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Torts

by Cynthia Trimboli Adams*
and
Charles R. Adams III**

Therefore if thou bring thy gift to the altar, and there rememberest that thy brother hath ought against thee; Leave there thy gift before the altar, and go thy way; first be reconciled to thy brother, and then come and offer thy gift.1

It was a survey period marked by the lack of reconciliation. As always, the victims of civil wrongs other than breaches of contract,2 unreconciled to the perpetrators of those wrongs, sought redress instead in the courts, especially, for present purposes, the appellate courts. Plaintiffs remained unreconciled to the limitations on their rights in malpractice cases and prosecuted more appeals than ever in this burgeoning legal field.3 Defendants of many stripes, and some plaintiffs, too, unreconciled to the litigational tactics of their adversaries, continued to flood the courts with allegations of abusive litigation.4 The courts themselves, apparently unreconciled to some of their own precedents, created several startling legal anomalies.5 Taking their text from all this, these writers are, if not reconciled, at least resigned to presenting what is necessarily only a representative sample of the hundreds of torts decisions encompassed in the survey period. Yet, the reader may be at once reconciled and consoled.

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1. Matthew 5:23-24 (King James).
3. See infra notes 66-128 and accompanying text.
4. See infra notes 392-413 and accompanying text.
5. See infra notes 338-45, 368-81 and accompanying text.
with this fact about the tort law: Its variety and vigor vitiate its vague-
ness and vertiginousness.

I. NEGLIGENCE

A. In General

One of the primary functions of tort law is the achievement of socially
desirable allocations of risk regarding specific activities.6 Over the years,
the Georgia legislature has immunized a whole host of activities from tort
liability.7 During its 1991 Regular Session alone, for example, the legisla-
ture conferred varying degrees of “immunity”8 on sponsors of equine ac-
tivities,9 on bankers,10 and on persons responding to oil spills,11 reporting
nursing home abuse,12 carrying out orders not to resuscitate,13 or provid-
ing volunteer transportation for senior citizens.14 “The idea [is] that,
though the defendant might be a wrongdoer, social values of great impor-
tance [require] that the defendant escape liability.”15 Contrast this view
with the social utility perceived to inhere in tanning facilities. The 1991
legislature passed a comprehensive set of regulations governing such oper-
ations16 and provided that “any consumer who is damaged by any viola-
tion of this chapter may bring an action . . . to recover a penalty fee of
no less than $1,000.00 and to recover any actual, consequential, or puni-

6. See CHARLES R. ADAMS III & CYNTHIA TRIMBOLI ADAMS, GEORGIA LAW OF Torts § 1-4
8. An “immunity” involves freedom from liability, even for behavior that is undisput-
edly tortious. It is thus distinguished from a “privilege,” which holds the defendant’s action
to be nontortious, or if tortious, then morally justified. See WILLIAM L. PROSSER & W. PAGE
KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984) [hereinafter PROS-
SEE & KEETON]. Immunity is based, therefore, on the status of the defendant, while privilege
is based on the nature of his act in a given situation. See GEORGIA TORTS, supra note 6, §
10. Id. § 7-1-840(d). A number of statutes shield banks from liability. For example, in
O.C.G.A. § 7-1-820 (1989) to shield defendant bank from a negligence claim for permitting a
joint depositor to withdraw funds from an account. But see infra notes 442-49 and accompa-
nying text.
12. Id. § 31-8-85(b) (1991).
15. PROSSER & KEETON, supra note 8, § 131, at 1032.
tive damages the court deems appropriate.\textsuperscript{17} The purpose of this remedy, which is "to encourage enforcement of this chapter through private rights of action,"\textsuperscript{18} clearly illustrates the social engineering role of tort law.

B. Premises Liability

\textbf{In General.} Whether to apply the specialized body of legal principles known as "premises liability"\textsuperscript{19} was before a sharply divided supreme court in \textit{Atlanta Gas Light Co. v. Gresham}.\textsuperscript{20} Although \textit{Gresham} is physical precedent only,\textsuperscript{21} it provides an interesting entry into this complicated legal field.

In \textit{Gresham} plaintiff's child was injured when, while exiting his family's mobile home, he tripped over the threshold and fell onto a pipe owned and maintained by defendant. The court of appeals held that defendant's duty was governed not by principles of premises liability, but by the duty to exercise reasonable care in the maintenance of its pipes, commensurate with the risks inherent in that particular business.\textsuperscript{22} The supreme court plurality disagreed, however, and applied the more relaxed "superior knowledge" standard of premises liability law:

"The true ground of liability is the proprietor's superior knowledge of the perilous instrumentalities . . . ." One who is familiar with the premises cannot rely for recovery upon the negligence of the defendant in failing to correct a patent defect where such party had equal means with the defendant of discovering it or equal knowledge of its existence.\textsuperscript{23}

Even applying this standard, however, the plurality recognized that the higher standard of care owed to a child would require a jury resolution of the "superior knowledge" issue.\textsuperscript{24} Nevertheless, the court affirmed summary judgment for defendant on the ground that the injury was not legally foreseeable.\textsuperscript{25}

\begin{itemize}
\item[17.] Id. § 31-38-10. "Any recovery under this Code section shall also include attorney's fees and court costs." Id.
\item[18.] Id.
\item[19.] See \textit{generally Georgia Torts, supra} note 6, ch. 4.
\item[21.] Justice Benham's plurality opinion in \textit{Gresham} commanded the support of only two other justices. Two more justices concurred in the judgment only, and two dissented.
\item[23.] 260 Ga. at 392, 394 S.E.2d at 346 (quoting McKnight v. Guffin, 118 Ga. App. 168, 169, 162 S.E.2d 743, 744 (1968)).
\item[24.] Id.
\item[25.] Id.
\end{itemize}
Presiding Justice Smith in dissent argued against extension of premises liability protections, which were developed to protect the owner or occupier of land, to one who merely holds a limited easement over a fraction of the premises. "If we extend premises liability principles to a mere easement holder who, as in this case, exerts no appreciable degree of control over the premises, we may create a duty where none existed before." Thus, if Justice Smith's prophecy proves correct, Gresham could in the long run prove to be more of a boon than a burden to injured plaintiffs in premises liability cases.

The owner's or occupier's duty to keep the premises safe also extends to the "approaches" to the premises. In Reed v. Ed Taylor Construction Co., the court refused to include the public highway leading to defendants' work site as an "approach" for premises liability purposes. Plaintiff, who was injured when he collided with a truck that was entering defendants' off-road work site, alleged that defendants should have posted warning signs along the road to alert passing traffic to the existence of the site. Holding that "the duty over a public way is circumscribed by the rights in it the occupier has exercised," the court concluded that because defendants had not used the road in a manner different from the motoring public, it could not legally be considered an "approach" to their premises.

The result in Reed is difficult to reconcile with the rule established by the supreme court in Todd v. F.W. Woolworth Co. In Todd the supreme court held that when a premises owner has the same opportunity as any member of the public to remove or warn of a hazard, the jury must determine whether the owner's failure to act was negligent. Why was the public sidewalk in Todd a legal "approach," while the public highway in Reed was not? In neither case did the defendant exercise any greater control over the approach than did the plaintiff or any other member of the public. One possible ground for reconciling these cases lies in an aspect of premises liability law not at issue in either Todd or Reed—that of the relative "status" of the plaintiffs. A brief digression to review several survey period cases on this point may help put these rules into perspective.

26. Id. at 395, 394 S.E.2d at 348 (Smith, P.J., dissenting).
27. O.C.G.A. § 51-3-1 (1982).
29. Id. at 597, 402 S.E.2d at 347.
30. Id. at 596-97, 402 S.E.2d at 347.
31. Id. at 597, 402 S.E.2d at 347-48. There was no allegation that the truck driver, who was also sued, was an agent of those defendants who were granted summary judgment. See id. at 596, 402 S.E.2d at 347.
33. 258 Ga. at 197, 366 S.E.2d at 676.
Generally, owners or occupiers of premises owe a lesser duty to licensees than to invitees.44 “An owner owes to a licensee no duty as to the condition of the premises . . . save that he should not knowingly let him run upon a hidden peril or wilfully cause him harm.”45 Some examples of licensees include social guests,46 uninvited salesmen,47 and motorists swerving off the road to avoid a collision.48 An invitee, on the other hand, is one who the owner or occupier of the land, “by express or implied invitation, induces, or leads . . . to come upon his premises for any lawful purpose.”49 The owner owes a duty of ordinary care to his invitees to keep the premises and approaches safe,40 and “[a]n invitee must also exercise ordinary care for [his] own safety.”41 Furthermore, if, as appeared to be the case in Reed, “the conduct of third persons . . . is such as to cause any reasonable apprehension of danger to other . . . invitees, . . . it is the duty of the proprietor to interfere to prevent probable injury.”42

Applying these rules to Todd and Reed, it appears that the greater liability imposed in Todd resulted from the fact that defendant in that case was a retail business which had invited plaintiff onto its premises,43 while plaintiff in Reed was neither invited to nor attempting to enter or leave the premises of defendants. Thus, under the rules set forth above, defendants in Reed owed a lesser duty to maintain the approaches than did defendant in Todd.

Landlord and Tenant. Several significant cases during the past few years have broadened the rights of plaintiffs against landlords in premises liability cases. Among these cases are Flagler Co. v. Savage44 and Thomp-
son v. Crownover," which have been discussed in previous editions of this survey. A divided court of appeals continued this trend during the survey period in Spence v. Citizens & Southern National Bank. Plaintiff, an employee of defendant's tenant, was injured when he fell through a poorly-constructed mezzanine floor in defendant's warehouse. The trial court applied the "superior knowledge" rule discussed in Gresham, and granted summary judgment to defendant, concluding that plaintiff's knowledge of the danger was actually superior to that of defendant. In a five-to-four decision reversing the trial court, the court of appeals implicitly rejected the "superior knowledge" test for actions involving a landlord's failure to repair. Contrary to slip and fall cases, discussed below, in which the plaintiff must show that he was without knowledge of the hazard or for some reason attributable to the defendant was prevented from discovering it, a plaintiff who sues a landlord for failure to repair must only show, according to Spence, that the landlord had knowledge of the hazard. The landlord then has the burden of affirmatively demonstrating the plaintiff's appreciation of the risk and the plaintiff's legal assumption thereof. In the words of the Spence majority, "[n]ow,

47. See supra text accompanying notes 20-26.
49. Id. at 295-96, 393 S.E.2d at 2-3.
50. See infra text accompanying notes 55-65.

For appellant to recover under a common law negligence theory, there must have been a defective condition on appellee's premises, which defect was the cause of appellant's fall and of which appellee had superior knowledge. The law is clear that the basis for an owner's liability for injury occurring to another while on the owner's property is the owner's superior knowledge of the danger or defect which was the proximate cause of the injury. The true ground of liability is the proprietor's superior knowledge [of a hazard] known to the owner or occupant and not known to the person injured . . . . Thus, the basis of the proprietor's liability is his superior knowledge, and if his invitee knows of the condition or hazard, there is no duty on the part of the proprietor to warn the invitee and there is no liability for resulting injury because the invitee has as much knowledge as the proprietor does.

53. Id. at 296, 393 S.E.2d at 3.
it appears that circumstances such as the landlord’s knowledge of defec-
tive conditions . . ., the tenant’s or the invited third parties’ knowledge
and appreciation of dangerous conditions on leased premises[,] and ‘ne-
cessity’ will be factors reserved solely for the finders of fact.”

Several years ago, the Georgia Supreme Court noted that “[t]he cases
have tended to drift toward a jury issue in every ‘slip and fall’ case” and
reversed that trend in the oft-cited case of Alterman Foods, Inc. v.
Ligon. The economic benefits of Alterman to anyone but lawyers are at
least questionable, given the volume of litigation flowing from that deci-
sion, and Flagler, Crownover, and Spence may herald the most socially
useful method of resolving premises liability cases. In any event, the so-
cial utility of favoring defendants in slip and fall cases over defendants in
landlord repair cases is at best questionable.

Slip and Fall. Slip and fall cases commanded interest during the sur-
vey period primarily because of the court’s rigid adherence to the “supe-
rior knowledge” rule, which it proceeded to reject in the landlord repair
case discussed above. Not only must the plaintiff show superior knowl-
edge of the hazard on the part of the defendant, the plaintiff must also be
able to state with some particularity exactly what caused him to fall. Plaintiff in McConnell v. Winn-Dixie Atlanta, Inc., who alleged that
“his ‘feet shot out from under’ him,” could not get to a jury, while plain-
tiff in Spivey v. Board of Education, who stated that “her feet . . . ‘flew
out from under’ her,” could. Beyond the difference in footwork, how-
ever, plaintiff in Spivey was able to point to the presence of rainwater on

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54. Id. at 296 n.3, 393 S.E.2d at 3 n.3 (emphasis added).
57. Although slip and fall appeals have been overtaken in number by malpractice ap-
peals in the last three years, during the decade since Alterman, these writers have empiri-
cally observed slip and fall cases to comprise consistently the largest single category of ap-
pellate litigation in the torts field. See Adams & Adams, supra note 32, at 388.
58. Failure to demonstrate defendant’s superior knowledge of the hazard defeated plain-
59. See supra text accompanying notes 44-54 for the discussion of Spence.
61. Id. at 700, 391 S.E.2d at 785.
63. Id. at 726, 391 S.E.2d at 783.
the steps, but plaintiff in *McConnell* was unable to prove the existence of any foreign object contributing to his fall.\(^6\)

**C. Malpractice**

**In General.** By far the largest single group of cases arising in the area of malpractice clustered around the expert witness affidavit requirements of Official Code of Georgia Annotated ("O.C.G.A.") section 9-11-9.1.\(^6\) Within that group, several survey period cases addressed the ongoing controversy concerning who is a "professional" entitled to invoke the protections of section 9-11-9.1.\(^6\) For example, the courts reaffirmed the applicability of section 9-11-9.1 to lawyers,\(^6\) architects,\(^6\) and engineers.\(^7\) In *Jordan, Jones & Goulding, Inc. v. Wilson*,\(^7\) a case involving engineering malpractice, the court stated that the section applies to "many professions,"\(^7\) the test being whether understanding "the applicable standard of professional conduct calls for 'highly specialized expert knowledge with respect to which a layman can have no knowledge at all.'"\(^7\) Of interest in this regard is Justice Weltner's concurrence in *Creel v. Cotton States Mutual Insurance Co.*\(^7\) Justice Weltner suggested limiting the term "professional," for purposes of section 9-11-9.1, to those occupations defined in the Georgia Professional Corporation Act\(^7\) and those services defined in the Georgia Professional Association Act.\(^7\)

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64. *Id.* at 727, 391 S.E.2d at 783.
65. 194 Ga. App. at 701, 391 S.E.2d at 786. Plaintiff alleged that the floor had become slick or frozen because of cold air coming in through defendant's doors. Could the tendency of the floors to freeze have constituted a static defect? Compare *McConnell* with *Boyd v. Garden Ctr., Inc.*, 197 Ga. App. 198, 397 S.E.2d 626 (1990), in which plaintiff's inability to state what caused her to fall down the steep back stairs of defendant's building precluded her claim as a matter of law. The court decided both *McConnell* and *Boyd* without reference to the possible static defects, although it does not appear that these claims were pressed by plaintiffs.
67. For the evolution of this controversy from its creation, see Adams & Adams, supra note 22, at 439-41; Adams & Adams, supra note 44, at 362-63.
72. *Id.* at 355, 398 S.E.2d at 386.
73. *Id.* at 355-56, 398 S.E.2d at 387 (quoting Pilgrim v. Landham, 63 Ga. App. 451, 454, 11 S.E.2d 420, 423 (1940)).
75. O.C.G.A. §§ 14-7-1 to -7 (1989). See *id.* § 14-7-2.
76. *Id.* §§ 14-10-1 to -18. See *id.* § 14-10-2.
The court of appeals took a much broader view in Razete v. Preferred Research, Inc., holding that when the negligence involved "is proved by reliance upon a standard of care or by rules of procedure used by others competently performing the same service, it is a 'professional' act or practice." This somewhat expansive finding should be tempered by the traditional test, implicit in Wilson and other cases, that "expert opinions are required only concerning conclusions that the jury could not ordinarily draw for itself, namely 'the conclusion is 'beyond the ken of the average layman.'" 

A rapidly developing exception to the expert testimony requirement in malpractice cases is found in those cases involving only a simple negligence theory of recovery. As a general rule, when actions performed by or under the supervision of a professional are nevertheless not professional acts constituting malpractice but are acts of simple negligence, they do not require proof by expert evidence. A "professional act" is one that involves reliance on a standard of care or rules of procedure used by others competently performing the same service, and expert testimony is necessary to establish the parameters of acceptable conduct in such cases. When, however, the plaintiff can prove negligence or breach of a duty without proof of a customary procedure and its violation, it is not malpractice, and expert testimony is not required.

Thus, during the survey period, plaintiffs who fell out of bed, who fell off of an examination table, who were dropped by a nurse, or who were burned by heat from an operating lamp did not need expert testimony to prove their contentions because the injuries did not result from the exercise of professional judgment. On the other hand, a plaintiff who was injured while being transported in a wheelchair did have to produce ex-
pert testimony because the decision to employ a wheelchair was determined by the medical condition of the patient and, therefore, implicated defendant’s professional judgment. Likewise, a hospital patient who slipped and fell in the shower had a malpractice claim because expert testimony was required concerning whether it was negligent to permit her to shower without continuous assistance.

Competency of expert witnesses continues to be a major issue in malpractice litigation. The Eleventh Circuit, in Rixey v. West Paces Ferry Hospital, Inc., applied the Georgia rule, established in the 1984 case of Beatty v. Morgan, that a physician testifying as an expert witness on the standard of care exercised by another physician is not required to be a specialist in the area of medicine practiced by the other physician. In Milligan v. Mano, a different panel of the Georgia Court of Appeals from the one that decided Beatty, ignored Beatty and held “that a member of a school of practice other than [the one] to which the defendant belongs is generally not competent to testify as an expert in a malpractice case.” The court in Milligan recognized, however, that if the methods of diagnosis and treatment employed by the two different schools of practice are the same despite differences in nomenclature, the witness is competent to testify. This exception did not apply in Milligan, however, because plaintiff’s expert was an osteopathic physician and defendant was an allopathic physician. Taking judicial notice of the fact that the two schools of medicine differ in many respects, the court held plaintiff’s failure to show affirmatively in her section 9-11-9.1 affidavit that her witness was competent to testify warranted dismissal. The court also noted that the rules governing competency of experts for trial purposes would be applied to section 9-11-9.1 affidavits as well.

A plaintiff in a professional negligence case must withstand not one but two challenges to the legal sufficiency of his claim; the first at the pleading stage pursuant to section 9-11-9.1 and the second at the summary

90. 916 F.2d 608 (11th Cir. 1990).
92. Id. at 662, 317 S.E.2d at 664.
94. Id. at 171, 397 S.E.2d at 714 (quoting Sanford v. Howard, 161 Ga. App. 495, 497, 288 S.E.2d 739, 740 (1982)).
95. Id.
96. Id. at 172, 397 S.E.2d at 715.
97. Id.
More is required of a plaintiff to stay in court in response to a summary judgment motion than is required in a section 9-11-9.1 affidavit to get into court. Generally, "[t]he expert’s affidavit must state the particulars; it must establish the minimum requirements of professional conduct applicable to the various professional categories of defendants involved, and set forth how or in what way the various defendants deviated therefrom."

With regard to the "particulars," although an expert "may not base his . . . opinion solely on . . . hearsay" or on reports or facts that are not in the record, the facts need not be within the personal knowledge of the witness, whose opinion may be based on records that he reviewed and which "would be the same facts introduced hypothetically at trial." In addition to identifying the relevant standard of care and breach thereof, the expert must establish that the breach was the proximate cause of the plaintiff’s injury. This cannot be done by mere conclusory (or "conclusional," according to Judge Beasley in Hall v. Okehi) opinions; the expert must state the particulars, or the plaintiff suffers summary judgment.

Medical Malpractice. "[T]he issue in a medical professional negligence action is whether the treatment met the standard of care of the profession generally and not what any one individual doctor believes is advisable." Although the importance of identifying the proper standard of care cannot be overstated, the supreme court eased plaintiff’s burden in this regard in McDaniel v. Hendrix. In that case, plaintiff’s expert articulated a standard of care for "physicians . . . practicing in Atlanta,

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105. For more complete treatments of the technicalities to which this area of law is subject, within the context of its most visible aspect, medical malpractice, see ROYAL & ALEXANDER, supra note 66, ch. 9; GEORGIA TORTS, supra note 6, § 5-2; Adams & Adams, supra note 32, at 392.


Georgia, or in any other similar community."  

The trial court awarded summary judgment to defendants on the basis that plaintiffs’ expert applied a local standard of care. In reversing, the supreme court reiterated that the general, not the local standard of care is the appropriate one for medical malpractice cases, but the general standard might not be articulated the same in every case.  

When the defendant moves for summary judgment, the trial court is to draw the inference most favorable to the plaintiff as the nonmoving party. In McDaniel the favorable inferences were that the standard in Atlanta was either lower than the general standard or the same as the general standard. In either case, the court stated, summary judgment would be precluded. The court even intimated that summary judgment would not be proper in the third instance (Atlanta’s standard higher than general), because “arguably the [defendants] should have to meet that standard.”  

Taken in conjunction with the court’s 1985 ruling in Kellos v. Sawilowsky that, for legal malpractice purposes, the local versus general standard is a distinction without a difference, McDaniel perhaps signals a willingness on the supreme court’s part to eliminate this pesky issue.  

In other issues concerning standards of care, the court in Littleton v. Ob-Gyn Associates, P.C. reiterated that “[p]rofessional medical negligence may consist of negligent diagnosis resulting in properly performed but inappropriate treatment, as well as a lack of skill or care in applying appropriate treatment.” The supreme court in Atlanta Obstetrics & Gynecology Group v. Abelson declined to recognize a cause of action for “wrongful birth” in Georgia. Plaintiffs in Abelson had a child born with Down’s Syndrome. They alleged that defendant failed to advise them about the risks of pregnancy and failed to conduct an amniocentesis, which would have detected the Down’s Syndrome in time for them to abort the child. Finding difficulty in holding a physician liable “for an impairment which the child unquestionably inherited from her

108. Id. at 858, 401 S.E.2d at 261.
109. Id., 401 S.E.2d at 262.
110. Id.
111. Id. at 859-60, 401 S.E.2d at 262-63.
112. Id. at 860 n.2, 401 S.E.2d at 263 n.2.
114. For discussion of the lingering uncertainty in this area prior to McDaniel, see Georgia Torts, supra note 6, § 5-2, at 95-96; Adams & Adams, supra note 44, at 365-96.
116. Id. at 45-46, 403 S.E.2d at 839. In other words, professional liability may result from doing the wrong thing the right way, as well as for doing the right thing the wrong way.
119. 260 Ga. at 711, 398 S.E.2d at 558.
parents and an impairment which was already in existence when the parents first came into contact with the physician," the court concluded that creation of any cause of action in this area should be left to the legislature "wherein all the issues, policy considerations and long range consequences involved in recognition of the novel concept of a 'wrongful birth' cause of action can be thoroughly and openly debated and ultimately decided."

Legal Malpractice. As with all torts, a plaintiff in a legal malpractice action must establish certain essential elements if he is to prevail on his claim. For example, actionable negligence must be the proximate cause of injury to the client. Thus, in Hendricks v. Davis, an attorney's alleged conflict of interest could not support a malpractice recovery in the absence of a showing that the conflict proximately resulted in damages to plaintiff. Likewise, the relationship of attorney and client is an essential element of the claim. Although such a relationship "cannot be created unilaterally in the mind of a would-be client," a divided court of appeals in Calhoun v. Tapley held the issue to be one for the jury when plaintiff alleged the defendant attorney kept assuring her he was "looking after [her] interest," and defendant's name appeared on suit papers filed on plaintiff's behalf by another attorney sharing office space with defendant.

II. IMPUTED LIABILITY

A. Negligent Entrustment

The decision of the court of appeals in Clarke v. Cox certainly underscores the difficulty in proving all the essential elements of a negligent entrustment claim. In that case plaintiff based his cause of action

120. Id. at 714-15, 398 S.E.2d at 560.
121. Id. at 718-19, 398 S.E.2d at 563.
122. See generally Georgia Torts, supra note 6, § 5-3.
124. Id. at 287-88, 395 S.E.2d at 634.
127. Id. at 319, 395 S.E.2d at 850.
128. Id. at 318, 395 S.E.2d at 849.
130. The owner of a motor vehicle may be liable for injuries caused by the vehicle's operation by one whom the owner has permitted to operate the vehicle, with the knowledge that such person was incompetent to operate the vehicle safely, because of the operator's age, lack of experience, physical or mental condition, intoxication, or his known habit of recklessness in operating a motor vehicle.
against defendant Clarke on a negligent entrustment theory for injuries received when Clarke's vehicle, which was driven by defendant Kielma, struck plaintiff's vehicle. The evidence at trial showed that Clarke and Kielma had known each other for a number of years, that they had been roommates for about a year prior to the accident, and that Kielma usually drank a pint of bourbon at home each night. It also showed that Clarke was usually at home on weeknights, that Clarke had seen Kielma intoxicated, that Clarke knew Kielma's primary source of transportation was MARTA, and that Clarke had lent his car to Kielma on the day in question. While acknowledging that a plaintiff generally must rely on circumstantial evidence in proving a case of negligent entrustment, the court, nevertheless, found that Clarke had no actual knowledge or facts from which his knowledge that Kielma "was currently driving, or had a history of driving, while under the influence of alcohol" could be inferred. Consequently, the court held that "the evidence supporting the negligent entrustment [jury] verdict failed to prove the tort" and reversed the trial court's denial of Clarke's motion for new trial.

B. Family Purpose Doctrine

After acknowledging that an owner's authority and control over a motor vehicle is the principal factor in determining the application of the family purpose doctrine, the court of appeals in Smith v. Sherman found that the trial court incorrectly granted defendant father's summary judgment motion on that issue. At the time of the collision, when defendant's son, while driving defendant's car, injured plaintiff, defendant resided outside of Georgia, but often returned to his wife's home in Geor-

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131. 197 Ga. App. at 83, 397 S.E.2d at 599. The evidence further showed that prior to the collision, Kielma had several DUI violations, and his driver's license had been suspended. Id.

132. Id. at 84, 397 S.E.2d at 600.

133. Id.

134. The other factors include: 1) permission by the owner for the family member to drive the vehicle; 2) control of the vehicle relinquished to the family member; 3) family member in the vehicle; and 4) the vehicle's use engaged in a family purpose. Quan v. Johnson, 190 Ga. App. 510, 379 S.E.2d 426 (1989). See generally GEORGIA TORTS, supra note 6, § 13-1.


136. Id. at 185, 397 S.E.2d at 619.
gia, although he later obtained a divorce from her.\footnote{Id. at 183-85, 397 S.E.2d at 618-19. The evidence also showed that defendant supplied his minor son with the vehicle in question, that defendant and his wife were not separated on the date of the accident, that defendant still retained his Georgia driver's license, and that defendant had not registered to vote in Louisiana where he claimed to reside. Id. at 185, 397 S.E.2d at 619.} In rejecting defendant's argument that his son was not driving a family purpose vehicle because he was not a member of defendant's immediate household, the appellate court stated \"[d]espite the multiple residences and subsequent divorce, there is evidence that at that time [defendant's] family continued to function as a cohesive social entity, and that he had the right and did in fact exercise authority and control over the use of the automobile involved in the collision.\"\footnote{Id. at 185, 397 S.E.2d at 619.}

### III. Negligence Defenses

#### A. Proximate Cause Defenses

In two survey period cases of note, \textit{Plantation Unit Owners' Association, Inc. v. Lee}\footnote{260 Ga. 391, 394 S.E.2d 345 (1990). See supra notes 20-26 and accompanying text.} and \textit{Atlanta Gas Light Co. v. Gresham},\footnote{196 Ga. App. 420, 395 S.E.2d 817 (1990).} the appellate courts determined that defendants' negligence, if any, was not, as a matter of law, the proximate cause of plaintiffs' injuries. Plaintiff in \textit{Lee} injured his head when he dove into a swimming pool owned by defendant and struck the concrete bottom.\footnote{Id. at 420-21, 395 S.E.2d at 818-19.} The evidence showed that the pool was unlighted and that plaintiff dove into it even though \"the water was black, because of the darkness, and he could not see the bottom of the pool. He . . . did not have any idea which end of the pool he was diving into.\"\footnote{Id. at 422, 395 S.E.2d at 820.} Similarly, plaintiff in \textit{Gresham} was injured when he fell from the steps of a mobile home onto a pipe owned by defendant,\footnote{Id. at 392, 394 S.E.2d at 346.} which was located \"well outside the expectable course of traffic entering and exiting the mobile home.\"\footnote{Id. at 423, 395 S.E.2d at 820. The court also found that since the evidence showed that plaintiff understood the danger of diving into water of an unknown depth, defendant had no duty to warn him of the dangers of diving into an unlighted pool at night without knowing anything about the depth of the water therein. Id. at 423, 395 S.E.2d at 820.} In each of these cases the courts found that the respective defendants' actions in failing to light the swimming pool\footnote{Id. at 422, 395 S.E.2d at 820.} or in
the placement of the gas pipe were not the proximate causes of the respective plaintiffs' injuries.

Conversely, the supreme court in Atlanta Obstetrics & Gynecology Group, P.A. v. Coleman, upheld the court of appeals finding that plaintiff wife's injuries resulting from a stroke following an abortion were proximately caused by defendant doctor's administration of a hormone shot to her. The jury had returned a combined verdict in the amount of $585,000 for plaintiffs. The supreme court stated that:

the jury in this case was authorized to conclude that Dr. Hutchinson should reasonably have known that a woman who was trying to become pregnant might already be pregnant. He was negligent in administering a hormone shot to a pregnant woman. This negligence directly caused Ms. Coleman to undergo an abortion procedure that would otherwise have been unnecessary. Further, the evidence authorized the jury to conclude that the events that followed the first abortion procedure were unusual, but entirely foreseeable complications that are attendant to that medical procedure.

Plaintiff in Peacock v. Strickland relied on the 1989 case of Glenn v. Hutcheson to contend that defendant's guilty plea to a failure to yield the right of way charge entitled her to a verdict on the issue of liability in her negligence action against defendant for injuries she received in an automobile collision. Although the court dismissed the reliance on Glenn by finding that case to be physical precedent only, other factual differences exist which make that case improper authority for Peacock. In Glenn defendant had pled guilty to the offense of homicide by vehicle, which requires the violation of another traffic statute that thereby

820. But see the dissent of Judge Deen concerning these issues. Id. at 423-24, 395 S.E.2d at 821 (Deen, P.J., dissenting).
146. 260 Ga. at 393, 394 S.E.2d at 347. But see the dissent of Justice Smith concerning this issue. Id. at 395-97, 394 S.E.2d at 348-50 (Smith, P.J., dissenting).
150. 260 Ga. at 570, 398 S.E.2d at 18. For a complete recitation of the tragic chain of events involved in this case see Coleman, 194 Ga. App. at 508-09, 390 S.E.2d at 856-57.
152. 194 Ga. App. 12, 389 S.E.2d 523 (1989). In that case, the court found that because defendant had pled guilty to the offenses of vehicular homicide and driving too fast for conditions, he had admitted, for the purposes of his civil liability, that his negligent driving was the proximate cause of plaintiff's death. See Adams & Adams, supra note 22, at 445-46.
154. Id. in Glenn Judge Sognier concurred in the judgment only. 194 Ga. App. at 13, 389 S.E.2d at 524 (Sognier, J., concurring).
155. 194 Ga. App. at 12, 389 S.E.2d at 524.
"causes the death of another person." Further, defendant in Glenn "did not attempt during the trial to contravene the admissions created by his guilty pleas." While Peacock is more in line with the cases that hold a guilty plea to a traffic offense does not constitute an irrefutable admission of proximate cause in a civil negligence action, the decision in Glenn, although it must be viewed carefully, is not without usefulness for the circumstances with which it deals.

B. Limitation of Actions

O.C.G.A. section 9-3-72 provides that a malpractice action for a foreign object left in a patient's body must be brought within one year from the date of its discovery. In Spivey v. Whiddon, the supreme court held that the one-year foreign object statute does not shorten the general two-year rule in medical malpractice cases. To reach this conclusion, the court overruled its 1988 decision in Ringewald v. Crawford W. Long Memorial Hospital, which held a plaintiff is not allowed to bring suit more than one year after discovering the foreign object. After Spivey the rule is that a plaintiff gets the later of two years from the date the foreign object is left in the body or one year from the date of discovery. In this way, stated the court, the "orderliness of the legislative scheme" is preserved.

O.C.G.A. section 9-3-73 creates special limitations provisions for five-year olds and for incompetent persons who are victims of medical malpractice. Subsection (b) of the statute gives a two-year grace period to minors born after July 1, 1982. Subsection (g) gives a similar two-year grace period to minors born before July 1, 1980. There was no grace period extended to persons born between those two dates, which included

156. O.C.G.A. § 40-6-393 (1991) (emphasis added). The elements of the vehicular homicide statute itself seem to supply the requisite causation factor.
162. 260 Ga. at 503, 397 S.E.2d at 118.
164. 258 Ga. at 303, 368 S.E.2d at 491.
165. 260 Ga. at 504, 397 S.E.2d at 119 (quoting 258 Ga. at 304, 368 S.E.2d at 492 (Clarke, P.J., dissenting)).
167. Id.
168. Id.
plaintiff in *Mansfield v. Pannell*. Accordingly, the supreme court stated that the statute failed the "rational basis" test on that point and was void on equal protection grounds. Exercising its power of judicial review, the court undertook to "blue-pencil" the law to give it the construction that would most adhere to the legislative intent and result in a constitutional statute. The way to do this, said the court, was to construe the two subsections as giving a two-year grace period to everyone, "meaning that no action will be barred before two years from the [statute's] effective date." Thus, section 9-3-73 will not bar any action, not otherwise barred, that was filed before July 1, 1989.

In *Associated Writers Guild, Inc. v. First National Bank of America*, the court was faced with the question of what limitations period should be placed upon the tort of wrongful dishonor of checks. Analogizing an action for wrongful dishonor to an action for injury to reputation, the court recognized that an action for wrongful dishonor involves an injury to the person. Taking all this into consideration, the court stated that "the statute of limitations for a wrongful dishonor claim would certainly be no greater than two years and quite possibly no greater than one year." Obviously, whether the one year or two year limitations period will be applied to this type of action is a question awaiting further judicial elucidation.

Plaintiff in *Jones v. Bates* was sixteen when he was injured and filed his action the day before his twentieth birthday. Finding that neither O.C.G.A. section 9-3-73 nor the general two-year statute was applica-

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169. 261 Ga. 243, 404 S.E.2d 104 (1991). This decision is technically outside the survey period; however, the earlier court of appeals opinion in this case was published during this year's survey period. See *Mansfield v. Pannell*, 194 Ga. App. 549, 390 S.E.2d 913 (1990). The court of appeals remanded the case to the trial court for a consideration of the constitutional issues, which were the subject of the supreme court's review. Id. at 552, 390 S.E.2d at 916.

170. 261 Ga. at 244, 404 S.E.2d at 105.
171. Id. at 245, 404 S.E.2d at 106.
175. 195 Ga. App. at 820, 395 S.E.2d at 24. Whether a one-year or two-year limitations period applied made no difference to the outcome of this case since more than two years had passed before the action was filed. See id. at 821, 395 S.E.2d at 24.
177. Id. at 240, 403 S.E.2d at 805.
179. Id. § 9-3-71. Generally, a medical malpractice action must be brought within two years of the date on which an injury or death arising from a negligent or wrongful act or omission occurred.
ble, the latter because the injury occurred within plaintiff's minority and the former because it didn't take effect until after his majority, the court applied the venerable rule that starts the statute running for injuries to a minor at the time of his majority.\textsuperscript{180}

The supreme court in \textit{Browning v. Maytag Corp.}\textsuperscript{181} was called upon to answer a certified question from the Eleventh Circuit Court of Appeals concerning whether O.C.G.A. section 51-1-11\textsuperscript{182} may be applied retroactively to bar a cause of action for negligence that is brought more than ten years after the date of the first sale of the product.\textsuperscript{183} Answering this question in the negative, the court specifically found that plaintiffs' "cause of action accrued at the time of the injury, some two years before the [July 1, 1987] effective date of § 51-1-11(c). Thus, to apply § 51-1-11(c) retroactively to defeat [plaintiffs'] substantive right to bring their cause of action would be unconstitutional."\textsuperscript{184}

O.C.G.A. section 9-3-51(a)\textsuperscript{185} sets forth an eight-year statute of repose for claims involving construction of an improvement to real property. The question that typically arises under this statute is whether the work done was actually an improvement to realty or merely repair and maintenance.\textsuperscript{186} The court in \textit{Broadfoot v. Aaron Rents, Inc.}\textsuperscript{187} found that installing horizontal expansion joints in the brick veneer of a building's wall was a structural change as contemplated by section 9-3-51.\textsuperscript{188} Thus, the statute of repose was applicable.

Dealing with a case of first impression in Georgia, the court in \textit{Butler v. Glen Oak's Turf, Inc.}\textsuperscript{189} was called upon to determine whether the statute of limitations for a common law tort action is tolled during the pendency of an unsuccessful workers' compensation claim. In \textit{Butler} plaintiff was

\begin{itemize}
  \item \textsuperscript{180} O.C.G.A. § 9-3-90(a) (Supp. 1991) provides that a statute of limitation will not begin to run against a minor until he reaches the age of majority. \textit{Id.}
  \item \textsuperscript{181} 261 Ga. at 20, 401 S.E.2d 725 (1991).
  \item \textsuperscript{182} O.C.G.A. § 51-1-11(c) (Supp. 1991) specifically forbids bringing an action for negligence against a manufacturer more than ten years from the date of the product’s first sale for use or consumption. \textit{Id.}
  \item \textsuperscript{183} 261 Ga. at 20, 401 S.E.2d at 726.
  \item \textsuperscript{184} \textit{Id.} at 22, 401 S.E.2d at 727.
  \item \textsuperscript{185} O.C.G.A. § 9-3-51(a) (1982). Any causes of action that come within the purview of this statute must be brought within eight years from the date of substantial completion.
  \item \textsuperscript{186} See \textit{Mullis v. Southern Co. Servs.}, 250 Ga. 90, 296 S.E.2d 579 (1982).
  \item \textsuperscript{188} \textit{Id.} at 299-300, 393 S.E.2d at 41. In addition, during this survey period it was specifically held that this statute of repose does not otherwise thwart the limitation of the discovery rule as set forth in \textit{Corporation of Mercer Univ. v. National Gypsum Co.}, 258 Ga. 365, 368 S.E.2d 732 (1988) (tolling of a statute of limitations until discovery of the harm applies only in cases involving bodily injury). \textit{Fort Oglethorpe Assocs. II, Ltd. v. Hails Constr. Co.}, 196 Ga. App. 668, 396 S.E.2d 586 (1990).
  \item \textsuperscript{189} 196 Ga. App. 98, 395 S.E.2d 277 (1990).
\end{itemize}
injured on the job when a forklift turned over on her. She filed a timely workers’ compensation claim and was awarded benefits that were later overturned by the court of appeals on the basis that her employment was not covered under workers’ compensation. Following an in-depth discussion of the untenableness of requiring a plaintiff to pursue mutually exclusive remedies simultaneously, the court held that the statute of limitations for plaintiff’s common law tort action was tolled during the pendency of her workers’ compensation claim.

The general rule is that the statute of limitations starts running on the date the damage is done, not the date the plaintiff finds out about it, absent some provision or circumstance that will cause it to be tolled. During the survey period the court of appeals rejected attempts by two plaintiffs to toll the statute with respect to their claims. In Hickey v. Askeren, plaintiff alleged that defendant’s treatment of her “rendered her so dependent on him that she submitted to sexual relations with him on two instances in 1981.” In June 1989 she brought suit, claiming that “until late 1988 she ‘simply was not aware of the extent of the harm she allegedly experienced as a result of [defendant’s] treatment . . . .” As alternatives to her discovery argument, plaintiff advanced theories of continuing tort, fraud, and mental incompetence. The court held that the facts, which included evidence that plaintiff had discussed the sexual encounters with a number of medical and mental health professionals over the intervening years, simply would not support any of plaintiff’s theories, and the statute was not tolled.


191. 196 Ga. App. at 101, 395 S.E.2d at 280. The court specifically noted as one reason for its holding that “in the case sub judice the workers’ compensation claimant was ultimately denied benefits on the basis that she was not covered under the Act, not . . . on the basis that, while covered, she was not entitled to compensation.” Id. at 100, 395 S.E.2d at 279.

192. See generally Georgia Torts, supra note 6, § 18-5.


194. Id. at 718, 403 S.E.2d at 226.

195. Id. at 719, 403 S.E.2d at 227.


197. O.C.G.A. § 9-3-96 (1982).

198. Id. § 9-3-90 (Supp. 1991).

An action for legal malpractice alleging negligence or unskillfulness is based on a breach of duty of the attorney-client employment contract and, thus, carries a four-year statute of limitations. This same type of action may sound in tort and be subject to a one-year or two-year limitations period. Applying this seeming double standard to the legal malpractice action brought in Cheeley v. Henderson, the court found that certain of plaintiff's claims sought damages for injury to his reputation and for mental anguish and were time barred pursuant to O.C.G.A. section 9-3-33.

C. Assumption of the Risk

In Marley v. Silver Dollar City, Inc., plaintiff was injured when she exited the "Bonzai Pipeline" waterslide at White Water Park in an upside down position. The court of appeals found that Atlanta Funtown, Inc. v. Crouch controlled the instant factual situation and held that plaintiff had assumed the risk "of landing upside down after being propelled downward by the force of gravity and flow of water . . . ." which was a normal hazard of this waterslide.

D. Delay in Service

In only one case decided during this survey period, Lloyd v. Tyson, did the court find that late service on a defendant was not attributable to a lack of due diligence. The accident which formed the basis for this case occurred on May 2, 1985. Suit was filed on October 25, 1985, and plaintiff's attorney found out that defendant had left the county with no

203. 197 Ga. App. at 547, 398 S.E.2d at 791.
205. Id. at 44-45, 400 S.E.2d at 337.
206. 114 Ga. App. 702, 152 S.E.2d 583 (1966). In Crouch the court discussed extensively the doctrine of assumption of the risk in relation to amusement rides and found that individuals who choose to go on such rides assume the hazards that naturally and obviously arise from the proper use and operation of them. Id. at 713, 152 S.E.2d at 590; see also Abee v. Stone Mountain Memorial Ass'n, 252 Ga. 465, 314 S.E.2d 444 (1984).
207. 198 Ga. App. at 45, 400 S.E.2d at 337.
208. Id.
210. Id. at 49, 392 S.E.2d at 552.
forwarding address. The attorney then inquired about defendant’s whereabouts from defendant’s mother and was told that defendant was somewhere in North Carolina. Plaintiff’s attorney checked with defendant’s mother approximately every two months concerning defendant’s address and asked the mother to inform him if defendant returned to Sumter County. The attorney received a Charleston, South Carolina address for defendant in November 1987. When service was attempted, he learned that she had moved. He then discovered that defendant would be in Sumter County at Christmas 1987 and tried to serve her at that time, but he missed her. He did, however, obtain a new address for defendant, and she was personally served in January 1988. Based on its review of these detailed facts in the record, the court held that there was “no abuse of the trial court’s discretion in finding due diligence [for service of process]

As for the other cases decided this year, excuses for plaintiffs’ dilatoriness in perfecting service abounded, but the courts did not buy their arguments. In Smith v. Winn, plaintiff alleged that defendant “fraudulently attempted to avoid service by misrepresenting his whereabouts,” yet plaintiff failed to do anything at all to locate him from September 13, 1988, until September 9, 1989. Similarly, plaintiff in Shears v. Harris presented to the court “misleading statements concerning who had retained the various investigators hired to locate” defendant and was “vague and unrevealing” concerning how he finally located defendant. Plaintiff in Anderson v. Hughes failed to identify defendant correctly, and plaintiff in Jones v. Cropps improperly relied on late interrogatories to locate his defendant. Finally, after learning specific service-oriented information about their defendants, plaintiffs in Land v.

211. Id., 392 S.E.2d at 551-52.
212. Id., 392 S.E.2d at 553.
214. Id. at 459, 402 S.E.2d at 80. Plaintiff made this argument pursuant to O.C.G.A. § 9-3-96 (1982), which provides: "If the defendant . . . [is] guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." Id. (emphasis added). The court deemed this statute inapplicable to the instant case, since defendant had done nothing to prevent plaintiff from bringing or filing his lawsuit. 198 Ga. App. at 460, 402 S.E.2d at 80.
217. Id. at 62, 395 S.E.2d at 302.
218. Id.
220. Id. at 188, 395 S.E.2d at 625.
222. Id. at 314, 398 S.E.2d at 296.
Casteel, "McManus v. Sauerhoefer," and Ennis v. Bradshaw simply failed to use due diligence in following their leads.

E. Immunities

The most far-reaching event in the area of immunities during this past year was the practically complete reinstatement of sovereign immunity brought about by the passage of an amendment to the 1983 Georgia Constitution. In effect, this amendment reserves sovereign immunity to the state and its departments and agencies, but provides that the legislature may waive this immunity in certain respects through the passage of a State Tort Claims Act. The amendment also provides public officers and employees with immunity for the negligent performance of discretionary acts for which immunity absolutely cannot be waived. Public officers and employees may still be subject to suit for the negligent performance of ministerial functions and for the performance of their official duties if damages are caused by actual malice or actual intent to cause injury. This provision may, however, be changed by the legislature. The amendment also eliminated the former constitutional provision that allowed for a waiver of sovereign immunity through the purchase of liability insurance.

Claiming that the ballot language describing this amendment, which was submitted to the people of the State of Georgia at the November 6, 1990 election, was misleading, plaintiffs in Burton v. Georgia brought suit in federal district court to enjoin the certification of this amendment. In a lengthy opinion, the court upheld the election and found

228. Id. art. I, § 2, para. 9(a), (e).
235. The ballot language was worded as follows: "Shall the Constitution be amended to provide that the General Assembly may authorize lawsuits against the state and its departments, agencies, officers, and employees and to provide how public officers and employees may and may not be held liable in court?" Id. The amendment passed by a margin of 53.11% to 46.89% Id. n.14; see also Cynthia Trimboili Adams & Charles R. Adams III, School Board Tort Liability Part II: The 1990 Amendment and Related Developments, School & College Law Section Newsletter 4 (Mar. 1991).
that plaintiffs’ evidence was insufficient to determine that the people of the state were deceived by the ballot language or that anyone would have voted differently if the language had revealed the immediate impact of the amendment upon existing law. It is interesting to note, however, that in a footnote the court observed that it “holds today not that the voters were not deceived, but that the plaintiffs have not proved that there was deception, with the requisite level of certainty.”

The Georgia appellate courts are still continuing to wrestle with the question of governmental duties versus ministerial acts in relation to the application of governmental immunity for municipalities. To add to this confusion, it is now possible for formerly ministerial activities to become governmental ones, as evidenced by the supreme court’s holding in Mayor of Savannah v. Radford. In this case, plaintiff brought an action against the City of Savannah for infliction of emotional distress and alleged interference by city employees with the burial of her husband in Bonaventure Cemetery. Although it recognized that the operation of this cemetery was not always for the benefit of the public at large, the court found that the character of its operation had changed, and governmental immunity was applicable to shield the city from liability.

In light of the supreme court’s decision in Martin v. Georgia Department of Public Safety, which held that when an insurance policy covers the official acts of a public official sovereign immunity is waived, the

237. Id. n.9.
239. A city’s operation of a cemetery has traditionally been held to be a ministerial function. See City of Atlanta v. Rich, 64 Ga. App. 193, 12 S.E.2d 436 (1940).
241. Id. at 129-30, 401 S.E.2d at 709.
242. Id. at 131, 401 S.E.2d at 710.
243. Id.

It is clear that Bonaventure Cemetery is now operated by the City of Savannah primarily for cultural, historical, and recreational purposes for the benefit of the general public and only secondarily for the use of the paying members of the public as a burial ground. In holding that the operation of Bonaventure Cemetery is a governmental function, we find that the operation of the cemetery as a burial ground for paying members of the public has become the lesser function of the cemetery and that such lesser function has merged with and into what has become the greater function of the cemetery property which is its operation for cultural, historical, and recreational purposes for the general public. As a result, the operation of this cemetery is now a governmental function.

Id.

245. 257 Ga. at 303, 357 S.E.2d at 572.
court in Logue v. Wright\textsuperscript{246} was faced with the decision of whether the applicability of sovereign immunity still turns on the distinction between a public official's ministerial and discretionary acts. After the court found that when there is no insurance in place "the distinction between ministerial and discretionary acts is still viable in ruling on immunity for public officials for liability for their negligent acts,"\textsuperscript{247} the court ruled that in Logue the deputy's rushing to a crime scene without the use of blue lights or siren was a discretionary act to which immunity applied.\textsuperscript{248} The court further held that counties are not required to obtain liability insurance for the operation of county-owned vehicles,\textsuperscript{249} nor does a county-implemented self-insurance plan waive sovereign immunity.\textsuperscript{250}

In Howard v. Liberty Memorial Hospital,\textsuperscript{251} the District Court for the Southern District of Georgia applied sovereign immunity to tort claims against county hospital authorities. Although medical malpractice claims may also sound in contract, the court found the constitutional waiver of sovereign immunity for contract actions only applies to written contracts, which would probably exclude many medical malpractice claims.\textsuperscript{252}

The court of appeals in Wynn v. Fulton-DeKalb Hospital Authority\textsuperscript{253} breathed new life into Georgia's doctrine of charitable immunity\textsuperscript{254} by de-

\begin{itemize}
\item 247. Id. at 206, 392 S.E.2d at 236.
\item 248. Id. at 207-08, 392 S.E.2d at 237. When the collision occurred, Deputy Logue had failed to yield the right of way to plaintiff. Although Logue was responding to an emergency call and was authorized to disregard certain rules of the road, he did so without activating his lights or siren as required by O.C.G.A. § 40-6-6 (1991). 260 Ga. at 207, 392 S.E.2d at 237. \textit{But see id. at 211, 392 S.E.2d at 239} (Smith, P.J., dissenting) ("While there are certain aspects of answering a call that may require discretion, no officer is 'empowered' to disobey the law.").

In the following survey period cases, other acts were held to be discretionary for sovereign immunity purposes: Peels v. Dobbs, 196 Ga. App. 684, 396 S.E.2d 600 (1990) (approval for construction and inspection of a chimney were discretionary acts of county building inspector); Vertner v. Gerber, 198 Ga. App. 645, 402 S.E.2d 315 (1991) (decisions concerning which inmates would go on work detail and how detail would be supervised were discretionary acts of county correctional institute's deputy warden); Gregory v. Cardenaz, 198 Ga. App. 697, 402 S.E.2d 757 (1991) (decision concerning how to respond to a downed stop sign was discretionary act of deputy sheriff). \textit{But see Joyce v. Van Arsdale}, 196 Ga. App. 95, 395 S.E.2d 275 (1990) (task of closing a bridge was ministerial act of county employees).

249. 260 Ga. at 208, 392 S.E.2d at 237.

250. Id. at 209, 392 S.E.2d at 238. While O.C.G.A. § 45-9-21 (1990) gives counties the discretion to purchase liability insurance on behalf of their employees, the legislature has not empowered them to establish self-insurance plans. 260 Ga. at 209, 392 S.E.2d at 238; see also Pizza Hut, Inc. v. Hood, 198 Ga. App. 112, 400 S.E.2d 657 (1990).


252. Id. at 1079.


254. \textit{See generally} Georgia Torts, \textit{supra} note 6, § 21-10.
clining to create an exception to an exception to the general rule. A chari-
table institution is typically liable in tort only to the extent of its liability
insurance coverage or for its failure to exercise ordinary care in the se-
lection and retention of its employees. An exception exists when it
"renders a service for pecuniary gain, [then] it is liable to the recipient of
such services as would be any other profit-oriented business, the only dif-
ference being the funds from which a judgment would be satisfied."This is known as the "paying patient" exception to the general rule.
Plaintiff in Wynn paid for part of his services, but the court held that if
the patient receives any charity, the immunity has full application.
Thus, the court declined to create a "partially paying patient"
exception.

The question of the application of sovereign immunity to the Board of
Regents once again reared its head in Pollard v. Board of Regents. Although this area of law has previously been in a somewhat confused
state, the supreme court in Pollard held definitively that sovereign im-
nunity does apply to the Board of Regents. In making this ruling, the
court found that the sovereign immunity amendment to the 1976 Georgia
Constitution was properly substituted into the 1983 Georgia Constitution through the mandate of the special commission established by the
1983 Constitution and empowered to reconcile new amendments to the
1976 Constitution with the 1983 Constitution. Further, in Board of Re-
gents v. Tyson, the court held that the Board's self-insurance plan did
not effect a waiver of its sovereign immunity.

256. See Harrell v. Louis Smith Memorial Hosp., 197 Ga. App. 189, 397 S.E.2d 746
257. Georgia Torts, supra note 6, § 21-10, at 241.
258. See Morton v. Savannah Hosp., 148 Ga. 438, 96 S.E. 887 (1918); Patterson v.
260. Id. at 53, 395 S.E.2d at 344.
262. See McCafferty v. Medical College, 249 Ga. 62, 287 S.E.2d 171 (1982), overruled by
Self v. City of Atlanta, 259 Ga. 78, 377 S.E.2d 674 (1989). See generally Georgia Torts,
supra note 6, § 21-7.
263. 260 Ga. at 888, 401 S.E.2d at 275.
264. The amendment to the 1976 Georgia Constitution restored sovereign immunity to the
Board of Regents by extending it to "the state and all its departments and agencies."
See Proposed Amendment to the Constitution, 1982 Ga. Laws 2546. For a history of sover-
eign immunity as applied to the Board of Regents, see Georgia Torts, supra note 6, § 21-7.
265. Ga. Const. art. XI, § 1, para. 5.
266. 260 Ga. at 88, 401 S.E.2d at 275.
268. Id. at 370, 404 S.E.2d at 559.
The court in *Hennessy Cadillac v. Pippin*\(^{266}\) was faced with determining at what point after a lawsuit is filed will the doctrine of family immunity no longer apply.\(^{270}\) In *Pippin* plaintiff parents brought suit against defendants for the wrongful death of their minor daughter. The car in which their daughter had been a passenger at the time of the collision was driven by their minor son. After the suit was filed the son reached majority, and defendants sought to file a third-party complaint against him as a joint tortfeasor.\(^{271}\) The court held that family immunity no longer applied to shield the son from liability since he had "reached majority prior to judgment and within the statute of limitation[; therefore, there was] no [longer any] impediment to his being brought in for purposes of contribution..."\(^{272}\)

**F. Limited Duty**

The court of appeals in *Bodyslimmer, Inc. v. Sanford*\(^{275}\) was faced with the decision of whether exculpatory provisions in relation to weight loss facilities violate public policy.\(^{274}\) After the court reviewed the factors used to determine the enforceability of such provisions\(^{276}\) as set forth in *Porubiansky v. Emory University*,\(^{278}\) the court found that the exculpatory clause in question was closely akin to the provisions used in fitness club contracts and, therefore, was enforceable.\(^{277}\) In reaching this decision the court's attitude concerning avoirdupois was most aptly expressed by the finding that "the service [provided by weight loss establishments is not] of great importance to the public (although it is desirable to have these services available)."\(^{279}\)

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270. Id. In Clabough v. Rachwal, 176 Ga. App. 212, 335 S.E.2d 648 (1985), the court held that the applicability of family immunity should be determined by the status of the family relationships at the time of "the filing of the suit and thereafter." Id. at 214, 335 S.E.2d at 650. The troubling "and thereafter" question was faced again, but not answered definitively, in Arnold v. Arnold, 189 Ga. App. 101, 375 S.E.2d 225 (1988), aff'd, 259 Ga. 150, 377 S.E.2d 856 (1989), when the court found that immunity did not apply because defendant had reached majority prior to the trial court having entered an order on the summary judgment motion before it. Id. at 104, 375 S.E.2d at 227.
272. Id. at 450, 398 S.E.2d at 726-27.
274. Id. at 566, 398 S.E.2d at 841. Plaintiff in this case received second degree burns while using the "Thermo-Body Slimmer" machine, a device that applies deep heat to the body to help with a weight reduction program. Id. at 565-66, 398 S.E.2d at 840-41.
275. Id. at 566-67, 398 S.E.2d at 841.
278. 197 Ga. App. at 567, 398 S.E.2d at 841.
G. Legal Accident

The survey period case of *Smoky, Inc. v. McCray* evidences the court of appeals continued indecisiveness concerning when the jury should be given a separate charge on the defense of legal accident. In a five-to-four decision in *Benson v. Hunter*, the court had previously held that when a full charge is given to the jury on the general principles of negligence law, a separate charge on legal accident is unnecessary because it is merely an elaboration of the general negligence principles previously charged. However, writing for the six-to-three majority in *McCray*, Judge Sognier penned an extensive discussion concerning the doctrine of legal accident and reversed the trial court’s decision not to give the requested charge. He admonished that it should be kept in mind that the sufficiency of a charge is weighed from the perspective of the average juror, not the reviewing court. A charge generally discussing duty, breach of duty, and proximate cause cannot be considered to have covered sufficiently the principles behind [plaintiff’s] requested charge in view of the fact that the charge as given did not once use the word “accident” or otherwise explain how the idea behind “accident” may have been germane in the case sub judice.

IV. OTHER GROUNDS OF TORT LIABILITY

A. Products Liability

In *Weatherby v. Honda Motor Co.*, the court of appeals resoundingly reaffirmed its adherence to the “open and obvious” rule in products liability cases. The rule provides that “[i]f a ‘product is designed so that it is reasonably safe for the use intended, the product is not defective even though capable of producing injury where the injury results from an obvi-

281. Id. at 40-41, 360 S.E.2d at 613-14; see also Adams & Adams supra note 32, at 400-01.
282. Chief Judge Carley, who wrote the majority opinion in *Benson*, was the author of the dissenting opinion in *McCray*, and Judge Sognier concurred in Presiding Judge Banke’s dissent to *Benson*.
283. 196 Ga. App. at 656-57, 396 S.E.2d at 800-01.
The court conducted an extensive review of the law in this area and concluded that, although the rule has been abandoned in some other jurisdictions, including the state of its origin, it remains firmly entrenched in Georgia. Thus, the court in Weatherby overruled its 1989 decision in Ogletree v. Navistar International Transportation Corp., which held that the product user's subjective perception of the danger was relevant to the obviousness of the danger. The court in Weatherby stated that "[i]n determining, under the 'open and obvious rule,' whether the peril from which an injury results is latent or patent, the decision is made on the basis of an objective view of the product, and the subjective perceptions of the user or injured party are irrelevant." Plaintiff in Weatherby was burned when gasoline from the motorcycle on which he was a passenger splashed from the open tank onto the engine and was ignited. He alleged a number of design defects, including absence of a device attaching the gasoline cap to the tank to remind a person to replace it. The court concluded that the dangers of spilled gasoline coming into contact with the engine and spark plug are well known, and applied the "open and obvious" rule to bar recovery.

In another application of the "open and obvious" rule during the survey period, the court in Gragg v. Diebold, Inc. held that the absence of a warning light at one entrance on a bank security system manufactured by defendants was "readily discernible." Thus, plaintiff could not recover for injuries sustained when she walked through the entrance without the warning light into the middle of an armed robbery in the bank lobby.

In a case of first impression in Georgia, the court in Tyler v. Pepsico, Inc. held that a franchisor is not a "manufacturer" for purposes of

288. 195 Ga. App. at 170, 393 S.E.2d at 65.
291. Id. at 171, 393 S.E.2d at 66 (citing, e.g., Stanton G. Darling, The Patent Danger Rule: An Analysis and a Survey of Vitality, 29 Mercer L. Rev. 583 (1978)).
292. Id. at 169, 393 S.E.2d at 65.
293. Id.
294. Id. at 172, 393 S.E.2d at 67.
296. Id. at 824, 403 S.E.2d at 230.
297. Id.
strict liability. Plaintiff was injured when a cap exploded from a bottle of Pepsi-Cola and struck her in the eye. She contended that defendant's extensive control over the production, sale, and distribution of Pepsi products by independent bottlers constituted it a "manufacturer" and therefore strictly liable to her. The court rejected this argument, holding that the purpose of the control defendant exercised over the bottling process was "protecting the Pepsi trade name," and that defendant, who neither assembled nor sold the product that injured plaintiff, was therefore not a manufacturer and not strictly liable.

B. Strict Liability

Animal Liability. Propensity for viciousness pursuant to O.C.G.A. section 51-2-7 was the subject matter of two survey period cases. In Sanders v. Bowen, the court ruled that the dangerous propensity of a pit bulldog may be inferred by evidence that the animal had been trained to fight and to attack boards and dead chickens in an aggressive manner, even though it had never previously attacked a human. In addition, the court in Tutak v. Fairley held that a dog who attacks another individual while it is running loose on its owner's property is deemed to have a vicious propensity when it is required by local ordinance to be "con-
fined within the property limits of his owner or custodian' " in order to be considered "'under control.' "

O.C.G.A. section 4-3-3 prohibits a livestock owner from permitting his animals to stray upon public roads. The court in *Evanko v. Baker* found, however, that a person who merely allows his land to be used for cattle grazing is not considered to be an "owner" of livestock for liability purposes pursuant to that section.

**Innkeepers and Common Carriers.** Pursuant to O.C.G.A. section 43-21-10, innkeepers may relieve themselves of liability for their guests' valuables by providing a safe place of deposit for them and by posting a notice of the availability thereof. Since the statute does not carve out any exceptions for losses occasioned by the negligence of the innkeeper when the guest has failed to comply with it, the court in *Gooden v. Day's Inn* held that defendant innkeeper was not liable for money stolen from plaintiff guest's room even if the inn's "employees were negligent in preventing the theft or were actually parties to the theft."

Likewise, the court in *Effort Enterprises, Inc. v. Crosta* placed a strict construction on the code section that requires common carriers to exercise extraordinary diligence for insuring the safety of the goods they carry. In *Crosta* plaintiffs' jewelry was stolen by employees of a moving company who had been hired to transport plaintiffs' goods to their new residence. Defendant moving company did not transport the jewelry in question, and the court held that in order for defendant to be liable for plaintiffs' loss the jewelry must have been delivered to it for transportation.

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308. 198 Ga. App. at 307, 401 S.E.2d at 74 (quoting Glynn County ordinance).
309. O.C.G.A. § 4-3-3 (1982).
311. In this case, the landowner was not involved in keeping the cattle, she simply allowed the cattle owner to use her land as long as he "tended to all aspects of his cattle and maintained the fence." Id. at 904, 397 S.E.2d at 167.
312. Id.
316. Id. at 325, 395 S.E.2d at 877-78.
317. Id., 395 S.E.2d at 878.
320. 194 Ga. App. at 666-67, 391 S.E.2d at 478. The jewelry was taken from a bathroom vanity, where it had been placed by plaintiffs. Id. at 667, 391 S.E.2d at 478.
321. Id., 391 S.E.2d at 479.
C. Nuisance

One of the most malleable areas of tort law is nuisance, which provides potential remedies when other theories of recovery, such as negligence or trespass, will not work.2 For example, a nuisance claim may defeat sovereign immunity in some circumstances, as a divided supreme court held in DeKalb County v. Orwig.2

At the trial of this case, the jury found [that] DeKalb County negligently failed to discover and remove an obstruction placed by a third party (Georgia Power) in its main sewer line after the obstruction caused three thousand gallons of raw sewage, including excrement, to back up and flood [plaintiff's] home.2

This failure to discover resulted in a second flooding of plaintiff's home by large amounts of raw sewage three weeks later.2 The supreme court held that plaintiff could recover, but, because of sovereign immunity, the law limited her damages to those recoverable in a condemnation action.2 Thus, the only nuisance for which a county can be liable is one that rises to the level of a taking of property.2 In such a case, the only damage recoverable is the decrease in the market value of plaintiff's property.2

Hirsh v. City of Atlanta2 presented a quite different application of nuisance law. This case arose out of Operation Rescue's2 civil disobedience campaign against abortion in Atlanta during the Democratic National Convention in the summer of 1988.2 Plaintiff City of Atlanta, relying on the same legal theories that a generation ago were used to ban the showing of the movie "I Am Curious (Yellow)" in Georgia,2 obtained an injunction against Operation Rescue protesters on grounds that their activities were "endangering the public security, health, safety, and wel-

322. See Georgia Torts, supra note 6, § 27-5.
325. Id. at 255, 396 S.E.2d at 825.
326. 261 Ga. at 138, 402 S.E.2d at 514.
327. Id.
328. Id.
331. For a heavily biased pro-abortion account of these events, see Elizabeth J. Appley, Two Decades of Reproductive Freedom Litigation and Activism in Georgia, 28 Ga. St. B.J. 34 (1991).
fare of the City and its citizens. The trial court found for the City and entered a detailed injunction against the protesters. The supreme court rejected the protesters' contention that the injunction, which included restrictions on peaceful picketing, leafletting, display of signs, and verbal communication of beliefs within a proscribed zone, violated their First Amendment right of free speech. Although the constitutional law implications of Hirsh are beyond the scope of this article, the decision does demonstrate the power of the state, through use of tort law, to curb social protest objectionable to those in authority.

D. Defamation

No less than three cases in the survey period involved attempts to hold corporations vicariously liable for slanderous utterances by their employees. In all three cases, the court rejected the attempts: "A corporation will not be liable for any slander uttered by an officer. . . . unless it can be proved that the corporation expressly ordered and directed that officer to say those very words: for a slander is the voluntary and tortious act of the speaker." Curiously, the contrary rule appears to apply in libel cases. In John D. Robinson Corp. v. Southern Marine & Industrial Supply Co., the court held that "[d]efendant was liable to plaintiffs for the libelous statements of its employee under the rule of respondeat superior. . . . Even the malicious intent of the employee is imputable to the employer in a libel case."

No principled basis seems to reconcile these two contradictory legal rules except for the greater quality of permanence and deliberation imparted to libellous utterances. The rule regarding slander does constitute an exception to the general rule of employer liability for employee

333. 261 Ga. at 24, 401 S.E.2d at 532.
334. Id. at 22 & n.1, 401 S.E.2d at 531 & n.1.
335. See id. at 29, 401 S.E.2d at 535 (Fletcher, J., dissenting).
336. Id. at 28, 401 S.E.2d at 535.
341. Id. at 405, 395 S.E.2d at 840.
torts, but, like John Bunyan’s Vanity Fair, it is “no new-created business, but a thing of ancient standing.” A more workable and flexible rule would focus on whether the employee uttered the defamation, be it libel or slander, in the scope of or in furtherance of the employer’s business. This rule seems a more equitable method of allocating the risk of loss in such circumstances because the employer is thereby given the incentive either to control the conduct of the employee or dispense with the employee’s services.

In two defamation cases during the survey period, the courts continued the practice of blending the element of publication with the defense of privilege. In Kenney v. Gilmore, the court held that a communication, authorized by plaintiff, from plaintiff’s former employer to a prospective employer, was not published “in the sense contemplated by the statutory scheme.” Likewise, in Green v. Sun Trust Banks, Inc., the court held that a number of allegedly defamatory statements were “made in meetings with the involved plaintiff and immediate supervisory personnel and a personnel department representative. These were all intra-corporate communications,” said the court, and were “therefore not published.”

As has been observed in a previous edition of this survey, the court could achieve the same result in these cases by the much more straightforward route of applying a privilege analysis. Georgia law provides that “[s]tatements made in good faith in the performance of a legal or moral private duty” are privileged. Certainly, the types of statements at issue in Kenney and Green would come within this privilege, and avoid unnecessary resort to the legal fiction of nonpublication.

343. See Georgia Torts, supra, note 6, § 7-1, at 106-07.
344. J. Bunyan, Pilgrim’s Progress, Ch. 6 (n.p. 1678).
345. See Georgia Torts, supra note 6, § 7-2.
346. See generally Prosser & Keeton, supra note 8, § 113, at 799.
348. Id. at 408, 393 S.E.2d at 473. The statute referred to is O.C.G.A. § 51-5-1(b) (1982), which provides that “[t]he publication of the libelous matter is essential to recovery.”
350. Id. at 809, 399 S.E.2d at 717.
352. See Adams & Adams, Torts, supra note 32, at 414.
353. O.C.G.A. § 51-5-7(2) (1982).
E. Mental Abuse

The experienced attorney learns that some people are more or less permanently unreconciled to peace and happiness, whether their own or anyone else's. Many of those people ineluctably find themselves giving or receiving the kinds of wrongs collected under the category of "mental abuse." Litigation being civilization's substitute for murder, the courts are called on as they were during the survey period, to attempt the only form of reconciliation that seems to work—the imposition of money damages. A representative sample follows.

Infliction of Emotional Distress. "In order to sustain a cause of action for intentional infliction of emotional distress, the plaintiff must show that the defendant's actions were so terrifying or insulting as naturally to humiliate, embarrass, or frighten the plaintiff." In several survey period cases, however, the court declined to find that the defendant's conduct rose to this standard. For example, threatening to file a lawsuit against plaintiff, publishing a true news story about plaintiff, or even threatening plaintiff's job if she didn't give favorable testimony in another case were not the kinds of conduct that would give rise to an emotional distress claim. On the other hand, in Georgia Farm Bureau Mutual Insurance Co. v. Mathis, plaintiff raised a jury question with evidence to the effect that defendant's employee, who was her insurance agent, "threw . . . [plaintiff's grandson's] funeral bills across his desk towards . . . [plaintiff], pounded on the desk, and pointed his finger at her." The distinguishing factor in Mathis appears to be that defendant was plaintiff's representative, and this "special relationship" gave defendant "a duty arising out of the business relationship such that his conduct went so far beyond the norms of acceptable business behavior that it was 'sufficiently extreme and outrageous to result in liability.'"
Invasion of Privacy. Tucker v. News Publishing Co. illustrates that, like defamation, invasion of privacy claims can produce "tension between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." Defendant published a graphic, but truthful account of a vicious attack on plaintiff by his fellow high school students. The account included plaintiff's name, and plaintiff contendted that publishing his name in connection with the graphic details of the assault violated his privacy. Although the court registered its sympathy for plaintiff's desire for seclusion, it nevertheless acknowledged that "there are times when one, whether willingly or not, becomes an actor in a public drama. Dissemination of information pertaining to this drama is no violation of [his] right of privacy." The court seems to be out of resonance with some of Georgia's defamation cases, which have held that a libel plaintiff can avoid "public figure" status simply by refusing to talk to the press. Perhaps the court was influenced by Judge Learned Hand's famous dictum: "Possibly any one who chooses to stir such a controversy in a court cannot have been very sensitive originally . . . ."

False Arrest/Malicious Prosecution. Although Georgia law makes a clear distinction between "false arrest" and "malicious arrest," the two are sometimes confused. Pinkston v. City of Albany, which at first glance appears to import a "malice" element into the tort of false arrest, is a good example of this confusion. The court in Pinkston cited O.C.G.A. section 51-7-1 as the standard for "malice necessary to found a cause of action for false arrest." It is well settled, however, that in cases of false arrest and false imprisonment, "malicious arrest involves the initiation of criminal proceedings, while false arrest is synonymous with false imprisonment, which consists only of an unlawful detention." Georgia Torts, supra note 6, § 29-4, at 68 (Supp. 1991) (footnote omitted).

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364. 197 Ga. App. at 85, 397 S.E.2d at 500.
365. Id. at 86, 397 S.E.2d at 500 (quoting Ramsey v. Georgia Gazette Publishing Co., 164 Ga. App. 693, 695, 297 S.E.2d 94, 96 (1982)).
368. "[M]alicious arrest involves the initiation of criminal proceedings, while false arrest is synonymous with false imprisonment, which consists only of an unlawful detention." Georgia Torts, supra note 6, § 29-4, at 68 (Supp. 1991) (footnote omitted).
malicious prosecution.” The source of the confusion appears to be yet another gratuitous editorial change wrought by the Official Code.

The group of code sections relied on by the court in Pinkston to find that plaintiff’s claim failed for lack of malice appear in the Official Code under the heading “False Arrest.” These same sections, however, appear in the Georgia Code Annotated, as they have in prior codes, under the heading “Malicious Arrest.” Although “title, chapter, article, part, and subpart captions or headings” are not part of the law, this unnecessary change generates unnecessary confusion, as Pinkston illustrates, and should be corrected by the editors of the Official Code.

Although the malice element is important, as cases in the survey period indicate, most malicious arrest and malicious prosecution cases turn on the existence vel non of probable cause for the underlying criminal prosecution. Courts typically dispose of this issue as a matter of law and appear to be inclined to affirm the existence of probable cause more often than not. During the survey period, for example, the court held the presence of an unauthorized cable-TV shunt leading into plaintiff’s apartment, a stolen parking medallion on plaintiff’s car, the hurried and suspicious departure of plaintiff from defendant’s retail establishment, and even the coincidental physical resemblance of plaintiff to an armed robber to be sufficient probable cause to defeat malicious prosecution.

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373. Georgia Torts, supra note 6, § 29-4, at 350.
374. A number of such changes are collected and discussed in Adams & Adams, supra note 22, at 461 n.296 and the authorities cited therein.
375. O.C.G.A. §§ 51-7-1 to -3 (1982).
377. Id. at 46-47, 395 S.E.2d at 590.
381. 1990 Ga. Laws 8, 42, sec. 54.
382. “The difference between malicious prosecution and malicious arrest is that the former contains the additional element of showing that a prosecution, whatever its extent, was carried on and terminated in favor of the plaintiff.” Barber v. H & H Muller Enters., Inc., 197 Ga. App. 126, 129, 397 S.E.2d 563, 565 (1990).
383. See id. at 129, 397 S.E.2d at 566. A grand jury indictment against the plaintiff in the underlying case is prima facie evidence of probable cause and shifts the burden to the plaintiff to come forward with specific facts showing malice and lack of probable cause. Sears Co. v. Weddington, 197 Ga. App. 52, 53, 397 S.E.2d 471, 472 (1990).
387. Weddington, 197 Ga. App. at 52, 397 S.E.2d at 471.
claims. In *Coker v. K-Mart Corp.*, however, the court of appeals reversed the trial court's determination that probable cause existed. Sustaining a half-million dollar jury verdict against defendant, the court held that plaintiff's discarding a lipstick she had not bought before leaving defendant's store did not suggest criminal intent and, therefore, did not furnish probable cause for defendant's subsequent arrest and prosecution of plaintiff for shoplifting.

**Abusive Litigation.** Second only to malpractice as a "growth industry" in the law of torts is the area involving attempts by parties to shift attorney fees and expenses of litigation. These are typically the major, if not the only, elements of damage involved in the plethora of modern "abusive litigation" claims. Georgia generally adheres to the "American rule" that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Three basic exceptions apply in the torts field, however, and each exception was thoroughly litigated during the survey period. A few brief highlights are presented here.

The most venerable fee-shifting statute in Georgia is, ironically, found in the contracts title to the code, but applies to torts cases as well. O.C.G.A. section 13-6-11, which allows a jury award of litigation expenses to the plaintiff when "the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense," has virtually exploded as the remedy of choice in recent years. Attempting perhaps to close the floodgates a bit, the court held during the survey period that section 13-6-11 does not create an independent cause of action, but merely gives the plaintiff an additional element of damages. On the other hand, in *Parking Co. of America v. Sucan*,

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390. Id. at 704, 399 S.E.2d at 252.
391. Id. Defendant's employees aggravated the damages in *Coker* by verbally abusing plaintiff repeatedly and by parading her down the center aisle of the store in handcuffs, with all of the employees lined up to watch. Id. at 702, 399 S.E.2d at 251.
392. The evolution of the common-law torts of malicious use and abuse of process, through the judicial conflation of these into the tort of "abusive litigation" in *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986), to the enactment of the abusive litigation statute, O.C.G.A. §§ 51-7-80 to -85 (Supp. 1991), is briefly traced in *Georgia Torts*, supra note 6, § 29-6, at 360-61.
395. Id.
396. Counting the number of citations to O.C.G.A. § 13-6-11 and its predecessor (Ga. Code Ann. § 20-1404) (repealed 1982) in Sheppard's *Georgia Citations* reveals that the courts cited the section an average of roughly five times a year in the 50 years between 1935 and 1985, but some 21 times a year in the past six years.
the court allowed attorney fees pursuant to this section when defendant demonstrated a “so sue me” attitude by promising to repair plaintiff’s car while continually refusing to do so.400

O.C.G.A. section 9-15-14 is the Georgia version of rule 11 of the Federal Rules of Civil Procedure.401 The court also fine-tuned this statute during the survey period, holding that a party’s victory on an abusive litigation claim does not automatically entitle him to attorney fees under this section; the trial court retains discretion in this regard.402 In Felker v. Fenlason,403 however, the court of appeals substantially limited a trial court’s discretion. The court held that the denial of defendants’ motions for summary judgment constituted a binding determination that the claim was sufficiently meritorious to preclude an award of attorney fees.404

Finally, fee-shifting may occur as an element of damages in a tort action for abusive litigation. Although Georgia’s abusive litigation statute405 made its first appearance in the appellate courts during the survey period,406 the bulk of decisions still involve cases arising under the judicially-created abusive litigation tort first enunciated in Yost v. Torok.407 The court held in Swift Loan & Finance Co. v. Duncan408 that a landlord’s wrongful use of a “dispossessionary warrant and claim for unpaid rent...as a device to extract money from [the tenant] and to harass her” constituted abusive litigation.409 In Webb v. State Automobile Mutual Insurance Co.,410 the court declined, however, to sustain a claim of abusive

399. Id. at 618, 394 S.E.2d at 413 (quoting U-Haul Co. v. Ford, 171 Ga. App. 744, 746, 320 S.E.2d 868, 871 (1984)).
400. 171 Ga. App. at 746, 320 S.E.2d at 871.
407. In Jones v. Bienert, 197 Ga. App. 554, 398 S.E.2d 830 (1990), the court dismissed an abusive litigation claim for failure to send to the other party the notice of the claim required as a condition precedent by O.C.G.A. § 51-7-84(a) (Supp. 1991).
408. 256 Ga. 92, 344 S.E.2d 414 (1986).
410. Id. at 557, 394 S.E.2d at 358.
411. Id. at 557-58, 394 S.E.2d at 358.
litigation when the subrogation agreement at issue "was subject to two valid interpretations." 418

F. Fraud

"In order to have an actionable fraud, the aggrieved party must have had a justifiable right to rely and must have actually relied upon the misrepresentation made to him." 414 When a confidential relationship exists, however, parties may be relieved from their duty to inquire and may absolutely rely upon representations made by the other party. 415 The court in Arnall, Golden & Gregory v. Health Service Centers, Inc. 416 held that because a confidential relationship exists between an attorney and client, the representations defendant had made to its client about the existence of an option to purchase in a lease contract remained a question for the jury. 417

Likewise, the court in Parks v. Howard 418 declined to impose a duty upon a purchaser of real estate to conduct his own termite inspection when the sales contract required the usual pest inspection report and "in the absence of some other evidence indicating the need for an [independent] inspection." 419 In this case, as well as in the factually similar Kieffer v. Linton, 420 the court held that the actions of both defendants constituted material misrepresentations concerning their knowledge of the existence of termite infestation in the properties sold to plaintiffs. 421 In Parks defendant, in response to a direct inquiry by plaintiffs, misrepresented that previous termite damage had been repaired. 422 In Kieffer defendant,

413. Id. at 610, 402 S.E.2d at 354.
414. Georgia Torts, supra note 6, § 32-4, at 398.
417. Id. at 793, 399 S.E.2d at 567-68. Defendant had drawn two lease agreements for plaintiff in relation to certain property. The first agreement contained an option to purchase the property, but the second did not contain one. Plaintiff alleged that defendant gave him assurances that the purchase option was still valid in spite of a merger clause in the second agreement. Plaintiff alleged that defendant concealed the fact that the second agreement contained no purchase option. Id. at 791-92, 399 S.E.2d at 566.
419. Id. at 407, 398 S.E.2d at 310. In two other cases decided during this survey period, the court held that there was no justifiable reliance on the representations which were made: Webb v. Rushing, 194 Ga. App. 732, 391 S.E.2d 709 (1990) (no justifiable reliance when plaintiffs were aware of roof leaks); English Restaurant, Inc. v. A.R. II, Inc., 194 Ga. App. 639, 391 S.E.2d 462 (1990) (no justifiable reliance when plaintiff was an expert restaurant operator and failed to review all relevant profit and loss statements).
422. 197 Ga. App. at 407, 398 S.E.2d at 310.
although not making any direct statements, presented plaintiff with a termite inspection report that defendant knew to be inaccurate.\(^{423}\)

During this survey period, the issue of fraud has again crept up in the context of domestic relations cases.\(^{424}\) In Foster v. Foster,\(^{425}\) the supreme court faced the question of whether one former spouse could sue the other for alleged misrepresentations made while negotiating their divorce settlement contract.\(^{426}\) In answering this question in the negative, the court held that a custodial parent's sole remedy for supplementing a divorce decree with a support obligation is an action for modification.\(^{427}\) Although "[s]uppression of a material fact which a party is under an obligation to communicate constitutes fraud,"\(^{428}\) the court in Justus v. Justus\(^{429}\) determined that a biological father has no affirmative duty to communicate to his lover's husband the true paternity of a child conceived in an adulterous relationship.\(^{430}\)

G. Interference with Business or Economic Relations

Wrongful Discharge. Plaintiff in Borden v. Johnson\(^{431}\) sought to create a common-law exception to the general rule that "'[a]n employee, employed at will and not by contract, cannot bring an action against his employer for wrongful discharge . . . when . . . he is an at will employee with no definite and certain contract of employment.'"\(^{432}\) Plaintiff claimed defendant discharged her because she was pregnant and asked the court to create an exception to the general rule of employer immunity when the cause of termination is pregnancy.\(^{433}\) An employer can be held civilly liable for discharging an at-will employee for reasons that are im-


\(^{426}\) Plaintiff wife alleged that when she signed the settlement agreement, her husband represented that if she would sign the joint custody agreement, he would let their children live with him. In actuality, he had no intention of letting the children live with him. Id. at 813 n.1, 400 S.E.2d at 630 n.1.

\(^{427}\) Id. at 814, 400 S.E.2d at 630. Concerning modification actions see O.C.G.A. § 19-6-19 (1991).


\(^{430}\) Id. at 535, 402 S.E.2d at 128-29. Readers with a bent toward the soap opera are specifically referred to the facts of this case as set out fully in the opinion!


\(^{433}\) 196 Ga. App. at 289, 395 S.E.2d at 629.
permissible on grounds of public policy, such as race, one garnishment, attendance at judicial proceedings, or handicap. Plaintiff sought to add pregnancy to this list of public policy exceptions. The court of appeals rejected her suit:

The courts of this state have consistently held that they will not usurp the legislative function and, under the rubric that they are the propounders of 'public policy,' undertake to create exceptions to the legal proposition that there can be no recovery in tort for the alleged 'wrongful' termination of the employment of an at-will employee. The court concluded that plaintiff's remedy, if any, would have to be pursuant to federal law, not Georgia tort law.

Wrongful Dishonor. One of the many intersections between tort law and commercial law is the tort of "wrongful dishonor," which is committed when a payor bank improperly refuses to honor an instrument for payment of money from the plaintiff's account. Because the gravamen of this tort is injury to the reputation of the plaintiff, it is analogous to a defamation action. The statute creating the wrongful dishonor cause of action provides that the plaintiff may recover "consequential damages proximately caused by the wrongful dishonor." In Malak v. First National Bank, the court held that a jury should determine whether defendant's conduct leading to the dishonor of plaintiff's check proximately caused plaintiff's land to be foreclosed upon. The court rejected the argument that it should apply only the contractual test of liability ("foreseeability") and declined to "[embellish] the language of the code . . . with additional requirements." When a wrongful dishonor occurs, plaintiff's theory of re-

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436. See id. § 34-1-3 (Supp. 1991).
437. See id. § 34-6A-6 (1988).
439. Id. at 289, 395 S.E.2d at 629.
441. 196 Ga. App. at 290, 395 S.E.2d at 630.
444. O.C.G.A. § 11-4-402 (1982).
445. Id.
447. Id. at 107, 393 S.E.2d at 269-70.
448. Id. at 108, 393 S.E.2d at 270.
covery is in tort, as in Malak, and the appropriate measure of liability would be the tort standard of proximate cause.  

V. Damages

Of major import is the supreme court’s decision in Denton v. Con-Way Southern Express, Inc. In Denton the court deemed O.C.G.A. section 51-12-1(b) (repealing the “collateral source” rule) to be unconstitutional. This statute allowed defendants to place into evidence in a tort claim any payments made to the plaintiff from a collateral source. In Denton the court characterized such evidence as “inherently prejudicial” to the presentation of plaintiff’s case to the jury and held that O.C.G.A. section 51-12-1(b) “violates that provision of the Georgia Constitution which mandates that the paramount duty of government is the protection of person and property and that the protection shall be impartial and complete.” In another case decided during this survey period, Motor Convoy, Inc. v. Brannen, the supreme court held that in the absence of collusion, a consent judgment entered into between a plaintiff and a resident joint tortfeasor defendant will not divest the Georgia courts of personal jurisdiction over the remaining nonresident joint tortfeasor defendant.

The intricacies of Georgia’s punitive damages statutes were the subject of a number of cases in the survey period this year. The supreme court set aside a jury’s award of punitive damages in WMH, Inc. v. Thomas. The court concluded that the jury impermissibly intended to punish rather than deter defendants since “[t]here was no bodily or property injury and no rational relationship between the alleged offense and the punishment in that the punitive damage award was almost 40

449. Id.
452. 261 Ga. at 42, 402 S.E.2d at 270.
453. According to the statute, collateral sources were comprised of “all compensation, indemnity, insurance (other than life insurance), wage lost replacement, income replacement, or disability benefits or payments available to the injured party from any and all governmental or private sources.” O.C.G.A. § 51-12-1(b) (Supp. 1991).
454. 261 Ga. at 45-46, 402 S.E.2d at 272.
455. Id. at 46, 402 S.E.2d at 272.
457. Id. at 340, 393 S.E.2d at 262.
times the actual damage award . . . .” In addition, as pointed out by the court in Clarke v. Cox, a punitive damage award under O.C.G.A. section 51-12-5 must include a separate finding from the jury concerning aggravating circumstances for each alleged tort. The punitive damages award was also set aside in Chrysler Credit Corp. v. Brown, for failure to make certain specific findings as required by O.C.G.A. section 51-12-5.1. In particular, the jury did not make a finding that punitive damages were awardable, they did not set an amount to be awarded as punitive damages, and they did not make a finding that defendant acted with specific intent to cause harm. Because defendants in Powell v. Ferreira exhibited at least some degree of care in controlling their dog, there was no evidence of “wilful misconduct or an entire want of care” that would support a punitive damages award. Although it is unlawful to award punitive damages against a municipality, damages pursuant to O.C.G.A. section 51-12-6 are in part compensatory. Therefore, as stated by the court in Radford v. Mayor of Savannah, “the prohibition against awarding punitive damages against a municipality does not bar” a claim under that code section.

461. 260 Ga. at 656, 398 S.E.2d at 198.
463. Id. at 84, 397 S.E.2d at 600.
465. Id. at 656-57, 402 S.E.2d at 756-57.
467. Id. § 51-12-5.1(d)(2).
468. 198 Ga. App. at 656-57, 402 S.E.2d at 756-57. In this respect the award also violated O.C.G.A. § 51-12-5.1(g), because without the specific finding of an amount awarded as punitive damages, it was impossible to know what amount should be written off so that the verdict would come within the $250,000 statutory limit. When asking a jury to award punitive damages, plaintiffs' attorneys should use special verdict forms to avoid running afoul of the specific finding requirements of § 51-12-5.1.
470. Defendants took precautions to keep their dog, which was known to bite, enclosed in their house and away from the public, but did not always exercise strict control to keep nonfamily members out of the house. Id. at 455-56, 402 S.E.2d at 86.
471. Id. at 467, 402 S.E.2d at 86.
473. O.C.G.A. § 51-12-6 (Supp. 1991) allows damages for injury “to the peace, happiness, or feelings” of the plaintiff. Id.
The court in Bullman v. Tenneco Oil Co. interpreted the prejudgment interest provisions of O.C.G.A. section 51-12-14. Plaintiff made separate demands upon each of several defendants and posited that "because the total judgment she was awarded exceeded the sum claimed in her separate demand upon each defendant, she [was] entitled to prejudgment interest." The court did not accept this argument, but held that the terms "judgment" and "sum claimed" should be read congruently so that the aggregate demand made upon defendants is the figure that is relevant to the judgment rendered. It should be noted that in 1991 the Georgia Legislature amended this code section to substitute the term "amount demanded" for "sum claimed" in the statute.

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477. Id. at 410, 398 S.E.2d at 312 (construing O.C.G.A. § 51-12-14 (1982, amended 1991)). Before its 1991 amendment (see infra note 480), this Code section provided:

Where a claimant has given written notice . . . to a person against whom claim is made . . . and the person against whom such claim is made fails to pay such amount within 30 days . . . the claimant shall be entitled to receive interest on the claimed sum if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the sum claimed.


478. 197 Ga. App. at 409, 398 S.E.2d at 312.
479. Id. at 409-10, 398 S.E.2d at 312-13.