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Reducing the Risk of Liability for Someone Else's Wrongs: A Victory for Landowners in Georgia

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One of the risks inherent in being a property owner is the potential to be held liable for persons injured by a third party who entered the property and caused harm. Businesses have a duty under the law to ensure that their premises are reasonably safe for their patrons. They may risk significant civil damage exposure if they fail to do so. For example, if a bank fails to provide proper lighting around its ATM and a customer is robbed and beaten while trying to withdraw money, the bank itself could be held liable in certain circumstances for failure to maintain the property safe from foreseeable risks to its customers.

Prior to 2005, Georgia law allowed for joint and several liability, as well as contribution, among co-defendants in premises liability cases. This meant that regardless of a landowner's level of fault in comparison to other defendants (i.e., the individual who actually robbed and beat the bank's customer), it could be held liable for all of the injured customer's injuries. The injured party could choose which wrongdoer from whom it would seek payment of the total final judgment. Given that landowners are often the ones with the deepest pockets and insurance, it is no surprise that they were often the parties that ended up paying 100 percent of any judgment under this system. While the landowner could then seek contribution from the other wrongdoers, it was often difficult if not impossible to do so, given that they were often judgment-proof, unknown or incarcerated. The amount of contribution was not proportionate to each party's level of fault. The allocation was based solely on the number of defendants (for example, if there were two defendants, the one who did not pay the initial judgment would be liable for 50 percent of the damages).

In 2005, Georgia enacted the Tort Reform Act, abolishing joint and several liability in favor of apportioning damages among defendants according to each defendant's percentage of fault. Since its enactment, the plaintiffs' bar in Georgia has been waging a relentless war against the apportionment aspects of the statute. In a victory for landowners, the Georgia Supreme Court recently decided two cases that clarify and uphold this portion of the Act.

First, in March 2012, in the case of *McReynolds v. Krebs*, the Supreme Court held that apportionment was required even in cases where the injured party was not comparatively negligent. The court also held apportioned damages were not subject to any right of contribution; that is, each defendant is only liable for his apportioned damages. The prior statute and case law had allowed – but not required – a jury to consider apportionment of liability, but only in cases where the injured party was to some degree at fault (i.e., where the injured party had somehow contributed to his own injury by acting negligently). Now, it is clear that apportionment does not depend on the injured party's comparative negligence. It must be applied in every case. In premises liability cases, *Krebs* means that apportionment will be applicable even in cases where the injured party did nothing wrong (e.g., was attacked by a third party).

Second, in July 2012, the Georgia Supreme Court decided the case of *Couch v. Red Roof Inns*, addressing a few additional issues that plaintiffs' attorneys have been pushing in their never-ending battle to limit the reach of apportionment. *Couch* involved a hotel guest who was attacked by an armed intruder while staying at a Red Roof Inn. The claim against the hotel was that it had provided negligent security, thereby allowing the armed intruder to enter the premises and attack the guest. The hotel guest argued that because the intruder had acted intentionally rather than negligently, apportionment should not apply. In other words, the argument was

that the hotel's negligence in failing to provide adequate security should not be apportioned with the intentional act of the criminal. The court dismissed this argument, holding that a jury may apportion damages between the landowner that negligently fails to secure the premises against a foreseeable criminal attack and the criminal assailant who perpetrates the crime. The court also dismissed a variety of constitutional arguments that had been raised against apportionment since its 2005 debut, likely pushing the constitutionality issues aside once and for all.

These cases are good news for Georgia business owners. Apportionment is an important tool in the defense of premises liability claims. Now that its applicability and enforceability have been upheld, the risk of significant damage awards for the acts of a third party is less than it once was. However, this is often a pendulum that swings both ways. Our experience with the real world application of the Act suggests that juries will find means to compensate innocent victims of crime from resources available to answer for the damages suffered. Should a landowner's invitee suffer injury in a third-party intentional crime, after a prior incident, the knowledge of the prior incident and any failure to take action to enhance protection as a result may well factor into the apportionment calculus.