Assumption of the Risk: Alive and Well in Premises Liability Actions in Georgia

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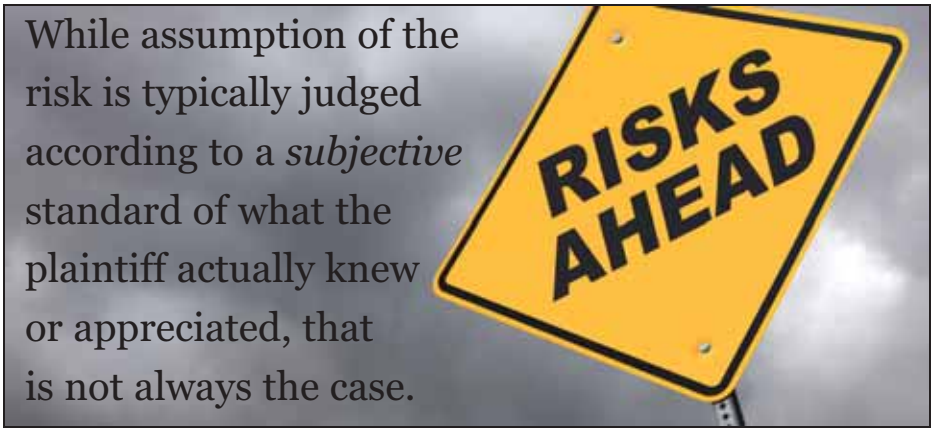
Those who own or manage real property in the state of Georgia received good news with the recent Supreme Court of Georgia case *Landings Association, Inc. v. Williams*, S11G1263, S11G1277 (June 18, 2012).

In *Williams*, the Supreme Court reversed a trial court's order denying summary judgment and held that an 83-year old woman, allegedly killed in an alligator attack while house-sitting at a residential golf community, had equal knowledge of the threat of alligators within the community.

This holding reiterates the long-standing defense in Georgia that, in certain situations of obvious danger, a person can be deemed, as a matter of law, to have assumed the risk of any injury or harm that results from his decision to voluntarily expose himself to that danger.

Additionally, and of significant value to premises liability defendants looking to argue an assumption of the risk defense, the Supreme Court arrived at its holding without requiring evidence that the decedent knew that alligators in general, or the specific alligator that attacked the decedent, posed a risk of injury. *Williams* supports the proposition that at a certain level of danger, a plaintiff cannot defeat summary judgment by arguing that he or she did not subjectively appreciate the danger or some highly discrete and specific element of that danger. Rather, the Supreme Court of Georgia has made a clear pronouncement that where a person of normal intelligence and faculties can perceive a risk of injury, a plaintiff's failure to do so equates to assumption of the risk and can support summary judgment in favor of the defendant.



Assumption of the Risk, Generally

Assumption of the risk is a long-standing principle of Georgia law, having been recognized by the Supreme Court of Georgia as a bar to a plaintiff's recovery over a century ago. *See*, *e.g.*, *Griffith v. Lexington Term. R. Co.*, 124 Ga. 553 (1905). "Assumption of risk in its simplest and primary sense means that the plaintiff has given his express consent to relieve the defendant of an obligation of conduct toward him and to take his chance of injury from a known risk." *Hackel v. Bartell*, 207 Ga. App. 563, 564 (1993); *Lundy v. Stuhr*, 185 Ga. App. 72, 75, *citing* Prosser, *Law of Torts* at 303 (2nd ed.). "The result is that the defendant is simply under no legal duty to protect the plaintiff." *Id.*

In order to prevail on a defense of assumption of the risk, the defendant must show that the plaintiff (i) had actual knowledge of the danger in question, (ii) understood and appreciated the risks associated with such danger, and (iii) voluntarily exposed himself to those risks. *Liles v. Innerwork, Inc.*, 279 Ga. App. 352 (2006). Successful proof of assumption of the risk will bar the plaintiff's claims even where the defendant acted willfully and wantonly or was grossly negligent. *Id.*; *Muldovan v. McEachern*, 271 Ga. 805 (1999).

Assumption of the risk differs from the affirmative defense of contributory negligence in that the court will apply a subjective standard in considering an assumption of the risk defense, looking to the particular plaintiff and his situation in order to determine whether "the plaintiff subjectively comprehended the specific hazard posed, and affirmatively or impliedly assumed the risk of harm that could be inflicted therefrom." *Muldovan*, 271 Ga. at 808 (2); *Garner v. Rite Aid of Ga., Inc.*, 265 Ga. App. 737, 739-40 (2004) (physical precedent only). Moreover, unlike contributory negligence, assumption of the risk can serve as the basis for summary judgment where "the facts are so plain and palpable that they demand a finding by the court as a matter of law." *Pearson v. Small World Day Care Ctr.*, 234 Ga. App. 843, 845 (1998); *see also O'Neal v. Sikes*, 271 Ga. App. 391, 392 (2005); *Spooner v. City of Camilla*, 256 Ga. App. 179, 181-82 (2) (2002).

While assumption of the risk is typically judged according to a *subjective* standard of what the plaintiff actually knew or appreciated, that is not always the case. Rather, the Georgia Court of Appeals has held that there are some cases where the plaintiff's assumption of the risk is so "plain and palpable," and the danger in question so obvious, that an *objective* standard applies instead:

> Every adult is presumed to be endowed with normal facul-

> ties, both mental and physical. No person should conduct [himself] in an irresponsible manner when even ordinary prudence would protect [him] from the likelihood of possible injury. ***At some point the danger and likelihood of injury becomes so obvious that actual knowledge by the plaintiff is unnecessary.***

Hackel, 207 Ga. App. at 564 (emphasis supplied); *Lundy*, 185 Ga. App. at 75.

Georgia's appellate courts have previously applied this reasoning to hold that summary judgment was appropriate on the basis of the plaintiff's assumption of the risk of injury in several contexts. For example, in *Liles v. Innerwork, Inc.*, the Court of Appeals affirmed the trial court's grant of summary judgment to the defendant where the plaintiff "had actual knowledge of the danger associated with the activity and appreciated the risk involved, as any reasonable person would understand the danger inherent in allowing oneself to be dropped from a height of eight to ten feet." 279 Ga. App. at 354 (2). Similarly, in *White v. Georgia Power Co.*, 265 Ga. App. 664 (2004), the Court of Appeals held that "the danger of drowning in a body of water is an apparent, open danger, the knowledge of which is common to all," and affirmed the trial court's grant of summary judgment to the defendant in that case. *Id.* at 666 (1). In *Muldovan v. McEachern*, the Supreme Court held that the decedent assumed the risk of death as a matter of law by loading a single bullet into a handgun, giving the gun to another individual, and instructing the individual to point the gun at the decedent's head and pull the trigger. 271 Ga. at 810 (2). In *Hackel v. Bartel*, 207 Ga. App. 563 (1993), the Court of Appeals reversed the trial court's denial of summary judgment in favor of a defendant where the plaintiff was struck by a car after she reached into its open door, while it was parked on a slope, and released the emergency brake without checking to see whether the car was in gear. *Id.* at 563-64 (1). And in *Lundy v. Stuhr*, 185 Ga. App. 72 (1987), a full Court of Appeals held that a part-time kennel attendant assumed the risk of being bitten when he entered the kennel of an Akita breed dog weighing over 100 pounds that he had been warned was an "escape artist" and "will bite," failed to exit the dog's kennel when it began to walk toward him, and, instead, suddenly stood and extended his arm to the dog as it approached him. *Id.* at 72-74.

But with the defense of assumption of the risk having fallen into disfavor in many other states, and with the Georgia Court of Appeals having issued several unfavorable decisions in the premises liability context in recent years, it was unclear how long defendants would be able to rely on assumption of the risk as a complete defense to liability, particularly in premises liability cases.

More importantly, prior to its opinion in *Williams*, the Supreme Court of Georgia had not recently addressed the issue of when an *objective* standard might apply in premises liability cases.

The Georgia Supreme Court's Decision in *Williams*

In *Williams*, the Plaintiffs sued two entities that owned and managed the planned residential and golf community where the Plaintiffs lived on Skidaway Island, Georgia, after Gwyneth Williams, the 83-year-old mother of one of the Plaintiffs, died allegedly as a result of an alligator attack within the community.

Before the community was developed, the area consisted primarily of marshlands and had a thriving native alligator population. In the 1970s, the defendants installed a system of lagoons to allow sufficient drainage to make the area suitable for residential development. Thereafter, alligators moved into and out of the community through those lagoons.

On the evening of October 5, 2007, Ms. Williams, who was "house-sitting" for the Plaintiffs, decided to go for a walk near one of the lagoons close to Plaintiffs' home. The next morning, her body was found floating in the lagoon, her right foot and both forearms having been bitten off. An alligator eight feet in length was subsequently located and caught in that lagoon. The alligator was killed, and "parts of Williams' body" were found in the alligator's stomach.

This incident represented the first known alligator attack within the community. It was undisputed, however, that Williams knew prior to the incident that alligators inhabited the premises. Indeed, Williams' son-in-law testified that on one occasion, Williams was riding with him through the community when he stopped the car to allow Williams to observe an alligator. He recalled Williams telling him on that occasion that she did not want to be anywhere near alligators. Williams' son-in-law also testified that "there was never any reason to" discuss with Williams how to behave around wild alligators, because Williams "was an intelligent person" who did not need to be told to "stay away from alligators."

The Supreme Court reversed the Court of Appeals' decision, and held that summary judgment should have been entered in favor of the defendants, because the Plaintiffs' decedent "had equal knowledge of the threat of alligators within the community." *Id.* at 2. The Court went on to hold that since Williams knew that wild alligators were dangerous, by choosing "to go for a walk at night near a lagoon in a community in which she knew wild alligators were present . . . Williams either knowingly assumed the risks of walking in areas inhabited by wild alligators or failed to exercise ordinary care by doing so." *Id.* at 5-6.

In both the trial court and the Court of Appeals, the Plaintiffs successfully defeated the defendants' motions for summary judgment by arguing that (1) the defendants failed to follow a purported policy of removing alligators greater than seven feet in length from lagoons on the subject premises, and (2) no evidence existed that the decedent

had seen or had knowledge of any alligators greater than seven feet in length on the premises or *any* alligators in the specific lagoon where her body was found. *See Landings Ass'n, Inc. v. Williams*, 309 Ga. App. 321, 323-24 (2011).

The Plaintiffs' arguments in this case followed a recent trend of many plaintiffs in Georgia attempting to avoid the entry of summary judgment in premises liability cases, notwithstanding the equal knowledge and/or assumption of the risk by the plaintiff or his decedent. Specifically, it has become commonplace for plaintiffs in such cases to oppose motions for summary judgment by alleging lack of knowledge by the plaintiff or his decedent of some very specific detail which, in reality, would not be necessary for a person of normal intelligence and faculties to have assumed the risk according to the standard by which assumption of the risk is applied in Georgia.

In its opinion in *Williams*, the Supreme Court specifically rejected the Plaintiffs' arguments in that regard:

> A reasonable adult who is not disabled understands that small alligators have large parents and are capable of moving from one lagoon to another, and such an adult, therefore, assumes the risk of an alligator attack when, knowing that wild alligators are present in a community, walks near a lagoon in that community after dark.

Williams, S11G1263, at 6.

The Effect of the Supreme Court's Decision in *Williams*

Although the Supreme Court also relied on Williams' equal knowledge in reaching its conclusion, perhaps the most significant part of the Court's opinion for precedential purposes is the Court's holding that the decedent assumed the risk of her injuries. With the significant erosion of available legal defenses in premises liability actions in recent years, the Supreme Court's re-affirmance of assumption of the risk as a viable defense in the premises liability context, specifically, must be viewed as a positive development.

The Supreme Court's opinion in *Williams* represents the first time that the Supreme Court has considered the applicability of the doctrine of assumption of the risk since *Muldovan*, a case involving one of the most obviously dangerous activities imaginable — a game of "Russian roulette" in which one of the participants, predictably, perished. Prior to *Williams*, the Supreme Court had not considered the applicability of an assumption of the risk defense in the premises liability context since *Thompson v. Crownover*, 259 Ga. 126 (1989), and the Court's opinion in that case is bereft of any analysis on the subject but, rather, simply stated that issues relating to assumption of the risk "are ordinarily not susceptible of *summary* adjudication." *Id.* at 129 (5) (emphasis in original). The most recent case in which the Supreme Court held that summary judgment was appropriate based on an objectively obvious danger appears to be *Abee v. Stone Mountain Memorial Ass'n.*, 252 Ga. 465 (1984), in which the Court held that the risk of flipping over and hitting one's mouth on a waterslide "was a danger which was patent and obvious to anyone familiar with the ride" and that the plaintiff had assumed the risk of his injury by choosing to ride the waterslide. *Id.* at 465-66.

Moreover, The Supreme Court's opinion in *Williams* appears to represent an endorsement and affirmance of the above-quoted principle from the *Hackel* and *Lundy* cases, as well as other Georgia Court of Appeals decisions. That is, where a particular hazard and its attendant risks are blatantly obvious, assumption of the risk can be established as a matter of law at the summary judgment stage based on an *objective* standard of reasonableness. By rejecting the plaintiffs' argument that summary judgment was inappropriate in *Williams*, the Supreme Court reaffirmed that assumption of the risk is a viable defense in 2012 and beyond, regardless of how severe the injury. Even in cases of death or serious injury, if the risk of injury is objectively obvious to a person of normal faculties, a plaintiff who voluntarily exposes himself to that risk will be barred from recovering when he is injured.

Ultimately, the high court's decision in *Williams* is significant in that it reaffirms that a plaintiff cannot avoid summary judgment in a case where the plaintiff or his decedent assumed the risk of an injury due to an obvious potential hazard, simply by contending that he did not subjectively appreciate the obvious hazard. Essentially, the Supreme Court in *Williams* held that the risk of being attacked by an alligator when alligators are known to live in the vicinity — much like the risk of falling from a significant height, drowning in a body of water, or being killed by another pointing a loaded gun at one's head and pulling the trigger — is plain, palpable, and obvious to anyone of normal intelligence. In so doing, the Supreme Court also reaffirmed the principle that summary judgment is appropriate in a premises liability case where the Plaintiff or his decedent had equal knowledge or assumed the risk of his injuries, without regard to the nature of the defendant's alleged negligence. As plaintiffs and some courts attempt to chip away at the defenses available to defendants in tort cases — particularly those involving premises liability — it is important and somewhat reassuring to know that the defense of assumption of the risk remains alive and well in those cases. ❖

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