by the defendant of the “evil” that causes harm to a plaintiff. Although the evidentiary standard may vary from case to case with respect to the showing of foreseeability, recovery in all premises liability cases require the establishment by the plaintiff of foreseeability.

### **THIRD-PARTY CRIMINAL ACT CASES -- THE YEAR IN REVIEW.**

Perhaps the most significant case decided by the Court of Appeals this past season in the area of third-party criminal acts is *Brown v. All-Tech Investment Group, Inc. et al.*, 265 Ga App. 889, 595 S.E.2d 517. The subject matter of this case received international headlines when on July 29,

1999, Mark Barton went on a shooting rampage in Piedmont Center killing nine people, and injuring twelve others in the span of thirty minutes. Mark Barton, at the time, was a "day trader" at two different day trading firms located across the street from each other at Piedmont Center. The Court of Appeals defined day trading with respect to this case as follows:

"Day trading is a form of financial securities trading in which traders place multiple buy and sell orders for securities and hold the positions for a very short period of time, usually less than one day, seeking to profit from the daily fluctuations in stock prices. In exchange for a commission on each trade, All-Tech and Momentum, as day trading firms, provided their customers access to computer terminals and specialized computer software used in day trading. At each of these trading firms, the terminal is located on a 'trading floor': a large common room which was not locked or otherwise secured during business hours."

596 S.E.2d at 520.

The evidence compiled by the plaintiffs showed that Mark Barton sustained heavy financial losses at both All-Tech and Momentum prior to July 29, 1999. The evidence further reflected that although All-Tech and Momentum had internal policies in effect that would deter or discourage an

investor from getting in “over his or her head” these policies were not enforced on a regular basis. At the time this case was litigated, day trading, as an industry, was being investigated by a Senate Sub-Committee who described day trading as a “predatory practice” because of the extremely high percentage of investors who lost substantial sums of money.

The plaintiffs’ liability theory against the day trading company defendants was that Barton’s shooting rampage was the result of his sustaining heavy financial losses which occurred as the result of the defendant’s “predatory practices” coupled with their failure to monitor his losses. The plaintiffs argued that this conduct by the trading firms was in fact the proximate cause of plaintiff’s injuries because the shooting spree, although it was an intervening criminal act, was an “intervening consequence” of the trading firms’ business practices rather than an “intervening cause” of the plaintiffs’ injuries.

“In their words [plaintiffs] the trading firms, by the manner in which they operated their day trading businesses, created a ‘Frankenstein monster’ and Barton ‘was a victim of the original tort and his subsequent criminal act was a result of and response to that tort’. 595 S.E.2d at 523.

The Court of Appeals ruled that as a matter of law plaintiffs could not establish foreseeability notwithstanding the “Frankenstein monster” argument. The Court noted that there was simply no credible historical

evidence that an investor who lost a substantial sum of money was likely to become violent with a propensity to inflict harm on others. The Court of Appeals defaulted to the standard set in its previous line of cases that in a third-party criminal act case, the plaintiffs are required to show a “substantially similar” incident which occurred prior to the plaintiffs’ injuries. The Court of Appeals reached this conclusion notwithstanding expert testimony that the Mark Barton event was foreseeable because some individuals will in fact become violent and seek revenge against those they perceive to be responsible for their financial losses. One bit of dicta by the Court of Appeals reflects the Court’s concern about “opening the flood gates” in this type of case.

“We are also troubled by the implication that the list of defendant’s potentially liable for any person’s violence, if sparked by economic misfortune, would be limited only by the number of stock brokers, investment advisers, lawyers, business partners, lottery ticket sellers, etc., whom the assailant blamed for his financial losses”. 595 S.E.2d 523.

Another decision of note in the third-party criminal act context decided by the Supreme Court this year is *Atlanta Committee for the Olympic Games v. Hawthorne*, 278 Ga 116, 598 S.E.2d 471. These “Olympic Park bombing cases” have been in the appellate courts for a number of years on various

issues. By way of background, the plaintiffs in these suits seek damages for wrongful death and personal injuries arising out of the bombing in Centennial Olympic Park during the 1996 Olympic Games. The pivotal issue in these cases concerns the applicability and interpretation of the Recreational Property Act (RPA). This Act limits the liability of a property owner for injuries that occur on the property if the property owner provides the property for recreational purposes free of charge to the public. The defendant, *Atlanta Committee for the Olympic Games, Inc.*, (ACOG) contended that since Centennial Olympic Park was open to the public, free of charge, for recreational purposes, it fell under the protection of the RPA. Plaintiffs, contended that the primary focus of the park was commercial because ACOG's purpose in allowing the public, free of charge, on the property was to derive, directly or indirectly, a financial benefit for profit from business interests on the property. The Trial Court granted ACOG's Motion for Summary Judgment finding that as a matter of law ACOG was entitled to the protections of the RPA. The Supreme Court in affirming the Court of Appeals reversal of the trial court held that a jury issue was presented as to whether ACOG, directly or indirectly, invited or permitted without charge individuals to use the property for recreational purposes to derive, directly or indirectly, a financial benefit from business interests at Centennial Olympic Park. In making this determination, the jury, according to the Supreme Court, would be entitled to consider all evidence which

would show the property owners' true purpose in making the property available free of charge to the public.

An instructive third-party criminal act case decided recently by the Georgia Supreme Court is *Munroe v. Universal Services, Inc.*, 277 Ga 861, 596 S.E.2d 604. This case illustrates the need for Plaintiff attorneys in particular, to think in terms of a premises liability concept when pursuing a case against a medical health entity. In *Munroe*, the plaintiff was an in-patient at the defendant's behavioral health facility and was raped by a mental health assistant employed by the facility. Among other things, the plaintiff contended that as an invitee at the defendant's medical facility, the facility had a statutory duty to exercise good faith in keeping her safe from known harmful conditions. In this light, plaintiff alleged that the facility breached this duty in hiring an employee whom the facility knew, or should have known, posed a dangerous risk to patients in the care of the facility.

The Supreme Court analyzes this case in the context of foreseeability but differentiates between the foreseeability standard to be applied where the perpetrator is an employee of the business owner as opposed to a straight third-party criminal act case, where there is no connection between the perpetrator and the business owner.

Although this court adopted a "substantially similar" foreseeability standard in *Sturbridge Partners*, the policy reasons for that higher

standard in premises liability cases have no application to negligent hiring/retention cases. Unlike the premises owner who has no control over the condition of surrounding properties or the illegal behavior of unknown assailants who come onto its property at different times and injuring invitees there, an employer has exclusive control over which specific individual gets hired for the job and thus has control over the access and opportunity that job may provide that individual to harm potential plaintiffs.” 590 2d S.E.2d at 606.

Thus, the court discounted the defendant’s foreseeability argument that it was entitled to judgment as a matter of law because the plaintiff could not point to a “substantially similar” incident whereby a patient in the facility was injured by the criminal act of a third-party. Nonetheless, the court ruled that as a matter of law the defendant could not be held liable for negligent hiring because in reviewing the information that the facility had at the time it hired the aberrant employee, there was nothing in the record which, in the Supreme Court’s opinion, would have put the facility on notice that the employee would pose any type of danger to patients of the facility. This was true, the report said, even though the pre-employment check done

by the facility prior to hiring the employee revealed that the employee had misrepresented to his own benefit his past employment history and had misrepresented his past experience. The court felt that although this information might make it foreseeable that the facility was hiring a dishonest employee, this information would not make it foreseeable that the employee had a propensity to commit acts against patients at the facility which would cause them harm. This case is an excellent reference for the required elements in pursuing a negligent hire/negligent retention case against a property owner when an invitee is injured as a result of an employee's actions.

The Court of Appeals opinion in *Bradford Square Condominium Association, Inc. v. Miller*, 258 Ga App 240, 573 S.E.2d 405 shows that the Court is willing to severely restrict its opinions in this area to a particular fact scenario. In the *Bradford Square Condominium* case, the plaintiff and her deceased husband were owners of a condo unit and the husband died as a result of injuries inflicted in a car highjack incident which occurred in the underground parking area of the condominium. The condominium association was sued under a negligent security concept and the trial court denied the association's Motion for Summary Judgment holding that O.C.G.A. §51-3-1 applied to condominiums. The Court of Appeals goes through an exhaustive analysis of the relationship between a condominium association and its member owners, and concludes that the condominium

association, as a matter of law, could not be held liable for the death of plaintiff's husband. In reaching this conclusion, Judge Eldridge, writing for the majority, points out that the condominium by-laws expressly stated that the association would not have a duty to provide security for the condominium owners and that such obligation would remain with the unit owners/members individually. The Court held that it would not interfere with the association's right to so provide in its by-laws noting that the by-laws had to be voted on and approved by the condominium owners. Therefore, the Court need not concern itself with the issue of foreseeability in this case because by contract, the association simply had no duty in the area of security with respect to the association members.

“It is possible that a condominium association may be charged by its unit owners/membership with a duty to provide security for a condominium property, in which case foreseeability, equal knowledge, assumption of the risk, and ordinary care in the exercise of such duty may be relevant issues. But here, under the express terms of the condominium instruments as agreed to by the unit owners/members, the Condo Association did not have any duty to control the security of the common elements of Bradford Square. Pretermitted the effectiveness of security gates, et al to prevent the type

of crime that occurred in this case, the Condo Association had no duty under the express terms of the condominium instruments to execute such security measures.”

573 S.E.2d at 412.

The Court in denying the plaintiff’s Motion for Reconsideration makes it clear that this decision applies only to the specific and unique facts of this case and should not be expanded into situations other than condominium associations where the by-laws specifically provide that no duty for security exists with the association.

#### **OTHER INTERESTING PREMISES CASES DECIDED THIS YEAR**

There are several non third-party criminal act cases decided this year by the appellate courts which should be noted. One of these is *Gibson v. Rezvanpour*, 268 Ga App. 377, 601 S.E.2d 848 which discusses, but fails to define, the term “occupier” as used in O.C.G.A. §51-3-1. Recall that this statute places a duty to exercise ordinary care for the safety of invitees not only upon the owner of the property but also upon the “occupier” of the property. A review of past appellate court decisions, unfortunately, fails to define or even suggest what an “occupier” of property might be. In the *Gibson* decision the plaintiff, in addition to the homeowner, sued the real estate agent who was showing the plaintiff a house which the plaintiff was interested in purchasing. During the course of the inspection the plaintiff was bitten by the homeowner’s dog. The plaintiff brought suit, not under

traditional “dog bite” theories, but instead, contended that the real estate agent at the time of the incident, was an “occupier” of the property and therefore, just like the owner, owed a duty of ordinary care for the safety of the plaintiff.

“The *Gibsons* next contend that all of the real estate agents and brokers are liable for failure to keep the premises safe in accordance with O.C.G.A. §51-3-1. The *Gibsons* contend that because *Martin and Rezvanpour* (the real estate agents) had access to the house through use of the lockbox, and could bring others to the house, *Martin and Rezvanpour*, and their brokers, were “occupiers” of the Foulkses’ (homeowner) home as that term is used in O.C.G.A. §51-3-1.”  
601 S.E.2d at 851.

However, the court declines to determine whether the agents would be “occupiers” within the meaning of the statute and instead holds that even assuming they were, there was no evidence in the record that suggest that the agents would have had “superior knowledge” of the propensity of the dog to bite strangers. Thus, the suspense continues as to exactly who or what an “occupier” of property would be within the meaning of the statute.

The Court of Appeals decision in *Howard v. The Gram Corporation*, 602 S.E.2d 241 (Oct. 2004) demonstrates why in most states, but not Georgia, the courts have done away with the distinction between an "invitee" and a "licensee". In *Howard*, the plaintiff was visiting a radio station with her daughter and tripped and fell fracturing her hip. She contended that her fall was caused by a negligently constructed floor. The Court of Appeals labors through the distinctions under Georgia law between an "invitee" and a "licensee". By statute, an invitee is owed a duty by the land owner to exercise ordinary care for his or her safety. However, under O.C.G.A. §51-3-2 if one is classified as a "licensee," then the owner or occupier of land can only be liable for injury to the licensee if the owner knows or has reason to know of the condition which caused the harm and should realize that this condition involved an unreasonable risk of harm to the licensee and further would not expect the licensee to discover the dangers. A person can be downgraded from an "invitee" to a "licensee" if the property owner can show that the person "is neither a customer, a servant, nor a trespasser, who does not stand in any contractual relation with the land owner, and who is permitted to go on the premises merely for her own interest, convenience, or gratification. 602 S.E.2d at 242.

The Court of Appeals in *Howard* determined that the plaintiff was a licensee because the record showed that she was on the radio station's property simply because she wanted to accompany her daughter who had

gone there for an interview for a job. The dissent in *Howard* (this was a full bench decision with three judges dissenting) goes on for pages arguing that under the facts of the case the plaintiff should have been upgraded to an “invitee” since the record showed that the radio station received some benefit from her being at her daughter’s interview. Completely lost in the majority and dissenting opinions is the fact that it would appear even assuming the plaintiff was classified as an “invitee”, under normal concepts of “superior knowledge of the defect”, the radio station would still not have been liable for the plaintiff’s injuries. The evidence as recited by the Court of Appeals failed to show any prior circumstance that would have put the radio station on notice that there was some defective condition with respect to the flooring in the lobby where the plaintiff fell. Further, the record reflects that the radio station had placed a “watch your step” sign for folks entering the lobby. Therefore, it would appear that it was unnecessary for the court to spend its time and energy on wrestling with the issue of whether the plaintiff was a invitee or a licensee since under the higher standard set forth in O.C.G.A. §51-3-1 the plaintiff could not show superior knowledge of any defect with respect to the flooring on the part of the property owner.

In *Hart v. Appling County School Board*, 266 Ga App. 300, 597 S.E.2d 462, the Court of Appeals dealt with sovereign immunity issues in the context of a premises liability case. In *Hart*, the plaintiff’s parents brought

suit against the Appling County School Board for injuries sustained by their daughter when she fell off a sliding board on the playground. The Court in addressing the sovereign immunity issue points out that for injuries occurring after 1991 there is no waiver of sovereign immunity to the extent of liability insurance which might cover the incident in question. In other words, prior to the 1991 amendment to the Georgia Constitution sovereign immunity for all cases was deemed waived to the extent that the entity involved had purchased liability insurance which covered the incident in question. After 1991 this was done away with and the absence or presence of liability insurance was irrelevant to the issue of whether sovereign immunity would apply. The second area the Court of Appeals deals with in the *Hart* decision is the Recreational Property Act and the Court held with respect to this particular issue the record did not establish, positively, that the playground was "open to the public free of charge" and thus refused to hold as a matter of law that the RPA applied.

In *Metts v. Wal-Mart Stores, Inc.* 204 WL 1925614 (Ga App. decided August 31, 2004) the Court is issuing a warning to all plaintiff attorneys in Georgia as follows: Never, Ever, Rely On The Doctrine of Res ipsa loquitur. As we all know, allegedly Res ipsa loquitur is an evidentiary rule which provides for an inference of negligence to arise from the occurrence of an injury causing incident when the following elements are present. (1) The injury is of a kind which ordinarily does not occur in the absence of

someone's negligence, (2) it must be caused by an agency or instrumentality within the exclusive control of defendant, and (3) it must not have been due to any voluntarily action or contribution on the part of the plaintiff. *Ken Thomas of Georgia, Inc. v. Halim* 266 Ga App. 570, 597 S.E.2d 615. In the *Metts* decision, the plaintiff was shopping at Wal-Mart near a display of stacked metal shelving units when the units "inexplicitly" fell on the plaintiff injuring her rather severely. After taking depositions of the store employees and receiving no help from them, whatsoever, in establishing "superior knowledge" on the defendant's part that the shelving units might fall, the plaintiff relied on the Res ipsa doctrine arguing that surely, in the absence of someone's negligence, a stacked display of metal shelving units should not fall and injure someone. The Court of Appeals nixed the plaintiff's Res ipsa argument stating that the evidence failed to show the second necessary element of Res ipsa, that is, that the "instrumentality" which caused the plaintiff harm was in the exclusive control of the defendant. The Court reasoned that although the evidence was that the defendant's employees would have stacked the shelving units, the shelving units were accessible by shoppers in the store and thus it could not be said that Wal-Mart had exclusive control over the units. Researching the application of Res ipsa reveals that the Georgia Court of Appeals, time and time again, has refused to apply this doctrine in premises liability cases.

The recent Court of Appeals opinion in *American Multi-Cinema, Inc., et al v. Walker*, 2004 WL 2340691 (Ga App) decided October 19, 2004 involves a premises liability theory in the context of a patron at a business establishment being subject to false arrest and/or malicious prosecution. In the *Walker* decision, the plaintiff, a thirteen year old lad, was waiting for his mother to pick him up at an AMC movie theatre where he had finished watching a movie. An off duty police officer employed by the theatre saw him standing and waiting for his Mom and told him he had to move on. When the boy did not respond, the off duty police officer strong armed him to the ground, handcuffed him, and took him to the theatre office. One of the pivotal issues in the case was whether AMC could be held responsible for the off duty police officer's actions. The Court sets forth a fairly instructive analysis to determine when a business can be held liable for the actions of an off duty police officer hired to patrol the property. If the property owner can show in this type of case that the police officer at the time of the incident in question was performing "police duties that the employer did not direct when the cause of action arose" then the property owner can not be held liable for the police officer's actions. On the other hand, if the police officer was carrying out the policies and procedures of the property owner at the time of the incident, then the property owner can be held liable for the actions of the police officer.