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Remarks and Recreation: Recent Changes in the Recreational Property Act and the State of the Law Going Forward*

I. INTRODUCTION

In 1965, the Georgia General Assembly passed the Recreational Property Act (RPA or the Act),¹ which generally grants landowners protection from liability when they open up their property for recreational purposes.² Almost all states have enacted recreational use statutes, and it has been said that these statutes “codify tort principles that are universally recognized in common-law jurisdictions with regard to duties owed by owners and occupiers of property to those who come upon such property merely as licensees to use it for outdoor recreational purposes.”³ The Georgia version declares, “The purpose of this [law] is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting the owners’ liability toward persons entering thereon for recreational purposes.”⁴ Until recently, the wording of the law has remained largely unaltered since its adoption in 1965. In fact, one of the only changes to the language of the law since 1965 was made in 2014, when the Georgia General Assembly extended the scope of recreational activities to include “aviation activities.”⁵

Generally, the RPA allows owners of land to “owe[] no duty of care to keep the premises safe for entry or use by others for recreational

*I would like to thank Professor James Hunt for helping me with this Comment.

1. Ga. S. Bill 108, Reg. Sess., 1965 Ga. Laws 476 (codified at O.C.G.A. §§ 51-3-20–51-3-26).

2. O.C.G.A. § 51-3-23 (2019).

3. 62 AM. JUR. 2D *Premises Liability* § 123 (2019) (citing *Crawford v. Consumers Power Co.*, 310 N.W.2d 343, 346 (Mich. Ct. App. 1981)).

4. O.C.G.A. § 51-3-20 (2019).

5. Ga. H.R. Bill 494, Reg. Sess., 2014 Ga. Laws 825 (codified at O.C.G.A. § 51-3-21).

purposes or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes.”⁶ Furthermore, when such a recreational property is open to the public for recreational use, the owner does not “[c]onfer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.”⁷ This is in contrast to the general premises liability law in Georgia, which states that whenever “an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.”⁸

On its face, the language and purpose of the RPA are simple. However, because of the simplicity in the language of the statute, Georgia appellate courts have disagreed about how, when, and to whom the RPA should be applied. The Georgia Supreme Court recently defined the test in determining when the RPA applies:

[T]he true scope and nature of the landowner’s invitation to use its property, and this determination is informed by two related considerations: (1) the nature of the activity that constitutes the use of the property in which people have been invited to engage, and (2) the nature of the property that people have been invited to use.⁹

In other words, the two-part test’s first question asks whether the activity in which the public was invited to engage was of a kind that qualifies as recreational under the Act, and the second asks whether, at the relevant time, the property was of a sort that is used for recreational purposes.

This two-part test will be discussed further in this Comment, including how the law has recently been applied in Georgia, and what criteria courts do and do not consider when deciding whether the law applies. As this Comment will explain, recent changes on this front indicate that property owners will more easily be able to utilize the protection of the Act.

6. O.C.G.A. § 51-3-22 (2019). In the statute, a recreational purpose is defined as including but not limited to “hunting, fishing, 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) (2019).

7. O.C.G.A. § 51-3-23(2) (2019).

8. O.C.G.A. § 51-3-1 (2019).

9. *Mercer Univ. v. Stofer*, 306 Ga. 191, 191, 830 S.E.2d 169, 170–71 (2019) (emphasis omitted).

Another change involving the RPA was sparked when a recent case resulted in an unpopular outcome concerning the injury of a six-year-old girl attending a youth football game.¹⁰ Because of the Georgia Supreme Court's statutory interpretation of the Act, the little girl was barred from recovering for her injuries.¹¹ The court's opinion could not be used for precedent long, however, because the Georgia General Assembly acted remarkably quickly to amend the RPA—altering the language of the law more than any other amendment has since the Act's adoption in 1965.¹²

This Comment will explain how the new amendment to the RPA, contrary to the new test for determining the applicability of the RPA, will limit property owners' use of the RPA's protection, and could even result in many recreational activities being excluded from protection under the Act.

II. DEVELOPMENTS IN THE LAW

A. *Background Cases*

In order to understand the recent developments in the Recreational Property Act, a short background of cases is necessary to understand where the law stood before and why the recent changes are important.

In *Cedeno v. Lockwood*,¹³ a case decided in 1983, the Georgia Supreme Court laid down a relatively simple formula for determining whether the RPA applies.¹⁴ This case arose when Cedeno, a sightseer, fell and injured herself while walking on a stairway next to Underground Atlanta. Cedeno was taking photographs of the tourist destination, and was, at least arguably, in the area for recreational purposes. The defendant-landowner argued that because the area was open to the public for recreational purposes, the RPA should protect him from liability.¹⁵ The court, however, pointed out that “[t]he property owners . . . and their tenants make their property available to the public for entertainment purposes and anticipate the visitors will purchase the food, merchandise, or services available. They are in the

10. *Mayor & Aldermen of Garden City v. Harris*, 302 Ga. 853, 854, 809 S.E.2d 806, 808 (2018).

11. *Id.* at 857, 809 S.E.2d at 809–10.

12. Ga. H.R. Bill 904, Reg. Sess., 2018 Ga. Laws 1083 (codified at O.C.G.A. § 51-3-25).

13. 250 Ga. 799, 301 S.E.2d 265 (1983), *overruled in part by* Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 598 S.E.2d 471 (2004).

14. *Id.* at 802, 301 S.E.2d at 267.

15. *Id.* at 800–02, 301 S.E.2d at 266–67.

business of entertainment or recreation.”¹⁶ In holding that the RPA did not protect the landowner in this case, the court laid down a simple rule: “If the public is invited to further the business interests of the owner—e.g., for sales of food, merchandise, services, etc.—then the RPA will not shield the owner from liability even though the public receives some recreation as a side benefit.”¹⁷ After *Cedeno*, the RPA was understood to protect property owners if their property’s purpose was primarily recreational and the public was invited to it for a recreational purpose, as opposed to furthering the landowner’s financial interest.

More than fifteen years later, another incident arising from downtown Atlanta caused a reconsideration of the RPA analysis. In the Georgia Supreme Court decision *Atlanta Committee for the Olympic Games, Inc. v. Hawthorne*,¹⁸ and a previous opinion from a prior appeal in the same case, *Anderson v. Atlanta Committee for the Olympic Games*,¹⁹ the state high court addressed the Recreational Property Act in consolidated cases arising out of the 1996 bombing in Centennial Olympic Park in Atlanta.²⁰ Based on those two cases, the Georgia Supreme Court created a balancing test for determining the status of any given property in mixed-use situations where there are both recreational and commercial interests.²¹ In *Anderson*, the court stated that its new test “requires that all social and economic aspects of the activity be examined. Relevant considerations on this question include, without limitation, the intrinsic nature of the activity, the type of service or commodity offered to the public, and the activity’s purpose and consequence.”²² In the subsequent appeal (*Hawthorne*), the court explained that this test could require juries to delve into questions about a property owner’s subjective intentions: “[M]ixed uses of the property may nevertheless raise a jury question about the owner’s purpose for ‘directly or indirectly inviting or permitting without charge any person to use the property.’”²³ The Georgia Supreme Court also determined it was relevant for a jury, in deciding whether a given activity was recreational, to consider if the landowner was subjectively

16. *Id.* at 802, 301 S.E.2d at 267 (emphasis omitted).

17. *Id.*

18. 278 Ga. 116, 598 S.E.2d 471 (2004), *overruled by Stofer*, 306 Ga. at 199, 830 S.E.2d at 170–71.

19. 273 Ga. 113, 537 S.E.2d 345 (2000), *abrogated by Stofer*, 306 Ga. at 199, 830 S.E.2d at 170–71.

20. *Hawthorne*, 278 Ga. at 116, 598 S.E.2d at 473.

21. *Anderson*, 273 Ga. at 117, 537 S.E.2d at 349.

22. *Id.* (emphasis omitted).

23. *Hawthorne*, 278 Ga. at 117, 598 S.E.2d at 474 (emphasis and internal punctuation omitted) (quoting O.C.G.A. § 51-3-23).

hoping to “derive, directly or indirectly, a financial benefit for pecuniary gain from business interests thereon.”²⁴ By mandating an examination of a landowner’s purpose in opening his land to the public, and by allowing an inquiry as to the landowner’s subjective motivations, the Georgia Supreme Court complicated the RPA analysis and made it much more difficult for property owners to avail themselves of the protection under the Act. Today, however, the standard laid out in the Atlanta bombing cases is no longer good law.

Very soon thereafter in 2001, the United States Court of Appeals for the Eleventh Circuit used the Georgia Supreme Court’s test to determine recreational use in *Hendrickson v. Georgia Power Co.*,²⁵ but the court did not find dispositive the indirect pecuniary benefits or subjective intentions of the defendant–landowner.²⁶ In that case, the defendant, a power company, owned and operated a lake as well as a public area alongside the lake. The lake supplied the power company with the necessary “water for cooling and steam generation.”²⁷ The power company opened the area to the public free of charge for recreational use, including, “boating, fishing, sailing, swimming, picnicking, camping, hunting, hiking, and scenic viewing of the lake and surrounding area.”²⁸ The plaintiff’s son was shot and killed while visiting the area, and the trial court granted the power company’s motion for summary judgment based, in part, on the protection under the RPA.²⁹ The Eleventh Circuit acknowledged that the operation of the lake furthered business interests of the power company (not only through power generation but also through public good will).³⁰ However, the court held that the plaintiff’s son was not on the property to further any of those commercial interests.³¹ Had this case been binding precedent on Georgia state courts, it could have limited the application of the Atlanta bombing cases so that indirect and subjective benefits to a landowner would only be considered if the damages occurred in connection to a commercial activity.

24. *Id.* at 118, 598 S.E.2d at 474.

25. 240 F.3d 966 (11th Cir. 2001).

26. *Id.* at 972.

27. *Id.* at 968.

28. *Id.*

29. *Id.* at 968–69.

30. *Id.* at 971.

31. *Id.*

B. The Stofer Case: Clarifying the Standard

1. Facts

In July 2014, two sisters, Sally Stofer and Carol Denton, were attending a free concert at Washington Park in Macon, Georgia.³² The concert was hosted by Mercer University and was “part of Mercer’s ‘Second Sunday’ concert series, which was planned, promoted and hosted by Mercer’s College Hill Alliance, a division of Mercer.”³³ After the concert, the two sisters began to ascend a staircase to exit the park. At this time, Denton “turned to check on her sister [and] saw Stofer lose her balance, fall backward, and hit her head on a part of the stairs that had no handrail.”³⁴ Stofer died from her injuries, and her estate filed suit against Mercer University based on premises liability theories (Mercer was the lessee of the property). Mercer moved for summary judgment, arguing, among other things, that it was immune from liability under the RPA.³⁵

2. The Georgia Court of Appeals’ Reasoning

The Georgia Court of Appeals, in an opinion delivered by Judge Ray, held that the RPA did not apply to Mercer in this situation.³⁶ The court pointed out that Mercer, by hosting a free concert series open to the public, was putting itself in a position to benefit the University by “improving the College Hill Corridor, making the university more attractive to potential students, and providing branding opportunities.”³⁷ The court noted other benefits the University could possibly receive by hosting a concert series:

As a private institution, Mercer has the capacity for direct and effective interaction with other local community economic development resources which could create the potential for additional revenue streams to the University. The Alliance will encourage and

32. *Mercer Univ. v. Stofer*, 345 Ga. App. 116, 117, 812 S.E.2d 146, 148 (2018), *overruled by Stofer*, 306 Ga. at 199, 830 S.E.2d at 170–71.

33. *Id.* at 117, 812 S.E.2d at 148.

34. *Id.* at 117, 812 S.E.2d at 149.

35. *Id.* at 118, 812 S.E.2d at 149.

36. *Id.* at 123, 812 S.E.2d at 152.

37. *Id.* at 121, 812 S.E.2d at 151.

support efforts at Mercer to utilize the academic and research capacity of the university to drive economic development.³⁸

Because of the possible indirect benefit Mercer could receive by hosting these free concerts, the court of appeals held that there was a jury question as to what Mercer's purpose was when it invited people onto its property to attend a concert free of charge.³⁹ "In the instant case, jury questions remain requiring the examination of 'all social and economic aspects of the activity, . . . the type of service or commodity offered to the public, and the activity's purpose and consequence.'"⁴⁰

It is worth noting that while Presiding Judge McFadden concurred with Judge Ray's opinion, the third judge on the court of appeals panel, Chief Judge Dillard, concurred dubitante.⁴¹ Chief Judge Dillard explained that he did not believe the precedent the court had to uphold was a proper interpretation of the RPA, but by law, the court of appeals was bound by the Georgia Supreme Court's previous decisions—although he believed those decisions did not comport with the Act's codified purpose and plain meaning.⁴² Chief Judge Dillard stated that analyzing whether a landowner would receive an indirect pecuniary benefit "renders the protections of the statute illusory and discourages property owners from holding or permitting the very activities the Act seeks to encourage."⁴³ Chief Judge Dillard went on to state that while:

[I]n some cases, it has proved difficult to determine whether or not a property owner permitted the public on the property for recreational purposes . . . [.] rather than engaging in an examination of all social and economic aspects of the activity occurring on the property in order to determine whether the owner's purpose was recreational in nature, the more appropriate inquiry—as evidenced by the codified purpose and relevant statutory text—is whether the owner obtained a direct pecuniary benefit from the activity.⁴⁴

38. *Id.* (internal punctuation and emphasis omitted).

39. *Id.* at 122, 812 S.E.2d at 151.

40. *Id.* at 122–23, 812 S.E.2d at 152 (quoting *Anderson*, 273 Ga. at 117, 537 S.E.2d at 349).

41. *Id.* at 127, 812 S.E.2d at 154–55 (Dillard, C.J., concurring). Black's Law Dictionary defines dubitante as "doubting." This term is usually placed in a law report next to a judge's name, indicating that the judge doubted a legal point but was unwilling to state that it was wrong. *Dubitante*, BLACK'S LAW DICTIONARY (11th ed. 2019).

42. *Stofer*, 345 Ga. App. at 128–30, 812 S.E.2d at 155–57.

43. *Id.* at 129, 812 S.E.2d at 156.

44. *Id.* at 128, 812 S.E.2d at 155–56.

Chief Judge Dillard's doubts did not carry the day, but debate on the interpretation of the Recreational Property Act was not over yet.

3. The Georgia Supreme Court Clarifies the RPA Analysis

The Georgia Supreme Court granted certiorari in the *Stofer* case to identify the proper test that should be applied in deciding when the RPA applies.⁴⁵ The court, in an opinion authored by Justice Peterson, stated that one of the issues before it was whether the language of the Act which states if any property owner “invites or permits without charge any person to use the property for recreational purposes,” directs a court to examine a property owner's subjective motivations, namely monetary motivations, for opening property to the public.⁴⁶ The court answered this question in the negative and pointed out that “[c]onsideration of a landowner's financial interests is nowhere found in the language of the statute, except to the important extent that no admission fee may be charged if immunity is to be enjoyed.”⁴⁷ Therefore, the court held that, in deciding whether the RPA applies in a given case, it is improper to take into consideration a landowner's subjective motivations: “It is not the law—and we have never said that it was—that inviting people to use recreational property for recreation activities could still fail to qualify for immunity under the Act solely because the landowner had some sort of subjective profit motive in doing so.”⁴⁸

The court gave an illuminating hypothetical in the opinion, explaining when a property owner's motivation to make money could prohibit him from availing the immunity granted in the Act:

[I]f a landowner allows certain people to fish in his lake while excluding other people without an obvious basis for who is allowed and who is not, it could be relevant in determining the nature of the invitation to show that the landowner was being paid 50 percent of the profits of the bait shop next to the lake, and the people allowed to fish had all bought their bait from the bait shop, while everyone not allowed to fish had not bought bait at the bait shop. But, as a general matter, the landowner's financial interest in the bait shop would probably not be relevant absent evidence of some effort to push

45. *Stofer*, 306 Ga. at 193, 830 S.E.2d at 172.

46. *Id.* at 195, 830 S.E.2d at 173 (quoting O.C.G.A. § 51-3-23).

47. *Id.* at 199, 830 S.E.2d at 176.

48. *Id.* at 200, 830 S.E.2d at 176.

people to shop there, or that the nature of the property strongly emphasized the bait shop relative to the lake.⁴⁹

In the court's example, it appears that, in order for a landowner to fall outside of the Act's protection, it would have to be blatantly obvious, or at least not indirect, that a landowner who opens his recreational property for public recreational use was doing so to make money. In other words, the entire nature of the activity or nature of the property would have to be altered by the landowner's venture for the RPA not to apply.

The court in *Stofer* also addressed another closely related issue—whether indirect financial benefits received by a landowner should be considered in deciding whether the landowner opened his property for recreational purposes.⁵⁰ The supreme court held that indirect financial benefits should not be considered.⁵¹ The court admitted that this issue was born out of language the high court itself used in previous years: “In *Hawthorne*, we introduced for the first time a suggestion that courts should consider indirect, speculative benefits that may inure to a landowner.”⁵² The court pointed out, however, that *Hawthorne* was inconsistent with other decisions coming from Georgia appellate courts holding that indirect financial benefits would not deprive landowners from protection under the Act.⁵³ In sum, the Georgia Supreme Court disapproved any inconsistent language coming from *Hawthorne*, and stated the ousted language

was thus inconsistent with the weight of our case law, and finds no support in the text of the statute to warrant keeping it notwithstanding this inconsistency, so we disapprove language in *Hawthorne* or any other cases that could be read to require consideration of evidence that a landowner was motivated by the possibility that it would obtain indirect financial benefits from allowing the public to use its land in determining whether that invitation was for “recreational purposes” under the Act.⁵⁴

Therefore, in *Mercer University v. Stofer*, the Georgia Supreme Court handed down two important holdings. First, when considering whether the RPA applies, it is improper for a court to take into consideration a

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 201, 830 S.E.2d at 176.

54. *Id.* at 201–02, 830 S.E.2d at 177 (emphasis omitted).

landowner's subjective motivations, such as a potential future benefit.⁵⁵ Second, the court explicitly held, and overturned any previous language to the contrary, that a court should not consider the possibility that a landowner could receive an indirect financial benefit as a result of opening their land to the public.⁵⁶ These two holdings simplified the RPA analysis and will likely have the effect of lessening the burden recreational property owners bear when attempting to avail themselves of the Act. The rule as it stands is as follows: 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 that landowner would be protected from liability that could arise from an injury in connection with a person's recreational use of that property; the landowner's subjective motivations and indirect financial benefits should not be considered in the RPA analysis.

C. Mayor & Alderman of Garden City v. Harris: An Unpopular Result Sparks Change

1. Facts and the Trial Court's Ruling

In *Harris v. Mayor & Aldermen of Garden City*,⁵⁷ the Harris family attended a youth football game in 2012. Garden City, a local municipality in Chatham County, owned the football stadium. At the stadium, the admission policy "was to charge an admission fee to spectators over the age of six. All members of the Harris family were charged an admission price, with the exception of Riley, who was six years old at the time."⁵⁸ During the football game, Riley slipped and fell through the bleachers onto the ground below suffering injuries.⁵⁹

The plaintiffs did not dispute that the football stadium was being used for a recreational purpose, but they instead argued that the RPA's protection did not apply in the situation, because the statute provided an exception.⁶⁰ This statutory exception stated, "Nothing in this article limits in any way any liability which otherwise exists . . . for injur[ies] suffered in any case when the owner of land charges the person or

55. *Id.* at 199, 830 S.E.2d at 175.

56. *Id.* at 200, 830 S.E.2d at 176.

57. No. STCV 1401410, 2015 WL 13719324 (Ga. State Ct. Oct. 20, 2015), *overruled by Harris*, 302 Ga. at 857, 809 S.E.2d at 809–10.

58. *Id.* at *1.

59. *Id.*

60. See O.C.G.A. § 51-3-25 (2019).

persons who enter or go on the land for the recreational use thereof.”⁶¹ This exception directly limits the language in a previous section of the Act that grants immunity to those who do not charge admission to enter upon recreational land, which states:

[A]n owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreational purposes does not thereby: (1) Extend any assurance that the premises are safe for any purpose; (2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed; or (3) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.⁶²

Therefore, the question was whether the statutory exception in the RPA (or alternatively the substantive language of the Act itself) granted immunity to the city in regards to Riley’s injury, simply because she did not pay an admission fee because of her young age.

The State Court of Chatham County held that the RPA did not grant immunity, because the exception applied.⁶³ “A ruling in this case which applies RPA immunity to injured children age six and under, and not to the remaining public charged a fee, would produce inconsistent and unintended results.”⁶⁴

2. The Georgia Supreme Court Extends the Protection of the Act

The Georgia Court of Appeals affirmed the trial court and stated a simple rule: “[T]he RPA applies where the property is open to the public for recreational purposes and the owner does not charge an admission fee.”⁶⁵ In laying down this rule, the court did not address whether “such person” in O.C.G.A. § 51-3-23(2) was the same person as “any person” in the same section, but instead based its holding on O.C.G.A. § 51-3-25(2).⁶⁶

61. O.C.G.A. § 51-3-25(2) (2017).

62. O.C.G.A. § 51-3-23.

63. *Harris*, 2015 WL 13719324, at *2.

64. *Id.*

65. *Mayor & Aldermen of Garden City v. Harris*, 339 Ga. App. 452, 456, 793 S.E.2d 628, 631–32 (2016), *overruled by Harris*, 302 Ga. at 857, 809 S.E.2d at 809–10.

66. *Id.* at 456, 739 S.E.2d at 631. The question not answered by the court here stems from a slightly ambiguous choice of words by the General Assembly. “[A]n owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreational purposes does not thereby . . . Confer upon such person the legal

Notwithstanding the City's suggested construction of OCGA § 51-3-23(2), an owner is not entitled under the RPA to immunity from liability "for injury suffered in any case when the owner of land charges the person or persons who enter or go on the land for the recreational use thereof."⁶⁷

Creation of a simple rule, however, was not advantageous for the city, so the defendant–appellant filed for certiorari, which was granted on June 5, 2017.⁶⁸

The supreme court, in an opinion written by Justice Melton, disagreed with the court of appeals, and held that a plain reading of the statute meant that recreational property owners could be held liable for injuries that occur to visitors who are invited to come upon their property and do not pay a fee.⁶⁹ The court stated that "[t]he statute specifically and unambiguously references 'any person' who is not charged a fee to use a landowner's property for recreational purposes as being such a 'person' to whom the landowner does not owe a duty of care."⁷⁰ By stating this, the Georgia Supreme Court did what the Georgia Court of Appeals refused to do, and held that "such person" as stated in O.C.G.A. § 51-3-23(2) did indeed mean "any person" referenced in that same section—a plain meaning understanding of the statutory text.⁷¹

The court further stated that the statutory exception in O.C.G.A. § 51-3-25(2) did not diminish the meaning of section 23.⁷² In fact, the court stated that reading the two in conjunction makes clear that:

[W]here the injured party is a person who has been charged a fee to use the landowner's property for recreational purposes, the landowner would not be immune from potential liability to such paying persons, because the landowner only receives the protections of OCGA § 51-3-23 with respect to those persons who have not been charged a fee to use the property for recreational purposes.⁷³

status of an invite or license to whom a duty of care is owed." O.C.G.A. § 51-3-23. Is such person any person?

67. *Harris*, 339 Ga. App. at 456, 739 S.E.2d at 631 (emphasis and internal punctuation omitted) (quoting O.C.G.A. § 51-3-25(2) (2017)).

68. *Mayor & Aldermen of Garden City v. Harris*, No. S17C0692, 2017 Ga. LEXIS 506 (Ga. June 5, 2017).

69. *Harris*, 302 Ga. at 855, 809 S.E.2d at 808.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 855–56, 809 S.E.2d at 809.

The majority opinion also stated that its interpretation of the statute was consistent with the Act's purpose. Justice Melton wrote that allowing some people to come onto one's property for free, and yet charging others, is nonetheless furthering the Act's stated purpose, which is to "encourage owners of land to make land and water areas available to the public for recreational purposes."⁷⁴ In conclusion, the Georgia Supreme Court held that the court of appeals was incorrect and summary judgment should have been granted to the city because Riley Harris did not pay to enter the property; therefore, the city could avail itself to the protections of the RPA.⁷⁵

However, the court's interpretation of the law, handed down on January 29, 2018, could only be used as precedent for a very short period of time.

3. The Georgia General Assembly Responds

Typically, changes in the law are slow. However, after the Georgia Supreme Court's decision in *Mayor & Aldermen of Garden City v. Harris*, the Georgia General Assembly moved swiftly to change the language of the Recreational Property Act.⁷⁶ In fact, the first reading of the bill that eventually did so, 2018 H.R. Bill 904,⁷⁷ occurred only fifteen days after the Georgia Supreme Court handed down its decision.⁷⁸ Five members of the Georgia House of Representatives sponsored the bill,⁷⁹ which contained language limiting RPA immunity to apply only when all members of the public are allowed onto the recreational property in question free of charge on the day the alleged tort occurs.⁸⁰ In other words, a recreational property owner, such as the city in this case, would not fall under the protection of the Act on the

74. *Id.* at 856, 809 S.E.2d at 809 (quoting O.C.G.A. § 51-3-20).

75. *Id.* at 857, 809 S.E.2d at 809–10.

76. *See generally* O.C.G.A. § 51-3-25.

77. Ga. H.R. Bill 904, Reg. Sess., 2018 Ga. Laws 1083 (codified at O.C.G.A. § 51-3-25).

78. *2017–2018 Regular Session—HB 904 Status History*, GEORGIA GENERAL ASSEMBLY, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/904> (last visited Nov. 5, 2019).

79. The five sponsoring house members included Representative Meagan Hanson (R-Brookhaven), Representative Wendell Willard (R-Sandy Springs), Representative Barry Fleming (R-Harlem), Representative Trey Kelly (R-Cedartown), and Representative Brett Harrell (R-Snellville). The sponsoring legislator in the Senate was Senator Blake Tillery (R-Vidalia).

80. Ga. H.R. Bill 904, Reg. Sess., 2018 Ga. Laws 1083 (codified at O.C.G.A. § 51-3-25).

day of the injury if it charges anybody to enter the land for recreational use and anybody gets injured in connections with such use.⁸¹

Originally, the exception in the RPA for property owners that charge an admissions fee stated, “Nothing in this article limits in any way any liability which otherwise exists . . . For injury suffered in any case when the owner of land charges the person or persons who enter or go on the land for the recreational use thereof.”⁸² However, the RPA exception after modification read:

Nothing in this article limits in any way any liability which otherwise exists . . . On a date when the owner of land charges any individual who lawfully enters such land for recreational use and any individual is injured in connection with the recreational use for which the charge was made.⁸³

This change in wording restricted the RPA and would have made immunity under the Act unavailable to the defendant in the *Harris* case.

As mentioned, the bill amending the RPA moved quickly through the General Assembly. On February 12, 2018, the bill was read for the first time in the Georgia House of Representatives. After passing through committee with minor changes, the Georgia House voted unanimously (170–0) to approve it. The bill then was somewhat changed in the Senate, but it passed overwhelmingly there as well. Back in the House, more changes were made to the wording of the bill, but once again, it passed easily, though with more opposition (155–16). The changes made by the House were then sent to the Senate where the final version of the bill was approved.

It is worth noting that although multiple changes were made to the wording of the bill, the different versions always included a policy of denying immunity under the RPA to property owners who charged an admissions fee to anyone on the day of the injury; the changes were all changes in semantics.⁸⁴

On May 8, 2018, Governor Nathan Deal signed the bill, and the amended exception to the Recreational Property Act took effect on July 1, 2018.

81. *Id.* § 2.

82. *Id.* § 1.

83. *Id.*

84. *H.B. 904 Status History*, *supra* note 78.

III. THE RPA GOING FORWARD

Going forward, the RPA will continue to further its stated purpose and “encourage owners of land to make land and water areas available to the public for recreational purposes by limiting the owners’ liability toward persons entering thereon for recreational purposes.”⁸⁵ This is especially true because of the results in the *Stofer* case, which will significantly reduce the burden for property owners by: (1) allowing property owners to know when they are and are not in compliance with the Act, and (2) allowing property owners to avail themselves of the immunity granted in the Act when proving to a court that the nature of the activity and the nature of the property are both recreational, because there will not always be a question of fact or an in-depth analysis of the owner’s motivations. While the amendment to O.C.G.A. § 51-3-25(2), created by Georgia House Bill 904, limits the breadth of the RPA, it does so in a commonsense fashion, and creates a bright-line rule that can easily be applied.

A. Changes Going Forward Because of the Stofer Case

Because of the *Stofer* case, recreational property owners and occupiers will be able to open their property to the public and be reassured that they fall under the RPA, as long as they do not charge a fee.

First, the *Stofer* case laid down the principle that it is improper to consider subjective motivations for opening property to the public.⁸⁶ This principle is beneficial for property owners who may have multiple interests, because it prevents plaintiffs from creating a question of fact, when the elements of falling under the RPA (recreational property being used for a recreational purpose) are already met. One group that will especially benefit from courts not being able to explore subjective motivations is public for-profit businesses in the state of Georgia. This is because many businesses are at risk of a derivative action if they act in a way that does not further the interest of the business. Therefore, a business will likely always have a subjective motivation for opening its property to recreational users even if that purpose is simply creating good will with potential customers.

Because a business will often possess a subjective motivation, a plaintiff could stretch the purpose behind an entity opening its property to the public just like the plaintiff did in *Stofer*. The plaintiff there argued, “Part of the stated mission of Mercer’s College Hill Alliance is

85. O.C.G.A. § 51-3-20.

86. *Stofer*, 306 Ga. at 199, 830 S.E.2d at 175.

to foster neighborhood revitalization, although . . . the concert series also benefitted Mercer by improving the College Hill Corridor, making the university more attractive to potential students, and providing branding opportunities.”⁸⁷ As evidenced by the court of appeals’ opinion in *Stofer*, anything seemed to be fair game for a plaintiff to claim as a property owner’s purpose in operating land in order to show it was commercial rather than recreational.⁸⁸ However, the Georgia Supreme Court rebutted this language when it took the case, and it used a bait shop analogy to demonstrate that a property owner would have to practically transform the nature of his property to not fall under the RPA—even if he had ulterior motives for inviting others onto his property.⁸⁹

The RPA analysis now seems to focus on a simple question: Why was the person invited to the property? If it was for a recreational activity, then the RPA applies; if it was for a commercial activity, the RPA does not apply. This change, if taken alone, would inevitably lead to more litigation, but thankfully the Georgia Supreme Court also shed light on what sort of activities are “commercial.” In *Stofer*, the court stated that indirect financial benefits that a property owner receives should not be considered in the RPA analysis.⁹⁰ Now, property owners can be covered under the Act, even if they receive some sort of indirect financial benefit from opening the land to the public.

Consider this hypothetical: A landowner owns a large tract of land and a river that runs through his property. The landowner allows people to float down the river in inner tubes, and people tend to enjoy it; he even has signs leading to his property inviting the public to float down the river free of charge. Eventually, the man sees a moneymaking opportunity, and he begins selling inner tubes to people who do not have one; he makes money doing this, but river-floaters are also allowed to bring their own inner tubes. One day, a river-floater does not realize the depth of the water and drowns in the river. Under a premises liability theory, the decedent’s family sues the man who opened his river-adjointing property to the public, but the man claims he is immune under the RPA. According to *Stofer*, the man should be immune from liability. The nature of the property was clearly recreational, and his purpose in inviting people to his property was recreational as well. Although the man may have had a subjective motivation in inviting the public to his property, and he gained an indirect financial benefit, the

87. *Stofer*, 345 Ga. App. at 121, 812 S.E.2d at 151.

88. *Id.*

89. *Stofer*, 306 Ga. at 200, 830 S.E.2d at 176.

90. *Id.*

man nonetheless was opening his recreational property for a recreational purpose; therefore, he falls squarely under the protection of the Act.⁹¹

This scenario differs from a situation where the owner of property opens his property with the predominant purpose of making money. In a situation where the owner of property opens a business to make money, the first question in the RPA analysis according to *Stofer*—whether the purpose in opening the property was recreational or commercial—should be dispositive. However, the trickier situation is when the owner opens the property for a recreational purpose but is making money by doing so. In this situation, a court can take into consideration direct financial benefits, but indirect financial benefits and subjective motivations are off limits. If the property owner is not receiving a direct financial benefit, and the purpose of opening the property to the public is recreational, the RPA will protect the property owner from liability.

The *Stofer* case greatly clarified the RPA analysis going forward. Now, it will be easier for land owners to avail themselves of the Act's protection, which will further the law's stated purpose of "encourag[ing] owners of land to make land and water areas available to the public for recreational purposes by limiting the owners' liability toward persons entering thereon for recreational purposes."⁹² Not only will it be easier for trial courts in Georgia to apply the RPA analysis, but it will also be simpler for landowners to know when they can and cannot be liable for injuries that occur on their property. Lawyers with recreational landowning clients should advise those clients to: (1) Make sure the activity that the public is invited to participate in is recreational; (2) Make sure the nature of the land is recreational; and (3) Make sure that there is no direct financial benefit behind opening the land to the public. A lawyer knowledgeable about the RPA would then make sure the landowner is aware of the quickest way protection from liability would be stripped away—charging a fee to come onto the property.

B. The Changes Going Forward Because of the Harris Case and Subsequent Legislation

The amendment to the RPA that the Georgia General Assembly passed in response to the Georgia Supreme Court's *Harris* opinion is relatively easy to summarize. In fact, all that is needed to explain this change is the statutory language itself.

91. This conclusion is logical based on not only the *Stofer* case, but also the totality of the case law regarding the RPA.

92. O.C.G.A. § 51-3-20.

Nothing in this article limits in any way any liability which otherwise exists . . . [o]n a date when the owner of land charges any individual who lawfully enters such land for recreation use and any individual is injured in connection with the recreational use for which the charge was made.⁹³

Put simply, if a recreational property owner charges a fee to anyone to come onto the property, then the RPA will not protect the property owner from liability if someone is injured, even if that specific person did not have to pay a fee. While this development in the law seems simple, there are nonetheless grey areas that might be litigated in the not so far future; some of which this Comment will discuss. In sum, the amendment to the RPA—unlike the effects of the *Stofer* case—will restrict the Act and limit its applicability. However, recreational property owners might have possible recourse in avoiding this amendment without falling outside of the RPA's protection.

First, consider this scenario. A property owner in rural Georgia opens his fishing land to the public. Anybody is welcome, and there is a fee box along the driveway down to the ponds underneath a sign that says “\$3 to fish.” However, nobody guards the gate to the ponds, and failure to pay the fee would almost certainly go unpunished. One day, a man fishing slips into the pond and drowns. His family brings a premises liability claim against the landowner, who in turn moves for summary judgment based on the Recreational Property Act. What result?

In that case, the facts likely turn on whether the decedent paid the fee, but not for the same reasons that the *Harris* case was decided. Here, the purpose of the fee box was for all persons fishing to pay before they fished, and just because it was not enforced does not mean the landowner did not ask for a fee. Therefore, if the decedent did not pay the fee, he would be considered a trespasser and the landowner would “owe[] no duty of care . . . except to refrain from causing a willful or wanton injury.”⁹⁴ On the other hand, if the deceased did pay the fee, then the RPA would not protect the landowner because the landowner charged a fee to enter the premises. And because the fisherman paid the fee, the exception in O.C.G.A. § 51-3-25(2) would prevent the RPA from protecting the landlord.⁹⁵

One potential wrinkle on this hypothetical is if a fisherman, who did pay the fee, brought a guest who did not fish and hence did not pay the fee? If the guest, who presumably was not a trespasser, were injured

93. O.C.G.A. § 51-3-25.

94. O.C.G.A. § 51-3-3(b) (2019).

95. The exception in O.C.G.A. § 51-3-25(2) would not have protected the landowner before or after the amendment in 2018.

while accompanying the fisherman, the RPA would most likely still not protect the landowner. This is because the landowner did charge an individual (even though it was not the injured individual) to come onto the land, and the injury was in connection to the purpose for which the charge was made.⁹⁶ The question of how connected the injury must be to the recreational use for which the charge was made will likely be solved in litigation in the coming years. For example, what if our hypothetical fisherman's friend were injured while photographing the water or wildlife? In that case, it could be argued that the charge was not made in connection to the injury, and therefore, the RPA would still protect the landowner. However, it could also be argued that the charge was made not simply to fish, but for enjoyment of the property, meaning the fee would remove RPA protection to anyone who legally came onto the property.

One loophole in the case law that property owners could potentially use to avoid the recent amendment to the RPA and therefore be protected by the RPA is a parking fee exception. In our hypothetical, what if instead of charging each fisherman a \$3 fishing fee, the landowner charged a \$3 parking fee for each vehicle regardless of the number of passengers, but anyone could walk up to fish for free?

In this scenario, a landowner would likely still fall under the protection of the Recreational Property Act. This is because the exception to the RPA states that the exception applies when the injury occurs in connection with the recreational purpose for which the charge was made.⁹⁷ Paying to park in the area of the recreational property is not paying for the recreational event.⁹⁸ Therefore, if a recreational landowner desired to avoid the charge exception in the Act, they could simply charge a parking fee instead of charging individuals an admission fee. However, to fall under the protection of the Act, and the fee truly be associated with parking and not entrance, a landowner

96. O.C.G.A. § 51-3-21(1) defines "charge" as "the admission price or fee asked in return for invitation or permission to enter or go upon the land." This analysis could be identically be applied to cases where landowners do not ask for money in return for admission, but instead ask for other things of value. This scenario is common for high school or college football teams that ask for bottled water, or laundry detergent, instead of a fee to come into a spring scrimmage.

97. O.C.G.A. § 51-3-25(2) (2019).

98. See *Brannon v. Stone Mountain Mem'l Ass'n*, 165 Ga. App. 120, 299 S.E.2d 176 (1983); *Hogue v. Stone Mountain Mem'l Ass'n*, 183 Ga. App. 378, 358 S.E.2d 852 (1987); *Quick v. Stone Mountain Mem'l Ass'n*, 204 Ga. App. 598, 420 S.E.2d 36 (1992). These three cases all stand for instances when visitors of Stone Mountain Park were unable to sustain suits against the park because of the RPA. This is notwithstanding the fact that the park, in each instance, charged a parking fee.

should charge the same amount for each vehicle regardless of the amount of passengers inside. Also, to be covered by a parking fee exception, a landowner should not charge a fee for visitors who walk to the recreational land or who are dropped off.

Other than the parking remedy, recreational property owners have another, more obvious remedy to avoid losing RPA protection—decline to charge a fee whatsoever. Going forward, this remedy likely will be the route taken by property owners such as Garden City in the *Harris* case, which charged a nominal fee.

IV. CONCLUSION

The Recreational Property Act has recently experienced multiple significant changes. The first occurred after a case in which a little girl, who was injured at a football game, was prevented from recovering against the owner of the football stadium under the RPA, due to the fact that she got into the game for free because of her young age.⁹⁹ Almost immediately, the Georgia General Assembly amended the RPA to provide that landowners of recreational property could be liable “[o]n a date when the owner of land charges any individual who lawfully enters such land for recreational use and any individual is injured in connection with the recreational use for which the charge was made,” effectively closing the loophole that protected the owner of the football stadium in the *Harris* case.¹⁰⁰ Going forward, Georgia is likely to see more property owners opt not to charge an admission fee at all, especially when the fee was a small amount in the first place. Alternatively, property owners eager to make a profit could charge for parking and remain under the protection of the RPA.

Another important development took place in a case where a plaintiff argued that Mercer University, by hosting a free concert for the public, stood to make an indirect financial gain, and therefore the RPA could not protect Mercer.¹⁰¹ The Georgia Supreme Court disagreed and laid down a new standard that excluded mention of subjective profit motives or indirect financial gain.¹⁰² The court held:

[T]he true scope and nature of the landowner’s invitation to use its property must be determined, and the determination is informed by two considerations: (1) the nature of the *activity* that constitutes the

99. *Harris*, 302 Ga. at 855, 809 S.E.2d at 808.

100. O.C.G.A. § 51-3-25(2).

101. *Stofer*, 306 Ga. at 191–92, 830 S.E.2d at 171.

102. *Id.* at 196, 830 S.E.2d at 173–74.

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.¹⁰³

The Georgia Supreme Court's decision in *Stofer* will make it easier for recreational property owners to avail themselves of the protection of the RPA, as they will not have to prove lack of subjective commercial intentions or indirect financial benefits to receive summary judgment.

While the legislative amendment to the Recreational Property Act will somewhat restrict the Act's future use, the clarified standard laid down by the Georgia Supreme Court will more than make up for this restriction and the Act will see an overall expansion in its use and success by landowners.

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103. *Id.*

