AFFIRMATIVE DEFENSES, CONTRIBUTORY NEGLIGENCE, ASSUMPTION OF THE RISK AND NON-PARTY APPORTIONMENT IN THE CONTEXT OF BOATING TORTS

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October 5, 2012

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I. Vicarious Liability of Boat Owners Under Georgia Law

In Georgia, boat owners can be held liable not only for their own negligence but also for the negligent acts of others they permit to operate their boat. O.C.G.A. § 51-1-22 provides for vicarious liability on the part of the owner of a boat as follows:

> The owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of the vessel, whether the negligence consists of a violation of the statutes of this state or of neglecting to observe such ordinary care in such operation as the rules of common law require. The owner shall not be liable, however, unless the vessel is being used with his or her express or implied consent. It shall be presumed that the vessel is being operated with the knowledge and consent of the owner if, at the time of the injury or damage, the vessel is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family. ...

Under O.C.G.A. § 51-1-22, "the owner's liability is predicated entirely upon the owner's consent to the use of the boat." Gunn v. Booker, 259 Ga. 343, 345 (1989). As long as the owner consented to another operating his boat, however, the owner will be subject to liability for any injury or damage negligently caused by the person operating his boat.

In Gunn, the plaintiffs were injured while riding in a motorboat owned by the defendant. At the time of the accident, the motorboat was being driven by the defendant's brother. It was undisputed that the defendant had not given his brother express permission to use his boat at the time of the accident, but the defendant subsequently testified that he would not have objected to his brother using the boat. The defendant's brother testified that he believed at the time that his brother would not have objected to him using the boat. The plaintiffs sued the defendant-owner, alleging

he was liable pursuant to O.C.G.A. § 51-1-22 and for negligent entrustment of the boat. The trial court held that O.C.G.A. § 51-1-22 was unconstitutional and granted summary judgment in favor of the defendant-owner on both of plaintiffs' claims, and the plaintiffs appealed.

In upholding the constitutionality of O.C.G.A. § 51-1-22, the Supreme Court in Gunn identified several purposes behind the statute: (i) to "protect injured plaintiffs from irresponsible, judgment-proof drivers"; (ii) to "place the financial burdens created by irresponsible drivers on the . . . boat's owner, who can best protect himself from the loss by purchasing insurance and who has set in motion the events leading up to the injury by giving consent to the driver"; and (iii) to "discourage owners from lending their . . . boats to reckless drivers." Gunn, 259 Ga. at 345 (1). The Supreme Court also held that the plaintiffs were entitled to a presumption pursuant to O.C.G.A. § 51-1-22 that the defendant's brother was driving the boat with the defendant's permission at the time of the accident, since "brother" is one of the persons specifically listed in the statute. Id. at 346 (2). The Supreme Court affirmed the grant of summary judgment on the plaintiffs' negligent entrustment claim, however, holding that there was no evidence of actual knowledge on the part of the defendant that his brother was intoxicated, incompetent to handle the boat due to intoxication, or had exhibited "a pattern or habit of recklessness" in driving the boat in the past. Id. at 347 (3).

II. Statutes and Regulations Imposing a Duty of Care on Boat Operators in Georgia

O.C.G.A. § 52-7-18 imposes several "rules of the road for boat traffic" which apply to watercraft on Georgia's coastal or inland waters:

> § 52-7-18. Rules of the road for boat traffic
>
> (a) All vessels operating on the coastal waters of this state shall conform to the "Steering and Sailing Rules" established by Section II, Rules 11 through 18, of the International Navigation Rules Act of 1977, as amended.
>
> (b) All vessels operating on the inland waters of this state shall conform to the "Steering and Sailing Rules" established by Subpart II, Rules 11 through 18, of the Inland Navigation Rules Act of 1980, as amended. [1]

[1] The Inland Navigation Rules Act of 1980, including the "Steering and Sailing Rules" contained in that Act, was repealed in its entirety effective May 17, 2010 pursuant to the Coast Guard and Maritime Transportation Act of 2004. *See* Pub. L. 108-293, 118 Stat. 1028, § 303(a) (2004); *see also* 75 Fed. Reg. 19544, 19546 (Apr. 15, 2010). The federal "Steering and Sailing Rules" for both inland and coastal/ international waterways can be viewed at http://www.navcen.uscg.gov/?pageName=navRulesContent. The federal "Steering and Sailing Rules" may apply directly as a matter of federal law to watercraft traveling on waterways in Georgia that are considered "inland waters of the United States." *See* 33 U.S.C. § 2001(a); Muhs v. River Rats, Inc., 586 F. Supp. 2d 1364, 1370 (S.D. Ga. 2008), *citing* Diesel "Repower," Inc. v. Islander Invs. Ltd., 271 F.3d 1318, 1322 (11th Cir. 2001) ("Federal maritime law controls when a tort occurs on navigable waters"); O'Dwyer v. B & K Constr. Co., 324 Fed. Appx. 370, 374 (5th Cir. 2009) (explaining that "navigable waters" for purposes of admiralty jurisdiction and federal regulatory authority are "those that have been used to transport interstate or foreign commerce").

(c) It shall be the duty of each operator to keep his vessel to the starboard or right side of the center of any channel, stream, or other narrow body of water; provided, however, this provision shall not give to the operator of a sailing vessel the right to hamper, in a narrow channel, the safe passage of another vessel which can navigate only inside that channel.

(d) Powered vessels approaching nonpowered vessels shall reduce their speed so that their wake shall not endanger the life or property of those occupying the nonpowered vessel.

(e) Whenever a vessel approaches a bend, point, or other blind area, it shall be the duty of the operator to:

(1) Move as far to the right or starboard as possible;
(2) Reduce speed to allow for an unexpected stop if necessary; and
(3) Sound a blast of eight to ten seconds' duration on a sounding device if such a device is carried.

(f) No person shall operate any vessel or tow a person or persons on water skis, an aquaplane, a surfboard, or any similar device on the waters of this state at a speed greater than idle speed within 100 feet of any vessel which is moored, anchored, or adrift outside normal traffic channels, or any wharf, dock, pier, piling, bridge structure or abutment, person in the water, or shoreline adjacent to a full-time or part-time residence, public park, public beach, public swimming area, marina, restaurant, or other public use area. This subsection shall not be interpreted to prohibit any person from initiating or terminating water skiing from any wharf, dock, or pier owned by such person or used by such person with the permission of the owner of said wharf, dock, or pier nor shall it be interpreted to prohibit the immediate return of a tow vessel to a downed water skier.

(g) No vessel shall run around or within 100 feet of another vessel at a speed greater than idle speed unless such vessel is overtaking or meeting such other vessel in compliance with the rules of the road for vessel traffic.

(h) No vessel shall be operated in such a manner as to ride or jump the wake of another vessel within 100 feet of such other vessel unless the vessel is overtaking or meeting such other vessel in compliance with the rules of the road for vessel traffic and, having passed or overtaken such other vessel, the operator of the passing or overtaking vessel shall not change or reverse course for the purpose of riding or jumping the wake of such other vessel within 100 feet of such other vessel.

(i) Subsections (f), (g), and (h) of this Code section shall not apply to ocean-going ships or to tugboats or other powered vessels which are assisting ocean-going ships during transit or during docking or undocking maneuvers.

Various provisions contained in Title 52, Chapter 7 of the Georgia Code regulate the type of equipment required of watercraft in Georgia. For example, O.C.G.A. § 52-7-11 provides specific requirements regarding the type, number, and color of lights that must be in use on watercraft. O.C.G.A. § 52-7-13 denominates certain portions of Georgia's inland and coastal waters as "boating safety zones" during all or part of the year and limits the size and type of watercraft that may be used on certain lakes within the state. O.C.G.A. § 52-7-16 requires the use of specific equipment and limits the

timing of towing persons on water skis, aquaplanes, surfboards, and similar devices. O.C.G.A. § 52-7-17 contains restrictions on the speed and load of watercraft, prohibits operation of a watercraft "at a speed greater than is reasonable and prudent under the conditions," and requires the operator of the vessel to "have regard for the actual and potential hazards then existing."

Counties and municipalities are permitted to enact their own regulations for particular waterways under some circumstances, as long as those regulations are more stringent than the ones provided by state law. O.C.G.A. § 52-7-21(b). As a result, it is important to ensure that a particular lake or waterway is not subject to any additional county or local ordinance or regulation. There are also federal regulations that may apply to persons operating watercraft on Georgia's coastal and inland waterways.

The Georgia Department of Natural Resources (DNR) has published a "Handbook of Georgia Boating Laws and Responsibilities." The DNR Handbook, which can be viewed online at http://boat-ed.com/assets/pdf/handbook/ga_handbook_entire.pdf, is a "guide to Georgia's boating laws for recreational boaters." For example, the Handbook provides three basic rules for avoiding boat collisions:

> To prevent collisions, every operator should follow the three basic rules of navigation:
>
> - Practice good seamanship.
> - Keep a sharp lookout.
> - Maintain a safe speed and distance.

(Handbook of Georgia Boating Laws and Responsibilities, Ga. Dept. of Natural Resources, p. 13.) Similarly, the Handbook contains a list of several examples of "unlawful and dangerous operation" of watercraft which, in addition to potentially subjecting the operator to criminal liability, could constitute negligence:

> These dangerous operating practices are illegal in Georgia:
>
> - **Reckless Operation** of a boat or PWC is the disregard for the safety of persons or property. Examples are:
>   - Water-skiing or dropping water-skiers close to swimmers, launching ramps, or other boaters
>   - Jumping the wake of another boat within 100 feet of that boat or buzzing other boats
>   - Causing damage from the wake of your boat or PWC
>
> - **Improper Distance** is not maintaining a proper distance while operating a boat or PWC or while towing a person on water skis or any similar device. The following operations are illegal.
>   - Operating a boat or PWC or towing a person on water skis or any similar device at greater than idle speed within 100 feet of a:
>   - Moored or anchored boat or any boat that is adrift
>   - Dock, pier, or bridge
>   - Person(s) in the water
>   - Shoreline adjacent to a full- or part-time residence

        - Public park or beach or swimming area
        - Marina, restaurant, or other public use area
    - Running around or within 100 feet of another boat at greater than idle speed unless you are overtaking or meeting the other boat in compliance with the rules for encountering other boats
    - Following closely behind another boat, jumping the wake of the other boat, or changing course or direction in order to jump the wake of another boat

- **Failure to Regulate Speed** is operating a boat or PWC at speeds that may cause danger, injury, damage, or unnecessarily inconvenience either directly or by the effect of the boat's wake. It is illegal to:
    - Fail to regulate your speed near swimming areas, docks, moored boats, and boats engaged in fishing.
    - Operate a boat or PWC faster than is reasonable and prudent under the conditions (weather or boat traffic).

- **Overloading** is loading the boat beyond the recommended capacity shown on the capacity plate installed by the boat manufacturer.

- **Riding on the Bow or Gunwale** is illegal if the boat is not equipped with a railing or some other retaining device. As a boat operator, you are prohibited from allowing your passengers to ride on the bow or gunwale.

(DNR Handbook, pp. 44-45.)

Operating a boat or personal watercraft while under the influence of alcohol or drugs, in addition to being illegal, can constitute negligence. The "legal limit" for blood-alcohol content while boating is the same as for operation of a motor vehicle – 0.08% for persons 21 years or older and 0.02% for those under 21.

Violating any of the applicable "rules of the road," equipment requirements, or other laws or regulations applicable to the use of a watercraft can subject the operator to a claim of negligence or negligence *per se*. Under Georgia law, where a statute, ordinance, or mandatory regulation imposes an affirmative duty upon the defendant, failure to comply with that statute, ordinance, or mandatory regulation may constitute negligence *per se*. Hubbard v. Dept. of Transp., 256 Ga. App. 342, 350 (2002); *see also* OCGA § 51-1-6. Of course, "negligence per se does not equate to liability per se," so the plaintiff will have to show a causal relation between the defendant's alleged failure to comply with the rule at issue and the plaintiff's alleged injuries. Combs, 287 Ga. App. at 13; Norman v. Jones Lang LaSalle Amers., Inc., 277 Ga. App. 621, 629 (2006); Walter v. Orkin Exterminating Co., 192 Ga. App. 621, 624 (1989).

Even when a defendant is negligent or negligent *per se*, however, there are a variety of defenses that may be available. If proven, the defenses outlined below can eliminate or diminish a defendant's liability in a boating tort case.

III. Contributory Negligence, Comparative Fault, and Assumption of the Risk in the Context of Boating Torts

Depending on the facts of a given case, the defendant in a boating tort case may have a litany of defenses available. Some of the most powerful defenses are those that allow the defendant to point to the negligence of the plaintiff or a non-party. As with any other negligence claim, the plaintiff in a boating tort case will be precluded from recovering in whole or in part if the plaintiff, by exercising ordinary care, could have avoided the consequences of the defendant's negligence. O.C.G.A. § 51-11-7. As long as the plaintiff's negligence does not exceed that of the defendant, however, the plaintiff is not denied recovery, but rather his recovery will be diminished by the proportion of fault assigned to him by the jury. Union Camp Corp. v. Helmy, 258 Ga. 263 (1988). One type of contributory negligence occurs when the plaintiff intentionally and unreasonably exposes himself to a danger created by the defendant's negligence and the plaintiff knows or has reason to know of that danger. Cobb Venture v. Donaldson, 256 Ga. App. 131, 567 S.E.2d 750 (2002), *citing* RESTATEMENT (SECOND) OF TORTS, § 466(a).

Similarly, where the evidence permits, the defendant in a boating tort case can rely on the doctrine of assumption of the risk as an affirmative defense to the plaintiff's claims. For example, an experienced water skier likely assumes the risk of falling while water skiing; a person who swims in an area he knows is frequented by heavy boat traffic arguably assumes the risk of being struck by a boat; and a person who elects to kayak without a lifejacket likely assumes the risk of drowning. As in any other tort case, even where the plaintiff's conduct in a boating tort case does not rise to the level of assumption of the risk, it may still be the basis for a finding of contributory negligence or comparative fault on the part of the plaintiff.

In order to prevail on a defense of assumption of 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, 631 S.E.2d 408 (2006).

> 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. The result is that the defendant is simply under no legal duty to protect the plaintiff.

Hackel v. Bartell, 207 Ga. App. 563, 564 (1993); Lundy v. Stuhr, 185 Ga. App. 72, 75, 363 S.E.2d 343, 345, *citing* Prosser, *Law of Torts* at 303 (2nd ed.).

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 v. McEachern, 271 Ga. 805, 808 (2) (1999); Garner v. Rite Aid of Ga., Inc., 265 Ga. App. 737, 739-40 (2004) (physical precedent only). Unlike the

defense of 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).

As now-Justice Blackwell wrote in a recent full-court decision of the Georgia Court of Appeals, however, "assumption of the risk does not require an accurate assessment of the precise probability that a danger will be realized and an injury sustained, only an appreciation that the danger exists." Kane v. Landscape Structures, Inc., 309 Ga. App. 14, 19, fn. 4 (2011). Furthermore, 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 faculties, 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 more objective standard to hold that summary judgment was appropriate on the basis of the plaintiff's assumption of the risk of injury in several contexts.[2]

Earlier this year, the Supreme Court of Georgia issued an opinion reaffirming the vitality of the assumption of the risk doctrine, even in cases where the plaintiff claims a

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[2] 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.

lack of subjective knowledge of the specific risk or danger at issue. In Landings Association, Inc. v. Williams, 728 S.E.2d 577, 2012 Ga. LEXIS 566 (2012), the plaintiffs sued two entities that owned and managed the planned residential and golf community where the plaintiffs after 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 had 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, the decedent, who was "house-sitting" for the plaintiffs, decided to go for a walk near one of the lagoons close to the plaintiffs' home. The next morning, her body was found in the lagoon. The plaintiffs alleged that the decedent had been killed by an alligator that was subsequently found in the lagoon.

This incident represented the first known alligator attack within the community. It was undisputed, however, that the plaintiffs' decedent knew prior to the incident that alligators inhabited the premises. Indeed, her son-in-law testified that on one occasion, she was riding with him through the community when he stopped the car to allow her to observe an alligator. The son-in-law recalled the decedent telling him on that occasion that she did not want to be anywhere near alligators. The decedent's son-in-law also testified that "there was never any reason to" discuss with her how to behave around wild alligators, because she "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." Williams, 728 S.E.2d at 579. The Court went on to hold that since she knew that wild alligators were dangerous, her decision "to go for a walk at night near a lagoon in a community in which she knew wild alligators were present . . . indisputably shows that [the decedent] either knowingly assumed the risks of walking in areas inhabited by wild alligators or failed to exercise ordinary care by doing so." Id. at 580.

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 Supreme Court rejected that argument, however, holding that "[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, 728 S.E.2d at 580.

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.

With regard to boating tort cases in particular, assumption of the risk and contributory negligence will often be viable defenses simply because a body of water and a known risk of drowning is typically involved. The Georgia Court of Appeals has held that "[t]he danger of drowning in water is a palpable and manifest peril, and the fear of water and of drowning is instinctively present in young children as a matter of law." Brazier v. Phoenix Group Mgmt., 280 Ga. App. 67, 71 (1) (2006) (internal brackets omitted).[3] Similarly, a plaintiff was held to have assumed the risk of injury from striking the bank of a waterway while waterskiing where he knew the area was too narrow to waterski safely; and a plaintiff was deemed to have assumed the risk of electrocution and serious burns where the plaintiff had been warned to look out for a downed, exposed power line prior to going onto a lake in his sailboat and the injury occurred when the mast of the plaintiff's sailboat contacted the exposed power line. *See* Knowles v. Vickery, 172 Ga. App. 593 (1984); Mann v. Hart County Elec. Membership Corp., 180 Ga. App. 340 (1986).

In any event, assumption of the risk, contributory negligence, and comparative fault remain viable defenses in boating tort cases. Even in cases where summary judgment may not be appropriate, these defenses can be the basis for directed verdict or a jury verdict at trial, and a finding of assumption of the risk will serve as a complete bar to recovery by the plaintiff.

IV. Issues Relating to Liability of the Co-Owner of a Boat Under O.C.G.A. § 51-1-22

As outlined above, O.C.G.A. § 51-1-22 renders the owner of a boat vicariously liable for the negligence of another person operating the boat with the owner's express or implied consent. The statute expressly provides that consent will be implied where the boat is operated by the owner's "spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family." O.C.G.A. § 51-1-22.

O.C.G.A. § 51-1-22 does not specifically address the situation where two or more people jointly own a boat and one co-owner is operating the boat outside the presence of

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[3] *See also* White v. Ga. Power Co., 265 Ga. App. 664 (2004) (applying same rule to children nine and twelve years old); Spooner v. City of Camilla, 256 Ga. App. 179 (2002) (holding as a matter of law that 13-year-old boy was charged with understanding of the inherent danger of water even though the boy was "slow" in school); Bowers v. Grizzle, 214 Ga. App. 718 (1994) (physical precedent only) (holding as a matter of law that 32-month-old child had natural fear of water); McCall v. McCallie, 48 Ga. App. 99 (1933) (holding that nine-year-old child was charged with knowledge, as a matter of law, of danger in drowning in a pool or lake).

the other co-owner(s). However, by expressly providing that operation of a vessel by the above enumerated list of persons *will* result in a presumption that vessel was being operated with the owner's consent, the absence of "co-owner" in this list suggests that no such presumption of consent exists when the vessel is being operated by a co-owner. *See* GeorgiaCarry.Org, Inc. v. City of Roswell, 298 Ga. App. 686, 690, n.7 (2009) ("It is a well-established canon of statutory construction that the inclusion of one implies the exclusion of others.").

The plaintiff in a case involving an absent co-owner of a boat will argue that O.C.G.A. § 51-1-22 is clear in providing that *any* owner of a boat is liable, regardless of whether he is the sole owner or a co-owner. The plaintiff will also argue that by agreeing to own a boat jointly with another person, each co-owner has consented to the other co-owner's use of the boat at any time. That is, the plaintiff may argue that co-ownership amounts to an ongoing grant of consent by each co-owner to the other to use the jointly-owned watercraft. The plaintiff may also contend that since O.C.G.A. § 51-1-22 contains an exception from an owner's liability for use of a boat without the express or implied consent of the owner, the absence of any explicit exception for co-owners indicates that the General Assembly did not intend for any such exception to apply.

There is no Georgia case addressing the applicability of O.C.G.A. § 51-1-22 to the co-owner of a boat being operated by the other owner of the boat. However, longstanding Georgia law suggests that co-owners of personal property can neither "consent" nor withhold consent to another co-owner's use of the jointly owned property; it is generally recognized that one co-owner has the power to use the entirety of the piece of jointly owned personal property without the consent of the other co-owner.[4]

In the case of Miles v. Harrison, 223 Ga. 352 (1967), the plaintiff sued two co-owners of a riding lawnmower, Miles and Phillips, for injuries to the plaintiff's son arising from an incident in which Phillips' six-year-old son was using the mower. Phillips' son had purposely driven the lawnmower close to the plaintiff's son in an effort to scare him, at which point he ran over several rocks, one of which was kicked up by the lawnmower's rotary blade and struck the plaintiff's son in the eye. The plaintiff's claims against Miles were based solely on his alleged duty, as owner of the lawnmower in question, to prevent it from being used by an incompetent operator to the detriment of others. Miles filed a demurrer to the plaintiff's complaint, arguing that he had no right or duty to restrict the use of the jointly-owned lawnmower by Phillips' son. The trial court denied Miles' demurrer and the Georgia Court of Appeals affirmed, holding that "Miles, as an alleged co-owner, had the right and duty to control the use of the mower by a third party, in the absence of any allegations disclosing a relationship whereby he had relinquished such right and duty exclusively to the other owner or another person." Miles v. Harrison, 115 Ga. App. 143, 150 (1967).

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[4] *See* Koutras v. Lazarus, 122 Ga. App. 870, 873 (1970) ("It is elementary that neither co-owner has the right to possession of their vehicle to the exclusion of the other."); Morden v. Mullins, 115 Ga. App. 92, 94 (1967) ("Each co-owner [of personal property] has a right to the use of the whole, subject to the rights of the other co-owners."). *See also* Roger A. Cunningham, William B. Stoebuck, and Dale A. Whitman, *The Law of Property*, § 5.3, at 194 (2nd ed. 1993) ("[T]he interests of . . . cotenants . . . carry[] with them equal rights of possession and enjoyment.")

The Supreme Court of Georgia granted Miles' petition for *certiorari* and reversed the decision of the Court of Appeals and the trial court. In holding that Miles was entitled to judgment as a matter of law on all of the plaintiffs' claims notwithstanding Miles' co-ownership of the mower, the Supreme Court explained:

> We would not know, and counsel fails to show us how Miles, holding only joint ownership in the personalty, could control Phillips who also owned it jointly with him. In such circumstances neither law nor equity *can* place any responsibility on Miles for what Phillips did and **which he was helpless to prevent**. ... There is nothing properly alleged to carry the case to a consideration of the alleged dangers attending an improper use of the mower, the incompetency of the child to whom Phillips entrusted it, or the pebbly condition of the yard, since none of these are chargeable to Miles who was not using it, and it was not being used for his benefit.

Miles, 223 Ga. at 354-55 (emphasis supplied). Several other jurisdictions have reached similar conclusions regarding the legal impossibility of one co-owner consenting or refusing to consent to the use by another co-owner of a jointly-owned item of personal property.[5]

Thus, a boat co-owner will argue that the statutory requirement of "consent" cannot be shown on the part of an absent co-owner to the use of a jointly-owned boat by another co-owner of the boat. As courts in other states have held with regard to the use of motor vehicles, the co-owner would argue that each co-owner of a boat "uses it in his or her own right and not by permission of the other." Neale, 585 A.2d at 202. A co-owner would argue that under the reasoning applied in Miles and similar cases, O.C.G.A. § 51-1-22 would not impose vicarious liability on a co-owner of a boat for the use of the boat by another co-owner, because neither co-owner has any right to control or prevent the other co-owner from using the boat.

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[5] *See, e.g.*, Neale v. Wright, 585 A.2d 196, 202 (Md. Ct. App. 1991) ("Where a motor vehicle is jointly owned each joint owner has the right to use and control the vehicle without the permission, knowledge and approval of the other. Each uses it in his or her own right and not by permission of the other...."); Parker v. McCartney, 338 P.2d 371, 372 (Ore. 1958) (holding that co-owners "are equal in status and ownership" with respect to the jointly-owned item of property, and "[t]here is no position of superiority [as between co-owners] giving the right of control"); Whistler v. Shoemaker, 502 S.W.2d 237, 239 (Tex. Ct. App. 1973) ("[C]o-owners are equal in status. There is no position of superiority giving the right of control."); Christensen v. Hennepin Transp. Co., 10 N.W.2d 406, 414 (Minn. 1943) ("An assertion of control or direction as to operation [by one joint owner] could properly be resisted by the [other] joint owner."); Hyer v. Caro, 17 Fla. 332, 341 (1879) ("Part owners or tenants in common cannot maintain suits against each other for the possession, or for their conduct in relation to the common property, because each part owner has the right of possession and may detain it as against the others...."); Weidenhammer v. McAdams, 98 N.E. 883, 885 (Ind. Ct. App. 1912) ("In order that one tenant in common of real property or co-owner of personal property may bind the other with respect to such property, consent on the part of the other is essential. ... Under ordinary circumstances neither tenant in common can bind the estate or person of the other by any act in relation to the common property, not previously authorized or subsequently ratified, for co-tenants do not sustain the relation of principal and agent to each other nor are they partners.").

In any event, the Georgia Supreme Court has made clear that the requirement of O.C.G.A. § 51-1-22 that the boat be used with the owner's "express or implied consent" is not satisfied merely by showing that the boat "had not been stolen, or borrowed without any authorization whatsoever." Wallace v. Lessard, 248 Ga. 575, 577 (1981). Rather, the plaintiff who seeks to impose vicarious liability under O.C.G.A. § 51-1-22 must come forth with affirmative evidence showing that the boat was being used *with* the owner's consent. Id. Where two people are co-owners of a boat, one co-owner is entitled to use the boat without the consent of anyone else, including the other co-owner; in fact, the absent co-owner cannot withhold consent to the other co-owner's use of the boat. As a result, it would appear that O.C.G.A. § 51-1-22 does not apply to co-owners of a boat.

While not addressing the specific issue of the applicability of O.C.G.A. § 51-1-22 to a co-owner, the Supreme Court of Georgia has explained the rationale behind the statute. As outlined above, the Supreme Court has explained that the purposes of O.C.G.A. § 51-1-22 and similar "owner-consent statutes" are (i) to "protect injured plaintiffs from irresponsible, judgment-proof drivers"; (ii) to "place the financial burdens created by irresponsible drivers on the car's or boat's owner, who can best protect himself from the loss by purchasing insurance **and who has set in motion the events leading up to the injury by giving consent** to the driver," and (iii) to "discourage owners from **lending** their automobiles or boats to reckless drivers." Gunn v. Booker, 259 Ga. 343, 345 (1989) (emphasis supplied).[6] Thus, a co-owner would argue that in any instance where the co-owner who is operating the boat in question at the time of an incident is covered by liability insurance, none of the three rationales set forth by the Georgia Supreme Court in Gunn would have any application, and imposing liability on the absent co-owner would not serve the stated purposes of O.C.G.A. § 51-1-22.

In addition, the co-owner of a boat may argue that the application of O.C.G.A. § 51-1-22 to an absent co-owner of a boat would be unconstitutional. Specifically, the argument would be that application of O.C.G.A. § 51-1-22 to create liability on the part of an absentee co-owner of a boat who cannot consent and has not consented to use of the boat by another co-owner would violate the due process and equal protection clauses of the Georgia Constitution and the United States Constitution, including Article I, section I, paragraphs I, II, and XVII of the Georgia Constitution and the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.

In order to pass muster under the equal protection clause of the Georgia and U.S. Constitutions, the legislative classification made by the statute must "bear a rational relationship to a legitimate end of government not prohibited by the constitution." Daniel v. Amicalola Elec. Membership Corp., 289 Ga. 437, 441 (2011); Nichols v. Gross, 282 Ga. 811, 813 (2007). More specifically, the "rational relationship" test requires that any statutory classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Clark v. Singer, 250 Ga. 470, 472 (1983); *see also* Shessel v. Stroup, 253 Ga. 56, 58-59 (1984).

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[6] *See also Prosser and Keeton on Torts*, *supra*, § 73, at 522-23, 527-28.

The Supreme Court of Georgia has previously addressed and upheld the constitutionality of O.C.G.A. § 51-1-22, although not in the context of its application to the co-owner of a boat. In Gunn v. Booker, 259 Ga. 343 (1989), the Supreme Court analogized O.C.G.A. § 51-1-22 to automobile "owner-consent" statutes, holding that both passed constitutional muster for the same reasons. Specifically, the Court explained that O.C.G.A. § 51-1-22 and other types of "owner-consent" statutes were constitutional because such statutes served "several valid state purposes, and **are based upon the owner's consent to use the vehicle**." Gunn, 259 Ga. at 345 (emphasis supplied).

The Supreme Court in Gunn also specifically distinguished the case of Frankel v. Cone, 214 Ga. 733 (1959), *overruled in part on other grounds*, Lott Inv. Corp. v. Gerbing, 242 Ga. 90, 93 (1978). In Frankel, the Georgia Supreme Court declared unconstitutional a Georgia statute that "ma[de] the owner of a motor vehicle liable if the vehicle [was] being used in the prosecution of the business of or for the benefit of such owner, even though operated without notice to her or without her knowledge and without her consent, express or implied." Id. at 736. The Georgia Supreme Court held that statute to be violative of the due process clause of both the U.S. Constitution and the Georgia Constitution, explaining as follows:

> To hold this statute constitutional, would be to hold a party liable for the negligent conduct of another, even though a trespasser were operating the vehicle against the express orders of the owner, and irrespective of how careful or free from negligence the owner was, the only condition being that it be operated for the benefit of the owner.
>
> The ruling of this court in *Lloyd Adams, Inc. v. Liberty Mutual Ins. Co.*, 190 Ga. 633, 641 (10 S. E. 2d 46), that, "[t]o allow any recovery on the basis stated by the statute would deprive the defendant of property without due process of law, would authorize a recovery without liability, and would compel payment without fault," is equally applicable to this statute.

Id. at 736-37.

Moreover, in affirming the constitutionality of O.C.G.A. § 51-1-22 in Gunn, the Georgia Supreme Court specifically distinguished a situation wherein a vehicle was "being used . . . without the knowledge and consent of the owner." Id. at 345, n.3, *quoting* Phillips v. Dixon, 236 Ga. 271, 275 (1976).

The co-owner of a boat would contend that the Georgia Supreme Court's rulings in Frankel and Gunn show that O.C.G.A. § 51-1-22 would be unconstitutional if applied to the co-owner of a boat who lacked knowledge that the boat was being used by another co-owner of the boat. Since the absent co-owner would have no right to control when or how the other co-owner operated the boat, he would argue that it cannot be said that any liability assigned to the absent co-owner in connection with the other owner's use of the boat would be "based upon the owner's consent to use the vehicle." Gunn, 259 Ga. at 345. Rather, the absent co-owner would argue that he could not possibly have

prevented the other co-owner from using the boat, and, thus, application of O.C.G.A. § 51-1-22 to impose liability on the absent co-owner "would hold [him] liable for the negligent conduct of another . . . irrespective of how careful or free from negligence [the absent co-owner] was . . . ." Frankel, 214 Ga. at 736. The co-owner would contend that as the Supreme Court held with respect to the statute at issue in Frankel, "[t]o allow any recovery on the basis stated by [O.C.G.A. § 51-1-22] would deprive [the absent co-owner] of property without due process of law, would authorize a recovery without liability, and would compel payment without fault[.]" Id. at 736-37.

The co-owner might also argue that the application of O.C.G.A. § 51-1-22 to an absent co-owner would run afoul of the "rational relationship" test because assigning liability to the co-owner would not bear *any* relation to the stated purposes of the statute. For one thing, an absent co-owner would be liable under the statute even where the allegedly negligent co-owner of the boat had significant liability insurance coverage. Clearly, this would not advance the stated purposes of the statute of "protect[ing] injured plaintiffs from irresponsible, judgment-proof drivers" and "plac[ing] the financial burdens created by irresponsible drivers on the car's or boat's owner, who can best protect himself from the loss by purchasing insurance." Gunn, 259 Ga. at 345. The argument would continue that an absent co-owner, being without any right to consent or to withhold consent to his co-owner's use of the boat, cannot be said to have "set in motion the events leading up to the injury by giving consent to the driver." Id. Finally, the co-owner would contend that imposing liability on him would do nothing to "discourage owners from lending their automobiles or boats to reckless drivers," since there would be no "lending" taking place where the other co-owner exercises his right to use the boat.

Thus, the absent boat co-owner would contend that imposing liability on him would not bear a "substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Clark v. Singer, 250 Ga. 470, 472 (1983); *see also* Shessel v. Stroup, 253 Ga. 56, 58-59 (1984). Accordingly, it arguably would be unconstitutional to apply O.C.G.A. § 51-1-22 to the co-owner of a boat who was not present at the time of the accident in question, did not grant permission to use the boat at the time of the accident in question, and could not have *prevented* his co-owner from using the boat at the time of the accident in question.

The absent co-owner of a boat also could contend that applying O.C.G.A. § 51-1-22 to impose liability under those circumstances would violate the prohibition against excessive fines contained in the Georgia Constitution and the U.S Constitution. The excessive fines clauses contained in Article I, Section I, Paragraph XVII of the Georgia Constitution and the Eighth Amendment of the U.S. Constitution apply to civil cases as well as criminal matters. Colonial Pipeline Co. v. Brown, 258 Ga. 115 (1988). In Brown, the Supreme Court of Georgia held those constitutional provisions applied to the imposition of punitive damages in civil cases, reasoning that "the purpose of the deprivation [through a punitive damages award] is among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence," and that the prohibitions against excessive fines in the Georgia and U.S. Constitutions were "intended as a protection from **all** excessive monetary penalties," specifically including

those in civil cases. Brown, 258 Ga. at 120 (emphasis supplied). In explaining when an award of punitive damages would not run afoul of the constitutional prohibitions against excessive fines, the Georgia Supreme Court explained:

> Typical of the torts for which such damages may be awarded are assault and battery, libel and slander, deceit, seduction, alienation of affections, malicious prosecution, and intentional interferences with property such as trespass, private nuisance, and conversion. **But it is not so much the particular tort committed as the defendant's motives and conduct in committing it which will be important as the basis of the award.**

Brown, 258 Ga. at 122, *quoting* Prosser and Keeton, Handbook on the Law of Torts, pp. 8-11 (5th ed. 1984).

An absent co-owner of a boat might argue that applying O.C.G.A. § 51-1-22 to the co-owner of a boat who was not present at the time of the incident that caused the plaintiff's injuries, who could not have prevented the other co-owner of the boat from using the boat, and who is not even alleged to have been negligent, arguably would violate the prohibition against excessive fines contained in the Georgia Constitution and the U.S Constitution. Under those circumstances, the co-owner would contend, O.C.G.A. § 51-1-22 would create strict liability on the part of the co-owner of a boat, without requiring or even permitting the jury to consider the co-owner's "motives and conduct" as would be required for an award of punitive damages, for example, to pass constitutional muster. Accordingly, the absent co-owner of a boat could argue that O.C.G.A. § 51-1-22 would violate the prohibition against excessive fines contained in the Georgia Constitution and the U.S. Constitution.

V. Fault of Non-Parties and The Impact of the Supreme Court of Georgia's Recent Decisions in *McReynolds v. Krebs* and *Couch v. Red Roof Inns* in the Boating Liability Context

One of the most popular areas of discussion in tort cases in Georgia over the past several years has been apportionment of fault to non-parties. Since the enactment of Senate Bill 3 in 2005, defendants in tort cases may seek to apportion fault to non-parties who were negligent or otherwise at fault for the plaintiff's injuries. *See* O.C.G.A. § 51-12-33(d). This can be invaluable in cases where the plaintiff cannot locate or simply chooses not to sue another person or entity who was to some degree at fault with respect to an incident. Non-party apportionment allows defendants to counter the strategy of many plaintiffs of suing only the "deep pocket" and permits a jury to apportion fault for the plaintiff's injuries – and, thus, responsibility for the plaintiff's claimed damages – to all of the persons or entities who may have been at fault for the plaintiff's injuries and damages.

Until very recently, many plaintiffs had attempted to block non-party apportionment in cases where a non-party was alleged to have acted intentionally or recklessly. In Couch v. Red Roof Inns, Inc., 291 Ga. 359 (2012), however, the Supreme Court of Georgia rejected an argument that a jury should not be permitted to apportion

fault to a non-party tortfeasor where the non-party committed an intentional tort. Although Couch was a premises liability case, the Supreme Court's holding clearly impacts apportionment to non-parties in other types of tort cases as well:

> The statutory scheme is designed to apportion damages among "all persons or entities who contributed to the alleged injury or damages" — even persons who are not and could not be made parties to the lawsuit — a scheme that makes no sense if persons whose intentional acts that contributed to the damages are excluded.

Couch, 291 Ga. at 362 (1). Any damages awarded to the plaintiff must be apportioned as between the parties and non-parties at fault regardless of whether the plaintiff himself is found to be at fault as well. McReynolds v. Krebs, 290 Ga. 850, 852 (2012).

The rationale and holding of the Supreme Court in Couch regarding the non-party apportionment statutory scheme applies equally well in boating tort cases. Given that boat collisions and other boating torts often involve negligence or fault on the part of multiple persons, non-party apportionment represents an important tool available to defendants in those cases. Importantly, however, it appears that some evidence of the non-party's alleged fault for the plaintiff's claimed injuries and damages must be presented in order for the issue of non-party apportionment to be submitted to the jury. *See* McReynolds v. Krebs, 290 Ga. 850, 852 (1) (2012). Generally this is not an issue since the plaintiff will present evidence as to how the incident in question occurred. In cases where the nature of the alleged negligence or fault of the defendant and the non-party differs, however, the defendant may need to present evidence in order for the non-party's name to appear on the verdict form.

The law has also changed regarding contribution between defendants. In the wake of the Supreme Court's decision in McReynolds, defendants are not permitted to seek contribution from other at-fault parties or non-parties, even if they have settled with the plaintiff. *See also* O.C.G.A. § 51-12-33(b).