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Torts: A Two-Year Survey

by Jarome E. Gautreaux*

I. INTRODUCTION

This Article addresses recent cases decided during the two-year survey period in the area of torts.¹ It includes cases in most of the areas of tort law, including medical malpractice, and addresses defenses such as immunity.

II. IMMUNITY

The scope of county immunity was at issue in *Wyno v. Lowndes County*,² in which the Georgia Supreme Court addressed official immunity (also called qualified immunity) of county employees.³ The case involved a deadly attack by a dog on a neighbor after numerous complaints were made to the county about the dog. The plaintiff alleged that the failure of the county employees to take appropriate protective action prior to the attack was a failure to perform a ministerial act (thus overcoming the county's immunity), which is defined as an act that is simple and specific.⁴

The court held that the county employees' actions in determining what actions to take were discretionary in nature, because "the [policy at issue] required the [employee] to perform a discretionary act to determine if the policy was applicable."⁵ The policy at issue vested the

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1. This Article covers the expanded survey period from June 1, 2016 through May 31, 2018 because no survey on this topic appeared in the seventieth volume of the Mercer Law Review. For an analysis of tort law from the previous survey period, see Christopher R. Breault et al., *Torts, Annual Survey of Georgia Law*, 69 MERCER L. REV. 299 (2017).

2. 305 Ga. 523, 824 S.E.2d 297 (2019).

3. *Id.* at 527, 824 S.E.2d at 301.

4. *Id.* at 528–29, 824 S.E.2d at 302–03 (citing *Roper v. Greenway*, 294 Ga. 112, 114–15, 751 S.E.2d 351, 353 (2013)).

5. *Id.* at 531, 824 S.E.2d at 304 (quoting *Grammens v. Dollar*, 287 Ga. 618, 621, 697 S.E. 2d 775, 778 (2010)).

employees with some discretion to determine appropriate actions to take after complaints of a dangerous dog were received.⁶

State immunity under the Georgia Tort Claims Act (GTCA)⁷ was at issue in *Britt v. Jackson*.⁸ The case arose out of a vehicle accident in which Britt, a passenger, was injured when the vehicle collided with a vehicle operated by a Department of Corrections (DOC) employee. At the time of the wreck, the vehicle operated by the DOC employee was assisting in a police search for suspects and was attempting to move out of the way for law enforcement vehicles to apprehend a vehicle in front of the DOC driver's vehicle.⁹

The Georgia Court of Appeals held that these actions were authorized by DOC policy and thus were within the scope of immunity afforded by O.C.G.A. § 50-21-24(6),¹⁰ the provision that extends immunity to "losses resulting from . . . the method of providing law enforcement, police, or fire protection."¹¹

The consequences of not being extremely careful about the use of a cell phone are illustrated by *Stephens v. Coan*.¹² While working from home, Stephens accidentally called his supervisor, Coan, at the Georgia Subsequent Injury Trust Fund, and the supervisor overheard a conversation between Stephens and his wife, in which Stephens made remarks about Coan's job performance.¹³

Not surprisingly, Coan confronted Stephens upon Stephens' return to the office, and Stephens then resigned. Stephens and his wife then brought claims for invasion of privacy against Coan.¹⁴

The court affirmed the trial court's dismissal, holding that the actions taken by Coan—his listening to the call—were taken within the scope of his official duties with the state.¹⁵

In *Georgia Department of Administrative Services v. McCoy*,¹⁶ the court of appeals considered whether the General Liability Agreement (GLA) of the State Liability Trust Fund provides coverage for acts of

6. *Id.*

7. O.C.G.A. § 50-21-20 (2019).

8. 348 Ga. App. 159, 819 S.E.2d 677 (2018).

9. *Id.* at 159–60, 819 S.E.2d at 678–79.

10. O.C.G.A. § 50-21-24(6) (2019).

11. *Britt*, 348 Ga. App. at 163, 819 S.E.2d at 680 (quoting O.C.G.A. § 50-21-24(6)).

12. 349 Ga. App. 147, 825 S.E.2d 525 (2019).

13. *Id.* at 147, 149, 825 S.E.2d at 526–27.

14. *Id.* at 149, 825 S.E.2d at 527.

15. *Id.*

16. 340 Ga. App. 877, 798 S.E.2d 687 (2017).

malicious prosecution committed by employees of the Department of Family and Children Services (DFCS).¹⁷

The plaintiff, McCoy, had obtained a large judgment against an employee of DFCS, based on malicious prosecution claims. McCoy then sought to obtain coverage for the judgment from Department of Administrative Services (DOAS) under the terms of the GLA.¹⁸

The court of appeals, in its majority opinion, held that there was no coverage for the claims of malicious prosecution under the GLA.¹⁹ To reach this conclusion, the court reasoned that, first, there were no claims that the torts were committed within the scope of the defendant's employment with the state.²⁰ This was also admitted at oral argument.²¹

The court held that the GLA was clear in providing no coverage for acts taken by State employees outside the scope of employment.²² The court rejected the argument by the plaintiff-appellee that there was an ambiguity in the GLA that should have been read in her favor.²³ Two judges dissented, concluding that the GLA was ambiguous and should have provided coverage.²⁴

One of the frequently litigated exceptions to state immunity concerns the negligent design exception found in the GTCA.²⁵ In *Department of Transportation v. Balamo*,²⁶ the court of appeals again addressed a case involving this exception for a roadway that allowed rainwater to accumulate and contribute to an automobile wreck.²⁷

The main problem, according to the court, was that there was no evidence from the plaintiff's expert that the design standards in effect at the time of the design of the roadway were violated, and further, the expert characterized the problem as a maintenance problem rather than a design issue.²⁸ In such circumstances, the state was immune.²⁹

One of the most litigated and difficult-to-apply distinctions in immunity cases is the distinction between ministerial and discretionary

17. *Id.* at 877–78, 798 S.E.2d at 689.

18. *Id.* at 878, 798 S.E.2d at 689.

19. *Id.* at 884, 798 S.E.2d at 693.

20. *Id.*

21. *Id.* at 882, 798 S.E.2d at 692.

22. *Id.*

23. *Id.* at 883, 798 S.E.2d at 692.

24. *Id.* at 886–87, 798 S.E.2d at 694–95 (Ellington, J., dissenting).

25. O.C.G.A. § 50-21-24(10) (2019).

26. 343 Ga. App. 169, 806 S.E.2d 622 (2017).

27. *Id.* at 170–71, 806 S.E.2d at 623–24.

28. *Id.* at 173–74, 806 S.E.2d at 626.

29. *Id.* at 174, 806 S.E.2d at 626.

functions. This seems particularly true in cases involving school districts. In *Barnett v. Caldwell*,³⁰ a student died as a result of his injuries when he and another student engaged in horseplay after the teacher left the classroom. Suit was brought against the teacher, who argued that she was protected by immunity because her action of leaving the classroom was a discretionary action.³¹

The school handbook required that all students be supervised at all times but did not further explain exactly what constituted “supervision.” There was testimony that supervision included having an ability to see the students, which the teacher could not do when she left the room.³² Nonetheless, the supreme court held that this policy of constant supervision gave the teacher discretion, even discretion to simply leave the room, and thus, she was entitled to immunity.³³

III. ANTE LITEM NOTICES

Nearly every survey period includes cases involving alleged defects in ante litem notices, and this period was no different. The requirements of ante litem notices apparently continue to vex practitioners.

In *Harrell v. City of Griffin*,³⁴ the defect at issue was the amount of the loss claimed.³⁵ O.C.G.A. § 36-33-5(e)³⁶ required the inclusion of an amount of the damages claimed.³⁷ No monetary amount, or range of amounts, was included in the ante litem notice, so the trial court dismissed the claim, and the court of appeals affirmed.³⁸

The person to whom an ante litem notice must be provided was at issue in *Moats v. Mendez*.³⁹ The case arose from an automobile wreck, and Mendez sued the sheriff of Polk County, Johnny Moats, in his official capacity, and the deputy sheriff involved in the wreck in her individual and official capacities.⁴⁰

30. 302 Ga. 845, 809 S.E.2d 813 (2018).

31. *Id.* at 845, 809 S.E.2d at 814.

32. *Id.* at 846–47, 809 S.E.2d at 815–16.

33. *Id.* at 851, 809 S.E.2d at 818.

34. 346 Ga. App. 635, 816 S.E.2d 738 (2018).

35. *Id.* at 636, 816 S.E.2d at 740.

36. O.C.G.A. § 36-33-5(e) (2019).

37. *Id.*

38. *Harrell*, 346 Ga. App. at 636–37, 816 S.E.2d at 741.

39. 349 Ga. App. 811, 824 S.E.2d 808 (2019), *petition for cert. filed*, (Apr. 17, 2019) (No. 19-1095).

40. *Id.* at 811, 824 S.E.2d at 809.

An ante litem notice was provided to the County via service on the Chairman of the Board of Commissioners, but no ante litem notice was sent to the Sheriff.⁴¹

A splintered court of appeals held that the ante litem notice was not proper because it was not served on the Sheriff, who is considered a separate constitutional entity from the County, and thus, entitled to a separate ante litem notice.⁴² Many practitioners were likely surprised by this result, since sheriffs are often considered part of the counties they serve.

Whether an ante litem notice is sufficient if presented to a county attorney employed by the county in-house, as opposed to an attorney privately employed but appointed as the county attorney, was resolved in *Croy v. Whitfield County*.⁴³ After an automobile wreck, a suit was brought against Whitfield County. The ante litem notice was served on the county attorney, who was not a county employee but was appointed as the county attorney.⁴⁴

The supreme court held that this notice was sufficient.⁴⁵ The supreme court rejected the distinction drawn by the court of appeals, at least for ante litem notices, between in-house county attorneys and those appointed as county attorneys but privately employed.⁴⁶

The requirements of ante litem notices to municipalities continue to be the subject of appellate court scrutiny. In *Williams v. City of Atlanta*,⁴⁷ the court of appeals held that a pedestrian's ante litem notice was insufficient, and thus, affirmed the grant of summary judgment to the City.⁴⁸

The pedestrian alleged that he fell into an uncovered water meter hole and was injured. He sent an ante litem notice specifying an address that later turned out to not have a water meter.⁴⁹ Also, in the litigation, the address of the incident was different from the address specified in the ante litem notice, and the two locations were approximately 0.3 miles apart.⁵⁰ The court focused on the fact that the

41. *Id.* at 812, 824 S.E.2d at 810.

42. *Id.* at 816–18, 824 S.E.2d at 812–14.

43. 301 Ga. 380, 801 S.E.2d 892 (2017).

44. *Id.* at 380, 801 S.E.2d at 893.

45. *Id.* at 386, 801 S.E.2d at 896–97.

46. *Id.*

47. 342 Ga. App. 470, 803 S.E.2d 614 (2017).

48. *Id.* at 473, 803 S.E.2d at 617.

49. *Id.* at 470–71, 803 S.E.2d at 615.

50. *Id.*

incorrect address did not provide sufficient information for the City to have conducted an investigation into the claims.⁵¹

IV. FOOD POISONING

The Georgia Supreme Court clarified the burden on non-movants facing summary judgment motions in food poisoning cases in *Patterson v. Kevon, LLC*.⁵² The facts arose from food—alleged to contain pathogens and to be undercooked—that plaintiffs consumed at a wedding reception.⁵³ The problem was the one faced in many such cases: which food caused the problems that began a few days later? In this case, the caterer, Big Kev’s, produced testimony that they had safe food-handling procedures and that other guests did not become ill. The plaintiffs produced evidence that some other guests did in fact become ill, and the plaintiffs tested positive for salmonella.⁵⁴

The supreme court reviewed many past decisions of the court of appeals and pointed out that there is no special causation proof requirement that applies to food poisoning cases at the summary judgment stage.⁵⁵ Instead, like other negligence cases, food poisoning cases require adequate proof, even if circumstantial, to get past summary judgment.⁵⁶ Thus, simply saying “I ate food and later got sick” likely does not suffice, but neither would a plaintiff be required to disprove every other possible cause of the maladies she suffered.

V. PREMISES LIABILITY

Many practitioners may have been surprised at how what appeared to be an ordinary negligence case—a person tripping over a concrete wheel stop—morphed into a case requiring expert design testimony in *Bartenfeld v. Chick-Fil-A*.⁵⁷ In that case, a patron of Chick-Fil-A was walking back to her vehicle when she tripped over a concrete wheel stop. Claims of negligence based on the design of the wheel stops were brought, along with ordinary negligence claims. The trial court rejected both claims and granted summary judgment to the defendants because there was no expert testimony that the wheel stop was a hazardous condition.⁵⁸

51. *Id.* at 473, 803 S.E.2d at 616.

52. 304 Ga. 232, 818 S.E.2d 575 (2018).

53. *Id.* at 233, 818 S.E.2d at 576.

54. *Id.* at 233, 818 S.E.2d at 576–77.

55. *Id.* at 237, 818 S.E.2d at 579.

56. *Id.* at 240, 818 S.E.2d at 581.

57. 346 Ga. App. 759, 815 S.E.2d 273 (2018).

58. *Id.* at 760–61, 815 S.E.2d at 276.

The court of appeals affirmed the grant of summary judgment, holding that the claim based on the design of the parking lot was a claim for professional negligence, requiring expert testimony.⁵⁹ An open question is whether this holding will open the door to transforming many seemingly ordinary premises liability cases into professional negligence cases.

VI. MEDICAL NEGLIGENCE

In *Tenet Health System GB Inc. v. Thomas*,⁶⁰ the supreme court affirmed the court of appeals in a medical malpractice case.⁶¹ In that case, the patient suffered quadriplegia after a c-collar was removed while her neck was fractured. Suit was filed prior to expiration of the statute of limitations and then amended after the passing of the statute of limitations to add claims based on the nurse's removal of the c-collar.⁶² Even though a new legal theory of imputed negligence was asserted in the amended complaint, and new persons were alleged to be negligent, the court held that the claims related back to the date of filing of the original complaint under O.C.G.A. § 9-11-15.⁶³

There always seem to be cases involving expert affidavits in medical malpractice cases, and this year includes them as well. In *Holmes v. Lyons*,⁶⁴ the adequacy of an expert's affidavit in a gynecological surgery case was at issue.⁶⁵ The main claim in that case was that the surgeon had physical disabilities that prevented him from doing the surgery properly, resulting in an ureteral injury.⁶⁶ There was nothing in the affidavit that specifically detailed exactly how the damage was done during the surgery, but instead it was alleged that the surgery was botched due to the surgeon's physical difficulties.⁶⁷ The court held that the affidavit was adequate, considering that the appropriate standard required drawing all inferences in favor of the adequacy of the affidavit.⁶⁸

59. *Id.* at 763–65, 815 S.E.2d at 278–79.

60. 304 Ga. 86, 816 S.E.2d 627 (2018).

61. *Id.* at 86, 816 S.E.2d 628.

62. *Id.* at 86–88, 816 S.E.2d at 628–29.

63. *Id.* at 93–94, 816 S.E.2d at 632–33 (citing O.C.G.A. § 9-11-15 (2019)).

64. 346 Ga. App. 99, 815 S.E.2d 252 (2018), *cert. granted*, (Mar. 11, 2019).

65. *Id.* at 100, 815 S.E.2d at 254.

66. *Id.* at 100–01, 815 S.E.2d at 254–55.

67. *Id.* at 103–04, 815 S.E.2d at 256–57.

68. *Id.* at 103–04, 815 S.E.2d at 256.

VII. DEFAMATION

The Georgia courts issued several opinions in defamation cases during the survey period. In *Smith v. DiFrancesco*,⁶⁹ a physician brought a defamation claim against another physician based on a letter sent to patients that included the phrase, “since [plaintiff] last had the ability to practice medicine.”⁷⁰

The trial court granted summary judgment, concluding that the statement was not libel *per se*, which, unlike libel *per quod*, requires no extrinsic facts to establish its defamatory meaning.⁷¹ On appeal, the defendant argued that this phrase could have meant that the plaintiff had simply lost the ability to practice medicine with the company he left.⁷²

The court of appeals rejected the defendant’s argument and held that this statement was libel *per se*, and further held that the statement was not privileged.⁷³ The main issue regarding privilege was whether the statement was made in good faith, which the court determined should have been left for the jury to find, particularly since the plaintiff had never lost his license or his ability to practice medicine.⁷⁴

The difficulty of succeeding in claims brought by public figures for defamation was illustrated in *Ladner v. New World Communications of Atlanta*.⁷⁵ Ladner was a police officer for the city of Holly Springs, Georgia. He completed an application to participate in an event for wounded veterans in Midland, Texas, which included a parade in which Ladner and his wife participated by riding on one of the floats. The float was involved in a collision with a train, and Ladner’s wife was seriously injured.⁷⁶

There were further reports in the news media about Ladner’s wife’s recovery, and some of those reports mentioned that Ladner had received a Purple Heart. Later, family members contacted the press and told them that Ladner had not received a Purple Heart. An Atlanta news station did several reports, relying on military documents that did not indicate Ladner received a Purple Heart.⁷⁷

69. 341 Ga. App. 786, 802 S.E.2d 69 (2017).

70. *Id.* at 787, 802 S.E.2d at 71.

71. *Id.* at 788, 802 S.E.2d at 72.

72. *Id.* at 789, 802 S.E.2d at 72.

73. *Id.* at 789, 791, 802 S.E.2d at 72, 74.

74. *Id.* at 790, 802 S.E.2d at 73.

75. 343 Ga. App. 449, 806 S.E.2d 905 (2017).

76. *Id.* at 449–50, 806 S.E.2d at 908–09.

77. *Id.* at 450–52, 806 S.E.2d at 909–10.

Ladner brought a defamation action, and the news station sought summary judgment on the grounds that Ladner was a public figure and that there was no showing of actual malice by the reporter.⁷⁸ Summary judgment was granted, and the court of appeals affirmed.⁷⁹

The court of appeals focused on the public interest in the various events in the case, including the initial trip to Midland, Texas, the accident, Ladner's medical needs, and fundraising on their behalf.⁸⁰ These various activities, and the public interest in them, supported a finding that Ladner was a public figure.⁸¹

The court also held that there was no showing of actual malice, based in large part on the reporter's many investigative activities, including obtaining documents and statements from several people about Ladner's military service.⁸²

VIII. WRONGFUL DEATH

The issue of causation and intervening acts was addressed by the Georgia Supreme Court in *Jordan v. Everson*,⁸³ a case involving the death of a man released from the hospital after being admitted because he was hearing voices and hallucinating.⁸⁴

The patient was discharged, and his parents decided to take him to Duke University Hospital. During the trip to Duke, he jumped from the vehicle and ran down the highway, where he was struck and killed by another vehicle.⁸⁵

Suit was brought against the emergency room physician, who sought summary judgment on the grounds that there was not a sufficient causal link between his alleged misconduct and the death.⁸⁶

The supreme court held that an intervening act does not need to be "wrongful or negligent" in order to break the causal chain between the original tortfeasor's acts and the result; instead, the act must merely be either reasonably foreseeable or triggered by the defendant's conduct.⁸⁷ Thus, the supreme court reversed the court of appeals on this point,

78. *Id.* at 452, 806 S.E.2d at 910.

79. *Id.* at 461, 806 S.E.2d at 915.

80. *Id.* at 455–56, 806 S.E.2d at 912–13.

81. *Id.* at 456, 806 S.E.2d at 913.

82. *Id.* at 459–60, 806 S.E.2d at 915.

83. 302 Ga. 364, 806 S.E.2d 533 (2017).

84. *Id.* at 364, 806 S.E.2d at 534.

85. *Id.*

86. *Id.* at 364, 806 S.E.2d at 533.

87. *Id.* at 365, 806 S.E.2d at 534.

because the court of appeals concluded that the intervening act must be wrongful or negligent to break the causal chain.⁸⁸

The Georgia Supreme Court addressed wrongful death damages in *Bibbs v. Toyota Motor Corp.*⁸⁹ In that case, the injured person's guardian settled her very serious personal injury claim, and then twenty years later the injured person died. The settlement documents expressly stated that any wrongful death claims were not released by the release in the personal injury case.⁹⁰ After a very long and thorough analysis, the court concluded that in this case the only type of damages the plaintiff would be permitted to recover would be the damages for the intangible value of the decedent's death, even though she had been in a coma for twenty years at the time of her death.⁹¹

IX. CONCLUSION

The Georgia Supreme Court and the Georgia Court of Appeals addressed many tort cases over the latest survey period, in areas that seem to always receive appellate scrutiny, such as immunity and medical negligence, and in some areas of tort law that are not as often addressed in appellate cases, such as food poisoning and defamation.

88. *Id.* at 365–66, 806 S.E.2d at 534.

89. 304 Ga. 68, 815 S.E.2d 850 (2018).

90. *Id.* at 69, 815 S.E.2d at 852.

91. *Id.* at 81, 815 S.E.2d at 860.