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Torts

by Deron R. Hicks* and Jacob E. Daly**

I. DOG BITE

During the 1998-1999 survey period, the Georgia Court of Appeals issued its decision in Supan v. Griffin,1 which effectively ended the "first bite" rule as it had previously been applied in Georgia in actions for damages arising from a dog bite.2 Prior to the decision in Supan, Georgia courts had traditionally held that, until a domesticated animal actually bites a human being, the owner of that animal could not be charged with knowledge of the animal's dangerous propensity. In Supan, however, the court of appeals rejected that narrow rule in favor of a much broader analysis of the animal owner's knowledge of the animal's temperament and disposition.3 In Clark v. Joiner,4 the court of appeals reaffirmed the broader analysis adopted in Supan and

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The views expressed in this Article are the personal opinions of the authors and do not necessarily represent the views of Page, Scrantom, Sprouse, Tucker & Ford, P.C.; its clients; or Judge Fitzpatrick.

2. Id. at 406, 519 S.E.2d at 23; see also Deron R. Hicks & Mitchell M. McKinney, Torts, 51 MERCER L. REV. 461, 482-86 (1999); CHARLES R. ADAMS III & CYNTHIA TRIMBOLI ADAMS, GEORGIA LAW OF TORTS § 26-3(b), at 459 (1999 ed.) ("This doctrine has given rise to the popular, although not legal, maxim 'that every dog is entitled to its first bite[,]... which is actually a variant of the 'superior knowledge' rule employed in premises liability cases.").
3. 238 Ga. App. at 406, 519 S.E.2d at 23.
reversed the trial court's failure to grant summary judgment for defendants.\(^5\)

In Clark plaintiff went to defendants' home to sell defendants an insurance policy. As plaintiff was approaching defendants' home, defendants' dog ran toward plaintiff. Apparently, plaintiff did not view the action of the dog as hostile but as a sign of playfulness. When plaintiff put his hand out to keep the dog from jumping on him, the dog bit plaintiff's hand. The record established that defendants had no knowledge that the dog had previously bitten anyone. Nonetheless, testimony was presented that the dog had previously acted in an aggressive manner toward an animal control officer who had tried to remove a stray dog in heat from under defendants' porch. The record, however, also revealed that defendants were not at home at the time of the incident with the animal control officer and were apparently unaware of the dog's aggressive behavior on that occasion.\(^6\)

According to the court of appeals, "[in order to support an action for damages under [section 51-2-7 of the Official Code of Georgia Annotated ("O.C.G.A.")] it must be shown that the dog was vicious or dangerous and that the owner knew it.\(^7\)" Further, "[t]he dog's nature and the owner's knowledge are two separate issues, and proof of both is necessary for recovery.\(^8\)" The court of appeals then noted that Georgia has traditionally adhered to the "first bite" rule in evaluating "whether a dog owner has knowledge that his dog has the propensity to bite someone.\(^9\)" The court acknowledged, however, that recent cases, including Supan, have dealt with "whether the owner had 'prior knowledge of his dog[s]' tendency to attack humans' and 'superior knowledge of his dog's temperament.'\(^10\)" Notwithstanding this broader analysis, the court of appeals rejected plaintiff's claim on the basis that plaintiff had failed to introduce any "evidence that this dog had ever bitten anyone before and also . . . introduced no evidence that the dog had a tendency to attack humans or that [defendants] had any knowledge about the dog's temperament that would have put them on

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5. Id. at 423, 530 S.E.2d at 47.
6. Id. at 421-22, 530 S.E.2d at 46-47.
7. Id. at 422, 530 S.E.2d at 46. Section 51-2-7 provides, in part, A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured.
8. 242 Ga. App. at 422, 530 S.E.2d at 46.
9. Id., 530 S.E.2d at 47.
10. Id. at 423, 530 S.E.2d at 47 (quoting Supan, 238 Ga. App. at 406, 519 S.E.2d at 22).
notice that the dog would bite someone.” Accordingly, the court of appeals reversed the decision of the trial court.\(^1\)

The decision in Clark, however, should be contrasted with the decision reached by the Georgia Court of Appeals in Thurmond v. Saffo.\(^2\) In Thurmond defendants kept their German Shepard–Chow mixed-breed dog on a chain in their garage. Plaintiff, who had known the dog since it was a puppy and had never had any prior problems with the dog, was entering defendants’ home through the garage when she was bitten by the dog. As in Clark, there was no evidence that the dog had ever bitten anyone prior to the incident at issue. There was, however, evidence of a prior occurrence in which the dog had walked slowly toward another individual and barked, but the individual involved managed to avoid the dog without incident. Moreover, the individual testified that on the prior occasion the dog did not growl, snap, attack, or bite. In contrast to the facts in Clark, however, the evidence established that defendants had knowledge of the prior incident. The trial court subsequently granted a directed verdict in favor of defendants.\(^3\) The court of appeals reversed.\(^4\)

Citing to the decision in Supan, the court of appeals noted that “the true test of liability is the owner’s ‘superior knowledge of his dog’s temperament.’”\(^5\) Based on evidence of the prior incident, the court of appeals held that insofar as defendants were aware that the dog tried to “attack” another person, the jury should have been allowed to determine whether defendants “should have anticipated the subsequent successful attack on [plaintiff].”\(^6\)

As in Supan, it is apparent in Thurmond that the court of appeals draws attention to the particular breed of dog at issue. While the decision in Thurmond does not rest in any manner upon a finding that the dog was of a breed known to have dangerous propensities, the court’s

11. Id.
12. Id. Special attention should be paid to Judge Ruffin’s concurrence in Clark. In his concurrence, Judge Ruffin argues that the court should explicitly reject the “first bite” rule as traditionally applied in Georgia. Id. at 424, 530 S.E.2d at 48 (Ruffin, J., concurring specially). Although Judge Ruffin acknowledges that recent decisions, including Supan, have expanded the traditional rule, it is apparently his contention that the liability of an animal owner should be more akin to strict liability than to an analysis of the owner’s prior knowledge of a dangerous propensity. See id.; see also ADAMS & ADAMS, supra note 2, § 26-3(b).
14. Id. at 687-88, 520 S.E.2d at 43-44.
15. Id. at 687, 520 S.E.2d at 43.
16. Id. at 688, 520 S.E.2d at 44 (quoting Supan, 238 Ga. App. at 406, 519 S.E.2d at 22).
17. Id.
identification of the breed in its decision—a fact that would otherwise appear to be irrelevant—could be interpreted as a factor that the court may consider in future cases when assessing the owner's knowledge of a dog's propensity to bite.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Can a claim of intentional infliction of emotional distress rest upon a harsh performance evaluation by an employer when the employer has knowledge of the employee's delicate mental condition at the time of the evaluation? According to the decision of the Georgia Court of Appeals in Jarrard v. United Parcel Service, Inc., the answer is no.

After six weeks of medical leave for psychiatric care, Michael Jarrard returned to his job at United Parcel Service ("UPS"). On his first day back to work, Jarrard was required to sit through a twenty-minute "stinging evaluation of his job performance at UPS for the three months preceding the leave." Viewed in a light most favorable to Jarrard, the record established that the supervisor who conducted the performance evaluation knew of Jarrard's prior psychiatric care and smirked during the course of the evaluation, even though Jarrard "repeatedly begged in tears that the evaluation be postponed because of his mental weakness." The supervisor also threatened to terminate Jarrard if he left the evaluation and, during the course of the evaluation, questioned Jarrard's loyalty and integrity. Subsequent to the evaluation, Jarrard "experienced a complete mental breakdown from which he has not recovered."

Jarrard subsequently brought suit against UPS for intentional infliction of emotional distress. The trial court granted UPS's motion for summary judgment, and Jarrard appealed. On appeal, the Georgia Court of Appeals affirmed the trial court's grant of summary judgment.

In affirming the decision of the trial court, the court of appeals first noted that the four essential elements of an action for intentional infliction of emotional distress are as follows: "(1) The conduct must be

19. Id. at 58, 529 S.E.2d at 146.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id. at 58-59, 529 S.E.2d at 146.
25. Id. at 58, 529 S.E.2d at 146.
26. Id. at 63, 529 S.E.2d at 149.
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intentional or reckless; (2) The conduct must be extreme and outrageous; (3) There must be a causal connection between the wrongful conduct and the emotional distress; and (4) The emotional distress must be severe.”

The sole issue on appeal, however, was whether the facts as viewed in a light most favorable to Jarrard satisfied the second element of the test—whether the conduct of Jarrard’s employer was sufficiently outrageous.

According to the court of appeals, as a general rule, derogatory comments in the employment context do not fall within the category of extreme and outrageous conduct. In particular, the court of appeals recognized that performance evaluations are an accepted employment practice. As a basis for comparison, the court of appeals noted that the termination of an employee, although unquestionably stressful, generally falls outside the definition of extreme and outrageous conduct for purposes of a claim for intentional infliction of emotional distress. For this reason, the court held the “lesser act” of providing a poor job evaluation would likewise fail to meet this standard.

The court of appeals recognized that the employer’s knowledge of the employee’s particular mental condition may, under appropriate circumstances, be a factor to be considered by the finder of fact in determining whether the conduct was extreme and outrageous. However, the court held that because the underlying conduct—the performance evaluation—is an accepted business practice, the mere fact that the employer knew of the employee’s delicate mental condition is not sufficient to sustain a cause of action for intentional infliction of emotional distress. As the court of appeals noted,

27. Id. at 59, 529 S.E.2d at 146 (quoting United Parcel Serv. v. Moore, 238 Ga. App. 376, 377, 519 S.E.2d 15, 17 (1999)).

28. Id. As the Georgia Court of Appeals noted in its 1999 decision in Moore, “The rule of thumb in determining whether the conduct complained of was sufficiently extreme and outrageous is whether the recitation of the facts to an average member of the community would arouse her resentment against the defendant so that she would exclaim ‘Outrageous!’” 238 Ga. App. at 377, 519 S.E.2d at 17.

29. 242 Ga. App. at 59, 529 S.E.2d at 146.

30. Id., 529 S.E.2d at 147. “Comments made within the context of one’s employment may be horrifying or traumatizing, but are generally considered a common vicissitude of ordinary life.” Id., 529 S.E.2d at 146-47 (quoting Biven Software v. Newman, 222 Ga. App. 112, 113-14, 473 S.E.2d 527, 530 (1996)).

31. Id. at 59-60, 529 S.E.2d at 147.

32. Id. at 60, 529 S.E.2d at 147.

33. Id. at 62, 529 S.E.2d at 148.

34. Id., 529 S.E.2d at 149.
[T]here is nothing inherently outrageous with subjecting an employee to a straightforward if harsh evaluation of his job performance, regardless of its timing. Forthright evaluations are to be expected, indeed encouraged. Perhaps it is Christmas, and a firing or poor job evaluation would devastate the employee who may be known to be experiencing holiday depression. Such may be poorly timed; it may be tactless and insensitive; it may be rude, inconsiderate, and unkind. But a negative performance review is not innately wrong or outrageous and is certainly less negative than an outright termination, which is not outrageous conduct under Georgia law. Georgia recognizes negative evaluations as one of the common vicissitudes of ordinary life.35

In reaching its decision, the court of appeals noted that much of the argument set forth by plaintiff focused on “evidence of malicious motives of UPS to retaliate for former conflicts between Jarrard and UPS management about demotions, transfers, and following through on company promises.”36 The court held, however, that evidence as to malicious intent is relevant “to the first element of the tort (acting intentionally or recklessly) and does not address the second element of whether the conduct was itself extreme and outrageous.”37

III. PREMISES LIABILITY

A. Slip and Fall

Since the Georgia Supreme Court's 1997 decision in Robinson v. Kroger Co.,38 the Georgia Court of Appeals has struggled to define the proper scope and application of the new standard for summary judgment in slip-and-fall cases as articulated in Robinson.39 In particular, the decision in Robinson severely limited the ability of defendants to secure summary judgment based upon the second prong of the Alterman Foods, Inc. v. Ligon40 test.41 As set forth in Alterman Foods, to prove negligence in a foreign substance slip-and-fall case, the plaintiff is required to establish (1) that the defendant had actual or constructive knowledge of the foreign substance, and (2) that the plaintiff lacked knowledge of the foreign substance or for some reason attributable to the defendant

35. Id.
36. Id. at 60, 529 S.E.2d at 148.
37. Id.
39. See Hicks & McKinney, supra note 2, at 461.
41. 268 Ga. at 746, 493 S.E.2d at 414.
was prevented from discovering it. Based in large part on the Georgia Supreme Court's 1991 decision in *Lau's Corp. v. Hashkins*, the burden of proof on motion for summary judgment in slip-and-fall cases weighed heavily against the plaintiff and in favor of the owner or occupier of the premises at issue. Combined with an increasing willingness on the part of trial and appellate courts to weigh evidence regarding the plaintiff's exercise of due care, summary judgment under the second prong of the test became increasingly common.

This trend abruptly changed with the supreme court's decision in *Robinson*. In *Robinson* the supreme court held that, except in the most extraordinary of cases, the issue of whether the plaintiff exercised ordinary care for his or her own safety (that is, whether the second prong of the *Alterman Foods* test has been satisfied) is a jury question. At least with respect to the application of the decision in *Robinson* to cases arising from a foreign substance slip and fall, the scope of the decision in *Robinson* has been somewhat confined to the second prong of the *Alterman Foods* test. As a result, the burden of proof on motion for summary judgment as to the first prong appears unchanged. Accordingly, it has been suggested that in the aftermath of the decision in *Robinson* an effort would be made by defendants in slip-and-fall cases to shift the summary judgment analysis to the first prong of the *Alterman Foods* test—that is, whether the defendant had actual or constructive knowledge of the foreign substance. This shift is well documented by the numerous slip-and-fall cases decided by the court of appeals during recent survey periods.

There is some indication, however, that the analysis of the first prong of the *Alterman Foods* test is slowly falling under the influence of *Robinson*, as evidenced in part by the Georgia Court of Appeals decision in *Shepard v. Winn Dixie Stores, Inc.* The decision in *Shepard* focused on the proper application of the first prong of the *Alterman Foods* test and the evidentiary burdens thereunder. In *Shepard* plaintiff

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42. *Id.* at 748-49, 493 S.E.2d at 414.
45. See *Hicks & McKinney*, supra note 2, at 466-67.
entered defendant's supermarket, walked to the back of the store, and then returned to the front of the store to secure a shopping cart. As plaintiff was returning to the front of the store, she slipped and fell in a puddle of water located next to a produce display. According to plaintiff, none of defendant's employees were in the area at the time of her fall. Moreover, plaintiff testified that she did not see the puddle before she fell and did not know how long the puddle had been on the floor prior to her fall. 47

The trial court granted summary judgment in favor of defendant grocery store on the basis that defendant lacked actual or constructive knowledge of the foreign substance. In support of its motion for summary judgment, defendant submitted an affidavit from its location manager, who described the inspection procedures utilized by defendant and stated that those procedures were followed on the day of the incident at issue. 48 The court of appeals reversed the grant of summary judgment in favor of defendant. 49

The court of appeals first noted that there was no evidence in the record that defendant or any of its employees had actual knowledge of the puddle that caused plaintiff's fall. 50 Accordingly, the court of appeals held that to establish constructive knowledge, plaintiff must prove either that one of defendant's employees was in the immediate area of the hazard and could have easily seen the substance or that the substance remained on the floor for a sufficient period of time and should have been discovered. 51

Because there was no evidence that any of defendant's employees were in the immediate area at the time of plaintiff's fall, the court of appeals turned its analysis to the second method of establishing constructive knowledge—whether defendant had reasonable inspection procedures in place at the time of the incident. 52 According to the court of appeals,

"Constructive knowledge may be inferred when there is evidence that the owner lacked a reasonable inspection procedure. In order to prevail at summary judgment based on lack of constructive knowledge, the owner must demonstrate not only that it had a reasonable

47. Id. at 746-47, 527 S.E.2d at 37-38.
48. Id. at 746, 527 S.E.2d at 38.
49. Id. at 749, 527 S.E.2d at 39.
50. Id. at 747, 527 S.E.2d at 38.
51. Id.
52. Id. at 747-48, 527 S.E.2d at 38.
inspection program in place, but that such program was actually carried out at the time of the incident.\textsuperscript{53}

Moreover, a plaintiff is not required to show how long the hazard had been on the floor until the owner or occupier of the premises has demonstrated its inspection procedures.\textsuperscript{54} The trial court's grant of summary judgment in this case rested upon the affidavit of defendant's location manager. The court of appeals, however, found the affidavit deficient.\textsuperscript{55} According to the court of appeals, "Affidavits submitted in support of a motion for summary judgment must be based on personal knowledge. Although an affidavit need not expressly state that it is based on personal knowledge, it must at least reflect that its contents are rooted in the affiant's personal knowledge and observation."\textsuperscript{56}

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The court of appeals then noted that, as defendant's location manager, the affiant "would almost certainly have personal knowledge of the general inspection procedures utilized by his store."\textsuperscript{57} However, that same knowledge is not necessarily implied with respect to the inspection procedures carried out on the day of the incident at issue.\textsuperscript{58} Insofar as the affidavit did not recite that it was based on personal knowledge, "and the contents [did] not reflect that he observed or had personal knowledge of the inspection procedures carried out on that particular day, Winn Dixie failed to meet its burden."\textsuperscript{59}

The court of appeals further noted that, even if the affidavit was not deficient, the court could not conclude as a matter of law that the inspection procedures in place were reasonable under the circumstances.\textsuperscript{60} The court set forth a number of different factors that should be considered when evaluating what constitutes a reasonable inspection procedure:

The length of time the substance must remain on the floor before the owner should have discovered it and what constitutes a reasonable inspection procedure vary with each case, depending on the nature of the business, the size of the store, the number of customers, the nature of the dangerous condition, and the store's location.\textsuperscript{61}

\textsuperscript{53} Id. at 748, 527 S.E.2d at 38 (quoting Avery v. Cleveland Ave. Motel, 239 Ga. App. 644, 645-46, 521 S.E.2d 668, 670 (1999)).
\textsuperscript{54} Id.
\textsuperscript{55} Id., 527 S.E.2d at 39.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
Based on an evaluation of these factors, the court of appeals concluded that the reasonableness of defendant’s inspection procedures was for the jury to determine.\(^\text{62}\)

**B. Social Guest**

Does the decision in *Robinson v. Kroger Co.*\(^\text{63}\) foreclose the trial court’s application of common sense in assessing whether a plaintiff has exercised ordinary care for his or her own safety? Apparently so, according to the Georgia Court of Appeals decision in *Waldo v. Moore.*\(^\text{64}\) In *Waldo* plaintiff was a social guest in the home of defendant. After breakfast one morning, plaintiff announced she was going to take a shower. Apparently, defendant had raised the thermostat on the water heater earlier that morning to wash clothes. Defendant, however, did not tell plaintiff she had raised the thermostat.\(^\text{65}\) Plaintiff then “entered the shower, turned on the hot water knob, and allowed the water to begin flowing directly onto herself without testing it.”\(^\text{66}\) The water flowing from the shower spout was approximately 130 degrees Fahrenheit, and plaintiff was immediately scalded. Plaintiff subsequently brought suit against defendant for the second-degree burns sustained in the shower. The trial court directed a verdict in favor of defendant.\(^\text{67}\) The court of appeals reversed.\(^\text{68}\)

The court of appeals first noted that the duty owed by a homeowner to a social guest is “to refrain from inflicting ‘willful or wanton injury.’”\(^\text{69}\) In short, the homeowner owes a duty to ensure the premises do “‘not contain pitfalls, mantraps, and things of that type.’”\(^\text{70}\) According to plaintiff, defendant violated this duty by creating a “hidden peril by intentionally increasing the temperature of the hot water.”\(^\text{71}\) Defendant conceded that she intentionally raised the water temperature; however, defendant argued plaintiff was still obligated to exercise “such prudence as the ordinarily careful person would use in a like situation.”\(^\text{72}\) In

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\(^{62}\) *Id.* at 749, 527 S.E.2d at 39.

\(^{63}\) 268 Ga. 735, 493 S.E.2d 403 (1997).


\(^{65}\) *Id.* at 799, 527 S.E.2d at 888.

\(^{66}\) *Id.* at 800, 527 S.E.2d at 889 (Phipps, J., dissenting).

\(^{67}\) 241 Ga. App. at 797-99, 527 S.E.2d at 887-88.

\(^{68}\) *Id.* at 799, 527 S.E.2d at 888.

\(^{69}\) *Id.* at 798, 527 S.E.2d at 888.

\(^{70}\) *Id.* (quoting Mandeville Mills v. Dale, 2 Ga. App. 607, 610, 58 S.E. 1060, 1061 (1907)).

\(^{71}\) *Id.* at 799, 527 S.E.2d at 888.

\(^{72}\) *Id.*
short, defendant contended that common sense dictated an ordinarily careful person would not have stepped into the shower without first testing the water. The court of appeals, however, concluded that, under the authority of Robinson, whether plaintiff exercised ordinary care for her own safety was an issue for the jury.  

Judge Phipps filed a dissent to the majority opinion, joined by Chief Judge Johnson and Presiding Judge Andrews. According to the dissent, the decision in Robinson did not mandate reversal of the trial court’s directed verdict:

Robinson is primarily concerned with the routine adjudication of negligence issues. The question here is whether there is evidence of wilfullness or wantonness. Alterman Foods v. Ligon was decided because summary judgment on negligence issues in slip and fall cases was being granted too infrequently. Because the pendulum had swung too far in the opposite direction, Robinson was decided. Yet Robinson recognizes that there are cases in which it can be held that, as a matter of law, an invitee failed to exercise ordinary care for personal safety. In my opinion, a competent adult who enters a shower, turns the hot water knob, and allows the water to begin flowing directly onto herself without testing it has, as a matter of law, failed to exercise ordinary care for her own safety. In refusing to so hold, the majority, rather than complying with Robinson, is swinging the pendulum back to the pre-Alterman Foods era. I respectfully dissent.

IV. CARRIERS

Over the last two survey periods, it has become apparent that the Georgia Supreme Court’s decision in Robinson v. Kroger Co. has slowly started to work its way outside the narrow confines of slip-and-fall law as described in Part III.A of this Article, and has begun to exert its influence over a much broader spectrum of tort law. In Saltis v. Daimler-Benz, the Georgia Court of Appeals continued this expansion of Robinson to include within its scope issues of contributory or comparative negligence in the context of a civil action against a public carrier. At Atlanta Hartsfield International Airport, shuttle trains provide service between the multiple terminals and concourses. However, unlike automatic elevators, automatic doors on the shuttle

73. Id.
74. Id. at 799-800, 527 S.E.2d at 889 (Phipps, J., dissenting).
75. Id. at 802, 527 S.E.2d at 890 (emphasis added) (citation omitted).
76. 268 Ga. 735, 493 S.E.2d 403 (1997).
78. Id. at 604, 533 S.E.2d at 774-75.
trains do not have any features to prevent the doors from closing on passengers. Plaintiff was injured when the shuttle train doors at the airport closed on him as he attempted to exit the train to prevent a small child from leaving the shuttle. Although plaintiff was able to exit the train, the doors caught his shoulder bag with his arm still in the strap. As the train pulled away, plaintiff's arm was wrenched. Plaintiff subsequently brought suit against the operator of the shuttle train. Defendant moved for summary judgment on the issues of contributory negligence, assumption of risk, and lack of negligence. The trial court granted defendant's motion.\textsuperscript{79} The Georgia Court of Appeals, however, reversed.\textsuperscript{80}

In reversing the decision of the trial court, the court of appeals first held that defendant had a duty to exercise extraordinary care to protect passengers based upon its status as a public carrier.\textsuperscript{81} According to the court of appeals,

\begin{quote}
"A carrier of passengers is one that undertakes the transportation of persons; a person or corporation who undertakes to transport or convey persons from one place to another, gratuitously or for hire. Such a carrier may be either a special or private carrier, or a public or common carrier. To constitute a public conveyance a common carrier, it is not necessary that it come within the definition of a public utility, so as to be subject to the rules and regulations of a public utility commission."\textsuperscript{82}
\end{quote}

In support of its motion for summary judgment, defendant offered the affidavit of its operations manager at Hartsfield Airport. According to the operations manager: "[E]very time the train leaves the station 'an audible warning is given that the train is leaving the station and that passengers should prepare themselves' and 'passengers should watch for the doors as they are closing.'"\textsuperscript{83} The court of appeals, however, held that defendant had failed to set forth sufficient evidence to establish that it had satisfied its duty to exercise extraordinary care to protect passengers.\textsuperscript{84} The court of appeals rested its decision in part upon certain deficiencies in the affidavit offered in support of defendant's motion for summary judgment.\textsuperscript{85} According to the court of appeals, the

\textsuperscript{79} Id. at 603-05, 533 S.E.2d at 774-75.
\textsuperscript{80} Id. at 608, 533 S.E.2d at 774.
\textsuperscript{81} Id. at 605, 533 S.E.2d at 776.
\textsuperscript{82} Id. at 604, 533 S.E.2d at 775 (quoting Scott v. Torrence, 69 Ga. App. 309, 319-20, 25 S.E.2d 120, 127 (1943)).
\textsuperscript{83} Id. at 606, 533 S.E.2d at 776.
\textsuperscript{84} Id. at 607, 533 S.E.2d at 776.
\textsuperscript{85} Id. at 606, 533 S.E.2d at 776.
affiant "never testified that there existed a warning on the outside of the train, that the doors would not reopen automatically." Furthermore, there was no evidence "that warnings were given 'that the doors do not swing back'" or that all of the conditions and safety measures described in the affidavit were in place on the day of the incident in question.

The court of appeals also noted that the injury suffered by plaintiff was reasonably foreseeable and should have been anticipated by defendant:

With the crowds of passengers with shoulder hanging bags, diaper bags, or shoulder purses at the shuttle stops and on the trains at the world's busiest airport, as well as the presence of young children, defendant should have reasonably foreseen that a child or other person would be at risk between the doors; that someone would attempt to stop the doors from closing; or that the crowds would delay detraining so that the doors would close on a body, clothing, or luggage with a shoulder strap around a passenger being caught between the doors.

Defendant, however, argued that summary judgment was appropriate on the basis that plaintiff had failed to exercise ordinary care for his own safety. Defendant argued that there were sufficient warnings the doors would not re-open and that plaintiff ignored those warnings when he attempted to exit the train while the doors were closing. The court of appeals, however, found there was sufficient contradictory evidence in the record to suggest the warnings provided by defendant were not sufficient to place a reasonable passenger on notice of the risk.

In this respect, the court of appeals held that Robinson should be extended to cases involving automatic doors such as the case sub judice "so that the passenger's contributory or comparative negligence was a matter for a jury."
The significance of the court's reliance upon *Robinson* cannot be overstated. Much effort has been made to confine the decision in *Robinson* to the second prong of the two-prong test adopted in *Alterman Foods, Inc. v. Ligon* with respect to a plaintiff's burden of proof in a foreign substance slip-and-fall case. It appears, however, that the broad principles set forth by the supreme court in *Robinson* have now slipped well beyond the confines of that narrow application and are beginning to exert their influence on a much broader range of tort actions.

V. PRODUCTS LIABILITY

A. Design Defects

Georgia's most notorious products liability case in recent years added another chapter to its already “tortured and protracted” appellate history during the survey period. In *Ogletree v. Navistar International Transportation Corp.* ("Ogletree VII"), plaintiff brought a wrongful death action against the manufacturer of the cab and chassis of the truck that killed her husband, alleging that the truck was defectively designed because it did not have a back-up alarm. After a series of appeals, the Georgia Court of Appeals held that the trial court properly granted judgment notwithstanding the verdict for defendant under the risk-utility test adopted in *Banks v. ICI Americas, Inc.* because "Ogletree failed to present evidence that would support a finding that the risk of the cab and chassis without the alarm outweighed the usefulness of the product in that condition." The Georgia Supreme Court reversed, holding that the court of appeals misapplied the standard for granting a motion for judgment.

leveling of elevators as well as conditions of floors[,] . . . by extension such principles apply to similar automatic doors, so that the passenger's contributory or comparative negligence was a matter for a jury.” 243 Ga. App. at 608, 533 S.E.2d at 777.

93. See supra Part III.A.
98. 236 Ga. App. at 94, 511 S.E.2d at 208.
A motion for judgment notwithstanding the verdict should not be granted if there is any evidentiary support for the verdict. This inquiry requires an analysis of all the evidence as well as any inferences that may be drawn from it. Although there was undisputed evidence that supported judgment for defendant, the court of appeals erred because it disregarded other relevant evidence and possible inferences that supported the verdict. The court of appeals hoped that its decision would conclude this saga, but the supreme court, with an air of exasperation, was compelled to "reject any unauthorized shortcut around our jury system," thus condemning the parties to another round of appeals.

Ogletree VII is significant because it clarified the supreme court's decision in Banks, which erected an almost insurmountable obstacle to obtaining judgment as a matter of law in design defect cases. The risk-utility test adopted in Banks makes judgment as a matter of law difficult to obtain because it necessarily encompasses the concept of reasonableness, which ordinarily requires a jury determination, by weighing a product's risk against its utility. Therefore, Ogletree VII and Banks signal that design defect cases typically are not susceptible to judgment as a matter of law. Accordingly, as long as there is any evidence upon which a verdict for either party could be based, judgment as a matter of law is inappropriate if reasonable people could disagree as to whether an inference of negligence should be drawn from the evidence. However, judgment as a matter of law is appropriate if the defendant adduces plain, palpable, and indisputable evidence that the product is not defective.

Thus, Ogletree VII begs the question of whether judgment as a matter of law is ever proper in design defect cases involving overwhelming evidence of the openness and obviousness of the product's danger. Although the supreme court has stated that no factor should be

100. Id. at 646, 522 S.E.2d at 469.
101. Id. at 647, 522 S.E.2d at 470.
102. Id. at 646-47, 522 S.E.2d at 470-71.
103. Id. at 647, 522 S.E.2d at 471.
104. Id. at 645, 522 S.E.2d at 469; see also Banks, 264 Ga. at 734, 450 S.E.2d at 673.
105. 271 Ga. at 647, 522 S.E.2d at 470.
106. Id. at 646, 522 S.E.2d at 470. The court noted that the risk-utility test imposes an increased burden on defendants seeking judgment as a matter of law to make this showing. Id.
singly dispositive under the risk-utility test, it has also promised that "Banks does not mean that adjudication as a matter of law is no longer appropriate in any case in which a design defect is alleged." However, because the risk-utility test is grounded in traditional negligence principles, design defect cases are generally not susceptible to judgment as a matter of law. Nevertheless, evidence of the openness and obviousness of a product's danger may, in certain circumstances, be so overwhelming that it justifies judgment as a matter of law.

B. Failure to Warn

In DeLoach v. Rovema Corp., defendants were the successors to the corporation that sold and serviced tea bagging machines manufactured by their German parent corporation. Plaintiff, an employee of Tetley Tea Company, injured his hand in 1992 while attempting to clear a paper jam in a tea bagging machine that defendants' predecessor sold to Tetley in 1984. The evidence showed that plaintiff was aware of the

111. See Morris v. Clark Equip. Co., 904 F. Supp. 1379, 1383 (M.D. Ga. 1995) (granting summary judgment for defendant because the evidence overwhelmingly indicated that the product's danger was objectively and subjectively open and obvious); see also Ogletree VII, 271 Ga. at 647-48, 522 S.E.2d at 471 (Fletcher, P.J., dissenting) (arguing that "this is one of those cases that demands judgment as a matter of law"); Raymond, 925 F. Supp. at 1578 (denying summary judgment, but noting that it is possible if "the evidence is plain and indisputable"); cf. Sharpnack, 223 Ga. App. at 834-35, 479 S.E.2d at 436-37 (holding that the decedent assumed the risk as a matter of law because the danger was objectively open and obvious).
risk of injury because he knew how the machine operated, and he knew about similar incidents that had occurred in the past.\textsuperscript{113}

Plaintiff argued that the machine was defective because it lacked a safety device that would have prevented his injury and that this defect constituted a dangerous condition. He further argued that defendants breached their duty to warn of this dangerous condition because they failed to warn him after they became aware of it following a similar accident in 1987 or 1988. Nevertheless, the trial court granted summary judgment for defendants.\textsuperscript{114}

Georgia law imposes different duties to warn on manufacturers and sellers.\textsuperscript{115} As the Georgia Court of Appeals observed, a manufacturer has a duty to warn of a danger that it becomes aware of after the product was sold, but a seller has no corresponding duty.\textsuperscript{116} Instead, Georgia law requires a seller to warn of a danger only if it had actual or constructive knowledge of the danger at the time it sold the product.\textsuperscript{117} In contrast, the Restatement (Third) of Torts: Products Liability extends this duty to require certain sellers to warn of dangers that come to their attention after the date of sale.\textsuperscript{118} Under Section 13 of the Restatement, a successor corporation has a postsale duty to warn of dangers posed by products sold or distributed by the predecessor corporation if the successor "undertakes or agrees to provide services for maintenance or repair of the product," and if "a reasonable person in the position of the successor would provide a warning."\textsuperscript{119} Factors for determining whether a reasonable person in the successor's position would provide a warning include (1) whether the successor knows or should know of the product's danger; (2) whether consumers of the product can be identified and can reasonably be assumed to be unaware of the danger; (3) whether the successor can communicate the warning to consumers and consumers can act accordingly; and (4) whether the product's danger is sufficient to justify imposing such a burden on the successor.\textsuperscript{120}

\textsuperscript{113} \textit{Id.} at 802-03, 527 S.E.2d at 882-83.
\textsuperscript{114} \textit{Id.} at 803-04, 527 S.E.2d at 882-83.
\textsuperscript{115} See \textit{id.} at 804, 527 S.E.2d at 883; see also Battersby v. Boyer, 241 Ga. App. 115, 116-17, 526 S.E.2d 159, 162-63 (1999) (reaffirming that, although "a seller's duty to warn consumers of a particular danger associated with the use of a product may be extinguished when the manufacturer has already warned consumers of the particular danger at issue," a "consumer's challenge to the adequacy of the manufacturer's warning is not foreclosed").
\textsuperscript{116} 241 Ga. App. at 804, 527 S.E.2d at 883.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 13 (1997).
\textsuperscript{119} \textit{Id.} § 13(a)(1), (2).
\textsuperscript{120} \textit{Id.} § 13(b)(1)-(4).
Plaintiff argued that by citing Section 13 in *Corbin v. Farmex, Inc.*, the Georgia Court of Appeals imposed a postsale duty to warn on sellers. However, the court in *DeLoach* determined that Section 13 could not be a basis for finding defendants liable for failure to warn because plaintiff was aware of the danger posed by the machine. Additionally, the court distinguished *Corbin* on the ground that it involved the successor to a company that manufactured and sold the product as well as a defendant who neither knew nor reasonably should have known about the defect. Therefore, the court affirmed the trial court's decision, concluding that "*Corbin* should not be read as erecting a post-sale duty to warn on the part of either a product seller or its successor."

Another case involving the duty to warn, *Fluidmaster, Inc. v. Severinsen*, is significant because it precludes an entire category of claims. In that case a toilet in plaintiff's home overflowed, causing damage to the property. Plaintiff sued the manufacturer of the toilet's flush valve, alleging negligent manufacture, negligent design, strict liability, and negligent failure to warn. The trial court dismissed all claims except the failure to warn claim because they were barred by the ten-year statute of repose. Defendant then moved for summary judgment on the failure to warn claim. The trial court denied the motion, and the Georgia Court of Appeals granted defendant's application for an interlocutory appeal.

Plaintiff contended that defendant owed him a duty to warn that the valve's seal would deteriorate over time under normal conditions. The court of appeals disagreed and reversed the trial court's denial of defendant's motion for summary judgment. Because manufacturers have no duty to warn of open and obvious dangers, the court held that defendant did not owe plaintiff a duty to warn because "it is obvious that the internal component parts of a device such as a toilet tank wear out over time." Thus, manufacturers have no duty to warn "[e]ven if the risk of product failure as a result of normal wear and tear could be

122. 241 Ga. App. at 804, 527 S.E.2d at 883.
123. *Id.*
124. *Id.*
125. *Id.* at 804-05, 527 S.E.2d at 883-84.
127. *Id.* at 755, 520 S.E.2d at 254.
128. *Id.* at 756, 520 S.E.2d at 255.
129. *Id.*
130. *Id.*
characterized as a ‘dangerous condition.’ This limitation on the ability of plaintiffs to bring lawsuits based on a manufacturer’s failure to warn is especially important because the statute of repose does not apply to such claims, which may not arise until years after the statute expires.

In Watkins v. Ford Motor Co., plaintiffs sustained severe injuries in an automobile crash involving a 1986 Ford Bronco II. The driver veered off the road slightly and lost control of the vehicle when he attempted to return to the road by steering left. The driver then attempted to regain control of the vehicle by steering right, but the vehicle flipped and rolled over about two and a half times. Plaintiffs sued, alleging that defendant failed to warn of the vehicle’s dangerous propensity to roll over. The district court granted summary judgment for defendant, finding that the failure to warn claim was barred by the statute of repose because that claim was merely plaintiffs’ design defect claim in disguise.

The Eleventh Circuit reversed, holding that the district court’s decision was “contrary to the clear language of the statute and contrary to the interpretation of that language by the courts of Georgia.”

The court explained that, although the statute of repose may bar a plaintiff from bringing a design defect claim, Georgia law does not automatically bar that plaintiff from bringing a failure to warn claim, even if the

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131. Id.
132. See O.C.G.A. § 51-1-11(c) (Supp. 2000) (“Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer.”); Chrysler Corp. v. Batten, 264 Ga. 723, 727, 450 S.E.2d 208, 213 (1994) (“That ‘[n]othing’ relieves a manufacturer from the duty to warn reflects the legislature’s recognition of the possibility that this duty may not emerge until long after the statute of repose has extinguished any cause of action arising out of the product’s sale . . . .”).
133. 190 F.3d 1213 (11th Cir. 1999).
134. Id. at 1215-16. Plaintiffs also alleged that the vehicle was defectively designed and that its defects caused it to roll over. Id. at 1215. The district court granted summary judgment for defendant on this claim, finding that it was barred by the statute of repose because plaintiffs filed the case more than ten years after the vehicle was first sold. Id. at 1215-16. However, the Eleventh Circuit reversed because factual issues existed as to whether defendant’s conduct constituted “willful, reckless or wanton disregard for property or life,” in which case the statute of repose would not apply. Id. at 1216-18; see also O.C.G.A. § 51-1-11(c) (“The [statute of repose] shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability, except an action seeking to recover from a manufacturer for injuries or damages . . . arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property.”).
135. 190 F.3d at 1219.
failure to warn claim is predicated on dangers arising from the alleged design defect.\textsuperscript{136}

Turning to the record, the court noted that plaintiffs had introduced evidence indicating that defendant was aware of the Bronco II’s stability problems and propensity to roll over at low speeds, especially after 1986, yet defendant did not issue any postsale warnings about these dangers.\textsuperscript{137} Defendant countered that no warning would have prevented plaintiffs’ injuries because once plaintiffs decided to drive the vehicle, no warning could have prevented it from rolling over.\textsuperscript{138} However, the court rejected defendant’s argument as a misunderstanding of the duty to warn.\textsuperscript{139} The duty to warn requires manufacturers (1) to apprise consumers sufficiently of dangers associated with using a product, and (2) to communicate adequately the warning to consumers.\textsuperscript{140} Thus, the law does not impose on manufacturers a duty to prevent accidents; instead, it “merely requires the warning to inform the consumer of the nature and existence of the hazard, allowing him to make an informed decision whether to take on the risks warned of.”\textsuperscript{141} Summary judgment was therefore inappropriate because a factual question existed as to the sufficiency of the warning that defendant did provide.\textsuperscript{142}

In a final attempt to convince the court to affirm the district court’s decision, defendant argued that the warning it provided was sufficient as a matter of law because its expert witness found that the same warning was sufficient on other similar vehicles.\textsuperscript{143} However, the court held that different (or more detailed) warnings may be required for different products, regardless of how similar they are, because different products may pose different dangers.\textsuperscript{144} Therefore, because a reasonable jury could conclude that defendant’s warning was insufficient, summary judgment was inappropriate.\textsuperscript{145}

C. Expert Witness Testimony

In \textit{Crosby v. Cooper Tire & Rubber Co.},\textsuperscript{146} the Georgia Court of Appeals made three significant rulings concerning expert witness

\begin{itemize}
  \item \textsuperscript{136} \textit{Id.} (citing \textit{Batten}, 264 Ga. at 727, 450 S.E.2d at 213).
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{142} \textit{Id.} at 1220.
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} \textit{Id.}
  \item \textsuperscript{146} 240 Ga. App. 857, 524 S.E.2d 313 (1999), \textit{cert. granted.}
\end{itemize}
testimony. Plaintiff, her husband, and her daughter were involved in an automobile crash when the left rear tire of their Ford Bronco II blew out, causing Mr. Crosby, who was driving, to lose control of the vehicle, which ultimately flipped over. The testimony at trial indicated there was "an explosive, shotgun-like sound" immediately before Mr. Crosby lost control. Plaintiff and her daughter sustained serious injuries, and Mr. Crosby died. Plaintiff sued the manufacturer of the tire, and a jury ultimately returned a verdict for defendant.\textsuperscript{147}

Less than one month before the crash, plaintiff had the right rear tire replaced and the remaining tires rotated and balanced because the vehicle had been shaking. Because the vehicle stopped shaking after this service, plaintiff believed that the lack of balance, the need for rotation, or misalignment of the tires had caused the shaking. Therefore, when the vehicle began shaking again two days before the crash, the Crosbys thought the problem was nothing more serious than misalignment of the tires.\textsuperscript{148}

Plaintiff's first enumeration of error relating to expert witness testimony was that the trial court erroneously instructed the jury to disregard testimony given by her expert witness about the cause of the tire failure. Defendant did not object to this testimony during direct examination, but during a recess following direct examination, defendant moved to strike the testimony and to instruct the jury to disregard it on the ground that the witness had failed to divulge certain of his opinions during discovery. The trial court granted defendant's motion.\textsuperscript{149}

The court of appeals reversed, holding that the trial court abused its discretion in excluding this testimony and that such abuse constituted reversible error and required a new trial.\textsuperscript{150} The court reasoned that defendant waived any objection by failing to object to the testimony at the time the witness gave it.\textsuperscript{151} Finally, the court characterized defendant's motion as a request for sanctions for discovery abuse, but noted that excluding relevant evidence from trial is not an appropriate remedy for such abuse.\textsuperscript{152}

\begin{itemize}
\item \textsuperscript{147} Id. at 857, 524 S.E.2d at 316.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Id. at 857-58, 524 S.E.2d at 316-17.
\item \textsuperscript{150} Id. at 859, 524 S.E.2d at 317.
\item \textsuperscript{151} Id. at 858, 524 S.E.2d at 317.
\item \textsuperscript{152} Id. "The appropriate remedies for discovery abuse are (1) postponement of trial or recess of trial in progress, pending action to procure rebuttal evidence, or (2) a mistrial, if there is no practical opportunity to make discovery and to obtain rebuttal evidence." Id. at 858-59, 524 S.E.2d at 317; cf. General Motors Corp. v. Blake, 237 Ga. App. 426, 427-31, 515 S.E.2d 166, 167-69 (1999) (en banc) (affirming the trial court's denial of defendant's motion for a continuance of the trial because defendant could not legitimately claim
Plaintiff's second enumeration of error was that the trial court erroneously disallowed impeachment of defendant's expert witness with prior inconsistent opinions that his company offered in other cases involving a Bronco that flipped over after a tire blew out and that he considered in reaching his opinion in this case. The court of appeals upheld the trial court's decision, finding that the different opinions reached by other employees of the witness's company in similar cases indicated impartiality, not bias or interest. The court reasoned that impeachment with the opinions of others is improper on cross-examination because such opinions are not prior statements by the witness. However, if the witness had participated in a similar case in which one of those opinions was used, impeachment with that opinion would have been proper. This reasoning reflects the fact that "[d]ifferent expert witnesses can come to divergent opinions based upon the same facts." Nevertheless, the court advised plaintiff that on retrial she could impeach the witness with the opinions of others employed by his company if she did so on rebuttal rather than cross-examination. To do so plaintiff would have to show (1) "sufficient substantial similarity" between this case and the case in which the other opinion was rendered, and (2) that the other opinion is subject to an exception to the hearsay rule.

Plaintiff's third enumeration of error was that the trial court erroneously excluded expert witness testimony regarding public awareness of the dangers resulting from tire vibration. Although the court of appeals conceded that such testimony became relevant as rebuttal evidence because of evidence presented by defendant during its case-in-chief, the court refused to reverse the trial court absent a manifest abuse of discretion, apparently because the proposed testimony would not have been helpful to the jury.

154. Id. at 861-62, 524 S.E.2d at 319.
155. Id. at 862, 524 S.E.2d at 319.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id. at 863, 524 S.E.2d at 320.
161. Id.
D. Preemption

In *Gentry v. Volkswagen of America, Inc.*, plaintiffs brought a wrongful death action against Volkswagen after their daughter was killed in an automobile crash. The automobile in which their daughter was riding contained a fully passive restraint system, which consisted of a passive two-point shoulder belt harness, a ramped seat, and a deformable knee bolster. This system used the ramped seat and deformable knee bolster instead of a lap belt. Plaintiffs argued that Volkswagen's fully passive restraint system was defectively designed, but the trial court granted partial summary judgment for defendant because the National Traffic and Motor Vehicle Safety Act preempted their wrongful death claim.

On appeal defendant argued that Federal Motor Vehicle Safety Standard 208 impliedly preempted plaintiffs' claim because that standard specifically allowed manufacturers to choose a fully passive restraint system to satisfy the regulatory requirements for automobile occupant protection; therefore, allowing plaintiffs' claim to proceed would conflict with federal law. To the extent that plaintiffs alleged that the lack of a lap belt constituted a design defect, the Georgia Court of Appeals held that their claim was preempted. However, the court found this view of plaintiffs' claim to be "overly simplistic." Instead, the court characterized plaintiffs' claim as an assertion that Volkswagen's particular design was defective. Standard 208 did not permit a manufacturer to use any fully passive restraint system, but rather allowed that option only if the system met minimum performance requirements. The court found that "[h]olding a manufacturer liable where a fully passive restraint system failed to exceed this minimum standard does not create a conflict [with federal law], but instead dovetails with congressional intent." Thus, the court held that federally mandated minimum performance requirements do not preempt state-law tort claims, even if the standard for state-law tort liability requires manufacturers to design fully passive restraint systems that

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163. *Id.* at 785-86, 521 S.E.2d at 15.
164. *Id.* at 787, 521 S.E.2d at 16.
165. *Id.* at 788, 521 S.E.2d at 17.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
provide greater protection to occupants. This result is consistent with the risk-utility test, under which compliance with federal regulations is ordinarily not a complete defense to liability for design defects, but rather is just one of many factors to consider.

The key to the court’s decision was the distinction between claims premised on the design of the fully passive restraint system and claims premised on the manufacturer’s decision to use such a system. When federal law provides manufacturers with options, as Standard 208 did, only the latter type of claims will be preempted as conflicting with the intent of the federal law. Indeed, the United States Supreme Court recently endorsed this view in Geier v. American Honda Motor Co. In that case plaintiffs alleged that the automobile was defectively designed because it did not have a driver’s side airbag. The Court held that plaintiffs’ claim was preempted because it conflicted with the objectives of Standard 208, which provided manufacturers with options regarding airbags. The Court reasoned that plaintiffs’ claim depended on the manufacturer having a state-law duty to install an airbag in the automobile. Because Standard 208 did not require manufacturers to install airbags, a state-law duty to do so would have erected an obstacle to the accomplishment of its objectives; therefore, the federal law preempted plaintiffs’ claim. The combined logic of Gentry and Geier indicates that compliance with federal regulations will act as a complete defense to liability for design defects if the claim is based on the manufacturer’s choice of options provided by federal law, but not if the claim is based on the particular design chosen by the manufacturer.

VI. BOVINE JURISPRUDENCE

The area of bovine jurisprudence has, in large part, been ignored by legal commentators. While the number of decisions do not as yet justify their own survey article, it is an area of law that demands recognition and analysis. Following in the hoof prints of such momentous decisions

170. Id.
171. Id. at 786, 521 S.E.2d at 16 (citing Doyle v. Volkswagenwerk Aktiengesellschaft, 267 Ga. 574, 577, 481 S.E.2d 518, 521 (1997)); see also Banks, 264 Ga. at 736 n.6, 450 S.E.2d at 675 n.6.
173. 120 S. Ct. 1913 (2000).
174. Id. at 1917.
175. Id. at 1925.
176. Id.
177. Id.
as Watkins v. City of Toccoa,\(^{178}\) Knight v. Addison,\(^{179}\) Simmons v. Bearden,\(^{180}\) Hollingsworth v. Thomas,\(^{181}\) and Cone v. Shaffer,\(^{182}\) the Georgia Court of Appeals once again revisited this particular area of the law in John Hewell Trucking Co. v. Brock.\(^{183}\) In Brock plaintiff brought suit against defendant for property damage sustained when one of its trucks collided with a cow owned by defendant. Plaintiff owned a rental trucking business. On the day of the incident, one of its rental trucks was traveling down Joe Chandler Road in Hall County, Georgia, at approximately 5:00 a.m. when the truck struck a cow in the roadway. The cow died. Plaintiff subsequently brought suit against the owner of the cow. Defendant moved for summary judgment, which the trial court granted.\(^{184}\) The court of appeals affirmed the trial court's decision.\(^{185}\)

On motion for summary judgment, defendant had set forth evidence that the fencing around his pasture had been inspected prior to the accident, that no holes or other openings had been found, and that he checked his cattle daily by driving around his property. Moreover, defendant testified in his deposition that no other cow belonging to him had been killed in a roadway for at least ten years. In response, plaintiff's president testified that he was aware of other incidents in which cows had been found in the middle of Joe Chandler Road; however, he could not offer any evidence that those cows belonged to defendant.\(^{186}\) Accordingly, the court of appeals held plaintiff had failed to rebut the proof offered by defendant that he had exercised ordinary care in the maintenance of his pasture and cattle.\(^{187}\)

\(^{178}\) 55 Ga. App. 8, 189 S.E. 270 (1936) (plaintiff injured when sanitary toilets on truck fell on plaintiff as truck attempted to avoid cow in roadway).

\(^{179}\) 49 Ga. App. 54, 174 S.E. 145 (1934) (holding that mortgagee of cow purchased with pension money of confederate veteran could levy execution on cow upon default).

\(^{180}\) 222 Ga. App. 430, 474 S.E.2d 250 (1996) (holding that failure to prove defendant had refused to return cow was fatal to plaintiff's claim for damages).


\(^{182}\) 146 Ga. App. 472, 246 S.E.2d 714 (1978) (holding that issue as to whether removal of dead calf from uterus of cow should have been accomplished while dead calf was whole or through dissection was jury question precluding summary judgment).


\(^{184}\) Id. at 862-63, 522 S.E.2d at 271-72.

\(^{185}\) Id. at 864, 522 S.E.2d at 273.

\(^{186}\) Id. at 863, 522 S.E.2d at 272.

\(^{187}\) Id. at 864, 522 S.E.2d at 273. In retrospect, the claim in Brock may very well have been a preemptive strike to prevent the filing of a claim against plaintiff rental company for the death of the cow. See Southern Ry. v. Freeman, 58 Ga. App. 403, 403, 198 S.E. 717, 717 (1938) (concerning "suit by the plaintiff against the defendant railway for the killing of one of his cows [on the track]").