

2003 UPDATE ON PREMISES LIABILITY

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TABLE OF CONTENTS

I.	Introduction	1
II.	Static Defect Cases.....	1
	a. <u>Myers v. Harris</u> , 257 Ga. App. 286, 570 S.E.2d 600 (2002).....	1
	b. <u>Yon v. Shimeall</u> , 257 Ga. App. 845, 572 S.E.2d 694 (2002)	2
	c. <u>Lake v. Atlanta Landmarks, Inc.</u> , 257 Ga. App. 195, 570 S.E.2d 638 (2002)	2
	d. <u>Rather v. Worrell</u> , 260 Ga. App. 174 (2003)	3
	e. <u>Emory University v. Smith</u> , 260 Ga. App. 900 (2003)	4
	f. <u>Pye v. Reagin</u> , 2003 Ga. App. Lexis 805 (Decided June 25, 2003)	4
	g. <u>Thomas v. Executive Committee of the Baptist Convention of the State of Georgia</u> , 2003 Ga. App. Lexis 910, (Decided July 14, 2003).....	4
	h. <u>Duvall v. Green</u> , Court of Appeals Case # A03A1181, ____ Ga. App. (2003), (Decided August 8, 2003)	5
III.	Foreign Substances on the Floor or Ground	6
	a. <u>Bolton v. Wal-Mart Stores, Inc.</u> , 257 Ga. App. 198, 570 S.E.2d 643 (2002) 6	
	b. <u>Dix v. The Kroger Company</u> , 257 Ga. App. 19, 570 S.E.2d 89 (2002)	6

c.	<u>Crook v. RaceTrac Petroleum, Inc.</u> , 257 Ga. App. 179, 570 S.E.2d 584 (2002)	7
d.	<u>Mansell v. Starr Enterprises</u> , 256 Ga. App. 257, 568 S.E.2d 145 (2002).....	8
e.	<u>Helton v. Riverwood International Corporation</u> , 261 Ga. App. 62 (2003) ..	8
f.	<u>Mitchell v. Austin</u> , 2003 Ga. App. Lexis 708, (Decided June 10, 2003)	8
g.	<u>Pylant v. Samuels Inc.</u> , Case No. A03A0527, 2003 Ga. App. Lexis 924 (2003), (Decided July 15, (2003)	9
h.	Leaf cases	
i.	<u>Flores v. Strickland</u> , 259 Ga. App. 335, 577 S.E.2d 41 (2003)	9
ii.	<u>Porter v. Omni Hotels, Inc.</u> , 260 Ga. App. 24, 579 S.E.2d 68 (2003).....	10
IV.	Construction Defect.....	11
a.	<u>Hicks v. Walker</u> , Case No. A03A0632, 2003 Ga. App. Lexis 720 (2003), (Decided June 11, 2003)	11
b.	<u>Mitchell v. Austin</u> , Case No. A03A0347, 2003 Ga. App. Lexis 708 (Decided June 10, 2003)	11
V.	Other Defects	12
a.	<u>Haynes v. Kingtown Properties, Inc.</u> , 260 Ga. App. 102, 578 S.E.2d 898 (2003)	12
b.	<u>Ergas v. Home Depot, Inc.</u> , 260 Ga. App. 734, 580 S.E.2d 684 2003)	13
VI.	Approaches.....	13
a.	<u>Food Lion, Inc. v. Isaac</u> , 261 Ga. App. 311 (2003)	13
VII.	Inadequate Security.....	15
a.	Invitees.....	15
i.	<u>Rice v. Six Flags Over Georgia, LLC</u> , 257 Ga. App. 864, 572 S.E.2d 322 (2002)	16
ii.	<u>Cook v. Micro Craft, Inc.</u> , 2003 Ga. App. Lexis 786, (Decided June 19, 2003)	17
iii.	<u>Fernandez v. Georgia Theatre Company, II</u> , 2003 Ga. App. Lexis 804, (Decided June 25, (2003)	18
b.	Duty to Guests and Liscences.....	18
i.	<u>Spear v. Calhoun</u> , 2003 Ga. App. Lexis 793, (Decided June 20, 2003)	18
ii.	<u>Rigdon v. Kappa Alpha Fraternity</u> , 256 Ga. App. 499, 568 S.E.2d 790 (2002)	19
c.	Duty to Passerbys or Pedestrians	20
i.	<u>Barnes v. St. Stephen's Missionary Baptist Church</u> , 260 Ga. App. 765, 580 S.E.2d 587 (2003).....	20
d.	Condominium Associations and their Members/Owners	20

	i.	<u>Bradford Square Condominium Association v. Miller</u> , 258 Ga. App. 240, 573 S.E.2d 405 (2002).....	20	
e.		Recreational Property.....	22	
	i.	<u>Anderson v. Atlanta Committee for the Olympic Games</u> , Case Nos. A03A0428 and A03A0429, 2003 Ga. App. Lexis 725 (Decided June 12, 2003)	22	
VIII.		Landlord/Owner Parts with Possession - O.C.G.A. §44-7-14	23	
	a.	<u>Ray v. Smith</u> , 259 Ga. App. 749, 577 S.E.2d 807 (2003)	23	
	b.	<u>Myers v. Harris</u> , 257 Ga. App. 286, 570 S.E.2d 600 (2002).....	23	
IX.		Tidbits		
	a.	Voluntary Undertaking, Negligent Performance of	23	
		i.	<u>Osowski v. Smith</u> , 2003 Ga. App. Lexis 917, (Decided July 15, 2003)	23
	b.	Pedestrian, Duty to Walk Safely	23	
		i.	<u>Beard v. Audio Visual Services, Inc.</u> , 260 Ga. App. 476 (2003)	24
X.		Conclusion.....	25	

I. Introduction

The following paper summarizes Georgia Court of Appeals and Supreme Court decisions addressing premises liability for the period July 1, 2002 through August 8, 2003. For ease of understanding and analysis, I've assigned each case to the discreet category upon which the Court's decision turns. That is, slip/trip and falls upon static defects from one line of cases and illustrate well appellate court's consistent holdings. Similarly, slip and falls on foreign substances carry a different analysis. Finally inadequate security cases enumerate a distinct line of reasoning. Yet all these cases - all these appellate court decisions (save two) - turn on this fundamental question: who has or should have higher knowledge of the hazard, defect or risk - the owner/occupier or the invitee /guest? Almost always the answer to that question foretells the court's ruling. If the guest or invitee has knowledge equal to or greater than the owner/occupier, summary judgment is appropriate. If the owner/occupier has or should have higher knowledge, summary judgment is inappropriate.

II. Static Defect Cases

In Myers v. Harris, 257 Ga. App. 286, 570 S.E.2d 600 (2002), Plaintiff and her friend followed an employee up a concrete ramp without handrails to an elevated furniture showroom. The Plaintiff stepped back and suddenly fell off the ledge. There were no barricades or ropes in place near the ledge and no warnings regarding the drop off. The Plaintiff had not traversed this area where she fell before this incident.

The Court noted in cases involving static cases, "if the invitee knows of the condition or hazard, there is no duty on the part of the proprietor to warn him and there

is no liability for resulting injury because the invitee has as much knowledge as the proprietor does." Bramblett v. Earl Smith Floors, 127 Ga. App. 296, 297 (488 S.E. 2d 766) 1977.

When a person has successfully negotiated an alleged dangerous condition on a previous occasion, that person is presumed to have knowledge of it and cannot recover for a subsequent injury resulting therefrom. Christiansen v. Overseas Partners Capital, 249 Ga. App. 827, 829 (549 S.E.2d 784) 2001. In Myers v. Harris, supra, plaintiff alleged that the proprietor failed to make the area safe and provide barriers or post a warning of the ledge, allegedly hidden by the layout of furniture for sale. Plaintiff's Affidavit supported these allegations and gave rise to a triable issue of fact and thus summary judgment against the proprietor is not proper. Thus the trial court did not err in not granting Judgment to the proprietor.

In Lake v. Atlanta Landmarks, Inc., 257 Ga. App. 195, 570 S.E.2d 638 (2002), the Plaintiff fell as she was coming down the stairs from the second floor of the Fox Theater. Initially, the Plaintiff stated at her deposition she had no idea why she fell; later she submitted an Affidavit stating there was inadequate light in the stairwell. Because she had traversed the stairs up and down on that very night before this fall, the Court found she was aware of the amount of the light in the theater and thus had equal knowledge with the Fox Theater of these conditions. Summary Judgment for the Fox was affirmed.

In Yon v. Shimeall, 257 Ga. App. 845, 572 S.E.2d 694 (2002), the tenant's mother fell on steep stairs descending to her daughter's basement apartment. The stairs were wet. The Court found that the mother was a guest of the tenant. Plaintiff testified that it

rained while she, her husband and her daughter were at dinner. The Plaintiff had successfully negotiated the stairs eight times over the course of the weekend before this injury and that she had walked down those stairs while they were wet on at least one occasion before this injury. Previously in Hannah v. Hampton Auto Parts, 234 Ga. App. 392, 506 S.E.2d 910 (1998), the Court held that, when a Plaintiff had successfully negotiated steps in the past, he could not recover for his subsequent injury. Even if the steps constituted a building code violation, the Court in Yon v. Shimeall reaffirmed that the equal knowledge rule precluded recovery. *Id.* at 847. The court found that the necessity exception¹ to the equal knowledge rule did not apply because there were two other means of ingress and egress from the apartment - one through the landlord's house (and the landlord had given the tenant a key to the house so she could use that entrance) - and the other from the front of the house, down just a couple of stairs.

¹Carey v. Bradford, 218 Ga. App. 325, 461 S.E.2d 290 (1995) addresses the necessity exception, a narrow one to the rule the Defendant have superior knowledge of the hazard when a tenant is forced to traverse the hazard and is injured thereby. "[W]hen the dangerous area is the plaintiff's only access or only safe [and] reasonable access to his home, the tenant's equal knowledge of the danger does not excuse the landlord of damages caused by his failure to keep the premises in repair." *Id.* at 326.

In Rather v. Worrell, 260 Ga. App. 174 (2003), Plaintiff climbed up a step onto a stage at a community meeting of residents. After she reached the stage, she fell. In this static defect case, the Court found there was no evidence that the step was unstable or that the failure to provide a handrail created a hazard. Specifically, the Plaintiff testified that she does not recall reaching for anything to break her fall. Thus the lack of a handrail could not have caused her to fall.

The Court found that there was no evidence that the occupier had any knowledge that the step was a hazard. No evidence that the step was unstable came from the Plaintiff. The Court affirmed summary judgment for the occupier, a residential community designed for senior adult living.

In Emory University v. Smith, 260 Ga. App. 900 (2003), the Plaintiff took her son to the hospital. It was raining and, when she stepped onto a concrete ramp, her foot slid and she fell. The “true basis of a proprietor’s liability for personal injury to an invitee is the proprietor’s superior knowledge of a condition that may expose the invitee’s to an unreasonable risk of harm.” *Id.* at pages 3 and 4. A slippery condition caused solely by rainwater is not a hazard because it presents no unreasonable risk of harm the court held. The Court noted that the Plaintiff did not introduce expert testimony that the ramp’s slope was excessive or that the worn surface made it hazardous, as in Flournoy v. Hospital Authority of Georgia, 232 Ga. App. 791 (504 S.E.2d 198) 1998. Even if the step were considered hazardous, because the Plaintiff saw the ramp before she stepped on it, knew that it was sloped and knew it was wet, she was aware of the hazard and thus “assumed the risk of the known condition by voluntarily

acting in face of such knowledge." *Id.* at page 7. In Pye v. Reagin, 2003 Ga. App. Lexis 805 (Decided June 25, 2003), Plaintiff tripped and fell on a tree root at the bottom of an access ramp leading to the parking lot of a doctor's office. She had successfully traversed the same area on several prior occasions. The Court held, "as Pye had knowledge of the condition created by the protruding roots at least equal to that of Reagin, she has failed to establish that Reagin had superior knowledge of the hazard." *Id.*

In Thomas v. Executive Committee of the Baptist Convention of the State of Georgia, 2003 Ga. App. Lexis 910, (2003), (Decided July 14, 2003), the Plaintiff stepped in a pothole

or divet approximately the size of a human foot in the paved parking lot of the Baptist convention center in Toccoa. The record contains Affidavits of two investigators that describe the asphalt as being gray in color and very old in appearance with numerous cracks and some divets as large as a human foot.

The Court of Appeals had previously held that development of small cracks and uneven spots in pavement is so customary and common that, if unobstructed, an owner/occupier is justified in assuming that a visitor will see them and realize the risk. Crenshaw v. Hogan, 203 Ga. App. 104, 105, 416 S.E.2d 147 (1992). However, in Thomas v. Executive Community, supra, the Court did not embrace the idea "that is justifiable for an owner/occupier to permit a parking lot to become pitted with potholes because an invitee should expect and assume that such hazards are common to all pavements." Id. The Court declined to render O.C.G.A. §51-3-1 "meaningless as to paved surfaces. Th at a parking lot may contain one or more human size divets cannot as a matter of law be deemed common knowledge and will not require an invitee to presume the existence of such." Id.

In Duvall v. Green, Court of Appeals Case # A03A1181, ___ Ga. App. ___ (2003), (Decided August 8, 2003), Plaintiff worked in Duvall's home and cared for his invalid wife. Plaintiff's knee buckled as she walked down the stairs by herself in Duvall's home. The Plaintiff had walked up and down these stairs many times before this incident. The Plaintiff alleged the stairs were too steep for regular travel. There was no evidence of any deficiency in the stairs; to the contrary, the Defendant said there were none.

Finding no evidence of any negligence, the Court reversed the trial court and granted summary judgment to the Defendant.

III. Foreign Substances on the Floor or Ground

The plain view doctrine sets forth the principle that the invitee is under the duty to look where he is walking to see obvious large objects in plain view which are in a location where there are customarily placed and expected to be. Of course, under Robinson v. Kroger Company, 268 Ga. 735, 493 S.E.2d 403 (1997), the plain view doctrine no longer requires a person to watch his every foot fall. In Bolton v. Wal-Mart Stores, Inc., 257 Ga. App. 198, 570 S.E.2d 643 (2002), the Plaintiff - while shopping - slipped and fell in what she believed might have been dishwashing liquid. However, Wal-Mart presented evidence that the assistant manager was in the area 10 to 15 minutes before the fall and at that time the floor was free from liquid soap or other foreign substance.

“Constructive knowledge may be shown in two ways: by showing that an employee was in the immediate vicinity of the fall and had an opportunity to correct the hazardous condition before the fall; or by showing that the substance had been on the floor for a sufficient length of time that it would have been discovered and removed had the proprietor exercised reasonable care in inspecting the premises”. Id. at 198.

“Furthermore, it is insufficient to show that an employee was in the vicinity of a foreign substance, it must also be shown that he was in a position to easily have seen the substance and removed it.” Id. at 198. Here the Plaintiff failed to establish actual or constructive knowledge and thus Summary Judgment for Wal-Mart was proper.

In Dix v. The Kroger Company, 257 Ga. App. 19, 570 S.E.2d 89 (2002), the Plaintiff went to Kroger to purchase groceries. She fell in the produce department and

then saw remnants of a grape stuck to the side of her shoe. The Kroger Manager did testify that an employee had walked the floor and inspected the premises less than 5 minutes before; however, the Manager was unsure whether the maintenance clerk performed his sweeping duties and the store did not keep its sweep cards. In addition, the Manager admitted he and two other employees at the customer care counter had an unobstructed view of the area where the fall occurred. In reviewing the requirements of either actual or constructive knowledge the Court found that, as to the second method of proving constructive knowledge, an adequate inspection shortly before an incident may be sufficient to support summary adjudication. However, the Manager and two other employees were in the immediate vicinity and could easily have removed the hazard had they seen it. Therefore the trial court erroneously granted summary judgment to the Kroger Company.

In Crook v. RaceTrac Petroleum, Inc., 257 Ga. App. 179, 570 S.E.2d 584 (2002), the Plaintiff parked near a gas pump. As she walked around her truck, she slipped and fell on a large puddle of gas. The Co-Manager testified that the manager on duty was responsible for conducting every two hours inspections of the property, including checking the parking lot, picking up trash, and cleaning up spills. The last inspection occurred about 4:00 p.m. Between 5:00 and 5:30 p.m., the Plaintiff slipped and fell in a large puddle of gas.

The Court had previously held that, when the nature of a business is likely to produce a spill or other hazard, frequent inspections may be necessary and the reasonableness of an inspection program is generally a question to be decided by the

jury. Shepard v. Winn Dixie Stores, 241 Ga. App. 746, 747, 527 S.E.2d 36 (1999). In this case, the Manager and another employee both testified that spills near the pumps were common and that there was at least one spill per shift. During some shifts as many as 20 customers would report spills. The Court found that the reasonableness of RaceTrac's inspection procedures was for the jury to determine.

In Mansell v. Starr Enterprises, 256 Ga. App. 257, 568 S.E.2d 145 (2002), the Plaintiff exited her car near the gas pump and noticed the ground was wet with water from an employee spraying the pavement in front of the store. The plaintiff entered the store and then fell. She produced no evidence of a foreign substance, condition or hazard other than the water she knowingly walked through. The Court analogized this case to rainy day slip and fall cases where Plaintiffs are charged with equal knowledge that water is apt to be found in any area frequented by any people coming in from rain outside. *Id.* at 258 - 259. The Court of Appeals affirmed summary judgment for the owner/occupier.

In Helton v. Riverwood International Corporation, 261 Ga. App. 62 (2003), Plaintiff delivered sulfuric acid to the property owner. Sulfuric acid is used for making tall oil. When dry, tall oil is sticky. The owner testified that, however when wet, it becomes slippery. Thus, the owner was on "notice that tall oil could be slippery." *Id.* at _____. The Plaintiff stated that he first experienced the slippery nature of tall oil at the time he fell. The Court held summary judgment for the owner/occupier was improper.

In Mitchell v. Austin, 2003 Ga. App. Lexis 708, (Decided June 10, 2003), the Plaintiff slipped and fell while descending stairs leading outside a home. She testified that she had previously used these stairs once or twice without incident. An expert testified that the staircase violated numerous, applicable building codes.

However, neither Austin nor her expert testified any of these code violations caused or contributed to her fall. A mere possibility of such causation is not enough and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the Court to grant summary judgment to the Defendant." Id. at 6. The Court reversed the trial court and granted summary judgment to the landowner.

In Pylant v. Samuels Inc., Case No. A03A0527, 2003 Ga. App. Lexis 924 (2003), (Decided July 15, 2003), the Plaintiff slipped and fell in a shower stall owned and operated by Samuels, Inc. d/b/a Samuel's Truck Stop & Restaurant. The truck stop provides shower stalls and soap.

Pylant stopped at Samuels to eat dinner. He then took a shower. When he entered the shower, he saw two white bars of used soap on the floor. He picked them up and threw them away. As he began to shower and wash his face and neck, he slipped and fell on a smear of soap. The Court noted that Samuels did not have a regular inspection and cleaning program in place. He testified he only cleaned the showers as needed or whenever customers complained. The Appellate Court reversed grant of summary judgment to the Truck Stop and found that a jury must decide whether Samuels breached its duty to keep its premises in a safe condition by failing to conduct

or negligently conducting inspections of its premises. The Court furthermore found that Pylant exercised due care because he saw and disposed of two used bars of soap. Judge Andrews dissented. He believed Pylant had actual knowledge of the hazard - soap on the floor - because he picked up two bars of soap and disposed of them.

h. Leaf cases

In Flores v. Strickland, 259 Ga. App. 335, 577 S.E.2d 41 (2003), Flores was a tenant of Raintree Properties. Flores descended a leaf covered stairwell adjacent to his apartment. Because Flores knew the leaves were being blown onto the iron stairs outside his North Georgia Apartment that autumn day and that a tree was shedding leaves adjacent to the stairwell and because he had used these stairs an average of 10 to 11 times per day without any trouble, the Court found Flores had actual knowledge of the hazard. Flores did not present evidence that this natural accumulation of leaves on the stairs remained there for a sufficient period of time that it should have been discovered and removed by the landlord after a reasonable inspection of the premises. Flores could not prove either constructive or actual knowledge of the hazard by the landlord and Flores had actual knowledge of these leaves. Flores attempted to apply the necessity rule. However, he did not prove that this hazard was known or should have been known to management and thus the necessity rule could not apply.

In Porter v. Omni Hotels, Inc., 260 Ga. App. 24, 579 S.E.2d 68 (2003), Porter climbed a flight of stairs and noticed leaves and pine straw on the steps. On the second flight of stairs he slipped and was injured. Leaves and pine straw had accumulated on these steps from surrounding trees during a fall morning. Because Porter saw the leaves

on the lower flight of stairs and because there is no evidence that Omni had actual knowledge of this condition, Porter's knowledge was at least equal to Omni's and thus Summary Judgment was appropriate. Porter also alleged that because he saw leaves and pine straw only on the lower flight of stairs he did not have knowledge of such on the second flight. However, he had testified that leaves and pine straw were in the general area and the Court found he had actual knowledge of their proximity.

The Court also held that Omni had no obligation to discover and remove naturally fallen leaves because there was no evidence that their inspection of the property was unreasonable and there was no evidence of how long the leaves and pine straw had been on the steps.

IV. Construction Defect

In Hicks v. Walker, Case No. A03A0632, 2003 Ga. App. Lexis 720 (2003), (Decided June 11, 2003), two year old Hicks was badly burned when a deck attached to the rear of the home she visited collapsed. A charcoal grill rolled down the deck and it and its hot coals landed on her. After this incident a professional home inspector examined the deck. He testified it was not built according to the minimum standard required by building code. The Court concluded that the Hickses were social guests and thus the Walkers could only be liable for willful and wanton injuries. However, the Court, citing Rigdon v. Kappa Alpha Fraternity, 256 Ga. App. 499, 568 S.E.2d 790 (2002), noted, if a danger to a licensee is known and foreseen by the property owner, the owner must exercise ordinary care and diligence to protect the licensee from that peril. Once the licensee's presence is known, the same duty may be required of the owner to satisfy his duty as if the licensee were invited. Hannah v. Hampton Auto Parts, 234 Ga. App. 392 (1998).

There was no evidence that the Walkers knew of the dangerous condition. However, where there is a construction defect, the owners are deemed to have constructive knowledge because the defects amounted to code violations. Freyer v. Silver, supra. Finally, the Court said, because a child may be unable to appreciate this danger, an owner would be held to a higher standard of care towards a child than an adult. Hobson v. Kroger, 204 Ga. App. 417 (1992). The Court of Appeals reversed Summary Judgment in favor of the home owner. In Mitchell v. Austin, Case No. A03A0347, 2003 Ga. App. Lexis 708, (Decided June 10, 2003), Mitchell slipped and fell

while descending stairs outside a home rented from the Defendant. She had previously been to this home and visited the tenant once or twice. She hired an expert, Mr. Blackmon, who testified that he inspected the staircase and found numerous violations of the applicable building code. These violations including the lip of each tread, or nose had only a 1/4" overhang instead of the 3/4" required, the tread depth was only 9 1/4" instead of 10", the handrails were too low, 35" in height rather than 36", the stairs were too narrow, 33" as opposed to the required 36" and the openings between the railings were 4 1/2" rather than 4".

However, Blackmon conceded on deposition that he did not want to assume how the fall occurred and because he did not know he was just testifying as to Code violations. He retracted his statement the Code violations caused Mrs. Austin to fall. Because he retracted his sworn testimony that the construction defects were a contributing factor to the fall, the Court found that a mere possibility of causation is not enough and, when the matter remains one of pure speculation or conjecture or at best evenly balanced, it becomes the duty of the Court to grant summary judgment to the Defendant.

V. Other Defects

In Haynes v. Kingtown Properties, Inc., 260 Ga. App. 102, 578 S.E.2d 898 (2003), the victim lived with his girlfriend, in one of the Defendant's apartments. While cooking french fries on the stove, a fire erupted and the Plaintiff was injured trying to extinguish the fire. The chief investigator for Savannah's Bureau of Fire and Emergency Services investigated and determined that the electric stove did not have drip pans and

in his opinion the drip pans had been missing a long time. The lack of drip pans underneath the burners on the stove was the cause of the fire he found.

However, the property manager required its maintenance team to replace all drip pans before a new resident moved in. The Property Manager testified there were drip pans in the unit before it was rented to the Plaintiff's girlfriend, some 7 months before. A maintenance worker testified there were drip pans two days after the fire. The Court found that, even assuming the drip pans were missing and it caused the fire, the landlord had no notice of that condition and thus could not have actual or constructive knowledge of this defect. The Court affirmed Summary Judgment for the Landlord.

In Ergas v. Home Depot, Inc., 260 Ga. App. 734, 580 S.E.2d 684 (2003), the Plaintiff, a customer at the Defendant's store, reached for base molding and one of the pieces of molding broke and fell on his wrist. A Georgia Pacific employee was working nearby. The only evidence in the record on how long the broken piece of wood had been in the bin was the Plaintiff's own testimony. Plaintiff's statement that it snapped or broke when the Georgia Pacific agent restocked the bins was pure speculation. The Court found there was no evidence to create an issue of fact as to whether Home Depot had equal or superior knowledge of the dangerous condition. The Court affirmed Summary Judgment for the Defendant. There was no other evidence as to the length of time the broken piece of wood had been in the bin. The Plaintiff failed to present evidence that the broken piece of wood had been in the bin long enough for Home Depot to discover and remove it.

VI. Approaches

In Food Lion, Inc. v. Isaac, 261 Ga. App. 311 (2003), the Court addresses what an approach is. The Plaintiff fell after exiting Food Lion, as she was walking to her car. The Court noted the Food Lion had a duty to exercise ordinary care to keep the approaches to its premises safe even if those approaches were over property not within its control. Previously the Court had defined approaches to mean "that property directly contiguous, adjacent to, and touching those entryways to premises under the control of an owner or

occupier of land, through which the owner or occupier, by express or implied invitation, has induced or led others to come upon his premises for any lawful purpose, and through which such owner or occupier could foresee a reasonable invitee would find it necessary or convenient to traverse while entering or exiting in the course of the business for which the invitation was extended. By contiguous, adjacent to, and touching, we mean that property within the last few steps taken by invitees, as opposed to "mere pedestrians," as they enter or exit the premises." Motel Properties, Inc. v. Miller, 263 Ga. 484, 486, 436 S.E.2d 196 (1993). Specifically, Isaac testified that after exiting the store she crossed the sidewalk adjacent to the store and slipped and fell on the asphalt parking lot area in front of the store. This parking lot was a common area of the shopping center where the store is located and was owned and maintained by Food Lion's landlord.

Although she testified that she parked within 20 feet of the store entrance, there was evidence to the contrary. The Court said the record shows she slipped and fell on a parking lot separated from Food Lion by a sidewalk. The Court held approaches may include the sidewalk "immediately in front of and adjacent to the premises leased by Food Lion but it did not include the landlord owned and maintained parking lot adjacent to the sidewalk." *Id.* at ____.

Judge Barnes dissented. She believed a question of fact remained as to the proximity of the parking lot to the store and that it was a question of fact whether the parking lot was an approach.

VII. Inadequate Security

a. Invitees

Ordinarily an intervening criminal act of a third party, without which the injury would not have occurred, will be treated as the proximate cause of the injury thus breaking the causal connection between the Defendant's negligence and the injury. Alexander v. Sportslife, 232 Ga. App. 538, 540, 502 S.E.2d 280 (1998). However, if a proprietor has a reason to anticipate a criminal act, then he or she has a duty to exercise ordinary care to guard against injury from dangerous characters. Lau's Corp. v. Haskins, 261 Ga. 491, 492 (405 S.E.2d 474) (1991). Foreseeability becomes a constant issue. If an incident causing injury is to be foreseeable, it "must be substantially similar in type as the previous criminal activities occurring on or near the premises so that a reasonable person would take ordinary precaution to protect his or her customers or tenants against the risks posed by that type of activity." Sturbridge Partners, Ltd. v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339 (1997). There is no requirement that the prior criminal activity be identical to that in issue. Matt v. Days Inn of America, 212 Ga. App. 792, 794-795, 443 S.E.2d 290 (1994), aff'd Days Inn of America v. Matt, 265 Ga. 235, 236, 454 S.E.2d 507 (1995). In other words, criminal activity by a third party may be foreseeable if the incident causing injury is substantially similar to previous criminal activities occurring on or near the premises at issue in such a way as to prompt a reasonable owner or occupier of the premises to take ordinary precautions to protect his or her invitees against the risk of harm posed by the potential for such criminal act.

Aldridge v. Tillman, 237 Ga. App. 600, 603, 516 S.E.2d 303 (1999); Doe v. Briargate Apartments, 227 Ga. App. 408, 409, 489 S.E.2d 170 (1997).

In Rice v. Six Flags Over Georgia, LLC, 257 Ga. App. 864, 572 S.E.2d 322 (2002), a father, for his minor daughter, filed suit against Six Flags for its alleged failure to exercise ordinary care to provide adequate security for the protection of invitees. Shortly before leaving Six Flags Park on July 5, 1999, Plaintiff, age 14 and her girlfriends, decided to ride the Ninja as the final ride of the day. Four unknown males offered to let them break in line near the front. The girls accepted, although cutting in line in this manner violated a posted park rule. One of the men grabbed the Plaintiff's arm and told her that she would take the ride with him. The Plaintiff did not notify Six Flags staff of this unwanted command or seek assistance of park staff who later assisted her in seating for that ride. During the Ninja ride, the Plaintiff was sexually assaulted. The Plaintiff introduced several previous criminal incidents, but the Court found none of them were sufficient to put a reasonable owner or occupier on notice to take ordinary precautions to protect invitees against this particular risk of harm. One prior incident involved a juvenile who reported that a white male attempted to rub her leg while sitting next to her on bench seats as the two rode on the Flying Dutchman ride. None of the remaining incidents involved a ride. Nevertheless, the Court found the record shows that the Plaintiff herself had knowledge of the potential for violence on board the Ninja and her knowledge was equal to or superior of that of Six Flags in that she, though fearful of what the adult might do, chose not to alert park authorities of her concerns prior to boarding the ride.

On this basis, the Court found that she had equal or superior knowledge of a dangerous condition existing on the owner's property and therefore there could be no recovery because she failed to exercise reasonable care to avoid that danger. The Court rejected the notion the girl, 14 years and 9 months old, was a child of tender age.

In Cook v. Micro Craft, Inc., 2003 Ga. App. Lexis 786, (Decided June 19, 2003), Plaintiff as representative of decedent's estate sued the Defendant company. The estranged husband of the Decedent murdered her on the Defendant's premises, the company where the decedent worked. Before this murder the estranged husband had called the decedent and told her he was coming to kill her. She called the Sheriff's office but they told her eventually there was nothing they could do. Decedent called for a friend to come pick her up at home. The friend picked her and another friend up and drove them to the Micro Craft Plant. As they entered the access road to the Plant, the murderer was waiting on the side of the road. The decedent recognized him and insisted they drive faster to the plant. They drove up to the plant and stopped three to five feet from an open bay door but did not enter the building. Within minutes Jackson drove up and rammed his car into their car and shattered the window. Plant employees summoned 911. Jackson, the murderer, reached into the car window and tried to grab the decedent. She climbed into the back seat. A company employee approached, but Jackson told him "if you don't get away from me I'll kill you." Id. at ____. Jackson got back into his car and rammed it into Faircloth's car two or three more times. Faircloth and the decedent then ran to the side of the building. Jackson accelerated towards the two and crushed the Plaintiff into a guardrail. The Appellate Court noted that this was

not a random stranger attack but rather grew out of a specific private relationship which had no connection with employment whatsoever. The Court found Micro Craft clearly lacked superior knowledge of Jackson's impending attack and that "the company had not experienced any other similar criminal attacks that would create a jury issue as to foreseeability."

In Fernandez v. Georgia Theatre Company, II, 2003 Ga. App. Lexis 804, (Decided June 25, 2003), a paying customer attended a movie with several family members. A loud patron sat behind them and cursed and talked loudly. Plaintiff's sister advised the Plaintiff that they should move seats, but the Plaintiff refused. Fernandez asked the loud man if he was going to curse and talk loudly throughout the whole movie; he threateningly asked what the Plaintiff would do if he did not stop talking. Plaintiff rose from his seat and told the boisterous man he was going to get the theater manager; then the loud man body slammed Fernandez into a wall, stomped on his ankle and caused injuries. The Court found there was no evidence of the theater's superior knowledge of the threat posed by the loud patron and no admissible evidence of prior similar incidents that would show the theater's superior knowledge. The Plaintiff attempted to use police reports but the Court, citing Brown v. State, 274 Ga. 31, 549 S.E.2d 1007 (2001), found them to be inadmissible hearsay. Id at ____.

b. Duty to Guests, Licenses, etc.

In Spear v. Calhoun, 2003 Ga. App. Lexis 793, (Decided June 20, 2003), the Plaintiff's daughter died after being fatally shot at the defendant owner's property. The Plaintiff was a guest at a New Year's Eve celebration. She was shot at approximately

midnight. First the Court analyzed whether the defendant owed any duty to the decedent. The Court noted, when the person on the premises is merely a social guest, the owner of the premises is liable to a licensee only for a willful or wanton injury. Plaintiff failed to offer evidence of substantially similar crimes occurring on Calhoun's property. The record failed to show that the Defendant had any knowledge of New Year's Eve's revelers. Apparently the Plaintiff died when another tenant at a New Year's Eve celebration shot a 357 into the air. The Court affirmed grant of summary judgment to the Defendant.

In Rigdon v. Kappa Alpha Fraternity, 256 Ga. App. 499, 568 S.E.2d 790 (2002), Rigdon, a student at Mercer University, attended a Kappa Alpha Fraternity party on Halloween. Party goers dressed in costume. While dancing with Montgomery, Amy Ussery threw a cold drink on the Plaintiff. Rigdon later danced with a man whom she thought was Montgomery. They went upstairs, sat on a couch and kissed. Then Rigdon realized it wasn't Montgomery, but someone named Chad. Chad left the couch and Rigdon stayed; Ussery and two girls approached. As the Plaintiff attempted to leave the room, Ussery pushed Rigdon and another woman, Sarah Richardson, grabbed the Plaintiff's hair. Blond headed Sarah Richardson repeatedly punched Rigdon in the face until she lost consciousness.

She filed suit against both Kappa Alpha Fraternity and the University. The Court first noted that Rigdon was merely a licensee and thus Kappa Alpha "would generally be liable to her only for wilful or wanton injuries." *Id.* at 501.

The Court held that she had not shown that Richardson's attack upon her was foreseeable. The Court said the earlier event of Ussery throwing a cold drink upon her was not adequate to put Kappa Alpha on notice that Rigdon would later be brutally beaten by another individual. No evidence of a substantially similar criminal attack which would make Richardson's conduct foreseeable was introduced and thus the appellant court upheld the trial Court's grant of summary judgment for Kappa Alpha.

Likewise, the appellant court found that Rigdon introduced no evidence that would render this attack foreseeable to Mercer University and therefore affirmed summary judgment to the university.

c. Duty to Passerbys

In Barnes v. St. Stephen's Missionary Baptist Church, 260 Ga. App. 765, 580 S.E.2d 587 (2003), the Plaintiff filed suit against the Church after she was attacked by a person who she alleged hid on church property. The Court initially noted that the attack did not occur on church property, but upon the sidewalk. The Court said that at best she was a passerby. The Court found that the landowner may have a duty toward those traveling a public way adjacent to their property in certain limited circumstances. The landowner has a duty to keep safe not only the premises but also the approaches upon which invitees enter. But this duty does not extend to mere pedestrians. *Id.* at 768. However, the landowner owes a duty to passerbys to protect them from objects falling from their property, such as trees with patent visible decay. Wade v. Howell, 232 Ga. App. 55, 58, 499 S.E.2d 652, 1998. Noting there would be serious issues regarding

causation, the Court found there was no duty to prevent unforeseeable criminal attacks of third parties upon pedestrians. *Id.* at 768.

d. Condominium Associations and Their Members/Owners

In Bradford Square Condominium Association v. Miller, 258 Ga. App. 240, 573 S.E.2d 405 (2002), the Court found an owner/member of the condominium association could not sue their own condominium association for its failure to provide security. Plaintiff had purchased a condominium at Bradford Square years before. One evening the Plaintiff and her husband went to dinner; upon returning, the Plaintiff's husband parked their car in the condominium parking lot. Two perpetrators approached and shot the Plaintiff's husband and took the Toyota. The Plaintiff filed a wrongful death action against her condominium association. The Court, citing Sacker v. Perry Realty Services, 217 Ga. App. 300, 457 S.E.2d 208 (1995), found that a condominium owner is an invitee of the condominium association as to the common elements. *Supra* at 244.

The condominium association declaration provided expressly that it was not providing security. The Court discussed at length the Condominium Declaration, its By-Laws and the relationship between a condominium association and its unit owners. "A condominium association's obligations and responsibilities toward the condominium property are dependent upon those allocated to it by the Act and those stated in the condominium instruments, i.e., the declarations and bylaws, as decided by a majority of unit owners/association members." *Id.* at 22. The Court found the condominium instruments analogous to an express contract between the unit owners and the condominium association. The Court held that "a condominium association's duties to

its members only pursuant to O.C.G.A. §51-3-1 with regard to the common elements of the condominium property may be circumscribed by the terms of the condominium instruments contracts.” Id. at 246. The Court noted it would not lightly interfere with the freedom of the parties to contract. Because the unit owners and association members specifically contracted with the condominium association that it would have no duty to control the security of the common elements at Bradford Square, the Court held the condominium association cannot be found responsible for the maintenance of any alleged continuing nuisance existing on the common elements due to a lack of security. Id. at 20.

On Motion for Reconsideration, Bradford Square Condominium Association v. Miller, 2002 Ga. App. Lexis 1408 (Decided November 1, 2002), the Court limited its decision to actions between owner/members and their condominium associations. “We were not asked to decide in this case a condominium association’s duty toward non-member owners pursuant to O.C.G.A §51-3-1.” Id. at ____.

e. Recreational Property

Anderson v. Atlanta Committee for the Olympic Games, Case Nos. A03A0428 and A03A0429, 2003 Ga. App. Lexis 725 (Decided June 12, 2003), concerns the bombing at the Olympic Park in July, 1996, during the Olympic Games. The trial court had granted Summary Judgment to the Atlanta Committee for the Olympic Games (ACOG) because it believed the Recreational Property Act, O.C.G.A. §51-3-20 insulated ACOG from liability. The Supreme Court reversed and held the Recreational Property Act is constitutional but it adopted a new test which balanced the recreational and

economic aspects of an activity to determine whether the act applied to such activities. Anderson v. Atlanta Committee for the Olympic Games, 273 Ga. 113, 537 S.E.2d 345 (2000). The trial court again found the activities in the Park recreational and granted summary judgment to ACOG.

The Appellate Court reversed the trial court again because the activities in the Olympic Park included both recreational and commercial activities. The pathways, the plaza and fountain, the public exhibits, amphitheater and entertainment were all intrinsically recreational. However the Court noted the corporate pavilion, including Bud's World Sports Bar, the food court, the Olympic souvenir stores and other commercial establishments were intrinsically commercial. The Court found there were material issues of fact as to whether the park was a commercial or recreational venture and that this issue should be determined by a jury and, once determined, then the trial Court may decide whether the Recreational Property Act applied or not.

VIII. Landlord/Owner Parts with Possession - O.C.G.A. §44-7-14

An owner who has parted with the possession of the premises has no duty to third persons resulting from the negligence or illegal use of the premises by tenants. O.C.G.A. §44-7-14. In Ray v. Smith, 259 Ga. App. 749, 577 S.E.2d 807 (2003), the Plaintiff fell inside a warehouse used as a residential loft. She fell from a skateboard ramp inside the loft. The skateboard ramp was built by the tenant. The Court noted that, although under O.C.G.A. §44-7-14 a landlord is responsible for damages arising from defective construction or for damages arising from failure to keep the premises in repair, an out of possession landlord is not responsible for damage resulting from the

negligence or illegal use of the premises by its tenants. Furthermore, the Court held the reservation of right of inspection by the Landlord does not evidence domination, control of premises so as to vitiate or to undo the landlord's limited liability under O.C.G.A. §44-7-14 and replace it with liability imposed by O.C.G.A. §51-3-1. Id. at 751.

In Myers v. Harris, supra, the owner of the premises was not in possession and the Court held the owner/landowner was not responsible for any failure to warn or to erect barriers after placement of furniture by the proprietor. O.C.G.A. §44-7-14.

IX. Tidbits

a. Voluntary Undertaking

Finally, a voluntary undertaking by an owner may be enforceable. In Osowski v. Smith, 2003 Ga. App. Lexis 917, (Decided July 15, 2003), the Plaintiff was at Defendant's premises to install cable. Plaintiff saw dogs roaming around. The Plaintiff asked the owner if the dogs were aggressive or would bite. The owner assured him there was not a problem and then offered to put the dogs up if the Plaintiff wanted him to. The Plaintiff did. However, the owner left one dog out who then ran into the Plaintiff causing his knees to buckle and an injury resulting. The Court found no liability of the owner under §51-3-1 or under §51-2-7. However the Court, citing Community Federal Savings & Loan Association v. Foster Developers, Inc., 179 Ga. App. 861, 865, 348 S.E.2d 326, 1986, did find that a person may be held liable for the negligent performance of a voluntary undertaking. Assuming there is a voluntary undertaking, the Court noted "a person may be held liable for negligent performance of the duties so assumed." Id. at _____. Because there were material conflicts in the

testimony, the Court found a jury question existed as to the terms of the voluntary undertaking and the appellant court reversed the trial court's grant of summary judgment for the owner.

b. Pedestrian, Duty to Walk Safely

In Beard v. Audio Visual Services, Inc., 260 Ga. App. 476 (2003), Beard collided with Owsley as she exited an elevator in the hotel lobby. She sued both Owsley and his employer whose offices were also located in the hotel. She did not sue the hotel. The trial court granted summary judgment because the evidence shows that Mr. Owsley was watching where he was going but Beard was not. The Court of Appeals reversed. Beard testified that she looked straight ahead before she stepped out of the elevator and that Owsley ran into her before she fully emerged. Because the jury could infer from this testimony that Owsley was walking unreasonably close to the elevator doors and perhaps too fast, thereby causing a collision, the Court of Appeals held that Owsley did have a duty to move and walk in a reasonably prudent matter so as to avoid colliding with and injuring fellow pedestrians in the hotel. Id. at ____.

X. Conclusion

All but two of these cases turn on the answer to this fundamental question - who has or should have higher knowledge of the hazard, defect or risk - the owner/occupier or the invitee/guest? Bradford Square Condominium Association v. Miller, supra, differs and it differs because the application of condominium law - O.C.G.A. §44-3-70 - limits the condominium association's duties to members/owners under O.C.G.A. §53-3-1. Anderson v. Atlanta Committee for the Olympic Games, supra, differs because application of the Recreational Property Act - O.C.G.A. §51-3-20 - also limits the owner/occupier's duties under O.C.G.A. §53-3-1.