THE LAST HURRAH FOR LAST CLEAR CHANCE?

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Georgia law recognizes a doctrine designed to prevent a jury from assigning *any* fault, or contributory negligence, to a plaintiff. It is the last-clear-chance doctrine.[1] This doctrine originated in jurisdictions applying the harsh, common-law rule under which a plaintiff's recovery was barred if the plaintiff was found to be guilty of even 1 percent contributory negligence.

Because its purpose is to prevent the assignment of *any* negligence to the plaintiff, the doctrine is a potent weapon for a plaintiff. When it is submitted incorrectly, the harm to the defendant is palpable and undeniable. As one court put it: "The last-clear-chance doctrine is a very just and a salutary rule to be applied in a proper case, but its misapplication is fraught with great danger and often leads to unjust results, because it always invites a jury to disregard or excuse contributory negligence. . . ."[2] Indeed, the cases, including Georgia cases, in which improper submission of a last-clear-chance instruction was held to require a new trial are *legion*.[3]

I. Georgia should abandon the last-clear-chance doctrine.

Now that Georgia has adopted apportionment of fault, a strong case can

be made that jurors should no longer be instructed on the last-clear-chance doctrine. Courts elsewhere have abolished last-clear-chance instructions after adopting comparative negligence.[4] As one commentator explained in the Harvard Law Review nearly 75 years ago, "The whole last-clear-chance doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar, and serves no useful purpose in jurisdictions which have enacted apportionment statutes."[5] More recent commentary explains that the doctrine of last clear chance has crumbled under legislative acts and judicial decisions adopting comparative negligence.[6]

Georgia adopted comparative fault in 2005, and it should follow the example of other jurisdictions by eliminating the last-clear-chance doctrine. The doctrine no longer serves a legitimate purpose, and "a doctrine that has caused as much confusion among the legal profession as this one has is certain to be potentially misleading and confusing to a lay jury. . . ."[7] The best that can be said for the last clear chance doctrine is that it has "generated massive amounts of litigation and require[s] complicated logical analysis few juries [are] capable of performing."[8]

II. If Georgia does not abandon the last-clear-chance doctrine, the suggested pattern jury instruction should be revised.

If Georgia does not abandon last clear chance, Georgia Suggested Pattern Jury Instruction 60.210 should be revised. The suggested instruction states:

> People are under an obligation to use ordinary care to avoid injuring others after finding them in a dangerous place,

> regardless of how they got there, and are liable for the failure to do so. This rule is known as the Last clear chance doctrine. The Last clear chance doctrine only applies when it is proved by a preponderance of the evidence that the plaintiff(s) placed himself/herself/themselves in danger because of his/her/their own negligence, the defendant actually knew of the plaintiff's (plaintiffs') danger, and the defendant had opportunity to take action to avoid the injury to the plaintiff(s) by the use of ordinary care under the conditions and circumstances that existed at that time but failed to do so. If you find such to be proved, then the failure of the defendant to use ordinary care under such circumstances to avoid the injury to the plaintiff(s) would be considered the proximate cause of the plaintiff's (plaintiffs') injuries.[9]

Georgia's suggested pattern jury instructions have, on occasion, been found to state the law incorrectly.[10] The pattern instruction on last clear chance does not correctly state the law because Georgia cases, including the cases cited as the source for the pattern instruction, make clear the last-clear-chance doctrine does not apply unless the plaintiff is in a state of peril from which the plaintiff is unable to extricate herself.[11] In Georgia, as elsewhere, the plaintiff *must* show that

by his own negligence, he put himself in a perilous position "from which he could not extricate himself."[12] This is an essential element.[13] The inescapable-peril element is omitted from the pattern jury instruction, and it therefore misstates the law. There is some authority for the notion the last-clear-chance doctrine also applies when the plaintiff's peril is escapable, but the plaintiff is oblivious to the peril.[14] The suggested pattern jury instruction, however, does not instruct on that alternative either, and it thus misstates the law as well.[15]

III. Until the last-clear-chance doctrine is abolished, practitioners should keep these points in mind about its application.

The last-clear-chance doctrine applies only when the defendant actually knew of the plaintiff's peril.[16] It does not apply when a defendant merely should have known of the danger.[17] The Georgia Court of Appeals has emphasized this point: "The doctrine simply has no application unless the defendant knew of the plaintiff's perilous situation and had opportunity to take proper evasive action to avoid injuring him. It does not apply to a 'should know' or 'should have known' situation."[18] There must be evidence that the defendant had "an opportunity to take evasive action after he became aware of the impending collision."[19]

In one case, for example, the Georgia Court of Appeals reversed the trial court's judgment and remanded for a new trial when a last-clear-chance instruction was improperly given in the absence of evidence to support the conclusion the defendant saw and knew of plaintiff's perilous position.[20] The defendant's vehicle struck the plaintiff while he was leaving a liquor store after the owner refused to sell him wine in

view of his apparent state of inebriation. Witnesses testified it was dark outside. The court held that giving a last-clear-chance instruction was reversible error because there was no evidence "that the defendant saw and knew of the plaintiff's perilous position and that he realized or had reason to realize his helpless condition."[21]

If a plaintiff invokes the "oblivious to the peril" basis for submitting a last-clear-chance instruction, the defendant should be aware of authority supporting an argument this "oblivious to the peril" theory is not available when the danger to which the plaintiff claims obliviousness is one which an ordinary person can be charged with knowledge of, such as the dangers associated with a railroad track.[22] By logical extension, this authority would also apply to charge a plaintiff with knowledge of the dangers of, for example, changing the tire on a car at night when the vehicle is partially on the roadway. Further, there must be evidence that it was possible for the defendant to discover the plaintiff's obliviousness.[23]

Also, the last-clear-chance doctrine does not apply unless the plaintiff placed himself in the position of peril as a result of his own negligence.[24] Again, the whole purpose of giving a last-clear-chance instruction is to prevent the assignment of *any* negligence to the plaintiff.[25] This is precisely why plaintiffs often seek a last-clear-chance instruction—to prevent the jury from assigning any contributory negligence to the plaintiff and to avoid the resulting reduction in the amount of recoverable damages under Georgia's comparative negligence statute.[26]

When a plaintiff seeks a last-clear-chance instruction and argues for the jury to apply the doctrine, the plaintiff is in

effect admitting his own contributory negligence. This is important because if the jury assigns no negligence to the plaintiff, and a reviewing court concludes a last-clear-chance instruction should not have been submitted, it is likely to conclude that submitting the instruction was harmful error. The analysis goes like this:

1. There was evidence plaintiff was contributorily negligent, as necessarily conceded by the plaintiff's request for a last-clear-chance instruction.
2. The jury assigned no contributory negligence to the plaintiff.
3. The last-clear-chance instruction told the jury it did not have to assign any contributory negligence to the plaintiff if the defendant had the last clear chance to avoid the accident.
4. It is possible that the instruction caused the jury to find no contributory negligence on the plaintiff's part.
5. Thus, the court is "unable to say" the instruction "could not have misled the jury."[27]
6. This means that if giving the Last-clear-chance instruction was error, the case must be retried.[28]
7. Giving a last-clear-chance instruction will be error when (i) the instruction misstates the law (as with the suggested pattern instruction), or (ii) the evidence does not support the giving of the instruction.[29] The evidence will not support submission of a last-clear-chance instruction unless there is some evidence of each of the following elements:
   - The plaintiff placed himself in danger

because of his own negligence;

- He was in a position of inescapable peril or was oblivious to his peril;
- The defendant actually knew of the plaintiff's peril or obliviousness; and
- The defendant had the opportunity to take action to avoid the injury to the plaintiff by the use of ordinary care and failed to do so.[30]

IV. Conclusion

Georgia should abolish the last-clear-chance doctrine. The doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar. It serves no useful purpose in jurisdictions, such as Georgia, which have enacted apportionment statutes.[31] Furthermore, the doctrine is confusing for jurors, the bench, and the bar. Until the doctrine is abolished, the suggested pattern jury instruction should be revised to include the essential element of the plaintiff's inability to escape the peril. And courts should be sure not to give a last-clear-chance instruction unless there is evidence both that the plaintiff's peril truly was inescapable and that the defendant had actual knowledge of the plaintiff's peril at a point when a reasonable person could act on that knowledge and, through the exercise of ordinary care, avoid injuring the plaintiff.

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[1] *See* O.C.G.A. § 51-11-7 ("If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases, the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.").

[2] Zettler v. City of Seattle, 279 P. 570, 572 (Wash. 1929).

[3] *See, e.g.*, Fouts v. Builders Transport, Inc., 222 Ga. App. 568, 474 S.E.2d 746 (1996); Ellis v. Dalton, 194 Ga. App. 114, 116, 389 S.E.2d 797, 799 (1989); Conner v. Magnum, 132 Ga. App. 100, 105, 207 S.E.2d 604, 609 (1974); Smith v. Mobley, 185 Ga. App. 462, 364 S.E.2d 597 (1987); Cent. of Ga. R. Co. v. Little, 126 Ga. App. 502, 191 S.E.2d 105 (1972); John J. Woodside Storage Co. v. Reese, 105 Ga. App. 602, 125 S.E.2d 556 (1962); Bayne v. Turner, 236 N.E.2d 503 (Ind. Ct. App. 1968); Brandelius v. City & County of San Francisco, 306 P.2d 432 (Cal. 1957); Graybill v. Clancy, 291 P. 87 (Okla. 1930); Vaughn v. Oates, 37 S.E.2d 479 (W. Va. 1946); Wilson v. Chesapeake & Ohio R. Co., 324 N.W.2d 552 (Mich. Ct. App. 1982); Simmers v. DePoy, 184 S.E.2d 776 (Va. 1971); Wilson v. Sereno, 461 P.2d 514 (Ariz. Ct. App. 1970); Stallings v. Dick, 210 N.E.2d 82 (Ind. Ct. App. 1965); Miller v. Atchison, T. & S.F. Ry. Co., 332 P.2d 756 (Cal. Ct. App. 1958); Nichols v. Spokane Sand & Gravel Co., 379 P.2d 1000 (Wash. 1963); Miles & Sons Trucking Serv. v. McMurtrey, 341 F.2d 9 (10th Cir. 1965); Brock v. Marlatt, 191 N.E. 703 (Ohio 1934); Hickambottom v. Cooper Transp. Co., 329 P.2d 609 (Cal. Ct. App. 1958); Thomas v. Boklage, 170 S.W.2d 348 (Ky. Ct. App. 1943); Cotterll v. Gehle, 114 N.E.2d 482 (Ohio Ct. App. 1951); Ratlief v. Yokum, 280 S.E.2d 584, 588 (W. Va. 1981); Schwandt v. Bates, 397 P.2d 244 (Idaho 1964); J.D. Ball Ford, Inc. v. Roitman, 206 So.2d 661 (Fla. Ct. App. 1968); Drinnon v. Smith, 503 S.W.2d 197 (Tenn. Ct. App. 1973); Rollman v. Morgan, 240 P.2d 1196 (Ariz. 1952); Cavitt v. Ferris, 269 F.2d 440 (5th Cir. 1959); Grossman v. Hudson Transit Corp., 96 N.Y.S.2d 674 (N.Y. App. Div. 1950); Kentucky & W. Va. Power Co. v. Lawson, 240 S.W.2d 843 (Ky. Ct. App. 1951); Graham v. Milsap, 290 P.2d 744 (Idaho 1955); Gordon v. Cozart, 110 So.2d 75 (Fla. Ct. App. 1959); Sherman v. William M. Ryan & Sons, 13 A.2d 134 (Conn. 1940); Cinncinati St. Ry. Co. v. Keehan, 186 N.E. 812 (Ohio Ct. App. 1932); Illinois Cent. R. Co. v. Pigott, 181 So.2d 144 (Miss. 1965); Capital Transit Co. v. Grimes, 164 F.2d 718 (D.C. Cir. 1947); Walker v. City of New York, 450 N.Y.S.2d 814 (1982); Box v. S. Ga. Ry. Co., 433 F.2d 89 (5th Cir. 1970).

[4] *See, e.g.*, French v. Grigsby, 571 S.W.2d 867, 867 (Tex. 1978); Hull v. Taylor, 644 N.E.2d 622, 624-25 (Ind. Ct. App. 1994); Bookhoven v. Klinker, 474 N.W.2d 553, 555-57 (Iowa 1991); Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981); Wendland v. Ridgefield Const. Servs., Inc., 462 A.2d 1043 (Conn. 1983); Callesen v. Grand Trunk W. R. Co., 437 N.W.2d 372, 377 (Mich. Ct. App. 1989); *see also* Spahn v. Town of Port Royal, 499 S.E.2d 205 (S.C. 1998) (holding doctrine has been subsumed by adoption of comparative negligence but jury may still be instructed on its elements) *but see* Vlach v. Wyman, 104 N.W.2d 817, 819 (S.D. 1960) ("Considered as a rule of proximate cause the common law doctrine of last clear chance is not incompatible or in conflict without our statutory rule of comparative negligence."); Jernigan v. Tart, 758 S.E.2d 481 (N.C. Ct. App. 2014) (holding that trial court erred in refusing to instruct jury on last-clear-chance doctrine).

[5] Malcom M. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225, 1251 (1940).

[6] HENRY WOODS & BETH DEERE, COMPARATIVE FAULT § 8.2 at 172 (3d ed. 1996).

[7] Gordon v. Cozart, 110 So.2d 75 (Fla. Ct. App. 1959).

[8] Matthew J. Moore, *Missouri, State of Confusion for Comparative Fault in Strict Liability Contexts*, 64 UMKC L. REV. 759, 764 (1996).

[9] Georgia Suggested Pattern Jury Instructions – Civil 60.210.

[10] *See, e.g.*, Clark v. Rush, 312 Ga. App. 333, 718 S.E.2d 555, 557 (2011) ("Today, we conclude that the pattern instruction on comparative negligence [§ 60.141] no longer is an accurate statement of the law."); Smith v. Finch, 285 Ga. 709, 710, 681 S.E.2d 147, 150-51 (2009) (holding that pattern instruction 62.311 was not a correct statement of Georgia law).

[11] *See, e.g.*, Smith v. Mobley, 185 Ga. App. 462, 463, 364 S.E.2d 597, 598 (1987); Townsend v. Wright, 220 Ga. App. 324, 469 S.E.2d 281 (1996*);* Nelson v. Hirsh, 1986 U.S. Dist. LEXIS 25990, at *1, *5 (S.D. Ga. 1986); *see also* Stallings v. Dick, 210 N.E.2d 82, 95 (Ind. Ct. App. 1965) (last-clear-chance instruction *must* include element of plaintiff's duty to extricate herself from position of peril); Haber v. Pac. Elec. Ry. Co., 248 P. 741 (Cal. Ct. App. 1926) ("The requested instruction omits entirely the ability of the plaintiffs to extricate themselves from the impending peril. . . ." * * * "[I]t will be readily

perceived that the requested instruction is deficient.").

[12] *Townsend*, 220 Ga. App. at 325, 469 S.E.2d at 282.

[13] Stallings v. Cuttino, 205 Ga. App. 581, 583, 422 S.E.2d 921, 923 (1992); Shuman v. Mashburn, 137 Ga. App. 231, 235-36, 223 S.E.2d 268, 271-72 (1976).

[14] *See* Lovett v. Sandersville R. Co., 72 Ga. App. 692, 696, 34 S.E.2d 664, 666 (1945).

[15] *Cf.* Stewart v. Capital Transit Co., 108 F.2d 1 (D.C. Cir. 1939) (Last-clear-chance instruction was defective because did not require that plaintiff's peril be either inescapable or that plaintiff was oblivious to danger).

[16] Palmer v. Stevens, 115 Ga. App. 398, 400, 154 S.E.2d 803, 807 (1967).

[17] Fouts v. Builders Transport, Inc., 222 Ga. App. 568, 571, 474 S.E.2d 746, 752-53 (1996).

[18] *Stallings*, 205 Ga. App. at 583, 422 S.E. 2d at 923-24; *see also* Shilliday v. Dunaway, 220 Ga. App. 406, 409, 469 S.E.2d 485, 488 (1996); Whitley v. Gwinnett County, 221 Ga. App. 18, 23-24, 470 S.E.2d 724, 730 (1996); Hickambottom v. Cooper Transp. Co., 329 P.2d 609, 613 (Cal. Ct. App. 1958).

[19] Rios v. Norsworthy, 266 Ga. App. 469, 472, 597 S.E.2d 421, 426 (2004); Grayson v. Yarbrough, 103 Ga. App. 243, 119 S.E.2d 41 (1961).

[20] *See* Conner v. Magnum, 132 Ga. App. 100, 105, 207 S.E.2d 604, 609 (1974); *see also* Nichols v. Spokane Sand & Gravel Co., 379 P.2d 1000, 1001-02 (Wash. 1963) (same); Schwandt v. Bates, 397 P.2d 244, 247 (Idaho 1964) (same); Rios v. Norsworthy, 266 Ga. App. 469, 472, 597 S.E.2d 421, 426 (2004) (last-clear-chance doctrine did not apply because there was no evidence that defendant had any opportunity to take evasive action after he became of aware of the impending collision); Bethel Apostolic Temple v. Wiggen, 200 So.2d 797, 798 (Fla. 1967) ("Instruction on the last clear chance should not be given unless the evidence clearly demonstrates its applicability."); Kuhn v. Dell, 404 P.2d 357, 362 (Idaho 1965) ("It is reversible error to instruct the jury on the doctrine of last clear chance where there is no substantial evidence to support the doctrine."); De Vore v. Faris, 199 P.2d 391, 396 (Cal. Ct. App. 1948) ("The giving of an instruction submitting an issue on the last-clear-chance doctrine, where there is not sufficient evidence to justify the submission, is reversible error.").

[21] *Conner*, 132 Ga. App. at 105, 207 S.E.2d at 609.

[22] *See* Alsup v. Henwood, 137 S.W.2d 586, 590 (Mo. Ct. App. 1940) (no evidence of obliviousness because "a pedestrian knows that a railroad track is of itself a warning of danger").

[23] *See* State ex rel. Thompson v. Shain, 159 S.W.2d 582, 586 (Mo. 1941).

[24] *See* Walker Hauling Co. v. Johnson, 110 Ga. App. 620, 625, 139 S.E.2d 496, 500 (1964) (last-clear-chance doctrine "does not apply against non-negligent plaintiffs."); Mealey v. Slaton Mach. Sales, Inc., 508 F.2d 87, 90 (5th Cir. 1975).

[25] *See generally* Malcom M. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940) (last clear chance was designed to prevent assignment of any negligence to plaintiff); *see also* Johnson v. Brewer, 105 P.2d 365, 367 (Cal. Ct. App. 1940) (same); Ratlief v. Yokum, 280 S.E.2d 584, 588 (W. Va. 1981) (same).

[26] O.C.G.A. § 51-12-33.

[27] Dept. of Transp. v. Davison Inv. Co., 267 Ga. 568, 570, 481 S.E.2d 522, 525 (1997).

[28] *Davison, Inv. Co.*, 267 Ga. at 570, 481 S.E.2d at 525.

[29] Jury instructions must be "adjusted to the evidence, apt, and a correct statement of applicable law." Royalston v. Middlebrooks, 303 Ga. App. 887, 892, 696 S.E.2d 66, 71 (2010). If they are not, the error requires a new trial. *See* Boston Men's Health Ctr., Inc. v. Howard, 311 Ga. App. 217, 221, 715 S.E.2d 704, 707 (2011); *see also* Rather v. City & County of San Francisco, 184 P.2d 727, 730 (Cal. Ct. App. 1947) ("The giving of a last-clear-chance instruction in a case where there is not sufficient evidence to justify the submission of such issue is fatally prejudicial error.").

[30] *See generally* Jay M. Zitter, *Sufficiency of the evidence to raise last clear chance doctrine in*

cases of automobile collision with pedestrian or bicyclist—modern cases, 9 A.L.R.5th 826 (1993).

[31] Comment, *Contributory Negligence—Doctrine of Last Clear Chance Retained by Comparative Negligence Statute*, 52 HARV. L. REV. 1187, 1188 (1939).