IN THE COURT OF APPEALS
STATE OF GEORGIA

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,	)	
Appellant,	)	
v.	)	Case Number A25A0936
GLORIA McLAMB,	)	On appeal from Chatham County State Court, Civil Action Number STCV2100400
Appellee.	)	

BRIEF OF APPELLEE

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Comes now Appellee Gloria McLamb [McLamb] in support of the Order on appeal and in opposition to the Appellant The Mayor and Alderman of the City of Savannah [City], and states the following:

I. INTRODUCTION

Judge Elizabeth Coolidge correctly held that City's interpretation of the Georgia Recreational Property Act [RPA] would be unconstitutional under "the facts of the case at hand" because of the confusing and nearly limitless immunity sought by City. The City distorts the scope of the RPA, arguing that vacationers forfeit fundamental and substantial rights when walking back to their hotel. Under the City's overbroad distortion, a person of common intelligence cannot know when they are engaged in a "recreational purpose" because the City's definition is nearly limitless. Even City residents who use a public sidewalk when enjoying a work break, a shopping trip or a dinner in the City's downtown would have crossed the line into RPA immunity.

Also, Judge Coolidge correctly applied the RPA's mixed-use analysis in finding that the RPA did not apply. However, the intensive fact analysis required by the mixed-use analysis that is conducted by trial and appellate judges, lawyers, and the occasional jury, illustrates the RPA's constitutional fatal flaw. Judge Coolidge correctly found that the City's constructive knowledge of the

long-existing sidewalk hazard, and the resulting injury caused by the City's failure to perform its ministerial duty, presented jury questions on liability.

II. STATEMENT OF FACTS

A. The Hazard and The Negligence

The City of Savannah's downtown historic district is a business and residential district containing numerous retail businesses, banks, federal office buildings including the district courthouse, county and city government office buildings including the county courthouse, professional offices, college dormitories and classroom buildings, restaurants, museums, churches, entertainment venues, antebellum homes for paid touring, townhomes, private homes, a fire station, a police station, and hotels. There are other historical districts in Savannah, including the Victorian District, Moon River District, Starland District, and Canal District. *See* V2-430 citing Footprints of Savannah Walking Tours at Neighborhoods & Districts https://visitsavannah.com/profile/footprints-savannah-walking-tours/5726 . [This brief cites to the electronic record, Ga. App. Rule 25(b)]. The public sidewalk where McLamb's injury occurred was adjacent to both businesses and residences, including a garage for a Honda car dealership, a bicycle business, trashcans, a parking pad and a fence. V1-388, 389, 428, 429, 525-528; *see* V2- 491-92.

The sidewalk hazard was a raised paver that was more than four times higher than the nationally recognized trip hazard standard of a quarter inch. V1-431,484, 454. The City Code, a City supervisor, and specifications agree that the sidewalk pavers should be level. V1-375, 430, 461. The City recognizes that tree roots can raise pavers approximately a quarter inch a year. V1-475. Based on the hazard's greater than one inch height above grade, a simple computation establishes that the hazard had existed for at least three and a half years. V1-376-77, 475.

The City utilizes a reactionary method, its "work order system," to maintain its sidewalks. V1-439, 475. This means that someone must report the hazard, usually with a 3-1-1 call to the City, before any efforts to maintain a sidewalk will be started. V1-439. Although the City has a Sidewalk Code and knows that the sidewalks will be used by the public, including vacationers that it actively markets for, the City does not inspect the sidewalks to determine if maintenance is needed. V1-373, 382, 438, 439, 461, 475. The Sidewalk Code disallows the use of the sidewalks for any private purpose, stating:

> No person shall use the streets, sidewalks, lanes or squares of the city for private purposes of any sort. They shall be used only as public ways and for the public purposes for which they are intended. V 2-499.

The City could not state the last time that the subject sidewalk had been inspected. V1-475. The City expects its employees who see a sidewalk hazard to

report it with a 3-1-1 call. V1-378, 439, 441. The City agreed that the tripping hazard violated the applicable standards and had existed for an extended period of time. V1- 376, 383-385, 569–70. After Plaintiff's injury was reported, the City's supervisor of the Street Maintenance Department, David Evans, determined that the sidewalk needed maintenance because of the unsafe pavers. V1-376, 569-70.

B. The Occurrence

Plaintiff Gloria McLamb, a 75 year old woman from North Carolina, came to Savannah with family members on April 8, 2019 to celebrate her 85 year old sister's birthday. V2-239-240. They rented rooms in a downtown hotel. V2-241. They planned to stay for three days. V2-238-39. The City's public sidewalks allow access for walking to businesses, including hotels in the downtown area.

On April 9th, the family toured the district, riding on a trolley most of the day. V2-241-42. The trolley would stop at certain designated areas, and the family would get out, sightsee, and then return to the trolley to continue their touring. Id. That afternoon, McLamb and her family got off the trolley and paid to tour the Davenport House Museum. V2- 241-43. After finishing their tour, the family began walking back to their hotel on a public sidewalk. V2- 244, 496.

McLamb's niece-in-law and the niece's husband walked in front of her on

the way back to the hotel. V2-278-80, 357-58. McLamb's shoe caught the trip hazard and she "dropped like a hundred pound bag of sugar." V2- 265-66. Her left wrist and left upper arm bone that fits into her left shoulder socket fractured and she required emergency treatment. V2-281, 294-95. She later underwent shoulder surgery. V2- 296, 317. She continues to suffer physical impairment from her shoulder injury. V2-233, 306, 339-343, 348-49. At the time of her fall, she was not sightseeing or recreating. V2-496.

After explaining that she and her family had been sightseeing during their trolley and Davenport House tours, she stated "We were going to walk back to where we were staying." V2-244. The area that they were walking through was not particularly historic. Photographs of the area where she fell show retail businesses, a parking lot, and a recently built wooden fence. V1-306, 388, 389, 428, 429, 525-528; *see* V2-491-92. Their route was not on the walking tour that the City references. V1-304, -430 *citing* "exploring Savannah in 10,000 steps." The proper context of her sightseeing statement is explained in McLamb's affidavit. V2-496. She was talking with her sister when she fell.

III. ARGUMENT AND CITATION OF AUTHORITY

A. The City's Interpretation of the RPA Is Unconstitutional

1. The RPA's Vagueness Violates Due Process

Constitutional challenges based on a statute's vagueness must be examined "in light of the facts of the case at hand." Anderson v Atlanta Comm. for the Olympic Games, 273 Ga. 113, 114 (2000) *citing* Hall v State, 268 Ga. 89 (1997). In Hall, the Court found that a criminal childcare statute was unconstitutionally vague. Hall, *supra*. 268 Ga. at 89. Under a different set of facts, the Court had considered a vagueness challenge to the same statute and had found it constitutionally definite. Id. at 91 *citing* Horowitz v State, 243 Ga. 441 (1979). In Hall, the State argued that Horowitz protected the statute from all future vagueness challenges. Hall, *supra*. 268 Ga. at 91. The Court disagreed, finding that Horowitz was not controlling, citing both Georgia and U.S. Supreme Court precedent: "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." Id. *citing* Hubbard v State, 256 Ga. 637 (1987) (Clark, J. concurring) (quoting United States v Mazurle, 419 U.S. 544, 550 (1975). A statute may be unconstitutionally vague in some instances, but not in others. Johnson v United States, 576 U.S. 591, 602 (2015) [applying federal constitutional

law].

The RPA, in this instance, must be examined in light of "the facts of the case at hand," and those facts differ from the facts in Anderson. A statute that is so vague and indefinite that persons of common intelligence must guess at its meaning and differ as to its application, violates the first principle of due process protection. Anderson, *supra*. 273 Ga. at 114. In this instance, McLamb was a person of common intelligence. She had no reason to expect that she was forfeiting her tort rights by walking back to her hotel.

Statutory immunity statutes should be strictly construed because they abrogate common law rights. Mayor and Alderman of Garden City v Harris, 302 Ga. 853, 861 (2018) (Hunstein. J. dissenting) [The RPA should be strictly construed]; Couch v Red Roofs, Inc., 291 Ga. 359, 374 (2012) [Strictly construes apportionment statute]; Lanier v McEver, L.P. v Planners & Eng'res Collaborative, Inc. 284 Ga. 204, 212 (2008) [Strictly construes "hold harmless" statute]; Thomas v Henry County Water Auth., 367 Ga. App. 469, 472 (2023) [Strictly construes *ante litem* notice provision].

The question becomes: applying the "the facts of the case at hand," whether the RPA provides adequate notice to a person walking back to their hotel on a City sidewalk that they are forfeiting fundamental and substantial rights.

Fundamental rights are derived from natural and fundamental law; encroachments upon them trigger strict scrutiny. Garner, Black's Law Dictionary 697 (8th ed. 1999). A substantial right is an essential right that is capable of legal enforcement and protection as opposed to a mere technical or procedural right. Garner, *supra.* at 1349. Plaintiff's fundamental and substantial rights at issue, are her right to protection and her tort remedies. Ga. Const. Art 1, §1, ¶1; O.C.G.A. §51-1-1, *et seq*. Substantial rights include the right to recover in tort. Parkside Ctr. v Chicagoland Vending, 250 Ga. App. 607, 611 (2001) [Exculpatory contractual language must be explicit, prominent, clear and unambiguous because it waives substantial rights]; Monitronics Int'l, Inc. v Veasley, 323 Ga. App. 126 (2013) [*en banc*] [Limitation-of-liability clauses are similar to exculpatory clauses because they waive substantial rights and so must be explicit, prominent, clear and unambiguous].

Judge Coolidge's Order describes five hypothetical questions that tested and illustrated the RPA's vagaries concerning both a person's classification and their activity. V2-519. When is a person deemed to be "recreating?" Does the asserted immunity apply to the City's public streets and crosswalks in the downtown district. Id. For instance, would the City enjoy RPA immunity if one of its buses ran a red light in the historic district and crashed into a trolley full of

bachelorette party revelers? According to the City's distortion, RPA immunity would apply because the party attendees would have been engaged in a "recreational purpose."

The "recreational purpose" questions raised by Judge Coolidge raises the issue of whether local residents or visiting attorneys and judges working in Savannah's downtown Historic District who take a break from work and step outside to drink a cup of coffee, or a take a walk for some fresh air or enjoy a moment of relaxation, are forfeiting their substantial tort rights. V2-519. Are these persons engaged in a "recreational purpose" because they are not working at the time and, therefore, vulnerable to suffering the City's negligence without any recourse? What if a person is vacationing in Georgia and then conducts an hour of business before walking back to his hotel. Is he still "recreating" when he walks back to his hotel? What if the person looked at a statute or an antebellum home on their way back to their hotel? Is the person then sightseeing and, therefore, "recreating," or because the person may have attended a business event for an hour, is he then "non-recreating"? The City argues that persons using the sidewalks for recreational purposes are subject to the RPA and those using it for commercial purposes are not. Appellant Brief at 10. However, this simplistic statement begs the question. Persons of common intelligence, including visitors,

vacationers, residents and business people cannot know when they are engaged in a "recreational purpose" and when they are not. Is a shopping trip recreational? Going to dinner? Is the City allowed to arbitrarily determine when it is immune, when someone has forfeited their substantial rights? That is exactly the power that the City seeks, and that Judge Coolidge has correctly denied.

The City's either/or test: "Persons using the City's sidewalks …. for recreational purposes are subject to the RPA and those using it for commercial purposes are not" (Appellant Brief at 10) fails as a usable test because persons may be involved in other purposes, neither recreational nor commercial. People may engage in educational purposes (i.e. going to a museum, library or classroom), religious purposes (i.e. going to church or church gathering), medical or health purposes (walking to reduce or maintain weight). These are a few of the other purposes that the City must disprove in order to obtain summary judgement and disprove at trial to establish the affirmative defense. O.C.G.A. §§ 9-11-56(c), 24-14-1. The either/or dichotomy argued by the City is too blurry for a standard application of the RPA. Is someone engaged in a recreational or commercial purpose when they are walking on a city sidewalk towards or away from an entertainment venue, such as the civic center? Does a person's payment for the entertainment create a commercial use of the sidewalk? McLamb had paid to

enter the museum that she had left before starting her walk back to her hotel.

The City places great emphasis on McLamb's responses to leading questions which McLamb places in context with her affidavit, satisfying the Prophecy Rule. Prophecy Corp. v Charles Rossingnal, Inc., 256 Ga. 27, 30 (1986). Although the McLamb family had been sightseeing that day, they were on their way back to the hotel and had decided to walk rather than take the trolley. Interestingly, the trolley option raises the issue of whether the public road in the City's historic district, that the trolley traveled on free of charge, is also property for which the City can claim RPA immunity. Under the City's interpretation, it could make this claim because the City's ministerial duty is to maintain both the public sidewalks and the public roads for public safety.

The vagaries of the City's extreme position create more questions: Is the City immune when a speeding City bus runs over a vacationer in a crosswalk only in Savannah's downtown historic district or in the City's other historic district where the ministerial duty also applies? Judge Coolidge expressed her concern on the limitless immunity sought by the City for its various historic districts. V2-519. Would the Victorian District, another historical part of Savannah, also be an area where the City can act or fail to act with complete immunity from any tort liability? Id. The statute is silent. No one knows. However, the City markets the

Victorian District as another neighborhood for vacationers to visit. V2-430 citing Footprints of Savannah Walking Tours at Neighborhoods & Districts: https://visitsavannah.com/profile/footprints-savannah-walking-tours/5726.

The "facts of the case at hand" illustrates the interpretation dilemma that would befuddle a person of common intelligence. The attorneys and judge may be exercising more than common intelligence in their professionally-trained review of precedent and statutory construction attempting to define the RPA's scope. The Courts have bent over backwards to accommodate the RPA's vagueness, creating tests involving in-depth legal analysis and jury questions to determine its scope. This continued use of judicial resources demonstrates that a person of common intelligence cannot know when they are engaged in a "recreational purpose" on a covered property and when they are not. Most persons do not have the benefit of a legal education, court opinions or a jury's deliberations in making decisions about whether to walk back to their hotel. Even persons of extraordinary intelligence would not expect the need to engage in such an analysis when deciding whether to go on vacation in Georgia or to walk back to their hotel on a city sidewalk anywhere in Georgia.

Even by reading the statute, a vacationer, a one-day visitor, or a resident would not come to the same conclusion of whether they are included in the

statute's broad "but is not limited to" clause, and so are subject to the Act's forfeiture of a substantial right. O.C.G.A. §51-3-21(4). Judge Coolidge correctly identified the RPA's fatal flaw, its subjective component caused by the open-ended subsection (4) that fails to adequately define "recreational purposes." V2-519 *citing* State v Johnson, 270 Ga. 111 (1998); Hall v State, 268 Ga. 89 (1997); Sliney v State, 260 Ga. 167 (1990) [J. Smith, dissenting]. The open-endedness invites arbitrariness because it is vague.

In Johnson, the vagueness of the term "extensive property damage" was the statute's fatal flaw because it was so indefinite that a person could not know whether they had violated the statute. Johnson, *supra*. 270 Ga. at 112. In Hall, the vagueness of the term "substantial and justified" in a child care statute was the fatal flaw because the language allowed a law enforcement official to arbitrarily decide whether the parent's conduct was prohibited. Hall, *supra*. 268 Ga. at 93-94. In Sliney, the Court found that a county regulation, although inartfully drafted, could be understood by persons of common intelligence. However, Justices Smith and Benham dissented, noting that the decision on whether the conduct was proscribed was inadequately described and left to an arbitrary decision. Sliney, *supra*. at 260 Ga. 169-170 [American flag was not "waste," "litter" or "refuse"].

The RPA's open-ended reference to "recreational purposes" fails to establish

the scope of the immunity. V2-519. Is anyone who is not working, then recreating? The City argues that the immunity is nearly limitless because of the statute's "but not limited to" clause. O.C.G.A. §51-3-21(4). The statute's vagueness continues to consume judicial resources on a *de facto* basis. A different factual scenario for the Courts to consider will be presented every time a person is injured because of a City's negligence while on vacation or while they are doing anything that a city considers a non-commercial purpose at the time of their injury. This continued necessity for in-depth legal analysis demonstrates the RPA's unconstitutional fatal flaw of vagueness. Ga. Const. Art. 1, §1, ¶1.

2. The RPA Treats Similarly Situated Persons Disparately Without A Rational Basis

Protection of persons are the government's paramount duty and shall be impartial and complete. Ga. Const. Art. 1, §1, ¶2. Judge Coolidge explains her equal protection concerns applying the law to the facts of the case at hand. She wrote that the evidence regarding McLamb's activities at the time of her fall and the mixed-use nature of the sidewalk resulted in disparate treatment of similarly situated persons without a rational basis. V2-519. Her finding is preceded by five hypothetical situations demonstrating the irrational treatment. Id.

For another example, imagine two persons walking on the same sidewalk at

the same time. One person is on vacation and has been sightseeing; the other person is delivering overnight mail. Both encounter the same hazard at the same time. Both are injured. Applying the City's interpretation to the above example, only the person delivering overnight mail could recover tort remedies because the vacationer had been sightseeing during the day and so was recreating. However, there is no rational basis for denying tort remedies to the vacationer because the public sidewalk was available to all persons in the City. Applying the City's distortion, the RPA takes the vacationer's rights away and allows the deliveryman's rights to survive. There is no rational basis for this disparate treatment. V2-519.

The facts in this case differ from those in Anderson, because in Anderson the only persons of concern were those attending a recreational event in a city park. Anderson, *supra*. 273 Ga. at 115. This attendance at a public event created a separate class from those persons not attending the event, satisfying the statutory purpose of encouraging owners of land to make land available for public recreation. Id. at 115. There were also distinctions of time because persons who were not attending the event were, by definition, not there at the same time as those attending the event. That distinction does not exist in the above walking-persons example. Both walkers are walking on the same sidewalk and hurt at the same

time. Neither is in a city park or attending a public event. The person's reasons for walking on the sidewalk differ, but that does not create a rational basis for disparate treatment of the walker on vacation because the distinction does not further the RPA's purpose. Regan v State, 317 Ga. 612, 616 (2023). Irrational and arbitrary classifications are forbidden. Id.

A classification must bear a direct relationship to the purpose of the legislation and must not involve a fundamental right. Grissom v Gleason, 262 Ga. 374, 377 (1992) *citing* Wilson v Zant, 249 Ga. 373, 384-85 (1982) [no fundamental right involved]; Home Materials v Auto Owners Ins. Co., 250 Ga. 599, 600 (1983) [rational classification of corporations distinct from persons]; *see also* McDaniel v Thomas, 248 Ga. 632, 637 (1981) [rational basis for classification based on school funding]. The disparate treatment in this case is important because the fundamental right for tort remedies is involved. Grissom, *supra*. 262 Ga. at 377 [Disparate treatment is an issue only when a fundamental right or suspect class is involved.]

There is no rational basis for discriminating against visitors, vacationers, shoppers, or diners who are walking on a public sidewalk in a historic district. The City's distinction between the walkers would be the same as saying that someone wearing slacks can recover tort remedies but someone wearing a dress cannot. Or that someone who was enticed by the City's aggressive tourist industry to visit the

City's downtown historic district is deprived of tort remedies while persons in the same area on business trips (setting aside the possibility of the business visitor's lapse from a purely commercial purpose) still enjoy their tort remedies. Innumerable classification examples, equally irrational and suspect, can be imagined.

Returning to the facts of this case, the City seeks to create a Vacationers' Loss-Of-Rights Doctrine depriving all vacationers, as a matter of law, of their fundamental rights for tort remedies when injured on public land. The RPA's irrational classification has nothing to do with encouraging "recreational purposes" on private lands, which is the RPA's stated purpose. O.C.G.A. §51-3-20. The disparate and irrational treatment is unconstitutional because it has no rational basis to furthering the RPA's purpose. Ga. Const. Art. 1, §1, ¶ 2; V2-519.

B. The RPA Does Not Apply Because of The Nature of The Activity and The Property.

The first holding in Judge Coolidge's Order is that the City's "interpretation of the RPA is too broad and would result in inconsistent applications of the interchange between the RPA and O.C.G.A. §32-4-93." V2-516-17. She noted the purpose of the RPA and then relied on the considerations set forth in Stofer I and Stofer II in analyzing the facts. V2-517 *citing* Mercer Univ. v Stofer, 306 Ga.

191, 191, 194 (2019) [Stofer I] *and* Mercer University v Stofer, 354 Ga. App. 458 (2020) [Stofer II]. She then compared the two-part test that is addressed below and that was created in Stofer I, with the Anderson opinion relied on by the City. V2-517 *citing* Anderson v Atlanta Comm. for Olympic Games, 273 Ga. 113 (2000). Judge Coolidge found questions of fact existed on the City's liability, noting that evidentiary conflicts on the purpose of the property where the injury occurred should be left for jury resolution. V2-518 *citing* Atlanta Comm. for Olympic Games, Inc. v Hawthorne, 278 Ga. 116 (2004) and City of Tybee Island v Godinho, 270 Ga. 567 (1999).

In 1965, the Georgia General Assembly passed the RPA that generally grants private landowners protection from liability if a property owner invites the public to engage in a recreational activity on his property, and the property is of a recreational nature, then the landowner would be protected from liability that could arise from an injury in connection with a person's recreational use of that property. Ga. S. Bill 108, Reg. Sess., 1965 Ga. Laws 476 (codified at O.C.G.A. §§ 51-3-20 to 51-3-26); Stofer I, *supra*. 306 Ga. at 191, 194; Stofer II, *supra*. 354 Ga. App. 458. O.C.G.A. §32-4-93 governs a municipality's ministerial duty to maintain its sidewalks in a safe condition for pedestrian travel. It is important for sidewalks to be maintained at a level grade in order to be safe for pedestrian travel, to qualify as

being in good order under the City's standards, and to be free of tripping hazards. V1-374-75, 385. O.C.G.A. §32-4-93 applies to municipal sidewalk liability cases unless the facts show the RPA applies. Godinho, supra. 270 Ga. 567. O.C.G.A. §32-4-93 applies in this case because the sidewalk involved in McLamb's fall was primarily for public everyday use, rather than primarily recreational property, and because McLamb's activity of walking back to her hotel was not primarily a recreational purpose. V2-517-18.

In order to establish whether a landowner maintained the requisite recreational purpose to be entitled to immunity under the RPA, the true scope and nature of the landowner's invitation to use its property must be determined. In Stofer 1, the Supreme Court set two considerations for determining the RPA's application that the Court of Appeals applied on remand:

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.

Stofer 1, *supra*, 306 Ga. at 191, 194); Stofer II, *supra.* 354 Ga. App. at 462

The first consideration asks whether the activity in which the public was invited or given permission to engage in qualifies as a recreational purpose, and the

second asks whether, at the relevant time, the property was of a sort used primarily for recreational purposes. Id. In citing the above law and the conflicting evidence, Judge Coolidge found that walking on a public sidewalk back to one's hotel room did not satisfy either of the Stofer I and II considerations.

The RPA defines "Recreational purposes" as any of the following or any combination thereof: hunting, swimming, boating, camping, picnicking, hiking, pleasure driving, aviation activities, nature study, water skiing, winter sports, and viewing or enjoying historical, archeological, scenic, or scientific sites. O.C.G.A. §51-3-21 (4). The Plaintiff was not engaged in any of these activities when she fell. V1-424, 425, 428, V2-496. Use of a public sidewalk in a downtown area for traveling from a private antebellum home tour back to your hotel is far different than using a sidewalk to access a beach. City of Tybee Island vs. Godinho, 270 Ga. 567 (1999). In Godinho, the RPA applied to a municipal sidewalk because the sidewalk's primary purpose was to provide beach access. Id. The subject sidewalk in Godinho was not located in a commercial or residential area.

The nature of the property, a public sidewalk, involved in McLamb's fall is not primarily used for recreational purposes and was not being used for a recreational purpose at the time of McLamb's fall. V1-424, 425, 428, V2-496.

The area where the defect existed and the injury occurred had no historical significance with its fences, parking lot, meter machines, trashcans, and local retail businesses. V1- 428, 525, 526, 527, 528. While the McLamb family may have been sightseeing that day on the trolley, at the time of her fall McLamb was not looking at anything with any historical significance. McLamb was talking with her sister and looking at a fence and two small trees in the area. V1-424, 425, 428; V2-496. The opinions relied upon by the City involve properties and activities distinguishable from the public sidewalk involved in McLamb's fall. *See* Godinho, *supra*. 270 Ga. 567 (1999), involving the beach access, city owned land and a city owned sidewalk; Stofer II, *supra*. 354 Ga. App. 458 (2020), involving a public park and an outdoor concert presented by Mercer University; and Hawthorne, *supra*. 278 Ga. 116 (2004), involving Centennial Olympic Park and a scheduled public event.

The City of Savannah Code confirms that the sidewalks cannot be used for private purposes:

> No person shall use the streets, sidewalks, lanes, or squares of the city for private purposes of any sort. They shall be used only as public ways and for the public purposes for which they are intended [See a Certified Copy of the City Ordinance Sec. 4-1001 at Exh. B].

McLamb was not permitted at the time of her fall to use the sidewalk for

private purposes of any sort, i.e. a private sightseeing excursion. Even if incidental sightseeing was involved during the walk back to the hotel, as would any walk anywhere, McLamb's primary purpose was to return to her hotel. V2-496.

The Court in Anderson considered Godinho, *supra.* 270 Ga. 567 (1999), where the primary purpose of the sidewalk property was recreational and Cedeno v. Lockwood, 250 Ga. 799 (1983), where the Court found the primary purpose of the property was not recreational and noted that an important criterion for consideration is the purpose for which the public is permitted to use the sidewalk. As noted in Godinho, the RPA will control when the sidewalk is used primarily for recreational purposes and the other requirements of the RPA are satisfied, and O.C.G.A. §32-4-93 will apply in other cases. Godinho, *supra.* 270 Ga. 567 (1999).

This hazardous sidewalk in this case was open to the public regardless of whether anyone was engaged in "recreational purposes." Distorting the RPA's reach to a sidewalk that is open to the public for all purposes simply because some intermittent and incidental recreation may occur, undermines the statute's plain language and the legislative intent. The distortion would also unjustly relieve a municipality of its duty under O.C.G.A. §32-4-93 to maintain sidewalks and roadways in a condition reasonably safe for ordinary travel. Anderson, *supra*.

273 Ga. 113 (2000); Silingo v. Village of Mukwonago, 156 Wis. 2d 536 (Wis. App. 1990); Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684 (2014). The primary purpose of the sidewalk property is to provide safe off-road pedestrian traffic.

In Camicia, the Washington Supreme Court, in interpreting its RPA that is similar to Georgia's, held that where land is open to the public for some other public purpose, i.e. as part of a public transportation corridor, the inducement of recreational use immunity is unnecessary. Camica, *supra.* 179 Wn.2d at 697. It was illogical to provide immunity on the basis of recreational use when the land would be held open to the public even in the absence of that use. Id. Providing immunity would also unjustly relieve the government of its common-law duty to maintain roadways in a condition reasonably safe for ordinary travel. Id. at 699. Similar to the Georgia RPA, the manifest object of the RPA is to provide free recreational areas to the public on land and in water areas that might not otherwise be open to the public. Id.; O.C.G.A. §51-3-20, et seq.

Judge Coolidge found that questions of fact existed under the Stofer II tests for application of the RPA. In order for RPA to apply, the primary purpose of both the activity and the property must be for "recreational purposes." Stofer II, *supra*. McLamb urges this Court to take a further step, and find as matter of law,

that neither the property nor the activity was covered by the RPA. Evidence on the "nature of the activity" establishes that McLamb's primary purpose was walking back to her hotel at the end of her day. Therefore, the primary purpose of McLamb's use of the sidewalk was for public pedestrian travel. Additionally, the City never invited McLamb to use the sidewalk although the City claims an "indirect" invitation. No invitation was expected and none was provided for her to use the public sidewalk, just as there is no invitation to drivers to use the public roads in the City's downtown historic district. Evidence on the "nature of the property" establishes that McLamb was not invited to use the public sidewalk, that the sidewalk's primary purpose was to provide a place for safe pedestrian travel, and that any sightseeing or recreational enjoyment from using the sidewalk was incidental to its primary purpose. Therefore, the RPA does not apply as a matter of law.

C. Questions of Fact Exist On The City's Negligence, Including Willful And Malicious Failure

A municipal corporation is bound to use ordinary care to keep its public streets and sidewalks in a reasonably safe condition for passage. O.C.G.A. § 32-4-93(a); Grayson v. City of Atlanta, 101 Ga. App. 575 (1960); see V1- 432, also see issue discussed in detail at V1-327-339. The City admitted that, "… To the

extent Plaintiff fell on a City-owned sidewalk, the City admits it has a duty to exercise ordinary care in maintaining that portion of the sidewalk in a reasonably safe condition for ordinary travel." V1-435. The statutory duty of a municipality to keep streets and sidewalks in a reasonably safe condition for travel is ministerial. Phillips v. Town of Ft. Oglethorpe, 118 Ga. App. 62 (1968). A violation that results in injury is actionable. Id.

O.C.G.A. §32-4-93(a) contains three (3) provisions applicable to the City's failure to carry out its duty. The provisions in the statute are separated by the word "or". The first section of the statute addresses whether the City carried out its own policy. The failure to carry out the policy is actionable negligence. O.C.G.A. §32-4-93(a). The second section addresses actual knowledge of a hazard. The third section involves constructive knowledge of the hazard. O.C.G.A. §32-4-93(a) applies to sidewalks. Clark v. City of Atlanta, 322 Ga. App. 151 (2013); Godinho v. City of Tybee Island, 231 Ga. App. 377 (1998); Housing Authority of Atlanta v. Famble, 170 Ga. App. 509, 520 (1984). The City's written policy to accomplish its duty is entitled the City of Savannah's Sidewalk Code. V1-461, 374. McLamb can recover based on O.C.G.A. §32-4-93 without any additional consideration as to whether McLamb is an invitee or a licensee under general premises liability law. *See also* Order, Stewart v The Mayor

and Aldermen of the City of Savannah, No. STCV1100535SA (State Court of Chatham Co. 7/3/2014) attached at V1-502, 508.

Two cases cited by the City can be quickly distinguished. In Smith, there was no evidence of constructive knowledge, and so the City of Brunswick was relieved of responsibility. City of Brunswick v Smith, 350 Ga. App. 501, 503 (2019) [bicyclist hit a pot hole]. Without evidence of how long the hazard had existed, there could be no issue of willful and wanton conduct. Id. In Strickland, plaintiff sued under O.C.G.A. §51-3-1 and so O.C.G.A. § 32-4-93 and constructive notice were not at issue. Ga. DOT v Strickland, 279 Ga. App. 753 (2006). The City is attempting to pigeon hole McLamb as a licensee, ignoring her different status accorded by O.C.G.A. §32-4-93. The liability standard in O.C.G.A. §32-4-93 does not equate to a licensee, but is based on knowledge of the municipality. As the City has admitted that a reasonable care standard applies:

" … the City admits it has a duty to exercise ordinary care in maintaining that portion of the sidewalk in a reasonably safe condition for ordinary travel." V1-435.

Judge Coolidge noted the City's duty, its written policy, and its actual practices. V2-514. She noted the City's admitted problems with maintaining the sidewalks and the "evidence showing that the raised paver existed for a period of

time prior to her trip-and-fall, which creates a factual question about Defendant's duty to maintain its sidewalk in a reasonably safe condition." V2-515. The evidence of the length of time that the hazard had existed created the questions of fact on both the City's negligence and, "potentially, willful and malicious failure to guard or warn, - i.e. failure to use even slight care- in light of its superior knowledge." V2-515.

Let us also recognize the City's inconsistent argument concerning McLamb's sidewalk use. *See* V1-348. In the City's RPA mixed-use analysis, the City argues that permission was indirectly given to McLamb in an effort to satisfy the RPA's invitation requirement. However, in the City's argument in an attempt to saddle McLamb with licensee status, the City argues that it never gave permission to McLamb to use the public sidewalk and that she was "using the sidewalk for her own convenience." Appellant Brief at 11, 16. These positions are inconsistent. Either the City "indirectly invites" use by McLamb or she uses it for her "own convenience." If she is using the sidewalk for her own convenience, rather than by invitation, then the RPA does not apply. The evidence shows that she was using the sidewalk for her convenience to walk back to her hotel. McLamb contended that the City's inconsistent positions were an admission *in judicio*. *See* V1-348. This confusion demonstrates the difficulty with applying

the RPA to a public sidewalk. Camica, *supra*. 179 Wn 2d at 697-99.

However, the RPA also includes a willful and wanton exception that the City equates with a licensee standard of care. The legal duties attributable to a licensee are not applicable to the analysis under the RPA because O.C.G.A. § 51-3-23 states specifically that licensee and invitee status do not apply. The RPA goes on to state at O.C.G.A. § 51-3-25 that, "Nothing in this article limits in any way any liability which otherwise exists: (1) [f]or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity…". This is the language Judge Coolidge used in her finding that questions of fact existed. V2-515.

Judge Coolidge cited the presumption of the City's knowledge of the hazard based on the extended length of time that the hazard had existed. V2-521: Clark v City of Atlanta, 322 Ga. App. 151, 153 (2013). Clark addressed a city's knowledge of a sidewalk hazard. Furthermore, constructive knowledge is ordinarily a jury question. Godinho v City of Tybee Island, 231 Ga. App. at 377, 379 (1998*) rev'd on other grounds*. Evidence of the three and a half years of the hazard's existence creates a presumption and jury question on constructive knowledge. V2-514-15, 520-21.

Under the RPA, the injured party coming within the provisions of that Act

would be obligated to show willful and malicious failure to guard or warn, that is, ***a failure to use even slight care***; whereas a licensee under O.C.G.A. §51-3-2 may recover by showing a lack of ordinary care, which under the circumstances may amount to willful and wanton negligence. Herring vs. Hauk, 118 Ga. App. 623, 624 (1968); *see also* V1-345-48. Wanton conduct is that which is so reckless and indifferent to the consequences as to be equivalent in spirit to actual intent. City of Brunswick v Smith, 350 Ga. App. 501, 503 (2019). This indifference is an I-don't-give-a-hoot-if-someone-is-injured-from-the-hazard-I-know-about attitude.

Judge Coolidge's finding that questions of fact existed on the issue is supported by the evidentiary record and inferences that may be drawn from the evidence. V2-52; O.C.G.A. §9-11-56(c). Evidence includes the over three and half years that the hazard had existed, the City's constructive knowledge of the hazard, the City's violation of its own written policies, and the lackadaisical attitude that the City exhibited in performing a ministerial duty involving public health. The record evidenced "***a failure to use even slight care***." V2-521.

D. Questions of Fact Exist on Whether the Hazard Was Open and Obvious

To obtain summary judgement, the City must defeat any possibility of a factual question on the issue. O.C.G.A. §9-11-56(c), Roberts v Connell, 312 Ga.

App. 515, 561 (2011). All doubts are resolved in favor of the non-movant. Id. Judge Coolidge found that "… it is for the jury to determine Plaintiff's reasonableness under the circumstances at the time of her fall." V2-521-22.

The City relies on an action brought under O.C.G.A. §51-3-1 for its argument. D'Elia v Phillips Edison & Co., 354 Ga. App. 696 (2020). In D'Elia, there was nothing obstructing the plaintiff's view of the static hazard. No one was walking in front of her. This fact alone is adequate to distinguish D'Elia from the instant action. Sherman v Dollar Tree Store, Inc., 2020 U.S. Dist. LEXIS 203316, 14 n. 1 (N.D. Ga. 9/18/2020) [Slight movement of the hazard caused claim to be distinguished from a static condition].

It is important to note that D'Elia, is specifically cited as being part of a line of opinions that the Supreme Court of Georgia considers out-of-line with precedent established in Robinson v. Kroger Co., 268 Ga. 735 (1997). Givens v. Coral Hospitality-GA, LLC, 317 Ga. 282, 285-86 (2023). The Supreme Court of Georgia has held that the fact that the injured party's view was not obstructed or that the hazard could have been seen had the injured party looked at the ground may be considered by the fact finder as evidence that the injured party reasonably should have seen and avoided the hazard, but that evidence taken alone does not ordinarily establish a claimant's failure to exercise ordinary care as a matter of law.

Robinson, *supra*., 268 Ga. at 739-43. Instead, the question of whether the injured party's own negligence precludes her recovery is whether, taking into account all the circumstances existing at the time and place of the fall, the injured person exercised the prudence that an ordinarily careful person would use in a like situation. Givens, *supra*., 317 Ga. at 285 *citing* Robinson at 748(2)(b). Therefore, unless the evidence on that question is plain, palpable, and undisputed, that question is for the jury. Id. Robinson limited the open and obvious defense, also known as the plain view defense, as an automatic bar to a recovery and placed the question in the hands of the jury to determine if the facts show that the injured party was acting reasonably at the time of the loss. Givens, *supra*. 317 Ga. at 283-87; Robinson, *supra*., 268 Ga. at 739-49. This analysis applies to both static defect cases and transient substance cases. Id. Questions about reasonableness under the circumstances are quintessentially questions for the fact finder. Id.

Before McLamb tripped and fell, she was looking at two little trees, the fence on the left side of the sidewalk, and was speaking with her sister beside her on her left. V1-424-45, 428. McLamb's niece-in-law was walking in front of her next to her husband. Id. McLamb has circled the raised paver that caused her to fall in the City's Exhibit 5 to her deposition. V2-416. McLamb has explained that she could not see the paver before her fall because she was not

looking down and the paver was hidden by the person in front of her. V1- 404, 389.

McLamb was not required to continuously look for hazards and defects during her visit. Jackson v. Waffle House, Inc., 245 Ga. App. 537 S.E.2d 188 (2000). She was walking on a sidewalk with other people walking in front of her that obstructed the view of the sidewalk ahead. V1- 404, 389. McLamb had a right to assume that the City had exercised reasonable care to make the sidewalk safe. Shepherd v. Winn Dixie Stores, 241 Ga. App. 746, 527 S.E.2d 36 (1999), Barrett v. J.H. Harvey, Company, 240 Ga. App. 508, 523 S.E.2d 912 (1999), Anderson v. Turton Development, 225 Ga. App. 270, 483 S.E.2d 597 (1997); O.C.G.A. §32-4-93; and City of Savannah Sidewalk Code at V1-461. In contrast to McLamb's lack of knowledge, the evidence shows that the hazard was present for years establishing the City's constructive knowledge and the City knew that people from out of town would likely be using the sidewalk.

Balancing the City's superior knowledge with McLamb's total lack of knowledge, Judge Coolidge correctly found that questions of fact existed concerning the comparative negligence of the parties. V2-521-22.

IV. CONCLUSION

McLamb respectfully requests that this honorable Court fully affirm the Order of Judge Coolidge entered on October 30, 2024 and remand this case for trial.

Respectfully submitted this 13th day of February 2025.

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

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CERTIFICATE OF SERVICE

This is to certify that a prior agreement exists between the parties and this day a copy of Appellee's Brief was served via electronic service to the following:

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This 13th day of February 2025.

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