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THE TORT REPORT

An Update on Liability Issues

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BUCKLE UP! EFFORTS TO REINSTATE THE SEAT BELT DEFENSE IN GEORGIA HAVE STALLED

BY: RACHEL MATHEWS

The most recent efforts to amend Georgia law to allow the introduction of a plaintiff's seat belt use into evidence have once again stalled. Under the current version of O.C.G.A. § 40-8-76.1, the failure of an occupant of a motor vehicle to wear a seat belt is inadmissible at trial to establish negligence, causation or any other question of liability or damages. One of the original purposes of the statute was to ensure that tortfeasors whose negligence results in vehicular collisions cannot escape liability by raising the defense that the injured party was not wearing a seat belt. Georgia is one of 31 states that currently have laws restricting the admissibility of seat belt usage into evidence.

The prohibition of the "seat belt defense" at trial has plagued the defense bar in Georgia and its clients since its institution in 1988. Opponents of the statute argue it prohibits civil defendants in both automobile accident and products liability cases from presenting all relevant evidence to the jury. Occupants of motor vehicles in Georgia are required by law to wear seat belts and, in many cases, a plaintiff's failure to wear their seat belt contributes to the severity of the injuries sustained. Without the ability to present evidence of a plaintiff's failure to use a seat belt, defendants are left without a key piece of evidence to support a defense under Georgia's apportionment statute, which provides that a jury shall consider the percentage of fault of a plaintiff.

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Given these concerns, the defense bar has made efforts over the years to amend O.C.G.A. § 40-8-76.1 to allow a plaintiff's failure to use a seat belt to be admissible as evidence. Earlier this year, the Georgia Senate Judiciary Committee voted on Senate Bill 155. The bill would have amended the statute to provide that a failure to wear a seat belt "may be considered in any civil action as evidence admissible on the issues of failure to mitigate damages, assumption of risk, apportionment of fault, negligence, comparative negligence, contributory negligence, or causation." Despite support of the bill from the Georgia Chamber of Commerce, the National Federation of Independent Business and the Georgia Motor Trucking Association, the Judiciary Committee rejected the bill in a 5-4 vote.

After the failure of Senate Bill 155, its proponents inserted the same language into Senate Bill 203, and the Georgia Senate Transportation Committee passed it by a 6-2 vote. Unfortunately, the Georgia Senate failed to pass Senate Bill 203 by Crossover Day, the day by which a bill must be passed out of either the House or the Senate. Nevertheless, legislators once again incorporated the above-quoted language as an amendment to House Bill 200 in the Georgia Senate Public Safety Committee. The Public Safety Committee passed the amended bill with a 5-2 vote, but unfortunately the full Senate never had the opportunity to vote on the bill and it ultimately stalled.

Attempts to amend the law regarding seat belt usage date back to 2014, when similar legislation was introduced, but rejected. As insurance companies, auto-manufacturers and the defense bar support the proposal to amend the law to allow for the introduction of seat belt use, we can expect future bills to amend the current law to advance. Until that time, however, defendants are still prohibited from introducing evidence of a plaintiff's failure to use a seat belt, even if that failure contributed to the plaintiff's injuries.

WHAT'S YOUR STATUS? A RECENT UPDATE ON LANDLORD LIABILITY

BY: MARVIS JENKINS

Third-party assault cases, commonly referred to as negligent security cases, have been on the rise for decades and are known for their exaggerated verdicts. These cases involve a victim (plaintiff) being "attacked" in some manner by an assailant while on the property of another. The property owner and/or company hired to manage the property are usually named as the defendants and the assailant often remains unidentified or unapprehended when the civil suit is filed (defense counsel routinely file a notice of non-party fault to allow a jury to apportion fault to the actual perpetrator(s) should the case go to trial).

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The legal framework for third-party assault cases requires a plaintiff to prove the traditional elements of negligence: (1) duty; (2) breach; (3) causation; and (4) damages. *Lau's Corp. v. Haskins*, 161 Ga. 491 (1991). The general rule regarding premises liability is that a property owner/landlord does not ensure an invitee's safety against third-party criminal attacks and any liability from such attacks must be predicated on a breach of duty to exercise ordinary care in keeping the premises safe. *Johns v. Hous. Auth. for the City of Douglas*, 297 Ga. App. 869, 871 (2009). However, the status of the victim on the property will determine the type of duty owed by a property owner/landlord.

Under the law, an *invitee* is defined as one who has business relations with the landlord or whose presence is beneficial to both parties, while a *licensee* is one who is "permitted, expressly or impliedly, to go on the premises merely for his own interests, convenience, or gratification." *Cham, et al. v. ECI Mgmt. Corp.* 2021 WL 954754, *3 (Supreme Ct. of Ga., March 2021). A licensee enters a premises at their own risk and the property owner owes no duty as to the conditions of the premises, except that the owner should not knowingly let a licensee run into a hidden peril or willfully or wantonly cause injury. *Id.* A third category is trespasser, who has no permission to be on the property and to whom a landlord owes no duty "except to refrain from causing a willful or wanton injury." *Id.*

In March 2021, the Supreme Court of Georgia clarified the first prong of the negligence analysis in third-party assault cases by comparing and defining a landlord's duty to a tenant, who is an invitee on the property, and its duty to a guest of a tenant. In *Cham, et al. v. ECI Management Corp.*, the guest of a tenant of an apartment complex was killed during an armed robbery in the apartment complex's parking lot. Suit was filed against the apartment complex owner and management company, alleging the defendants negligently failed to secure the premises from criminal activity. The trial court jury returned a defense verdict, which was appealed on three issues. The Supreme Court of Georgia certified just one question: Did the trial court err in charging the jury on the duty a landowner owes a licensee, when there was evidence showing that the plaintiffs' decedent was a guest of a lawful tenant of the landowner?

A divided Supreme Court of Georgia found there was no error and upheld the lower courts' rulings that allowed jury instructions on the landlord's responsibilities to both an invitee and a licensee. In *Cham*, the deceased lived with his girlfriend at the apartment complex. Conflicting evidence was presented at trial as to whether the living arrangement was known to or permitted by the landlord (the deceased was not a signatory on the lease, though the tenant claimed he was present when touring the apartment and when the lease was signed, and that management agreed to allow him to live on the premises). The Supreme Court of Georgia explained that, under the facts, at least slight evidence was presented at trial from which the jury could have concluded the deceased guest was a licensee with respect to the landlord, rather than an invitee.

The *Cham* decision reaffirms the general rule that a social guest of a tenant is, in most instances, an invitee of the landlord while in common areas of the apartment complex because the landlord generally receives some benefit or has some interest in the guest's presence on the property. However, in disapproving several prior Georgia premises cases, *Cham* clarifies that the liability of a landlord under the premises liability statute must be determined by the visitor's relationship with the landlord, rather than the relationship between the visitor and the tenant. Depending upon the unique factual circumstances presented, there remains a

possibility that the guest of a tenant may actually be considered a licensee of the landlord, and a jury charge on the duty owed to a licensee would be proper. While uncertainty surrounding one's status on a property may preclude summary judgment in some cases, the potential for jurors to be instructed on the lesser duty owed to a licensee (or even a trespasser) under a particular set of facts may lead to a more favorable outcome for defendants at trial.

INSTAGRAM STORIES: NOT GONE FOR GOOD

BY: ROB WHEELER

Discovery requests are a vital when building or finalizing a case. In order to use this tool to its full advantage, attorneys are requesting and obtaining information from opposing parties' social media accounts during written discovery more and more frequently to find information that a party might not otherwise document. For example, a request for production of documents that seeks a plaintiff's Instagram Stories may reveal information crucial to a case's outcome, such as the plaintiff admitting to a non-injury or revealing the existence of a previously unknown interested party. Social media discovery requests have become particularly important in cases involving younger plaintiffs.

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The internet continues to grow in scale and become more widely used by all ages and demographics. Since 2006, all age groups have increased their social media participation. However, one age group continues to dominate social media use. Eighty-six percent of people between the ages of 18-29 use at least one social media site.

Not surprisingly, social media participation increased during the COVID-19 pandemic. "Visits to TikTok's website grew nearly 600 percent on average in 2020 compared to the year before," according to SimilarWeb. "Meanwhile, visits to Instagram were up 43 percent, Twitter 36 percent, and 3 percent for Facebook, which is still impressive considering how massively popular the site already was," Reported Rani Molla in an article for Vox.

Instagram has become one of the more popular forms of social media, especially for young adults. "A majority of 18- to 29-year-olds say they use Instagram (71 percent) or Snapchat (65 percent), while roughly half say the same for TikTok," according to a Pew Research Center report by Brooke Auxier and Monica Anderson. A likely reason for this growth is due to the variety of ways users can share information with their followers. Instagram provides four platforms for sharing information: Instagram Posts, Instagram Live, Instagram Stories and Instagram Reels. Instagram Stories are photos or videos that appear on a user's feed for 24 hours and then disappear. Depending on the user's preferences, Stories can be shared during that time frame with the public, a user's followers or a specific group of followers personally selected by the user known as "close friends."

While one may think these posts to Instagram Stories disappear into oblivion, they do not. Instagram stores a user's Stories in two different ways: Instagram Data Download and Instagram Archive. A download of a user's Instagram Data creates a zip drive that contains all of the photos or videos a user has posted, old Stories they have saved and more. Although this data may provide a case-altering photo or video, a discovery request for the Data Download could elicit an objection from plaintiff's counsel that the request is "overbroad and unduly burdensome." Instead, the simpler way for a plaintiff to access prior Instagram Stories is through Instagram Archive. This default feature on Instagram is automatically applied and saves posts made on Instagram Stories, even though users might be unaware of the feature. Instagram users can access their archived Instagram Stories through four easy steps:

1. Open the Instagram app and tap on the profile button.
2. Once on the profile page, tap the three bars in the upper-righthand corner.
3. Tap "Archive" next to the clock icon.
4. At the top select "Stories Archive."

A discovery request to a plaintiff for their Instagram Archive cannot reasonably be said to be overly intrusive or unduly burdensome for the plaintiff to perform, particularly if the steps for accessing the Instagram Archive are provided within the request.

Social media is here to stay so we will use this technology to our advantage. While asking for the download of a party's Instagram Data is one way to obtain the Stories a plaintiff might believe are long gone, requesting a plaintiff's Instagram Archive provides an even easier method for defense attorneys to obtain the potentially relevant information from these "temporary" social media posts, provided the Archive feature is set to save the plaintiff's Stories. As the plaintiff may think these Stories are available only for 24 hours, they may feel free to post a photo or video that could change a losing case into a winning one.

MOVING IN THE *WRIGHT* DIRECTION: CASE LAW DEVELOPMENTS ON RESPONDING TO TIME-LIMITED DEMANDS MADE PURSUANT TO O.C.G.A. § 9-11-67.1

BY: LAUREN KAMENSKY

Handling time-limited demands for policy limits, especially those under O.C.G.A. § 9-11-67.1, can create headaches for even the most seasoned defense attorneys. These demands have become playgrounds for plaintiffs to impose conditions of acceptance and performance that are, arguably, meant to elicit a rejection of the demand (and trigger potential excess exposure), rather than to resolve the claim for policy limits. It is common for these demands to require the insurer (or its counsel) to comply with various conditions of acceptance and performance, and plaintiffs often improperly conflate conditions of performance with conditions of acceptance. However, the Court of Appeals of Georgia recently issued an opinion that appears to be a step in the right direction for insurers and their counsel when responding to time-limited demands made under this code section.

In *Wright v. Nelson*, the Court of Appeals of Georgia examined whether the inclusion of a proposed release by a defendant's insurer, after the defendant and the insurer accepted the material terms of the plaintiff's demand, constituted a rejection fatal to entering into a binding settlement agreement. 2021 WL 926131 (Ga. Ct. App. March 11, 2021). There, the plaintiff sent the defendant's insurer an offer to settle the plaintiff's claims for the defendant's insurance policy limits. *Id.* at *3. The demand, which referenced O.C.G.A. § 9-11-67.1, stated the plaintiff would accept the policy limits in exchange for a limited liability release "as that term is used and contemplated under Georgia law" and also included nine other conditions on which the demand was contingent. *Id*. Notably, the plaintiff's offer to settle did not include a specific proposed release. The defendant's insurer accepted the plaintiff's demand in writing, tendered its policy limits and advised that it would contact the plaintiff's counsel regarding a release. *Id*. A few weeks later, the defendant's insurer provided the plaintiff with a proposed release and the plaintiff unilaterally deemed it a counteroffer and rejection of his time-limited demand. *Id*.

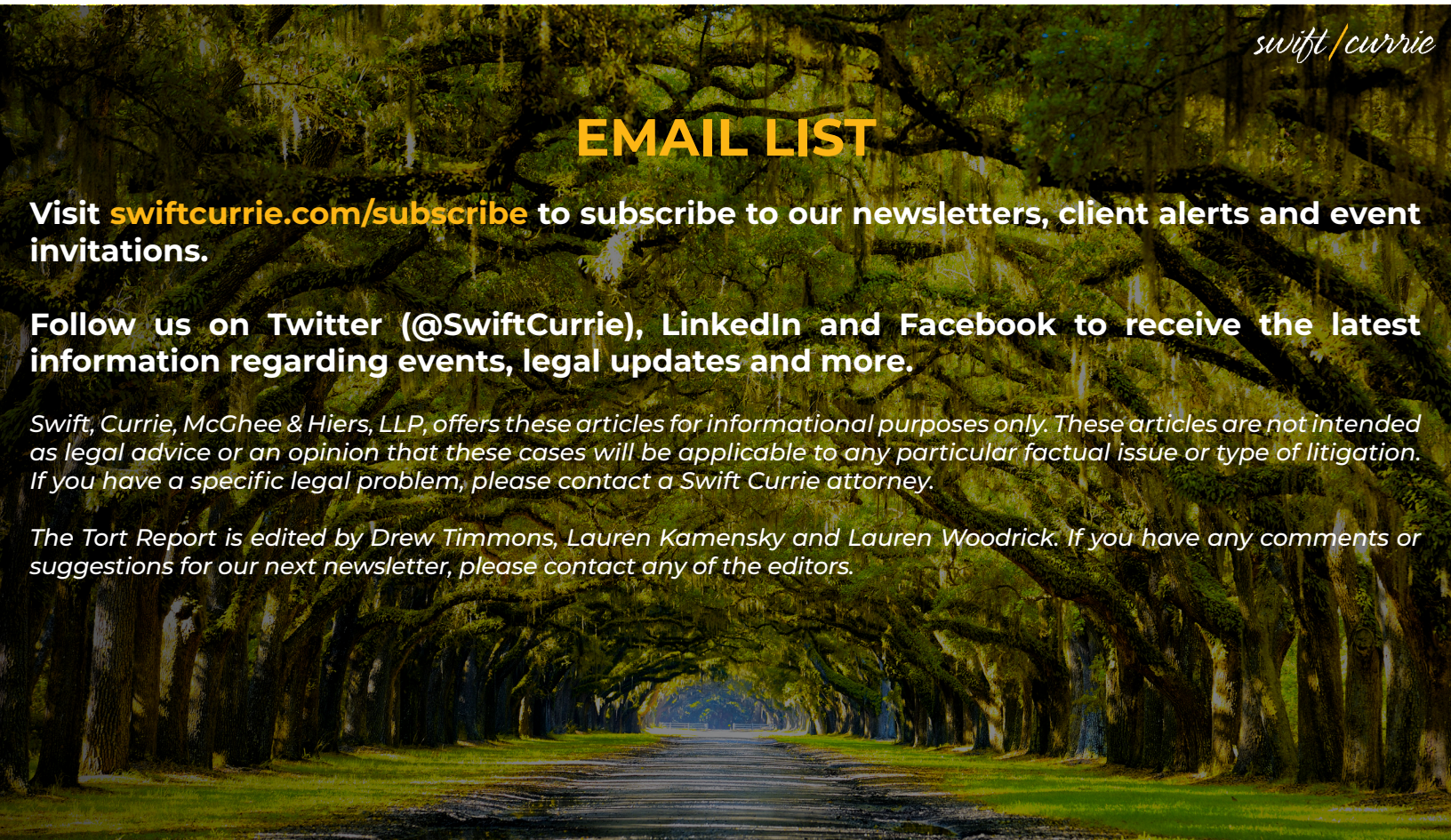
The Court of Appeals rejected the plaintiff's argument that the insurer's proposed release constituted a counteroffer because the court reasoned the defendant's insurer had accepted the essential terms of the plaintiff's demand in writing (which did not add any conditions to its agreement to pay the policy limits or make any objection to the release terms requested by the plaintiff) and had tendered its policy limits. *Id*. Most critically, the Court of Appeals held that: (1) a plaintiff is free to explicitly make presentation of a specific, acceptable release a condition of acceptance in the demand, but in the absence of such a condition, a proposed release is not deemed a counteroffer; and (2) once a settlement is formed, subsequent exchange of release proposals does not constitute a rejection of the previously accepted demand. 2021 WL 926131 at *3 (quoting *Herring v. Dunning*, 213 Ga. App. at 699). *See also, Turner v. Williamson*, 321 Ga. App. 209, 213, 738 S.E.2d 712 (2013); *Sherman v. Dickey*, 322 Ga. App. 228, 744 S.E.2d 408 (2013); *Hansen v. Doen*, 320 Ga. App. 609, 612, 740 S.E.2d 338, 342 (2013). The court also noted that the insurer provided the proposed release with precatory language seeking the plaintiff's approval of the release, and later correspondence showed the insurer attempted to capture the plaintiff's specified release terms. 2021 WL 926131 at *3.

> "The holding in *Wright* clarifies the distinction between a condition of acceptance and condition of performance.

The holding in *Wright* clarifies the distinction between a condition of acceptance and condition of performance. Under *Wright*,

plaintiffs will now have to explicitly state that a presentation of, or other agreement to, a specific release is a condition of acceptance in order for the subsequent exchange of proposed releases to constitute a counteroffer. As Chief Justice McFadden addressed in a concurring special opinion, it is the reality that "plaintiffs sometime structure offers not to reach settlements, but rather to elicit rejections." This concurrence signals that the judiciary may also be growing wary of time-limited "demands" that may as well be called "invitations to respond with a rejection."

Even though the holding in *Wright* is a positive sign for insurers, it remains critical to comply with all conditions of acceptance to make sure there is a binding settlement agreement with the plaintiff. Only time will tell, but *Wright*, along with upcoming revisions to O.C.G.A. § 9-11-67.1, should make it less difficult for insurers to respond to, and attempt in good faith, accept time-limited demands.



The Tort Report is edited by Drew Timmons, Lauren Kamensky and Lauren Woodrick. If you have any comments or suggestions for our next newsletter, please contact any of the editors.