IN THE COURT OF APPEALS
STATE OF GEORGIA

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, Appellant, v. GLORIA MCLAMB, Appellee.	)	Case No. A25A0936

APPELLANT'S BRIEF

PATRICK T. O'CONNOR
Georgia Bar No. 548425
BENJAMIN M. PERKINS
Georgia Bar No. 140997
WILLIAM C. PHILLIPS
Georgia Bar No. 552370
OLIVER MANER LLP
218 West State Street (31401)
Post Office Box 10186
Savannah, Georgia 31412
Telephone: (912) 236-3311
pto@olivermaner.com
bperkins@olivermaner.com
wphillips@olivermaner.com

BATES LOVETT
Georgia Bar No. 459568
OFFICE OF THE CITY ATTORNEY
Post Office Box 1027
Savannah, Georgia 31402
Telephone: (912) 525-3092
blovett@savannahga.gov

Attorneys for Appellant the Mayor and Aldermen of the City of Savannah

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Constitutional Provisions

I. INTRODUCTION

On April 9, 2019, Appellee Gloria McLamb tripped and fell on a sidewalk that is owned and maintained by Appellant City of Savannah. The evidence construed in her favor shows that she tripped when she encountered a raised paver on the sidewalk. Appellee testified that she was sightseeing at the time she fell and did not see the hazard because her view of it was obstructed by her niece-in-law, who was walking in front of her. (V2/75; V2/87; V3/978 at Line 25; V3/979 at Lines 1-2; V3/985 at Lines 19-25; V3/986 at Lines 1-23). Because the Recreational Property Act bars Appellee's claims, because the City lacked actual or constructive notice of the alleged defect in the sidewalk, because there is no evidence the City willfully and wantonly injured Appellee, and because nothing obstructed Appellee's view of the alleged static defect, the City moved for summary judgment. The trial court denied the motion.

Because the trial court's denial of the City's motion is contrary to well-established Georgia law, the City respectfully requests that this Court reverse the trial court and rule that the City is entitled to summary judgment.

II. JURISDICTIONAL STATEMENT.

After completing depositions and written discovery, the City filed a Motion for Summary Judgment (V2/74-311) which the trial court denied.

(V3/1222-31). Recognizing the significance of the legal questions presented by the City's motion, the trial court issued a certificate of immediate review. (V3/1239). This Court granted the City's Application for Interlocutory Appeal on December 10, 2024 (V3/1240), and the City's Notice of Appeal was filed on December 16, 2024. (V2/1-6).

This Court, rather than the Supreme Court of Georgia, has jurisdiction of this appeal for the reason that this case is not one within the exclusive or general jurisdiction of the Supreme Court. GA. CONST. ART. VI, SEC. VI, PARA. II and III. While this appeal involves the trial court's erroneous conclusion about the constitutionality of a state statute, it involves an "unquestioned and unambiguous" constitutional provision. This Court has jurisdiction of the appeal since it concerns the application of a statute (the RPA) which the Supreme Court previously upheld as constitutional. *Hodges v. Hartford Cas. Ins. Co.*, 176 Ga. App. 284, 285 (1985). Specifically, the trial court's finding that the RPA is unconstitutional was addressed and rejected by the Supreme Court in *Anderson v. Atlanta Committee for Olympic Games, Inc.*, 273 Ga. 113 (2000). Accordingly, as appellate jurisdiction is not reserved to the Supreme Court or conferred on other courts, this Court has jurisdiction over this interlocutory appeal. *See* GA. CONST. ART. VI, SEC. V, PARA. III; O.C.G.A. § 15-3-3.1(a)(6).

III. ENUMERATION OF ERRORS

No. 1: The trial court committed reversible error in holding that the RPA is unconstitutional (both facially and as-applied).

No. 2: The trial court erred in holding that the RPA does not bar Appellee's claims against the City.

No. 3: The trial court committed reversible error in failing to hold that Appellee was a licensee and that there is no evidence the City willfully and wantonly injured her.

No. 4: The trial court erred in failing to hold that the raised paver at issue constituted an open and obvious static condition which Appellee could have avoided in the exercise of ordinary care.

IV. STATEMENT OF THE CASE.

A. Material Facts Relevant to Appeal.

In the spring of 2019, Appellee was on vacation in Savannah with her family. (V3/947 at Lines 1-5; V3/948 at Lines 8–11). For most of that day, Appellee and three relatives explored historic Savannah on a trolley tour. (V3/948 at Lines 17-19; V3/951 at Lines 9-16). In the afternoon, Appellee and her family exited the trolley to visit the Davenport House Museum. (V3/1017 at Lines 13-21). After leaving the Davenport House, they decided to take a self-guided sightseeing walk to, in Appellee's words, "see[] the

parks[,] . . . old buildings[,] . . . plants[,] and the big trees" in a scenic area of downtown Savannah. (V3/950 at Lines 15-17; V3/951 at Lines 23-25; V3/952 at Lines 3-6 and 16-20; V3/1017 at Lines 13-23). The family walked north toward River Street. (V3/983 at Lines 17-25; V3/984 at Lines 1-11).

Shortly after embarking on the sightseeing walk through Savannah's historic district, Appellee tripped and fell on uneven pavers on a sidewalk between East Congress Street and Broughton Street. (V2/17 at ¶ 4; V3/1017 at Lines 16-21). When she fell, Appellee was talking to her sister and admiring a live oak tree instead of watching where she was placing her next step. (V3/985 at Lines 16-25; V3/986 at Lines 1-23; V3/1066 at Lines 20-25; V3/1067 at Lines 1-9). Appellee admits she was not watching where she was walking when she fell. (V3/985 at Lines 19-22) ("Q: Can you help me understand how you didn't see [the pavers] when you were walking? A: When I was walking. [*sic*] Because I was not looking down."). Although Appellee's niece-in-law was walking in front of her, they were "spaced out enough . . . where [they] could walk . . . a comfortable [distance] from one another." (V3/986 at Lines 1-23). There is no evidence that any foreign object or substance obstructed the pavers from Appellee's view. (V2/983-984). There are no businesses in the area where Appellee fell—only historic

homes, scenic landscaping, and Warren Square. (V3/871 at Lines 21-24; V3/872 at Lines 5-10).

B. Relevant Proceedings Below and Preservation of Error.

The City moved for Summary Judgment on each of Appellee's claims. (V2/74-311). The matter was fully briefed by the parties, and the trial court held a hearing on the motion. (V2/312-535; V3/1132-1221). Following the hearing, the trial court denied the City's motion on October 30, 2024, and entered a certificate of immediate review seven days later on November 7, 2024. (V3/1239). The City timely filed its Application for Interlocutory Appeal on November 15, 2024, within ten (10) days of issuance of the certificate. This Court entered an order granting the City's Application on December 10, 2024. (V3/1240).[1] The City filed its Notice of Appeal in the State Court of Chatham County on December 16, 2024. (V2/1-6). This appeal was docketed on January 6, 2025. In accordance with Georgia Court of Appeals Rule 23(a), this brief is filed within twenty (20) days of the Court's docketing of this matter.

[1] Because they were included in the City's Application for Interlocutory Appeal, each enumeration of error is properly preserved for consideration.

V. ARGUMENT AND CITATION OF AUTHORITIES.

A. Standard of Review.

"[A] *de novo* standard of review 'applies to an appeal from a grant or denial of summary judgment, and [the Court] view[s] the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant.'" *Whitehead v. Green*, 365 Ga. App. 610, 613 (2022) (quoting *Martin v. Herrington Mill, LP*, 316 Ga. App. 696, 697 (2012)). "[A]t the summary judgment stage, we do not 'resolve disputed facts, reconcile the issues, weigh the evidence, or determine its credibility, as those matters must be submitted to a jury for resolution.'" *Id.* (quoting *Tookes v. Murray*, 297 Ga. App. 765, 766 (2009)). "With these guiding principles in mind," the City "now turn[s] to the enumerations of error[.]" *Id.*

B. Enumeration of Error No. 1: The trial court committed reversible error in holding that the RPA is unconstitutional (both facially and as-applied).

i. The RPA is facially constitutional.

In *Anderson v. Atlanta Comm. for Olympic Games*, the Georgia Supreme Court explicitly held that the RPA is constitutional. 273 Ga. at 113 ("We find no error in the trial court's ruling that Georgia's Recreational

Property Act is constitutional.")[2]; *see also Savage v. State*, 297 Ga. 627, 635 (2015) ("In *Anderson,* this Court rejected a constitutional vagueness challenge to the term 'recreational purposes' as used in the Recreational Property Act.") (internal quotations omitted) (citing GA. CONST. ART. OF 1983, ART. IX, SEC. II, PARA. III(a)(5); *Anderson*, 273 Ga. at 113; and O.C.G.A. §§ 51–3–20 to 51–3–26).

In *Anderson*, the Supreme Court set out specifically to determine the constitutionality of the RPA: "This Court consolidated these three appeals because they all involve challenges to the constitutionality of the Recreational Property Act ('RPA'), OCGA § 51–3–20 *et seq*., and its application to two suits arising out of the bombing in Centennial Olympic Park during the 1996 Olympic Games." *Anderson*, 273 Ga. at 113–14. The court first found that the RPA was not "unconstitutionally vague." *Id.* at 114. The court specifically considered the plaintiff's due process and equal protection rights in its analysis of the RPA. *Id.* at 115 ("We find no merit in appellants' argument that the RPA unconstitutionally violated their due

[2] *See Recreational Property Act, 2 Ga. Real Estate Law & Procedure § 11:63* (7th ed.) ("The Recreational Property Act has been held to be constitutional.") (citing *Anderson*, 273 Ga. at 113); *Standard of care owed to invitees on recreational property, Ga. Law of Torts § 5:17* ("The Georgia Supreme Court and the Eleventh Circuit have upheld the RPA against certain constitutional challenges.") (citing *Anderson*, 273 Ga. at 113 and *Hendrickson v. Georgia Power Co.*, 240 F.3d 966, 973 (11th Cir. 2001)).

process and equal protection rights."). Further examining due process and equal protection considerations, the court held:

> The RPA does not disadvantage a suspect class or interfere with the exercise of a fundamental right and thus it need only bear a reasonable relationship to a legitimate state purpose. *City of Atlanta v. Watson,* 267 Ga. 185(1) (1996). The RPA reasonably promotes the legitimate governmental purpose of making recreational property more accessible to the public and the classification the RPA draws between those persons injured while on recreational property and those persons injured on other premises is rationally related to this legitimate purpose. *See generally Love v. Whirlpool Corp.,* 264 Ga. 701 (1994) (equal protection analysis); *Dept. of Nat. Resources v. Union Timber Corp.,* 258 Ga. 873(4) (1989) (due process analysis).

Id. at 115.

Curiously, while the City cited *Anderson* in its reply brief and while the trial court cited *Anderson* in its order denying the City's Motion for Summary Judgment (in analyzing the applicability of the RPA), the trial court's order did not look to *Anderson* in evaluating the constitutionality of the RPA. (V3/1135-36, V3/1227, V3/1229). The trial court erred in holding that the RPA is unconstitutional and did so without evaluating the most relevant case on the issue: *Anderson*.

Additionally, while not binding upon this Court, the Eleventh Circuit Court of Appeals has provided some context on the constitutionality of the RPA:

> [The plaintiff] also argues that the RPA . . . violates his equal protection rights under both the United States and Georgia Constitutions because it "furnish[es] a gratuity to a narrow class of property owners." The Georgia Supreme Court rejected a similar argument in *Anderson*. . . . We also find no merit to [the plaintiff]'s argument that the RPA unconstitutionally violated his equal protection rights. As the Georgia Supreme Court properly noted: "The RPA does not disadvantage a suspect class or interfere with the exercise of a fundamental right and thus it need only bear a reasonable relationship to a legitimate state purpose." *Id.* at 348 (citing *City of Atlanta v. Watson*, 267 Ga. 185 (1996)). . . . We find that the RPA reasonably promotes the legitimate governmental purpose of making recreational property more accessible to the public and that the classification the RPA draws is rationally related to this legitimate purpose. *See Bah v. City of Atlanta*, 103 F.3d 964, 966–67 (11th Cir. 1997); *see also Anderson*, 273 Ga. at 113 (citing *Love*, 264 Ga. 701). Additionally, we disagree that the RPA's distinction between property owners who make their property available to the public without charge is arbitrary or that it violates the United States or Georgia Constitutions for any other reason.

Hendrickson, 240 F.3d at 973 (citations cleaned up). The Supreme Court has already ruled on the constitutionality of the RPA, which has existed since 1965. The trial court erred in holding otherwise.

ii. <u>The RPA is constitutional as applied.</u>

In addition to incorrectly holding that the RPA is facially unconstitutional, the trial court wrongly held that the RPA is unconstitutional as applied. Specifically, the trial court held that "the contradicting evidence regarding Plaintiff's activities at the time of this incident, as well as the mixed-use nature of this sidewalk, would result in the

disparate treatment of similarly-situated persons without a rational basis, violating the requirement for equal protection of the laws. Ga. Const. ART. 1, §1, ¶2." (V3/1228). The City has not located any reported decision ruling that the RPA is unconstitutional on an as-applied basis. Moreover, in circumstances under which the RPA does not apply, inapplicability is not tantamount to unconstitutionality. The trial court's error is obvious: similarly situated persons would be treated exactly the same. Persons using the City's sidewalks in Savannah's National Historic Landmark District for recreational purposes are subject to the RPA, and those using it for commercial purposes are not. Therefore, the trial court erred in holding that the RPA is unconstitutional on an as-applied basis. As explained in the following enumeration, the RPA bars Appellee's claims.

C. Enumeration of Error No. 2: The trial court committed reversible error in holding that the RPA does not bar Appellee's claims against the City.

The RPA applies in this case and bars appellee's claims. The sidewalk at issue is recreational property, Appellee admits she used it for a recreational purpose (sightseeing), and it is undisputed that she did not pay the City to use it. (V2/75; V2/77; V2/79-80; V2/84; V2/88; V3/950 at Lines 15-17; V3/953 at Lines 14-22; V3/954 at Lines 6-8; V3/963 at Lines 13-16; V3/971 at Lines 5-12; V3/1017 at Lines 16-23).

The RPA, O.C.G.A. § 51-3-20 *et seq.*, limits a property owner's liability for injuries that occur when visitors use its property for recreational purposes. Specifically, it shields from liability a property owner "who either directly or indirectly invites or permits without charge any person to use the property for recreational purposes[.]" O.C.G.A. § 51-3-23. Here, there is no dispute that the City owns the sidewalk in question and that the City did not charge a fee to use it. Thus, the only remaining issues for the trial court to consider were whether Appellee used the sidewalk for a recreational purpose and whether one of the purposes of the sidewalk is to provide a place for public recreation. In establishing whether a landowner maintained the requisite recreational purpose (and is therefore entitled to immunity under the RPA) the following analysis is applied:

> [T]he true scope and nature of the landowner's invitation to use its property must be determined, and this determination properly is informed by two related considerations: (1) the nature of the activity that constitutes the use of the property in which people have been invited to engage, and (2) the nature of the property that people have been invited to use. In other words, the first asks whether the activity in which the public was invited to engage was of a kind that qualifies as recreational under the Act, and the second asks whether at the relevant time the property was of a sort that is used primarily for recreational purposes or primarily for commercial activity.

Mercer Univ. v. Stofer, 306 Ga. 191, 196 (2019) (hereinafter *Stofer I*).

Upon remand by the Supreme Court in *Stofer I*, this Court found that the defendant was entitled to RPA immunity because (1) "the nature of the activity, attending a free concert, was recreational[,]" and (2) "the nature of the property at the time of the concert [was] purely recreational," even though concert-goers indirectly engaged in commercial activity with vendors at the park during the concert. *Mercer Univ. v. Stofer*, 354 Ga. App. 458, 461 (2020) (hereinafter *Stofer II*). Moreover, "[t]he fact that there might have been an indirect commercial benefit is not sufficient to create a factual question." *Id.* at 462 (citing *Stofer I*, 306 Ga. at 192).

The circumstances in the matter *sub judice* are materially indistinguishable from those of *Stofer I* and *II* in that the nature of the activity in which Appellee engaged was recreational and the nature of the property at the time she used it was purely recreational. Looking first to the nature of Plaintiff's activity, "the test [for determining the applicability of the RPA in mixed-use cases] does not preclude consideration of the user's subjective assessment of the activity, but the user's assessment is not the controlling factor." *Anderson*, 273 Ga. at 117. However, the user's subjective assessment remains *a factor*, and Appellee's deposition testimony establishes that she was engaging in sightseeing at the time of her injuries. (V2/75; V2/77; V2/79-80; V2/84; V2/88; V3/950; V3/953-54; V3/963;

V3/971; V3/1017).[3] Furthermore, an objective assessment of Appellee's activities at the time of her injuries establishes that her purpose was recreational in that she was on a pleasure walk to "see[] the parks[,]. . . old buildings[,] . . . plants[,] and the big trees" in a scenic area of downtown Savannah. (V2/75, 79; V3/950 at Lines 15-17; V3/951 at Lines 23-25; V3/952 at Lines 1-6 and 16-20; V3/1017 at Lines 16-23).

---

[3] Appellee executed an affidavit after her deposition in which she stated that she was not sightseeing. (V3/1205 at ¶ 4). However, the testimony of a party who offers herself as witness on her own behalf at trial "is to be construed most strongly against h[er] when it is self-contradictory, vague or equivocal." *Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 30 (1986) (citing *Douglas v. Sumner*, 213 Ga. 82, 85 (1957) and *W & A Railroad Co. v. Evans*, 96 Ga. 481 (1895)). "Once the trial court has eliminated the favorable portions of the contradictory testimony, it must take all testimony on motion for summary judgment '*as it then stands,* and construe it in favor of the party opposing the motion in determining whether a summary judgment should be granted.'" *Prophecy*, 256 Ga. at 28-29 (emphasis in original) (citing *Chandler v. Gately,* 119 Ga. App. 513, 514 (1969)). "The courts concluded that this rule must necessarily be applied to summary judgment proceedings, otherwise, 'any opposing party may, by the simple device of filing conflicting affidavits, get the motion denied. The temptations to perjury are greater in this situation than in a jury trial.... The conflict can easily be avoided. A party knows what he has sworn.'" *Id.* The Court further held:

> [O]n motion for summary judgment a party offered self-contradictory testimony on the dispositive issue in the case, and the more favorable portion of his testimony was the only evidence of his right to a verdict in his favor, the trial court must construe the contradictory testimony against him. This being so, the opposing party would be entitled to summary judgment.

Prophecy, 256 Ga. at 28. Therefore, the *Prophecy* rule requires trial courts, when considering summary judgment motions, to: (1) eliminate all portions of a party's self-contradictory testimony that are favorable to, and left unexplained by, that party; and (2) consider the remaining evidence in favor of the party opposing summary judgment. *Thompson v. Ezor*, 272 Ga. 849 (2000). Appellee's affidavit directly contradicts her deposition testimony regarding her purpose on the City's sidewalk at the time of her injuries. (*See* V3/1205 at ¶ 4; V3/933-1088, *generally*). Therefore, Appellee's testimony must be construed "most strongly against h[er]." *Prophecy*, 256 Ga. at 30.

Next, looking at the City's purpose for the sidewalk, it is evident that a primary purpose of the area where Appellee fell is to provide the public a place to engage in recreation. Specifically, the City introduced evidence that Appellee was sightseeing in Savannah's National Historic Landmark District when she fell, that the Savannah Area Chamber of Commerce promotes "exploring Savannah in 10,000 steps," and that the National Park Service website offers visitors suggestions for taking self-guided tours of the Savannah Historic Landmark District. (V3/1136-37, V3/1139). The activity in which the City invited the public to engage on the sidewalk—sightseeing in a scenic and historic area of downtown—is of a kind that qualifies as a "recreational purpose" under the RPA. *Stofer I*, 306 Ga. at 196; O.C.G.A. § 51-3-21(4) (defining as a "recreational purpose": "viewing or enjoying historical . . . [or] scenic . . . sites").

Furthermore, this case cannot be materially distinguished from *City of Tybee Island v. Gohdino*, in which the Georgia Supreme Court held that a municipal sidewalk was recreational property under the RPA because visitors used it to view the ocean. 270 Ga. 567 (1999), *disapproved of on other grounds* by *Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne*, 278 Ga. 116 (2004). Thus, like the park in *Stofer* and the sidewalk in *Godinho*, the sidewalk where Appellee fell is recreational

property under the RPA. And because Appellee used the sidewalk for the purpose of sightseeing, a recreational purpose under O.C.G.A. § 51-3-24(4), the trial court should have held that Appellee's claims are barred by the RPA.

D. Enumeration of Error No. 3: The trial court committed reversible error in failing to hold that Appellee was a licensee and that the City did not willfully and wantonly injure her.

i. Appellee was a licensee.

Appellee was a licensee because there is no evidence that: (1) the City explicitly or implicitly induced or led her to use the sidewalk where she was injured, nor that (2) she was a customer, servant, or stood in contractual relationship to the City. *Howard v. Gram Corp.*, 268 Ga. App. 466 (2004).[4] The generally "accepted test to determine whether one is an invitee or a licensee is whether the party coming onto the business premises had present business relations with the owner or occupier which would render [her] presence of mutual benefit to both, . . . or was for business with one other than the owner or occupier." *Id.* at 467.[5] And this Court previously decided that a person bicycling on a city roadway to a nearby gas station was a licensee "because he was using the alleyway for his own convenience to reach

[4] *See Georgia Dep't of Transp. v. Strickland*, 279 Ga. App. 753, 754 (2006).

[5] *See Moore-Sapp Inv'rs v. Richards*, 240 Ga. App. 798, 799(1)(a) (1999) and *Restaura, Inc. v. Singleton*, 216 Ga. App. 887(1) (1995).

the back entrance of the gas station." *City of Brunswick v. Smith*, 350 Ga. App. 501, 502 (2019). Applying similar logic seven years later, this Court held that a person walking from a car parked on a city street to a city sidewalk was a licensee of a city. *Strickland*, 279 Ga. App. at 753-54 (holding that where the injured party was "neither a customer, a servant, nor a trespasser," stood in no contractual relationship with the City or the Department, and used the public parking for "her own interest, convenience, and gratification," her status was that of a licensee) (citing O.C.G.A. § 51–3–2 and *Howard*, 268 Ga. App. at 467).

Like the plaintiffs in *Smith* and *Singleton*, Appellee was using the sidewalk for her own convenience and was not engaged in business dealings with the City at the time of her fall. Therefore, Appellee was a licensee.

ii. The City did not willfully and wantonly injure Appellee.

On this issue, the trial court held:

> Assuming, arguendo, that she had the status of a licensee at the time of this incident, Plaintiff has pointed to sufficient evidence creating genuine issues of material fact about whether Defendant had constructive knowledge of the raised paver prior to Plaintiff's trip-and-fall and its alleged failure to maintain its sidewalks. It is also for the jury to decide whether such evidence constitutes a willful or malicious failure to guard or warn, or a failure to use even slight care, in regard to the raised paver as relevant to an RPA immunity waiver under O.C.G.A. § 51-3-2. *Id.*; *Herring vs. Hauk*, 118 Ga. App. 623 (1968).

(V3/1230).

As a licensee, the City only owed Appellee a duty not to willfully and wantonly injure her. *Smith*, 350 Ga. App. at 502. This Court has held that "[g]enerally, 'wilful misconduct' is 'an actual intention to do harm or inflict injury,' and wanton misconduct is 'that which is so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent.'" *Harbin v. Ritch*, 364 Ga. App. 885, 886 (2022) (citing *Brown v. Dickerson*, 350 Ga. App. 137, 138-39 (2019) (internal brackets omitted)). Under this onerous standard, more than a mere possibility of constructive knowledge is required to show willful or wanton conduct. *See Lumley v. Pollard*, 61 Ga. App. 681, 694 (2) (1940) (Allegations that a train engineer had "constructive knowledge" of a dead body on the tracks were insufficient to "sustain the conclusion that the engineer's acts were wilful and wanton.").[6]

In *Harbin*, this Court further held that a property owner "also acts wilfully and wantonly by failing to 'exercise ordinary care to prevent injuring a person who is actually known to be or may reasonably be expected to be, within range of a dangerous act being done or a hidden peril on [the]

[6] Georgia's appellate courts have not expressly ruled that evidence of constructive knowledge alone can give rise to willful and wanton conduct. This case demonstrates that such a ruling is necessary. Where constructive notice is premised solely upon the alleged length of time a defect has existed, it is logically impossible to find that the premises owner acted equivalent in spirit to actual intent.

premises." *Id.*[7] Appellee failed to satisfy her burden. Georgia law merely places upon cities a duty to exercise reasonable care to maintain sidewalks in a reasonably safe condition for ordinary travel, and to remedy or place a safeguard around known defects. *City of Vidalia v. Brown*, 237 Ga. App. 831 (1999).

In *Strickland*, this Court granted summary judgment to the defendants (the Department of Transportation and the City of Sylvania) where a licensee "caught her foot in a pothole or 'depression' in the surface of the right-of-way, tripped and fell, and sustained injuries as a result of her fall." 279 Ga. App. at 753-54. In evaluating wilfulness and wantonness, this Court held that "there is no evidence that the pothole was created, concealed, or maintained wilfully or wantonly, that is, with an 'intent to injure or with any conscious indifference as to infer an intent to injure.'" *Id.* at 755 (citing *Aldredge v. Symbas*, 248 Ga. App. 578, 581 (2001) (a landowner was not liable to licensee who fell into a drainage ditch obscured by shrubbery)).

[7] *See also Dickerson*, 350 Ga. App. at 139 ("[A] possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and (c) the licensees do not know or have reason to know of the condition and the risk involved. Where a licensee has equal knowledge of the dangerous condition or the risks involved, there is no wilful or wanton action on the part of the owner and there is no liability to the licensee.").

Similarly, there is no evidence that the City created, concealed, or maintained wilfully or wantonly any raised paver with intent to injure Appellee or with conscious indifference toward her. The evidence of record establishes that the raised paver at issue constituted a static condition which Appellee could have avoided in the exercise of ordinary care. The record contains no evidence that anything in the City's control obstructed Appellee's view of the raised paver and no evidence that Appellee could not have avoided the alleged hazard in the exercise of ordinary care. Therefore, the trial court should have granted summary judgment to the City on this separate and independent ground.

E. Enumeration of Error No. 4: The trial court erred by failing to hold that the raised paver at issue constituted an open and obvious static condition which Appellee could have avoided in the exercise of ordinary care.

The trial court also erred by not ruling that the alleged raised paver at issue constituted an open and obvious static condition which Appellee could have avoided in the exercise of ordinary care. *See D'Elia v. Phillips Edison & Co., Ltd.*, 354 Ga. App. 696, 699 (2020) (a plaintiff "cannot recover if it is shown that the hazard [upon which she tripped and injured herself] was open and obvious."). "An uneven walkway is a static condition." *Id.* at 698; *Jones Lang LaSalle Operations v. Johnson*, 350 Ga. App. 439, 440 (2019) ("A static condition is one that does not change and is dangerous only if someone

fails to see it and walks into it."). "When a claim involves a static condition, if nothing obstructs the invitee's ability to see the static condition, the proprietor may safely assume that the invitee will see it and will realize any associated risks." *D'Elia*, 354 Ga. App. at 698–99 (citation and punctuation omitted).[8]

Appellee's claims fail as a matter of law because the raised paver that she alleges caused her to fall constituted an open and obvious static condition and nothing within the City's control obstructed her view of that condition. "[T]he relevant inquiry is whether the plaintiff's view of the alleged hazard was obstructed at the time she approached it and was about to traverse the area." *D'Elia*, 354 Ga. App. at 699. In this case, Appellee's view was not obstructed by anything within the City's control – Appellee testified that she failed to observe the raised paver because she "was looking at the trees" and because she "was not looking down and . . . had a person in front of [her]." (V2/75; V2/87; V3/985 at Lines 24-25; V3/989 at Lines 57:10-17; V3/1149). The trial court's order denying summary judgment recognizes that "Plaintiff testified that she could not see the paver before her fall because of her niece-in-law walking directly in front and the fact that she was not looking down." (V3/1223). While a claimant's self-induced obstruction has no bearing on

[8] While Appellee was a licensee, the same standard applies.

the liability of a third party, the trial court inexplicably concluded that the issue was "for the jury to determine." (V3/1230-31); *see Gilchrist v. Meldi Sub, LLC*, 363 Ga. App. 53, 58 (2022), *cert. denied* (Nov. 2, 2022) (citing *Norman v. Jones Lang Lasalle Americas, Inc.*, 277 Ga. App. 621, 623-24 (2006)) ("[W]hen a plaintiff claims he was prevented from seeing the hazard, he must show that the obstruction was 'due to conditions within the defendants' control.'"). The record establishes that nothing in the City's control obstructed Appellee's view of the raised paver.[9] "Therefore, any alleged hazard the [sidewalk] presented was avoidable by [Appellee] in the exercise of reasonable care." *D'Elia*, 354 Ga. App. at 700 (citing *Cherokee Main Street v. Ragan*, 345 Ga. App. 405, 407 (2018)).

The evidence of record establishes that the raised paver at issue constituted a static condition which Appellee could have avoided in the exercise of ordinary care, and the record contains no evidence (a) that anything in the City's control obstructed Appellee's view of the raised paver or (b) that Appellee could not have avoided the alleged hazard in the exercise

[9] Appellee admitted that she could have avoided the hazard if she had been looking, testifying that that if she had seen the raised paver, she "would have stepped over it." (V3/1068 at Lines 13-16). *See D'Elia*, 354 Ga. App at 700 (quoting *McLemore v. Genuine Parts Co.*, 313 Ga. App. 641, 644-45 (2012)) ("Where an obstruction is perfectly obvious and apparent, so that one looking ahead would necessarily see it, the fact that the plaintiff merely failed to look will not relieve her from the responsibility for her misadventure.").

of ordinary care. Therefore, the trial court erred by not granting summary judgment to the City for this separate and independent reason.

VI. CONCLUSION.

For the foregoing reasons, the City respectfully requests that this Court rule that Appellant City of Savannah is entitled to summary judgment for the separate and independent reasons that (1) the RPA is constitutional, applies in this case, and bars appellee's claims; (2) Appellee was a licensee and there is no evidence that the City willfully and wantonly injured her; and (3) the raised paver at issue constituted an open and obvious static condition which Appellee could have avoided in the exercise of ordinary care.

[*Date and Signature on Following Page*]

Respectfully submitted this 27th day of January, 2025.

This submission does not exceed the word count limit imposed by Rule 24.

OLIVER MANER LLP

/s/ Benjamin M. Perkins
PATRICK T. O'CONNOR
Georgia Bar No. 548425
BENJAMIN M. PERKINS
Georgia Bar No. 140997
WILLIAM C. PHILLIPS
Georgia Bar No. 552370

Attorneys for Appellant the Mayor and Aldermen of the City of Savannah

218 West State Street (31401)
Post Office Box 10186
Savannah, Georgia 31412
T: (912) 236-3311
pto@olivermaner.com
bperkins@olivermaner.com
wphillips@olivermaner.com

OFFICE OF THE CITY ATTORNEY

BATES LOVETT
Georgia Bar No. 459568

City Attorney for Appellant the Mayor and Aldermen of the City of Savannah

Post Office Box 1027
Savannah, Georgia 31402
T: (912) 525-3092
blovett@savannahga.gov

CERTIFICATE OF SERVICE

I CERTIFY that I have served the foregoing **APPELLANT'S BRIEF** upon all parties by email to the below counsel of record. I certify that there is a prior agreement among all counsel to allow documents in PDF format sent via email to constitute service in accordance with Rule 6.:

J. Bradley Stevens, Esq.
The Stevens Firm, P.C.
317 W. York Street
Savannah, Georgia 314013
bstevens@stevensfirmpc.com

Eugene C. Brooks, IV, Esq.
Brooks Law Firm
313 W. York Street
Savannah, Georgia 31401
gbrooks@brooks-law.com

This 27th day of January, 2025.

OLIVER MANER LLP

/s/ Benjamin M. Perkins

218 West State Street (31401)
Post Office Box 10186
Savannah, Georgia 31412
T: (912) 236-3311
pto@olivermaner.com
bperkins@olivermaner.com
wphillips@olivermaner.com

PATRICK T. O'CONNOR
Georgia Bar No. 548425
BENJAMIN M. PERKINS
Georgia Bar No. 140997
WILLIAM C. PHILLIPS
Georgia Bar No. 552370

Attorneys for Appellant the Mayor and Aldermen of the City of Savannah